IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Shih v. Shih,*
2015 BCSC 2108

Date: 20151118
Docket: E141017
Registry: Vancouver

Between:

Vanya Karmalita Laurie Shih aka Karli Shih

Claimant

And

Rick Tzunh-Hao Shih aka Rick Shih

Respondent

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Claimant:	Kerry L. Somerville
Counsel for the Respondent:	David Batist
Place and Dates of Trial:	Vancouver, B.C. April 7-10, 13-17; September 23-25, 2015
Place and Date of Judgment:	Vancouver, B.C. November 18, 2015

Introduction

[1] The claimant, Karli Shih, and the respondent, Rick Shih, lived together for approximately

eight-and-a-half years, commencing in June 2005. They were married in May 2006 and separated in January 2014. They have two sons who are eight and six years old. They have agreed to a shared parenting regime, leaving only a few parenting issues to be resolved. The primary disputes concern the division of family property and, in particular, whether a significant portion of the value of several assets is excluded property and therefore not subject to division under the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*]; whether income should be imputed to Ms. Shih for the purpose of calculating child and spousal support; and the amount of income to be imputed to Mr. Shih for those purposes.

[2] Both parties had assets before their relationship began and each of them claims that various portions of the value of their current assets are excluded property because they can be traced to their pre-relationship assets. Mr. Shih owned a condominium on West 4th Avenue in Vancouver, which he still owns, and Ms. Shih owned a condominium on West 13th Avenue in Vancouver she still owns. They have agreed that their respective condominiums are excluded property and they have also agreed that neither will account to the other for any increase in value in their respective condominiums during the relationship. Each of them also owned financial assets prior to the relationship, which they each say can be traced into certain currently owned assets.

[3] When they began cohabiting in June 2005, Ms. Shih moved into Mr. Shih's condominium and rented out her condominium. In April 2008, the parties moved into a new condominium they purchased together on Birney Avenue in Vancouver. Since then, both parties have rented out their respective, individually-owned condominiums. In April 2010, the parties moved into a house they purchased together on Braemar Place in North Vancouver and in January 2011 they sold the Birney condominium. When the trial commenced in April 2015, Ms. Shih was still living in the Braemar house. By the time the trial continued in September 2015, the Braemar house had been sold, generating proceeds of $957,922.87. It is not clear where Ms. Shih is now living. After the separation, Mr. Shih purchased a new condominium in North Vancouver, where he currently resides.

[4] The parties maintained separate finances throughout their relationship. They each had bank accounts and investments in their own names. They also held some assets jointly, including the Birney condominium, the Braemar house, and some investments. Each of them assumed responsibility for paying certain family expenses out of their own incomes. For example, Ms. Shih paid for the groceries, utilities and child care, while Mr. Shih assumed responsibility for the larger expenses including the mortgages on the Birney condominium and then the Braemar house. Mr. Shih also funded the parties' jointly held investments which, at the time of trial, consisted of a Canadian dollar account at the National Bank (valued at

approximately $50,000), a US dollar account at the National Bank (valued at approximately $23,000), a mortgage investment referred to as the Dundarave MIC (valued at approximately $380,000), and an RESP (valued at approximately $50,000).

[5] Ms. Shih is self-employed as a mortgage broker. Her gross business income in the three years from 2012 to 2014 has ranged from a low of approximately $40,000 in 2014 to a high of approximately $62,000 in 2013. From the gross business income she deducts business expenses and a portion of household expenses associated with her home office. Ms. Shih also helps manage several rental properties owned by her mother, for which her mother pays her a salary of $12,000 a year. She also receives net rental income from the West 13th Avenue condominium of approximately $8,000 a year.

[6] During the parties' relationship, Ms. Shih received seven lump sum payments from her parents in the total amount of $322,500. The first of these was $100,000 from her father in September 2005. Since her father's death in 2008, she has received six lump sum payments, in amounts varying from a low of $5,000 to a high of $100,000, from her mother. The last of these was $50,000, which was received on January 7, 2014, just a few weeks before the parties separated. Ms. Shih characterizes these payments as gifts and she claims that a portion of the value of certain of the parties' current assets is excluded property because it can be traced to these gifts.

[7] Mr. Shih characterizes these payments as undeclared income paid to Ms. Shih for her work managing the rental properties owned by her mother and the revenue generated from them, which Mr. Shih refers to as Ms. Shih's "family business". He asserts that, properly characterized as undeclared income, these payments do not give rise to a claim to excluded property. In the alternative, if I find that Ms. Shih has established a claim to excluded property founded upon the monetary payments she received from her parents, then Mr. Shih says it would be significantly unfair for the family property to be divided equally and that it should be reapportioned in his favour. Finally, he asserts that whether characterized as gifts or as undeclared income, these payments are likely to continue and the court should impute additional income to Ms. Shih as a result.

[8] Mr. Shih has worked in the technology industry for at least 15 years. He has been employed at Telus, Cisco, Apple and SAP. Between 2011 and 2014, his net employment income ranged from a high of about $365,000 in 2011, to a low of $163,763 in 2014. (In 2011, in addition to his employment income, he also received a retiring allowance or bonus of approximately $155,000.) His average income during the three years from 2012 to 2014 was $232,700, which includes his net employment income including bonuses and net rental income from the West 4th Avenue condominium.

[9] Until just before the commencement of the trial in April 2015, Mr. Shih was working at SAP. He says Ms. Shih would not agree to the liquidation of a jointly held investment and this deprived him of funds he required to retain his counsel to conduct the trial. As a result, he says he was forced to represent himself at the trial and had to quit his job in order to do so. Apparently, he has not looked for a new job. He says that he wants to become involved in a technology start-up business rather than pursue an employment position. He agrees that, in the circumstances, income must be imputed to him and he proposes $166,763.26, which is the sum of his gross employment income during 2014 and the net rental income from the West 4th Avenue condominium. Ms. Shih asserts that 2014 was "a low water mark income wise" for Mr. Shih and that it is more appropriate to impute income of $232,700 to Mr. Shih, which was his average income over the three years from 2012 to 2014.

[10] Although the parties separated in January 2014, Mr. Shih did not move out of the family residence until April 2014. Between April 2014 and March 2015, the boys resided primarily with Ms. Shih. This was a period of significant conflict between the parties. Among other things, Ms. Shih alleged that Mr. Shih has difficulty controlling his anger and has inappropriately, physically punished the children. She also attended at one of Mr. Shih's sporting events and video-taped him, to which Mr. Shih took great exception. Ultimately, a report was prepared by Dr. Aube pursuant to s. 211 of the *FLA*. Dr. Aube concluded that Mr. Shih does not have a "deep-rooted anger management problem" and that both parties are "nurturing, caring and devoted parents". She recommended a shared parenting regime, with each parent having equal parenting time and equal decision-making responsibilities.

[11] The s. 211 report was received by the parties in mid-January 2015. At a settlement conference before Madam Justice Watchuk in March 2015, the parties resolved most of the parenting issues. Their agreement concerning those matters was reflected in a consent order dated March 27, 2015 (the "Consent Order"), which provides that the parties will share joint custody and guardianship of the boys and attaches a schedule containing a detailed parenting plan pursuant to which the boys spend equal time with each of the parties. The parties have been following that plan since March 2015, without any significant issues having arisen. However, Ms. Shih seeks to supplement the plan reflected in the Consent Order with orders requiring the appointment of a parenting coordinator and giving each of the parties a right of first refusal to care for the children if the party exercising parenting time is unable to do so for a period in excess of four hours. Mr. Shih seeks to supplement the parenting plan with orders prohibiting the parties from enrolling the children in extra-curricular activities that might occur during the other's parenting time without the written consent of the other parent, and prohibiting each of the parties from video-taping or audio-taping the other.

[12] In addition to reflecting the parties' agreement concerning parenting arrangements, the

Consent Order also contained two terms related to the division of property. A dispute has arisen over the meaning of these provisions in the Consent Order.

[13] Mr. Shih represented himself during the first nine days of the trial in April 2015. During final submissions, the trial was adjourned to permit him to retain counsel for the purpose of applying to reopen to adduce evidence concerning what he says are his excluded assets. He retained counsel and, in June 2015, I granted his application to reopen. The trial continued in September 2015 and he was represented by counsel during the September dates.

Issues

[14] The following issues require a determination:

(a) Have the grounds for divorce been established?

(b) Should the parenting arrangements reflected in the Consent Order be supplemented by terms:

(i) requiring the parties to engage and work with a parenting coordinator;

(ii) requiring each party to ask the other if he or she wants to parent the children before making babysitting arrangements with a third party, if the party exercising parenting is personally unable to care for the children for more than four hours;

(iii) prohibiting the parties from enrolling the children in extra-curricular activities that might occur during the other's parenting time without the written consent of the other parent; and

(iv) prohibiting the parties from video-taping or audio-taping the other?

(c) What is the meaning of the terms of the Consent Order that deal with property division?

(d) What property is family property? The primary dispute concerns the identification of excluded property.

(e) How should the family property be divided? The principal question is whether it would be significantly unfair for the family property to be divided equally in the event I find that Ms. Shih has established a claim to excluded property.

(e) What are the parties' respective incomes for purposes of calculating prospective

child support and spousal support?

(f) What orders should be made for child support, prospectively and retroactively?

(g) What if any orders should be made for spousal support, prospectively and retroactively?

Divorce

[15] The parties have been separated for over a year. There is no prospect of reconciliation. I am satisfied the grounds for divorce, pursuant to s. 8 of the *Divorce Act*, R.S.C. 1985, c. 3 (2d Supp.), have been met. I therefore grant the divorce which shall take effect on the 31st day after the date of this order.

Parenting Arrangements

Parenting co-ordinator

[16] Ms. Shih seeks an order for the appointment of a parenting coordinator, which she says is necessary given the history of conflict between the parties over parenting issues. She emphasizes that the parties have been unable to agree on even minor issues such as whether Ms. Shih should be permitted to attend the older boy's hockey games. Also, while "true" s. 7 expenses such as child care and dental expenses will be shared proportionately, she submits that the shared parenting arrangement results in uncertainty regarding the parties' respective obligations to pay routine expenses such as for clothing and haircuts. She submits if a parenting coordinator is not appointed to assist the parties in making these kinds of decisions, it is inevitable they will be back in court.

[17] Dr. Aube recommended the appointment of a parenting coordinator because of the level of conflict that she perceived continued to exist between the parties. She also noted in the s. 211 report that "their perception of how to raise children and their conception of how to challenge the boys intellectually and emotionally, are often quite divergent and at times contradictory".

[18] Mr. Shih opposes the appointment of a parenting coordinator. He emphasizes that since the equal parenting regime was implemented following the Consent Order there have been no disputes over parenting issues. He also says that a parenting coordinator will merely continue the mindset of litigation. Finally, he says the expense associated with a parenting coordinator weighs against the appointment.

[19] Section 224 of the *FLA* empowers the court to order the appointment of a parenting

coordinator and direct the payment of the associated fees. However, as noted by Madam Justice Saunders in *Fleetwood v. Percival,* 2014 BCCA 502, the *FLA* does not legislate the considerations that may bear upon a decision to engage a parenting coordinator. As she put it at para. 22:

> It is left to the judge, having found the facts and understanding the purpose of a parenting coordinator, to assess the merits of such an appointment.

[20] It is clear from Part 2 of the *FLA* that the broad purpose of a parenting coordinator is to assist the parties in attempting to resolve parenting disputes out of court. The mandate of a parenting coordinator, as expressed in s. 17 of the *FLA*, extends to assisting the parties build consensus by, among other things, identifying and creating strategies for resolving conflicts between the parties, and making determinations respecting prescribed matters.

[21] For the following reasons, I have concluded that a parenting coordinator should be appointed.

[22] First, it was apparent from the parties' testimony at trial that there continues to be a high level of conflict and animosity between them. Ms. Shih is anxious about the boys and it appears this anxiety has driven her to engage in some unreasonable conduct, such as going through the cupboards and drawers in Mr. Shih's new apartment to ensure he has stored his possessions safely. There was no evidence that provided any justification for her concerns in this regard. She also acknowledged having followed Mr. Shih to an ultimate Frisbee game in order to gather evidence that he had gone out on an evening when he was parenting the boys. (He had a babysitter looking after the boys at the time.) Mr. Shih does not want Ms. Shih to attend the older boy's hockey games, and it is apparent that he continues to be resentful about what he considers were unreasonable positions taken by Ms. Shih regarding his parenting style. The conflict has caused Mr. Shih to go so far as to seek orders prohibiting the parties from enrolling the children in extra-curricular activities without the written consent of the other parent and from video-taping or audio-taping each other. In these circumstances, it is very likely the parties will be back in court without the assistance of a parenting coordinator.

[23] Second, Dr. Aube, who is a highly respected professional with specific expertise in assessing such matters, reached the same conclusion after having conducted a thorough assessment.

[24] Third, I am not persuaded that a parenting coordinator will "continue the mindset of litigation" as submitted by Mr. Shih. To the contrary, a parenting coordinator can assist the parties develop strategies for more effective co-parenting and thereby reduce the need for the parties to return to court to resolve minor disagreements.

[25] Finally, while the cost of a parenting coordinator is always a factor to consider, the parties in this case have the means to easily bear that cost. In all the circumstances, I am persuaded that it is in the best interests of the children that a parenting coordinator be appointed.

[26] I grant an order appointing a parenting coordinator, to be selected by the parties, to fulfill the role contemplated by Division 3 of Part 2 of the *FLA*. I also order that the parties share the costs of the parenting coordinator equally. I will leave to the parties the task of drafting the language required to define the parenting coordinator's role. However, they have leave to appear before me if they are unable to reach agreement in that regard, or if they are unable to agree on the identity of the parenting coordinator.

Right of first refusal, extra-curricular activities, video-taping and audio-taping

[27] Mr. Shih opposes the granting of an order giving the parties a right of first refusal to care for the children during the other's parenting time. Ms. Shih opposes the granting of orders concerning extra-curricular activities, video-taping or audio-taping. I have considered their respective submissions in regard to these issues and have decided that it is not in the best interests of the children to grant any of these orders. In my view, further prescribing the parties' conduct in relation to the children is likely to inhibit the consensus building that is one of the primary purposes of the parenting coordinator. If disputes arise concerning such matters, the parenting coordinator will be available to assist.

Meaning of the Consent Order

[28] The portions of the Consent Order that have given rise to dispute read:

> 1. The Parties jointly held assets … will be divided equally, subject to determination of the issue of excluded assets which is adjourned to the trial judge.
> 2. The parties will each retain the assets in their own name … subject to satisfactory and relevant disclosure being provided by both parties, subject to the determination of the issue of excluded assets which is adjourned to the trial judge;

[29] The parties agree that paragraph 1 of the Consent Order means that the jointly held assets are to be divided equally unless one or both parties can establish that a portion of the value of a jointly held asset is excluded property. If so, the excluded portion is to go to the party proving the exclusion and the remainder is to be divided equally. The parties do not agree on the meaning of paragraph 2 of the Consent Order.

[30] It is helpful to begin by noting some aspects of the property division regime under the *FLA*. Pursuant to s. 81, subject to an agreement or order that provides otherwise, on separation each spouse has a right to an undivided interest in all "family property". Pursuant to s. 84, "family property" includes, among other things, all property owned by a least one spouse

on the date of separation, except "excluded property". Pursuant to s. 85, "excluded property" includes, among other things, property acquired by a spouse before the relationship began, gifts to a spouse from a third party, and property derived from such pre-relationship property or gifts or from its disposition. Pursuant to s. 95, the court may order an unequal division of "family property" if an equal division would be significantly unfair.

[31] Ms. Shih says that the Consent Order makes clear that the parties intended the trial judge to identify the family property available for division by deciding the parties' respective claims to excluded property. She says that is why both paragraphs 1 and 2 are expressly stated to be "subject to the determination of the issue of excluded assets". She says the express statement in paragraph 2 that the retention of the individually held assets was "subject to the determination of the issue of excluded assets" makes clear that it was left to me to decide the extent to which the individually held assets are nonetheless family property and therefore subject to division. She says the opening words of paragraph 2 address only mechanics and merely mean that each party will retain the assets in their own names but will compensate the other to the extent required to implement my decisions concerning the division of the portion of the individually held assets that I conclude is family property. Finally, she says the Consent Order has no application to assets for which proper disclosure had not been made at the time of the settlement conference before Madam Justice Watchuk.

[32] Mr. Shih says that Ms. Shih's interpretation of the Consent Order cannot be correct because he says that interpretation deprives paragraph 2 of all meaning. He says that the mechanics of each party keeping the assets in their own names and then an equalization payment being made is what the court always does in family cases where property division is in issue. He says that he gave up his claim for unequal division of family property in exchange for Ms. Shih's agreement that he would retain the assets held in his name without any adjustment. He says the only exception applies to individually held assets not disclosed at the time of the settlement conference.

[33] The correct approach to interpreting a court order, including a consent order, is to determine the meaning objectively, by examining the pleadings, the language of the order itself, and the circumstances in which the order was granted: *Yu v. Jordan,* 2012 BCCA 367 at paras. 1 and 53. In my view, the pleadings, the circumstances, and the words used all weigh in favour of Ms. Shih's position on the meaning of the Consent Order.

[34] In her Amended Notice of Family Claim, Ms. Shih sought an equal division of all "family assets" including those held by the parties individually, but she also indicated she was seeking an unequal division based on s. 85 of the *FLA* for what she alleged were excluded assets; namely, assets she owned prior to the marriage and gifts she received prior to and during the

marriage. While this pleading is, on its face, somewhat confusing in that it refers to "family assets" rather than family property and advances a claim for both an equal and unequal division, it is clear that in substance she was claiming that some portion of the assets held by the parties was her excluded property under s. 85, and that otherwise the assets should be divided equally.

[35] In his Amended Counterclaim, Mr. Shih sought an unequal division of assets and debt pursuant to s. 95 of the *FLA.* In the section of the Counterclaim where he was to state the grounds for his claim to an unequal division, he simply quoted all the factors listed in s. 95(2)(a) though (i) of the *FLA*, without any particularization. He did not assert a claim to excluded assets pursuant to s. 85 of the *FLA*.

[36] The Consent Order was the culmination of a settlement conference held over two days (March 26 and 27, 2015) before Madam Justice Watchuk. At that time, Mr. Shih had not made full document disclosure and examinations for discovery had not been conducted. A few days prior to the settlement conference, Master McNaughton granted an order requiring Mr. Shih to produce certain documents at the settlement conference. Mr. Shih did not comply with that order, or at least he did not fully comply. Ms. Shih knew what assets the parties held jointly and what assets she held individually. She knew what portion of the joint assets and what portion of the assets in her name she was claiming as excluded property. She was aware of some of the assets Mr. Shih held individually but was not confident that she was aware of all of Mr. Shih's individually held assets. She also did not know whether and to what extent he was advancing a claim to excluded property, and she had seen no documents to substantiate any claim on his part to excluded property.

[37] It is unlikely that Ms. Shih would have agreed that each party would retain the assets in their respective names without any adjustment when she knew she had a claim to some of those assets as excluded property and had seen no documents that appeared to substantiate a corresponding claim on Mr. Shih's part.

[38] Turning to the language of the Consent Order itself, both paragraphs 1 and 2 contain the phase "subject to the determination of the issue of excluded assets which is adjourned to the trial judge". Those words must be given meaning.

[39] Mr. Shih says that he gave up his claim to an unequal division of family property in exchange for an agreement that the individually held assets would remain in his name without any division or adjustment. However, that interpretation deprives the words "subject to the determination of the issue of excluded assets which is adjourned to the trial judge" in paragraph 2 of the Consent Order of any meaning. The presence of those words in paragraph 1 indicates

that he gave up his claim to an unequal division of jointly held family property in exchange for an agreement that he could assert a claim to excluded property even though such a claim was not advanced in his pleadings. By using the same words in paragraph 2, the parties must have meant something similar. That is, that Mr. Shih could assert a claim to excluded property in respect of the individually held assets even though such a claim was not advanced in his pleadings. This interpretation is inconsistent with the parties each retaining their individually held assets outright and without any accounting or adjustment.

[40] I accept that Ms. Shih's interpretation limits the meaning of paragraph 2 to little more than the mechanics typically employed in family cases where asset division is in issue. This has made construing the Consent Order difficult. However, her position preserves at least some meaning for paragraph 2, limited as it is. In contrast, and as already discussed, the interpretation urged by Mr. Shih gives no meaning at all to the express words "subject to the determination of the issue of excluded assets which is adjourned to the trial judge" in paragraph 2.

[41] Having considered the pleadings, the language of the Consent Order, and the circumstances in which it was made, I interpret paragraphs 1 and 2 of the Consent Order in the following manner. The Consent Order refers to "assets" but not "family property", thus leaving the identification of family property to be determined by excluding any portion of the assets held by at least one of the parties at the time of separation that I find is excluded property pursuant to s. 85 of the *FLA*. Once that is done, the excluded portion of any jointly held asset will go to the party proving the exclusion and the remainder of the value of such jointly held asset will be divided equally. The individually held assets will remain in the names of the parties holding them, but a compensation payment may be required to give effect to my conclusions regarding the extent to which the individually held assets are excluded property and my determination of the appropriate division of the balance of the individually held assets.

What property is subject to division?

[42] I have not sustained Mr. Shih's position on the meaning of the Consent Order. Accordingly, when I refer to his position or submissions on any question concerning the identification or division of family property, I am referring to the position he advanced in the alternative.

[43] As already discussed, under the *FLA*, "family property" is subject to division. It includes all property owned by one or both spouses on the date of separation, except excluded property. Pursuant to s. 85, "excluded property" includes, among other things, property acquired by a spouse before the relationship began, gifts to a spouse from a third party, and

property derived from such pre-relationship property or gifts.

[44] In the absence of an agreement or order that provides otherwise, the value of family property is to be determined as of the date of the trial: *FLA*, s. 87. The trial commenced in April 2015 and continued in September 2015. There was evidence of the value of some of the assets as of the separation in January 2014, while others were valued at various times between the separation date and April 2015. Helpfully, the parties have agreed on the values of the assets in issue making it unnecessary for me to determine their values at any particular time.

[45] All the assets owned by one or both parties at the time of separation have been identified in a detailed Scott Schedule prepared by Ms. Shih's counsel. The parties have reached agreements concerning the division of many of those assets. When I refer to the various assets I include the corresponding numbers from the Scott Schedule for clarity.

[46] As already noted, Mr. Shih owned the West 4th Avenue condominium (Scott Schedule #2) prior to the commencement of the relationship and Ms. Shih owned the West 13th Avenue condominium (Scott Schedule #1) prior to the commencement of the relationship. Both of these condominiums are excluded property; however, pursuant to s. 84(2)(g) of the *FLA*, the amount by which the values of these condominiums have increased since the relationship began is family property and subject to division. Nevertheless, the parties agreed that each of them will retain their respective condominiums without accounting for any increase in value. In addition, they have agreed that Ms. Shih's condominium has a value of $350,000 and Mr. Shih's condominium has a value of $414,000.

[47] The parties also agreed that:

(a) Ms. Shih will retain a Royal Bank of Canada bank account in her name which she holds for the parties' older son, valued at $37.96, without division or adjustment (Scott Schedule #7);

(b) Ms. Shih will retain two Royal Bank of Canada bank accounts in her name, valued at $126.82 and $1,207.30 respectively, and the value of these is to be divided equally resulting in a payment by Ms. Shih to Mr. Shih of $667.06 (Scott Schedule #4 and #5);

(c) Mr. Shih will retain three Bank of Montreal bank accounts in his name, valued at $17,711.92, $108,951.84, and $193.73 respectively, and the value of these is to be divided equally resulting in a payment by Mr. Shih to Ms. Shih of $63,428.75 (Scott Schedule #18, #19 and #22);

(d) Mr. Shih will retain two Bank of Montreal bank accounts in his name, each valued at $125.80, without division or adjustment (Scott Schedule #20 and #21);

(e) Mr. Shih will retain Apple shares in an E-trade account, valued at $58,163.91, and the value of these is to be divided equally resulting in a payment by Mr. Shih to Ms. Shih of $29,081.95 (Scott Schedule #23);

(f) Ms. Shih will retain a Dundarave Mortgage Investment RRSP in her name, valued at $61,865, and half the agreed value will be rolled over into an RRSP in Mr. Shih's name (Scott Schedule #9);

(g) Mr. Shih will retain a Sunlife RRSP, a McCurdy Quadras RRSP and a National Bank RRSP in his name, valued at $3,000, $96,759.25 and $25,843.77 respectively, and half the agreed value of each will be rolled over into an RRSP in Ms. Shih's name (Scott Schedule #24, #16 and #17);

(h) Mr. Shih will retain an Olympia Trust TFSA in his name, valued at $17,235.50, and half the agreed value will be rolled over into a TFSA in Ms. Shih's name (Scott Schedule #15);

(i) Mr. Shih will retain his interest in a "pre-buy" condominium in lower Lonsdale, without division or adjustment (Scott Schedule #25);

(j) The parties will divide equally the following jointly held assets:

(i) their National Bank joint account valued at $50,087.04 (Scott Schedule #26); and

(ii) their National Bank joint US dollar account valued at $22,738.59 (Scott Schedule #27); and

(iii) the balance remaining in the parties' jointly held MIC investment (Scott Schedule #28). Most of the value of that investment (which had a value before any division of approximately $380,000) has already been liquidated and divided equally. What remains is valued at $8,334, and that amount is to be divided equally, by agreement.

(k) Ms. Shih will retain the Honda Odyssey motor vehicle, valued at $17,000, and the value will be divided equally resulting in a payment by Ms. Shih to Mr. Shih of $8,500 (Scott Schedule #30);

(l) Mr. Shih will retain full responsibility for all liabilities in his name (Scott Schedule #38 through #41);

(m) Ms. Shih will retain full responsibility for most of the liabilities in her name (Scott Schedule #32 through #36).

[48] Before addressing the assets over which there exists significant dispute, I note that there are two bank accounts in Ms. Shih's name of negligible value but with respect to which the parties have not formally agreed. These are accounts at the Royal Bank of Canada valued at $1.48 and $123.90 respectively (Scott Schedule #6 and #8). No submissions were made by either party with respect to these particular assets. In the circumstances, I discern no basis for anything other than an equal division of the value of these two accounts. Ms. Shih shall retain these accounts but their value shall be divided equally resulting in a payment by Ms. Shih to Mr. Shih of $62.69.

[49] There are several assets and one liability with respect to which the parties have not reached agreement. Three of these can be dealt with summarily.

[50] The parties jointly hold an RESP at Quadras McCurdy valued at $49,689 (Scott Schedule #29). Ms. Shih says the parties should continue to hold this asset jointly and it should be used to fund post-secondary education for one or both of the boys, before any claim by either party to s. 7 expenses under the *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*]. Mr. Shih says that this RESP should be transferred into his name because he and his mother made all the contributions to it. Ms. Shih acknowledges that she did not contribute to the RESP, but she emphasizes that she paid for the child care and says she did not have sufficient cash flow to contribute to the RESP during the marriage.

[51] I am not persuaded that the fact Mr. Shih made the contributions is a sufficient basis, on its own, to justify transferring the RESP into his name. It is family property. In the circumstances, I conclude that the RESP shall continue to be jointly held for the benefit of both the boys for post-secondary education.

[52] Ms. Shih has retained the contents of the former family home which she values at $8,700 (Scott Schedule #31). Her valuation is based on Mr. Shih's testimony that it cost him $8,700 to furnish his new condominium. She says it is reasonable to attribute a similar value to the contents of the home. She says the value should be divided equally resulting in a payment by her to Mr. Shih of $4,350. Mr. Shih says the household contents should be valued at $20,000 and that Ms. Shih should pay him $10,000 for his share. He expressed his opinion about the value of various items of furniture in the home. Even if these opinions were admissible, I would give them virtually no weight because they were exaggerated or otherwise unreliable. For

example, Mr. Shih said the tools were worth $8,000 but he was unable to describe the tools with any specificity. He also said some "old stuff in the basement", such as paint, grout and tiles had a value of $2,000.

[53] Mr. Shih spent $8,700 to purchase furniture for his new condominium, but he did not have to buy bedroom furniture for himself as he took that from the former family home. Very little evidence was led on this point, but that $8,700 must have been spent on furniture for his kitchen, living room and the boys' bedroom in his new condominium. Ms. Shih appears to have more furniture, but Mr. Shih's furniture is new while hers is used. In all the circumstances, it is reasonable to give a similar value to the furniture each of them now has. The parties agreed that in addition to most of the furniture in the former family home, Ms. Shih retained a painting worth approximately $1,500. I value the contents of the home that were retained by Ms. Shih at $10,200, which comprises $8,700 for the furniture and $1,500 for the painting. Ms. Shih shall pay Mr. Shih $5,100 for his share of the household contents.

[54] Ms. Shih spent $3,030.80 to repair the Braemar home in preparation for sale (Scott Schedule #37). This included cleaning the carpets, painting, cleaning up the yard and installing a new hot water tank. She says Mr. Shih should reimburse her half this amount. Mr. Shih does not dispute that she spent this amount but says that she should bear the entire cost because after he moved out she prevented him from going into the home to conduct maintenance and she did not properly maintain the home herself. There was no evidence that would support the conclusion that these expenses were incurred for anything other than normal wear and tear, or that they would not have been incurred even if Mr. Shih had access to the home. In my view they should be shared equally. Mr. Shih shall pay Ms. Shih $1,515.40 for his share of this liability.

[55] The remaining assets are those with respect to which one or both of the parties claims an exclusion pursuant to s. 85 of the *FLA*.

Claims to Excluded Property

Legal Principles

[56] As already noted, s. 85 of the *FLA* provides that certain classes of property, including property acquired by a spouse before the relationship began and gifts to a spouse from a third party, are excluded from the definition of family property. Section 85(1)(g) is a tracing provision that clarifies that property derived from excluded property or the disposition of excluded property continues to be excluded property.

[57] There were conflicting lines of authority with respect to whether this tracing provision

applies when excluded property is transferred into the name of the other spouse or into the spouses' joint names. In *Remmem v. Remmem*, 2014 BCSC 1552, and in *P.G. v. D.G.*, 2015 BCSC 1454, the court concluded that such a transfer did not extinguish the right of the transferor to claim the exclusion. In *Wells v. Campbell*, 2015 BCSC 3, and *V.J.F. v. S.K.W.*, 2015 BCSC 593, the court came to the opposite conclusion and held that the presumption of advancement applied to the transfer with the result that the exclusion is lost. Both parties in this case urged me to adopt the approach in *Remmem* and *P.G*.

[58] In *Andermatt v. Tahmasebpour*, 2015 BCSC 1743, Mr. Justice Pearlman recently concluded that he should follow the approach in *Remmem* and *P.G.* As he explained at para. 51:

> Where judgments of the court conflict, a judge who must choose between them should follow the judgment which is later in time if that judgment was pronounced following a full consideration of the earlier judgment: *Richard Niebuhr Enterprises Ltd. v. Vancouver (City) Board of Variance* (2006), 60 B.C.L.R. (4th) 135 (S.C.) at para. 38, aff'd 2007 BCCA 528, supp. reasons 2007 BCCA 593, leave to appeal to S.C.C. refused [2008] 1 S.C.R. xiii. The judgment in *P.G.* is the most recent decision and was pronounced following a full and careful consideration of the earlier judgments. The court in *P.G.* provides a compelling analysis of the effect of s. 85(1)(g). Further, I share the view of the court in *P.G.* that the approach in *Remmem* is consistent with the objects of the *FLA*.

[59] I agree with that analysis and conclude that a transfer of excluded property from one spouse into the name of the other spouse or into the spouses' joint names does not extinguish the right of the transferor to claim the exclusion.

[60] Section 85(2) casts the burden of proof on the spouse seeking to exclude property. The parties disagree with respect to the nature of the evidence required, although they both rely on *Asselin v. Roy*, 2013 BCSC 1681, as supportive of their position.

[61] Ms. Shih says *Asselin* establishes that documentary evidence is required to prove a claim to excluded property. Mr. Shih submits that conclusive documentary evidence is not essential and that even if a party does not have documentary evidence to establish a direct link from an excluded asset into an existing asset, an exclusion will be established provided there is a sufficient evidentiary basis for the court to conclude, on a balance of probabilities, that there is such a link. He emphasizes that in *Asselin*, Mr. Justice Harvey found that the husband had established some excluded property on the basis of an informed estimate notwithstanding the absence of specific documentary proof of its value.

[62] As noted in *Asselin* and subsequent cases that have considered this issue such as *Cizmic v. Cizmic*, 2015 BCSC 1430, and *V.J.F.*, the *FLA* reflects a more formulaic and less discretionary approach to both the identification and division of family property than existed

under the former *Family Relations Act*. As stated by Mr. Justice Harvey in *Asselin* at para. 106 "more mathematical certainty from a clear evidentiary record is required." Thus, generally speaking, a party asserting a claim to excluded property is expected to produce documents showing the value of the property at the critical times and, where relevant to the claim, documents showing the movement of the property as it changes character from one asset into another.

[63] Notwithstanding that general expectation, I do not read *Asselin* as holding that documentary evidence is invariably required. In *Asselin*, the respondent established a claim to certain excluded property on the basis that it was derived from property he owned before the relationship began, notwithstanding the absence of documentary evidence establishing the value of the property at that time. He also established a claim to other excluded property on the basis that it was derived from property he inherited, notwithstanding the absence of documentary evidence establishing the value of the inheritance or the purpose to which it was first applied. This is because Mr. Justice Harvey was satisfied that the evidence tendered was sufficient to permit him to make informed findings: *Asselin* at paras. 194-203.

[64] The principle that emerges from the case law is that a broad brush or rough estimate approach to identifying excluded property is not appropriate and that a party claiming excluded property must establish, on a balance of probabilities, the basis for and extent of the exclusion with precision. Where it is asserted that excluded property has changed character, each link in the chain required to trace the property into a currently owned asset must also be established. Depending on the nature of the claim in question, this may mean, in practical terms, that it is impossible for a party to meet the onus without documentary evidence. For example, where the claim in question is a bank account that one party says pre-existed the relationship the court may conclude that a party's *viva voce* testimony of the balance in the account at a particular point in time several years earlier is unreliable, and therefore insufficient to meet the onus, if not corroborated by a bank statement. On the other hand, where the claim in question is founded upon an unusually memorable event, such as inheritance, the court may conclude that a party's *viva voce* testimony as to the value of the inheritance is reliable without corroborating documents. In other words, in determining whether the onus has been met, the court will assess the credibility and reliability of the whole of the evidence tendered in the context of the specific case, but having regard for the precision mandated by the more formulaic approach of the *FLA*.

Exclusions Claimed by Ms. Shih

[65] Ms. Shih says that the proceeds from the sale of the Braemar house were derived in part from contributions of $95,000 and $80,000 that she made to the acquisition of the Braemar

house, which had their genesis in gifts she received from her father and mother respectively. She says that her Quadras McCurdy RRSP was derived in part from a pre-relationship RRSP valued at $93,687.86 at the time the relationship began, and in part from gifts in the amount of $60,000 she received from her mother. She says her TFSA was derived in part from a gift of $7,500 she received from her mother. She also says the balance in the Royal Bank account held jointly with her mother at the time of separation ($45,487.50) was what then remained of a $50,000 gift from her mother. Thus, most of the exclusions claimed by Ms. Shih are founded upon the assertion that the assets in question were derived in part from gifts she received from her parents.

[66] Mr. Shih did not dispute that Ms. Shih received the lump sum payments from her parents. As already discussed, his position is that the payments were not gifts, but rather were undeclared income paid to her as consideration for her role managing what he referred to as the "family business". Therefore, whether the payments Ms. Shih received from her parents were gifts is a threshold question.

[67] Mr. Shih relies on the jurisprudence concerning the imputation of income to a spouse, pursuant to s. 19(1) of the *Guidelines,* in circumstances where the spouse has received monetary payments from a parent. This jurisprudence is not, in my view, directly applicable. The question of whether to impute income pursuant to s. 19(1) of the *Guidelines* is a matter of discretion, to be exercised bearing in mind the objectives of the *Guidelines*, whereas the question of whether a transfer of money is a gift as contemplated by s. 85 of the *FLA* is a question of fact that turns on the transferor's intention.

[68] In most of the cases relied upon by Mr. Shih, the character of the transfers was not in issue. Rather the transfers were assumed to be gifts and the question was whether, because of the circumstances surrounding the gift and the family in question, the court should exercise its discretion to impute income to the recipient for purposes of determining child and/or spousal support. For example, in *Bak v. Dobell*, 2007 ONCA 304, the question was whether the payments, which were not alleged to be anything other than gifts, nevertheless provided an appropriate justification for imputing income for purposes of child and spousal support. As is apparent from the analysis in *Bak*, that "depends on the circumstances of the family at issue" (at para. 73) and those circumstances are assessed having regard for the objectives of s. 19(1) of the *Guidelines* which are "to establish fair [child] support based on the means of the parents in an objective manner that reduces conflict, ensures consistency and encourages resolution [of disputes over child support]": *Bak* at paras. 28 and 36.

[69] In contrast, when determining whether particular monetary transfers are gifts as contemplated by s. 85 of the *FLA*, the objectives of the property division regime of the *FLA*

must be considered. As already noted, one of the objectives of the *FLA* is to create more certainty in the division of assets upon breakdown of domestic relationships by reducing judicial discretion, particularly at the family property identification stage of the analysis. There is certainly no provision in s. 85(1) of the *FLA* that preserves judicial discretion in determining excluded property akin to s. 19(1) of the *Guidelines,* which requires judicial discretion in the imputation of income.

[70] Section 85(1)(b.1) of the *FLA* provides, simply, that "gifts to a spouse from a third party" are excluded from family property. As stated in *Waters' Law of Trusts in Canada*, 4th ed., (Toronto: Carswell, 2012) at 187, "[f]or a valid gift *inter vivos* the donor must intend to give immediately, and there must be a delivery." Thus, whether a transfer is a gift depends on the intention of the transferor when the transfer was made: *Waters'* at 187-188. While some of the factors referred to in the income imputation cases may be relevant to determining the transferor's actual intention, others are unlikely to shed any light on that question. Any such factors that are relevant are but items of circumstantial evidence to be weighed together with all the evidence in determining the transferor's intention as a matter of fact.

[71] The question then is whether Ms. Shih's parents intended the transfers as gifts or as compensation for services provided by Ms. Shih. Answering this question requires a consideration of Ms. deVries' testimony concerning her intention and that of her deceased husband, assessed in the context of the circumstances under which the transfers were made.

[72] After immigrating to Canada from Holland in 1957, Ms. Shih's father, Joan deVries, became a real estate agent and he acquired several real properties, including three revenue-generating apartment buildings, a house in Surrey, and a farm in Surrey. These properties were held in Mr. deVries' name. Ms. deVries testified that Mr. deVries assumed responsibility for all aspects of managing the rental properties and she had no involvement. She said she has "no head for business". Mr. and Ms. deVries separated in 1982, but remained on good terms.

[73] For some years before Mr. deVries' death in 2008, Ms. Shih helped him pay bills associated with the rental properties and tally rents. He paid her a salary of approximately $1,000 per month, which she reported as income for tax purposes.

[74] In September 2005, Mr. deVries gave Ms. Shih and each of her siblings a lump sum payment of $100,000. Ms. Shih testified that her father asked her to meet with him and he simply presented her with a cheque. She said this was a big surprise and she had never received a large monetary gift before. Ms. deVries testified that before Mr. deVries gave their three children these gifts, he discussed with her his intention to do so. She said she thought it

was a great idea. She said there were no strings attached to the gift — it was to be used by Ms. Shih and her siblings for fun or otherwise as they each saw fit.

[75] Mr. deVries died in November 2008 and, even though he and Ms. deVries had been separated for many years, Ms. deVries inherited most of his properties, including the three apartment buildings. Ms. Shih continued to assist with managing the properties. Her mother has continued to pay her a salary of $1,000 per month for this work, which Ms. Shih has continued to report as income for tax purposes. Ms. Shih's brother and sister also help manage the properties. Ms. Shih is responsible for accounts payable. She writes cheques for utilities and repair bills on bank accounts held jointly in her name and her mother's name. Her brother, Jorian deVries, is responsible for overseeing maintenance and repairs, and her sister, Marie deVries, is responsible for collecting rents and making bank deposits.

[76] Since Mr. deVries' death, Ms. deVries has received the revenue from the rental properties. She holds title to the properties in her own name and reports the revenue personally for tax purposes. She also invests in mortgage investments through Dundarave Mortgage Investment Corporation ("Dundarave"), a business with which Jorian deVries is associated.

[77] Since Ms. deVries inherited the properties, she has given each of her children six lump sum payments, which she testified were gifts. Specifically, these were payments of $5,000 in February 2009, $100,000 in December 2009, $35,000 in February 2011, $7,500 in February 2012, $25,000 in February 2013, and $50,000 in January 2014.

[78] Ms. Shih testified that her mother has also paid some of her expenses, including her house insurance and the rent for the office out of which she operates her mortgage broker business. As I understood her testimony, her office is located in the same premises where her brother works and where Dundarave operates.

[79] Ms. deVries testified that she has given the money to her children because she can afford to, and because she loves them and is proud of them. She testified that Ms. Shih and her siblings are free to use the money as they see fit. She said she anticipates giving additional monetary gifts to her children in the future, and she plans to leave her estate to her children and grandchildren. She also testified that she always consults her son before deciding to give her children a monetary gift and he advises her about whether she should do so. It was apparent from her testimony as a whole that she has invariably acted in accordance with her son's advice. However, she maintained that she makes the final decision as to whether to give a gift and, if so, in what amount.

[80] Ms. Shih acknowledged that she and her siblings periodically discuss whether their

mother is in a position to make a monetary gift to them and that her mother seeks advice from her brother about whether to make a gift. Ms. Shih denied participating in the actual decision-making process.

[81] It is apparent that Ms. deVries is not actively involved in the management or operation of the rental properties or the management of her mortgage investments. She acknowledged that she simply follows the advice she receives from her children, and in particular the advice she receives from Jorian deVries.

[82] Mr. Shih testified that during the marriage, he and Ms. Shih often discussed her "family business". He said she wanted to become a mortgage broker so she could work with her brother because that would give her the opportunity to also help her brother with the family business. He said she told him that she and Mr. Shih would "reap the rewards when they retired". According to Mr. Shih, Ms. Shih told him that the net revenue generated from the apartment buildings owned by Ms. deVries is invested by Jorian deVries in second mortgages, both individually and in pooled investments through Dundarave. He said Ms. Shih told him that she and her siblings review the performance of the business annually and decide how much money to reinvest in the buildings, how much to invest in mortgages, and how much to distribute to themselves. He said she told him that they then recommend the plan to Ms. deVries and she agrees with whatever they suggest.

[83] Mr. Shih also testified that Ms. Shih told him she participates actively in strategic planning for the business. For example, he said she told him that she and her siblings implemented a plan to increase the expenses associated with the apartment buildings to offset revenues and that they are gradually renovating the buildings to attract higher income tenants.

[84] Mr. Shih did not cross-examine Ms. Shih about the discussions he says they had about her role in managing her mother's properties and investments. In turn, Mr. Shih was not cross-examined on any of his testimony concerning Ms. Shih's role. As already noted, Ms. Shih acknowledged that she and her siblings periodically discuss whether their mother is in a position to make a monetary gift to them but she denied participating in the actual decision-making process. She and Ms. deVries acknowledged that Ms. deVries acts on advice from Jorian deVries. Ms. Shih works out of the same office as Jorian deVries, and Ms. Shih acknowledged that that they discuss whether their mother is in a position to make a monetary gift to them. It is reasonable to infer that they also discuss their mother's business generally.

[85] Having considered all the evidence, I find that Ms. Shih's role extends beyond fulfilling an accounts payable function and includes participating, with her siblings, in formulating business advice for her mother, which her mother invariably follows. Nevertheless, in my view, the

evidence as a whole establishes that Ms. Shih's parents intended the monetary transfers as gifts. I have reached that conclusion for three primary reasons.

[86] First, I accept Ms. deVries' testimony that the initial gift of $100,000 was given by Ms. Shih's father with no strings attached and that the gifts she has given since then were given in recognition of her love and affection for her children. She testified in a forthright manner and her credibility was not undermined. She did not attempt to inflate her own participation in the management or operation of the rental properties and readily acknowledged that she makes all decisions on advice from her children and, in particular, her son. Nevertheless, she was firm that the ultimate decisions are made by her.

[87] Second, there is no consistency in the amounts of the gifts, which indicates they were not intended as compensation for Ms. Shih's assistance in managing the rental properties and investments. The nature of Ms. Shih's involvement in her mother's affairs has remained relatively constant, at least in the seven years since her father's death. She has continued to be responsible for accounts payable and she has participated in strategic and planning discussions with her siblings. If the payments were intended to compensate her for her efforts in this regard, it is likely they would have been made in consistent amounts reflecting the consistency in her contributions.

[88] Third, there is no evidence that would support the conclusion that Ms. deVries was compelled to give any of the gifts or that Ms. Shih or her siblings has any legal or equitable right to any of the income generated by Ms. deVries' rental properties or her investments. While Ms. Shih and her siblings clearly work together to manage and operate the properties, even on Mr. Shih's evidence the time Ms. Shih spends doing so is not extensive. He estimated that Ms. Shih spent one to two hours a week paying bills associated with Ms. deVries' rental properties and that she and her siblings met once a week or once every two weeks, over lunch or dinner, to discuss the family business. This amounts to a maximum of eight hours plus two to four meals per month. The $1,000 monthly salary Ms. Shih is paid is generous compensation for the time she devotes to her mother's affairs. Further and in any event, it is reasonable to conclude that Ms. Shih and her siblings would assist their mother in managing the properties and investments without expecting any compensation because, leaving aside any family duty they might feel obliged to meet, they expect to inherit their mother's estate. As Mr. Shih testified, Ms. Shih expected to reap the rewards when they retired, which I infer was a reference to her eventually inheriting a significant portion of her mother's estate.

[89] Ms. Shih's counsel characterized the payments as advances on an inheritance. I agree with that characterization. For the foregoing reasons, I find that Ms. Shih received gifts from her parents of $100,000 in September 2005, $5,000 in February 2009, $100,000 in December

2009, $35,000 in February 2011, $7,500 in February 2012, $25,000 in February 2013, and $50,000 in January 2014.

[90] Before addressing the specific exclusions claimed by Ms. Shih, I wish to refer to the question of whether any of the gifts Ms. Shih received could be said to have been advanced to her for the purpose of purchasing a family home.

[91] Mr. Shih submitted that if the monetary payments Ms. Shih received from her mother were gifts then, because they were advanced to her by her mother for the purpose of purchasing a family home, there is a presumption that the funds were gifts to both parties: *Madruga v. Madruga*, 2015 BCSC 1605 at paras. 16-18. In this case, there was no evidence supporting the inference that the funds advanced by Ms. deVries were intended by her to be used by Ms. Shih to purchase a family home. Ms. deVries testified that there were no strings attached to the gifts. There was no evidence suggesting she had any reason to believe that any of the gifts would be used to purchase a family home. Finally, Ms. Shih's siblings were given monetary gifts at the same times and in the same amounts and there was no evidence that they were all buying homes at around the same time. For these reasons, the presumption has no application.

Proceeds from the sale of the Braemar House (Scott Schedule #3)

[92] Ms. Shih says that the proceeds from the sale of the Braemar house were derived in part from contributions of $95,000 and $80,000 that she made to the acquisition of the Braemar house, which had their genesis in gifts she received from her father and mother respectively. Specifically, she says that she contributed $97,990 to the acquisition of the Birney condominium, of which she can trace $95,000 to the $100,000 gift from her father in September 2005, and that this $95,000 can be traced into the Braemar house because the net proceeds of the sale of the Birney condominium were used to reduce the mortgage on the Braemar house. She also says that she contributed a further $80,000 to the acquisition of the Braemar house from the $100,000 gift from her mother in December 2009.

[93] I have found that Ms. Shih received a gift of $100,000 from her father in September 2005 and a gift of $100,000 from her mother in December 2009. The question is whether Ms. Shih has established a sufficient evidentiary link between the gifts and the claimed exclusions.

[94] It is not disputed that in 2007 Ms. Shih and Mr. Shih each contributed $57,990 to the deposit on the Birney condominium. This transaction was a "pre-buy" and the deposit was paid before construction was complete. The purchase closed in 2008. At that time, the balance of the purchase price was financed with a mortgage of $234,513 and a payment drawn on Mr. Shih's bank account in the amount of $276,081. Ms. Shih's testimony, corroborated by

documents, was that she transferred $40,000 to Mr. Shih's bank account on April 22, 2008, which he used as part of the $276,081 withdrawn from that account on April 23, 2008 to complete the purchase.

[95] Mr. Shih does not dispute that Ms. Shih made the contributions of $57,990 and $40,000 to the acquisition of the Birney condominium. However, he says that Ms. Shih has not established that those funds were derived from the $100,000 payment she received from her father in September 2005.

[96] Ms. Shih received the $100,000 from her father in September 2005. She testified she invested $95,000 in a Great West Life investment through a financial advisor named Diane McCurdy, and she spent the remaining $5,000. The documents Ms. Shih produced establish that on September 28, 2005, she wrote a cheque to Great West Life in the amount of $95,000 on her bank account at the Royal Bank and that a week later, on October 5, 2005, she purchased units in a Great West Life mutual fund. Ms. Shih did not produce any document showing the actual receipt of the $100,000 gift. For example, she did not produce a copy of a cheque in that amount drawn on her father's bank account or a copy of her bank statement showing the deposit of $100,000 into her bank account in September 2005.

[97] Despite the lack of such documentation, I am satisfied that Ms. Shih did receive the $100,000 gift in September 2005 and did deposit it into the bank account on which her September 28, 2005 cheque to Great West Life was drawn. I accept her testimony to this effect. I found her to be a credible witness. She testified in a direct and forthright manner and she was not shown to have been inconsistent in her evidence. It is not disputed that by the time she received this gift in 2005, Ms. Shih had over $90,000 invested in an RRSP and she owned the West 13th Avenue condominium. From her evidence as a whole it is apparent that she is by nature financially cautious. It is consistent with the probabilities affecting the case as a whole that she would have invested the majority of the gift. Further, this was a significant event in her life, and the gift was large and in a round number. She is unlikely to have been mistaken about the timing or amount of the gift, or the purpose to which she initially applied it.

[98] The documents establish that the Great West Life mutual fund units were held in two separate accounts that were identified by different account numbers. Units purchased for $84,933 were held in an account described in the documents as an "open" account and units purchased for $10,067 were held in an account described in the documents as an "RRSP" account. The documents Ms. Shih produced show that $58,000 was debited from the Great West Life "open" account on July 18, 2007. There is no documentary evidence showing those funds going into her Royal Bank account but a copy of the July 30, 2007 cheque drawn on her Royal Bank account in the amount of $57,990 was in evidence and Mr. Shih does not dispute

that those funds were used as half the deposit on the Birney condominium.

[99] The documents Ms. Shih produced also establish that on April 18, 2008, $40,000 was debited from the same Great West Life "open" account. While there are no documents showing specifically where those funds went, it is not disputed that she transferred $40,000 to Mr. Shih's account on April 22, 2008, which he used on April 23, 2008 towards a further down payment on the Birney condominium. Ms. Shih testified that the $40,000 debited from the Great West Life open account were the same funds she caused to be transferred to Mr. Shih's account on April 22, 2008.

[100] Despite the lack of a document clearly showing the transfer of the $58,000 from the Great West Life "open" account on July 18, 2007 to the Royal bank account out of which the $57,990 was drawn less than two weeks later, I am satisfied from Ms. Shih's testimony corroborated by the documents showing the timing of the withdrawal and the cheque, and the similarity in the dollar amounts, that this transfer did occur. Similarly, despite the lack of a document clearly showing the movement of the $40,000 withdrawn from the Great West Life open account on April 18, 2008 into Mr. Shih's bank account four days later, I am satisfied from Ms. Shih's testimony corroborated by documents showing the timing of the withdrawal and the subsequent deposit into Mr. Shih's account, and the similarity in the dollar amounts that this transfer also did occur. Ms. Shih has established, on a balance of probabilities, that the $57,990 and $40,000 contributions she made to the Birney condominium were derived from her Great West Life open account, which in turn was derived from $84,933 of the $100,000 gift she received from her father in September 2005.

[101] It is not clear on the evidence what became of the Great West Life "RRSP" account, but it is apparent that the $10,067 she invested in that account, did not make its way into the Birney condominium.

[102] The Birney condominium sold in January 2011 for $740,000. By that time the parties had already purchased the Braemar house. The parties agree that the net sale proceeds of the Birney condominium were used to reduce the mortgage on the Braemar house. Thus, Ms. Shih has traced $84,933 from the September 2005 gift, into the Great West Life open account, then into the Birney condominium, and then into the Braemar house.

[103] The parties purchased the Braemar property for $1.135 million in May 2010. It is not disputed that Ms. Shih contributed $80,000 to the acquisition of the Braemar house. Again, the dispute concerns whether she has established that these funds had their genesis in the December 2009 gift of $100,000 from her mother.

[104] The documents Ms. Shih produced establish that on December 24, 2009, $100,000 was

transferred into Ms. Shih's Royal Bank account. Prior to that transfer there was a balance of just over $800 in that account. The documents do not establish the source of those funds, but Ms. Shih testified this was the gift from her mother. For the reasons expressed above concerning Ms. Shih's credibility, I accept that testimony.

[105] The documents Ms. Shih produced also show that on April 14, 2010, she caused a bank draft in the amount of $80,000 to be issued to Mr. Shih by the Royal Bank. There was no dispute that this was used towards the purchase of the Braemar house.

[106] Following the birth of the parties' second son in April 2009, Ms. Shih took a 15-month maternity leave. She testified that in 2010 she reported income of about $40,000, but some of that was the result of income splitting with Mr. Shih. She was paying for food for the family, utilities and expenses for the children. In the circumstances, it is unlikely she could have covered those costs and also saved enough to make the $80,000 contribution to the acquisition of the Braemar house. In the circumstances, I am satisfied that this $80,000 contribution had its genesis in the December 2009 gift from Ms. Shih's mother.

[107] In the result, I am satisfied that of the $957,922.87 net proceeds of the sale of the Braemar house, the sum of $164,933 is Ms. Shih's excluded property.

Quadras McCurdy RRSP (Scott Schedule #11)

[108] Ms. Shih says that her Quadras McCurdy RRSP, valued by agreement at $175,056.47, was derived in part from an RRSP she had before the commencement of her relationship with Mr. Shih that had a value of $93,687.86 when their relationship began, and in part from gifts from her mother of $35,000 in February 2011 and $25,000 in February 2013.

[109] Mr. Shih agrees that Ms. Shih had an RRSP valued at $93,687.86 at the time the relationship began and that this amount should be excluded from the value of Ms. Shih's Quadras McCurdy RRSP. However, he says that Ms. Shih has not established that a further $60,000 of the value of that RRSP was derived from gifts from her mother.

[110] I have found that Ms. Shih received gifts from her mother of $35,000 in February 2011 and $25,000 in February 2013. The question is whether Ms. Shih has established a sufficient evidentiary link between the gifts and the claimed exclusion.

[111] Ms. Shih did not produce documents showing the actual transfer of these two gifts to her from Ms. deVries. However, a summary of account transactions prepared by Ms. McCurdy's office shows that on February 12, 2011, $15,000 was used to purchase a registered GIC and $20,000 was used to purchase a non-registered GIC which was ear-marked for Ms. Shih's

2011 RRSP contribution. The same summary shows that the $20,000 non-registered GIC was then used to fund an RRSP contribution for 2011, and that a further RRSP contribution of $25,000 was made on February 23, 2013. No documents were produced to show the source of any of those contributions.

[112] In the circumstances, Ms. Shih has established that she made contributions to her Quadras McCurdy RRSP of $15,000 on February 12, 2011, $20,000 at some later date for 2011, and $25,000 on February 2013. The question is whether, in the absence of corroborating documents, Ms. Shih has established that the source of those RRSP contributions were the two gifts from her mother.

[113] Again, I found Ms. Shih to be a credible witness. Further, Ms. Shih's ability to save from income continued to be limited. As noted above, in 2010 she reported income of about $40,000, but some of that was the result of income splitting with Mr. Shih. In 2011, her line 150 income was $99,109, but much of that was the result of income splitting. That year she earned $12,000 from her mother, net rental income of about $9,000 and net business income from her mortgage broker business of only about $7,600. In 2012, her line 150 income was $68,518, which included the $12,000 from her mother, net rental income of about $8,000, net business income from her mortgage broker business of about $15,800 and the balance a combination of universal child care benefit and dividend and interest income. During these years, Ms. Shih continued to paying for child care, food for the family, utilities and expenses for the children. In the circumstances, it is unlikely she could have covered those costs and also saved enough to make the RRSP contributions from her income. Finally, the amounts and timing of the gifts corresponds with the RRSP contributions.

[114] For the foregoing reasons, I am satisfied that $60,000 should be excluded from the value of Ms. Shih's Quadras McCurdy RRSP as being derived from the gifts she received from her mother in February 2011 and in February 2013. As a result, when combined with the $93,687.86 Mr. Shih agrees she had invested in her RRSP at the time the relationship began, a total of $153,687.86 is excluded from the value of Ms. Shih's Quadras McCurdy RRSP, leaving $21,368.61, as family property, to be divided.

The TFSA (Scott Schedule #10)

[115] Ms. Shih says her TFSA at Dundarave, valued by agreement at $11,875, was derived in part from a gift of $7,500 she received from her mother in February 2012.

[116] I have found that Ms. Shih received that gift in February 2012. The question is whether Ms. Shih has established a sufficient evidentiary link between it and the claimed exclusion.

[117] Statements for Dundarave accounts that were produced by Ms. Shih show that she did invest $7,500 in an account with Dundarave on March 26, 2012. The statements also establish that at the time of the separation she had an account with Dundarave valued at $11,875. However, the statement showing the investment on March 26, 2012 refers to the account as an "RRSP" account whereas the statement showing the balance of $11,875 in 2014 refers to the account as a "TFSA" account. There was no evidence tendered adequately explaining the relationship between the Dundarave RRSP account and the Dundarave TFSA account or establishing a link between them. In these circumstances, Ms. Shih has not established, with sufficient certainty, the link between the balance in the current TFSA account and the $7,500 gift.

The RBC Bank Account (Scott Schedule #12)

[118] This is an account held jointly by Ms. Shih and her mother. Ms. Shih did not explain why this account is held jointly, but she testified that it is used by her to pay her expenses. She testified that the $50,000 gift her mother gave her in January 2014 was deposited into this account and then spent on family expenses during the separation.

[119] I have found that Ms. Shih received a gift of $50,000 from her mother in January 2014. The documents Ms. Shih produced showed a bank-to-bank transfer of $50,000 into this account on January 7, 2014, and then the depletion of the account over the next several months.

[120] The balance in the account at the time of separation was $45,487.50. In the circumstances I find this was derived from the gift she received a few months earlier. Accordingly, this was excluded property at the time of the separation.

The exclusions claimed by Mr. Shih

[121] Mr. Shih claims exclusions pursuant to ss. 85(1)(a) and (g) of the *FLA* (property derived from the property he had before the relationship). Specifically, he says that the proceeds from the sale of the Braemar house were derived in part from contributions he made to the acquisition of the Braemar house in the amount of $65,221.53, $33,701 and $77,800, which had their genesis in assets he had before the commencement of his relationship with Ms. Shih. He says that his Olympia Trust RRSP was derived in part from RRSPs he had before the commencement of the relationship that had a value of $33,654 when the relationship began. He also says that his locked-in RRSP at Olympia Trust was derived in part from a pension he had before the commencement of the relationship that had a value of $32,615.41 when the relationship began.

[122] Ms. Shih submits that Mr. Shih has not established that he owned these assets before the relationship began, or he has not established the value of these assets when the relationship began, or he has not established the link from a pre-relationship asset into an existing asset, and therefore he has not met the onus of establishing the exclusions.

Proceeds from the sale of the Braemar House (Scott Schedule #3)

[123] Mr. Shih says that at the commencement of the relationship, on June 1, 2005, he had two bank accounts at the Bank of Montreal. The documents he produced show that on December 8, 2005 he had a total of $65,221.53 in those two bank accounts. He says he has been unable to obtain bank statements for these accounts for any period prior to December 2005 but asks the court to accept that at least the same amount was in the accounts six months earlier, at the commencement of the relationship. He also says that this $65,221.53 can be traced into the Birney condominium and then into the Braemar house.

[124] The documents produced by Mr. Shih establish that on September 15, 2006, he transferred $65,000 from his Bank of Montreal chequing account to his Great West Life account; on April 14, 2008, he transferred $98,387.29 from his Great West Life account to his Bank of Montreal chequing account; and on April 23, 2008, he wrote a cheque in the amount $276,081.39 on his Bank of Montreal chequing account, which was used as part of the down payment on the Birney condominium. It is not disputed that the $98,387.29 he transferred from his Great West Life account to his Bank of Montreal on April 14, 2008 formed part of the down payment on the Birney condominium or that the proceeds of the sale of the Birney condominium can be traced into the Braemar house and then into the proceeds of the sale of the Braemar house. The question is whether Mr. Shih has established that the $98,387.29 transferred from his Great West Life account to his Bank of Montreal chequing account on April 14, 2008 was derived from funds in his Bank of Montreal accounts almost three years earlier, on June 1, 2005.

[125] Mr. Shih did not actually testify as to the amounts in his Bank of Montreal accounts in June 2005, which is not surprising given ten years have passed since then. It is very unlikely that he would remember such details so many years later. Rather, Mr. Shih submits that it is reasonable to infer that the amount in his Bank of Montreal accounts in December 2005 is the same as the amount he had in those accounts in June 2005 because he was living on his "fixed" income from Telus, where he was employed at the time. The inference he seeks to have the court draw is that he was not saving at all between June and December 2005. However, he later said that, in fact, he did save income he earned from Telus in 2005. Further, the statements from his Bank of Montreal account that were tendered in evidence show that in the nine months between December 8, 2005 and September 8, 2006 (just before he transferred

the $65,000 into his Great West Life account), the balance in the two Bank of Montreal accounts had grown by over $74,000, from $65,221.53 to $139,465.15, which indicates that he was saving. In the face of this evidence, it is not possible to draw the inference that there was no material increase in the balance of these accounts between June 2005 and December 2005. There is simply no basis in the evidence upon which I could make even a rough estimate of what was in those accounts in June 2005.

[126] Mr. Shih also seeks to exclude the amount of $33,701.22 from the proceeds of the sale of the Braemar house, which he says can be traced back to Telus stock options granted to him in February 2004.

[127] The documents Mr. Shih produced establish that he was granted Telus options prior to the commencement of the relationship and that those options had a notional value of almost $35,000 in February 2005. I have referred to the value as "notional" because the document upon which Mr. Shih relies for that value indicates that none of the options were, at that time, available to be exercised. The documents also establish that at some point in 2005 Mr. Shih exercised some options, in two separate transactions, generating proceeds of $30,237.73 and $3,427.49. The documents do not establish when in 2005 this occurred.

[128] Mr. Shih testified that he invested those proceeds, in two separate transactions, in a GIC at Envision Credit Union. He did not tender any documents showing the purchase of the Envision GIC or specifically linking the proceeds from the exercise of the options to the Envision GIC. The documents he produced do establish that he received $30,785.96 from Envision on April 10, 2008, which was deposited on April 14, 2008 into his Bank of Montreal chequing account and which formed part of the $276,081.39 drawn on his Bank of Montreal chequing account on April 23, 2008 and was used as part of the down payment on the Birney condominium. Mr. Shih testified that he received a further sum of $3,799 from Envision which was also deposited on April 22, 2008 into his Bank of Montreal chequing account and which formed part of the $276,081.39 drawn on his Bank of Montreal chequing account on April 23, 2008. While the documents show a deposit in that amount to the Bank of Montreal account on April 22, 2008 no documents were tendered to show the source of that deposit.

[129] Again, it is not disputed that the $30,785.96 from Envision was deposited into Mr. Shih's Bank of Montreal chequing account on April 14, 2008 and that a further $3,799 was deposited on April 22, 2008. It is not disputed that those amounts formed part of the down payment on the Birney condominium or that the proceeds of the sale of the Birney condominium can be traced into the Braemar house and then into the proceeds of the sale of the Braemar house. The question is whether Mr. Shih has established that any portion of these amounts can be traced back to the options he owned at the time the relationship commenced. For the following

reasons, I find he has not.

[130] First, there is no evidence on which I could determine the value of the options on June 1, 2005. Options are a right to buy stock, upon vesting, at a stipulated price. The documents indicate that in February 2005, none of the options were available to be exercised. Mr. Shih was not able to say how many options had vested in June 2005 at the time the relationship commenced. No evidence was led as to the market value of the stock to which the options applied at the time the relationship began or as to the market value of any non-vested options at that time. The documents indicate that some options were exercised sometime in 2005 generating proceeds totalling $33,665.22, but the evidence does not disclose whether that occurred before or after June 1, 2005. Further, Mr. Shih acknowledged that he likely would have paid capital gains tax on those proceeds but he could not say how much capital gains tax he would have paid and no documents were tendered from which the after tax value of the proceeds could be determined.

[131] Thus, even if it could be inferred that the options exercised some time in 2005 had a gross value of $33,665.22 on June 1, 2005 when the relationship began and even if I found a link between the proceeds from the exercise of the options and the Envision GIC notwithstanding the absence of documents showing the source of the Envision GIC, Mr. Shih has not adduced evidence sufficient for me to determine the net after tax value of the proceeds from the exercise of the options, which is the amount that could potentially be traced into the Braemar proceeds.

[132] Finally, Mr. Shih also seeks to exclude the amount of $77,800 from the proceeds of the sale of the Braemar house, which he says can be traced back to proceeds of a mortgage he granted over his West 4th Avenue condominium.

[133] It is not disputed that Mr. Shih owned the West 4th Avenue condominium prior to the commencement of the relationship. It is also not disputed that in April 2010, Mr. Shih increased the mortgage on the West 4th Avenue condominium and applied the proceeds of approximately $77,800 to the purchase of the Braemar house. The documents tendered by Mr. Shih show that the original mortgage balance on the West 4th Avenue condominium mortgage in May 2004 was $215,925, the mortgage balance just prior to the increase in April 2010 was $182,656.71, and the new balance as of April 15, 2010 was $260,400. Mr. Shih testified that by the time of separation in 2014, the mortgage balance had been reduced to approximately $160,000.

[134] It is clear that the Braemar house, and thus the proceeds from its sale, were derived in

part from the mortgage proceeds of approximately $77,800 from the increase to the West 4th Avenue mortgage. The question is whether the mortgage proceeds were derived from the equity Mr. Shih had in the West 4th Avenue condominium at the time the relationship began or the disposition of that equity, so as to fall within ss. 85(1)(a) and (g) of the *FLA*.

[135] In *P.G.*, Madam Justice Fenlon considered the meaning of the words "derived from" and "disposition of" in s. 85(1)(g) at paras. 70-73. She concluded that "derived from" has a meaning broader than "received" and is equivalent to "arising or accruing from". She concluded that the definition of "dispose" in the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29, applies. That definition includes to "transfer by any method" including to "grant" and to "charge".

[136] The increased mortgage was a charge on the West 4th Avenue condominium and to charge a property is to "dispose" of it as that word is defined in the *Interpretation Act*. The mortgage proceeds also arose from the West 4th Avenue condominium and thus could be said to have been derived from it. However, the question remains as to whether Mr. Shih has established that the mortgage proceeds were derived from the equity he held in the condominium measured at the time the relationship began or the disposition of that equity.

[137] As noted above, Mr. Shih established the mortgage balance at various times, but not specifically in June 2005, when the relationship began. Further, he led no evidence as to the value of the condominium at any time and no evidence of the value of his equity at the time the relationship began, at the time he increased the mortgage, or at the time of the separation. He is not entitled to claim any exclusion in relation to the amount by which the equity increased during the relationship: s. 84(2)(g) of the *FLA*. It is only the equity as it existed in June 2005 that can, potentially, form the basis of the claimed exclusion. The amount of the equity could have varied significantly depending on the market value of the condominium. There is simply no basis in the evidence upon which I could make even a rough estimate of the equity Mr. Shih had in the condominium in June 2005. In the circumstances, I am unable to determine how much, if any, of the mortgage proceeds could be said to be derived from the pre-relationship equity or the disposition of it.

[138] For the foregoing reasons, Mr. Shih has not established a claim to exclude any portion of the proceeds of the sale of the Braemar house.

The Olympia Trust RRSP (Scott Schedule #13)

[139] Mr. Shih says that his Olympia Trust RRSP was derived in part from pre-relationship RRSPs that had a value of $33,654 when the relationship began. In submissions, this Olympia Trust RRSP was referred to as item 14 on the Scott Schedule, with an agreed valued at

$45,659.50. In fact, the statements from Olympia Trust that were tendered in evidence indicate that the account referred to as item 14 on the Scott Schedule is actually Mr. Shih's "locked-in" RRSP, which is Mr. Shih's Olympia Trust account #***65. Mr. Shih testified that his locked-in pension, discussed below, was transferred into account #***65 at Olympia Trust. If the locked-in pension is the source of the funds in Mr. Shih's Olympia Trust account #***65, which the documents indicate is the case, then the pre-relationship RRSP is not the source of the funds in that account. According to the Scott Schedule, the only other RRSP account currently in Mr. Shih's name is the Olympia Trust account #***866. This is item 13 on the Scott Schedule, which the parties agree has a current value of $66,735.25.

[140] Mr. Shih testified that in the five years from 2000 to 2004 he contributed a total of $33,654 to RRSPs. This was corroborated by the Income Tax Notices of Assessment issued to him by CRA for each of those years. He did not produce any documents evidencing the actual RRSP account or accounts in which those funds were invested, but he testified that he deposited those amounts into his RRSP account at the Bank of Montreal. He produced a statement for the period July 1, 2007 to September 30, 2007, showing that as of July 1, 2007, roughly two years after the relationship began, he had an RRSP account at the Bank of Montreal with a balance of $37,362.34.

[141] Mr. Shih testified that he transferred the funds in his Bank of Montreal RRSP account to another institution or institutions and then, eventually, to Olympia Trust. As already noted, there are two Olympia Trust accounts disclosed on the Scott Schedule. Presumably, given his testimony that his locked-in pension was transferred into account #***65 at Olympia Trust (item 14 on the Scott Schedule), he must have meant that the funds from his Bank of Montreal RRSP account eventually ended up in account #***866 at Olympia Trust (item 13 on the Scott Schedule). However, he produced very few documents and those he did produce do not provide evidence of the chain of transfers from the Bank of Montreal account eventually into an Olympia Trust account.

[142] The statement for the Bank of Montreal RRSP account shows that $19,397 was transferred from that account in September 2007. There are no documents showing what happened to that $19,397 or to the $18,783.24 that remained in the Bank of Montreal RRSP account as at September 30, 2007.

[143] Mr. Shih produced some documents that show he had RRSP accounts with Fidelity Investments. He testified that he transferred the funds in the Bank of Montreal RRSP account into these Fidelity accounts. The Fidelity documents appear to show that Mr. Shih invested in several Fidelity mutual funds between January 2008 and December 2014, in which he made numerous trades, but they do not appear to show that these investments were derived from

funds previously held in the Bank of Montreal RRSP account. The transfer of $19,397 out of the Bank of Montreal account in September 2007, occurred several months before the first transaction noted in the Fidelity accounts in January 2008. This is inconsistent with Mr. Shih's evidence that the funds in the Bank of Montreal account were transferred to Fidelity.

[144] The documents tendered in evidence disclose nothing about the source of the funds invested by Mr. Shih in the Fidelity accounts. The Fidelity documents contain several columns of information, some of which appears to be codes, and none of which was explained by Mr. Shih. It is not even possible for me to discern from the documents how much money Mr. Shih had invested in these mutual funds at any given time. However, they appear to indicate that he still had at least some money invested in Fidelity in December 2014. The one statement produced in relation to account #***866 at Olympia Trust indicates it was in existence by January 1, 2014.

[145] In the circumstances, while I accept that in the five years from 2000 to 2004 Mr. Shih contributed a total of $33,654 to RRSPs, the evidence discloses no basis upon which to make an informed finding as to the value of any RRSPs Mr. Shih actually held when the relationship began in June 2005. Further and in any event, the evidence is insufficient to permit the tracing required to conclude that some portion of the current Olympia Trust RRSP was derived from RRSPs held by Mr. Shih in June 2005.

The Locked-In RRSP (Scott Schedule #14)

[146] Mr. Shih says that his locked-in RRSP at Olympia Trust, which was referred to in submissions as item 13 on the Scott Schedule, was derived in part from a pre-relationship pension valued at $32,615.41 when the relationship began. As discussed above, the documents indicate that the Olympia Trust locked-in RRSP is actually the asset referred to as item #14 on the Scott Schedule. The parties agree that asset has a current value of $45,659.50.

[147] Mr. Shih produced a document showing that he had a Telus pension, with Standard Life, that was valued at $32,615.41 as of May 31, 2005. Mr. Shih testified that this pension was "locked-in" and that he transferred it to a locked-in RRSP account with Phillips Hager & North. He produced a statement for a locked-in RRSP account with Phillips, Hager & North indicating that $34,547.62 was transferred into it from Standard Life in April 2006.

[148] Mr. Shih testified that he transferred all the funds in the Phillips, Hager & North account to a locked-in RRSP account with Olympia Trust. He produced a statement for his Olympia Trust account #***65 showing the transfer of $10,000 from Phillips, Hager & North on February 1, 2010 and the transfer of $19,493.35 also from Phillips, Hager & North on June 29, 2012.

Although the sum of these two transfers is only $29,493.35, Mr. Shih testified that those transfers completely depleted the Phillips, Hager & North account.

[149] The documents Mr. Shih produced do permit the tracing of a portion of the funds in his locked-in Olympia Trust RRSP back to his Telus pension. I am satisfied from his testimony corroborated by those documents, that $29,493.35 of the balance in his Olympia Trust locked-in RRSP was derived from the disposition of the Phillips, Hager & North account, which, in turn, was derived from the pre-relationship Telus pension. He has established that $29,493.35 of the value of the Olympia Trust locked-in RRSP (item 14 on the Scott Schedule) is his excluded property.

Conclusions on Excluded Property

[150] In summary, Ms. Shih established excluded property consisting of $164,933 of the $957,922.87 net sale proceeds from the Braemar house (Scott Schedule item #3), leaving $792,989.87 as family property to be divided; $153,687.86 from her Quadras McCurdy RRSP (Scott Schedule #11), leaving $21,368.61 as family property to be divided; and $45,487.50 in her RBC account at the time the parties separated (Scott Schedule item #12), which has since been spent.

[151] In summary, Mr. Shih established that $29,493.35 of the Olympia Trust locked-in RRSP (Scott Schedule #14) is his excluded property, leaving a balance of $16,166.15 as family property to be divided.

[152] The difference in the outcomes of the parties' respective claims to excluded property turns to some extent on the nature of the exclusions claimed by each of them.

[153] Ms. Shih's claims were founded upon property she owned prior to the relationship and gifts from her parents. The former was conceded by Mr. Shih, which left Ms. Shih in the position of having to prove that she received the gifts, their amounts, and the purposes to which they had been applied. In the circumstances of this case, that was not particularly difficult for her to do, in large part because there were only a few gifts, they were given in memorable circumstances, and some of them were received relatively recently. For the most part, she had documents that established the steps in the process of tracing the gifts into current assets.

[154] In contrast, Mr. Shih claimed exclusions arising from property he owned prior to the relationship and these claims were not conceded by Ms. Shih. He had to prove the value of particular assets that he held many years ago in circumstances where the values were not particularly memorable and, in some cases, such as the stock options and the equity in the West 4th Avenue condominium, not easy to discern. In the result, it was not possible for him to

prove the exclusions he sought without clear documentary evidence and, at least in respect of the equity in the West 4th Avenue condominium, expert evidence of historical value.

[155] While sympathetic to the position Mr. Shih found himself in, the *FLA* makes clear that the party claiming the exclusion bears the onus of establishing it, with precision. For the most part, Ms. Shih met that onus and Mr. Shih did not.

Should the family property and debts be divided equally?

[156] As an alternative position, Mr. Shih submits that if I find the monetary payments Ms. Shih received from her parents are gifts (which I have found) and if I find Ms. Shih has established claims to excluded property based upon those gifts (which, to a large extent, she has), then there should be an unequal division amounting to $100,000 in his favour, to be paid out of the remaining sale proceeds of the Braemar house, on the basis that the majority of his earnings during the relationship went towards the accumulation and maintenance of family property whereas a significant amount of the funds Ms. Shih received from her parents went into her personal assets. I do not agree with this submission for the following reasons.

[157] First, providing Mr. Shih with more than half the sale proceeds from the Braemar house, after payment to Ms. Shih of the amount of her excluded property, would be inconsistent with paragraph 1 of the Consent Order. As already discussed, that paragraph reflects the parties' agreement that the jointly held assets be divided equally after payment of any excluded portion to the party proving the exclusion.

[158] Second, even if Mr. Shih's submission was not contrary to the Consent Order, the premise upon which it is based is flawed. There is not a material difference in the extent to which the parties accumulated "personal" assets during the marriage. Of the $322,500 in gifts Ms. Shih received from her parents, at least $215,000 was applied for family purposes, with $165,000 being contributed to the acquisition of the family homes and at least the last $50,000 being spent on family expenses. During the marriage, Ms. Shih's own income was used to support the family. Ms. Shih did apply $60,000 of the gifts to her own RRSPs but Mr. Shih was also building up RRSPs. By the time of the separation, they each had RRSPs worth approximately $237,000. In addition they both had TFSAs, and Mr. Shih had bank accounts in his own name with balances in excess of $100,000.

[159] Finally and in any event, under s. 95(1) of the *FLA* the court's discretion to order an unequal division of family property is limited to circumstances where an equal division would be "significantly unfair" and, in my view, to divide the family property equally in this case would not give rise to significant unfairness.

[160] I acknowledge that the parties' respective contributions toward the accumulation and maintenance of family property are one factor to be taken into account in determining whether an equal division would result in significant unfairness. However, differing financial contributions alone are unlikely to give rise to unfairness that is so weighty as to meet the threshold of significant unfairness required by s. 95(1) of the *FLA* which, as stated by Mr. Justice Brown in *L.G. v. R.G.*, 2013 BCSC 983 at para. 71, cautions against departing from the default of equal fairness "in an attempt to achieve 'perfect fairness'."

[161] It is commonplace that parties in domestic relationships make unequal financial contributions. The extent to which those differences should be accounted for in the division of property upon breakdown of the relationship is reflected in the excluded property regime. As stated by Mr. Justice Savage in *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60:

> The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the *FLA* recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.

[162] To sustain Mr. Shih's position, in the circumstances of this case, would deprive Ms. Shih of a significant amount of the benefit of the exclusions she has proved. As noted by Madam Justice Fenlon in *P.G.* at para. 76, the reasons for introducing the excluded property regimes were described in the British Columbia Ministry of Attorney General's White Paper on *Family Relations Act Reform: Proposals for a new Family Law Act*, in part as follows (at 81):

> The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subjected to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship. …
>
> [Emphasis in *P.G.*]

[163] Ms. Shih has established a claim to excluded property valued at about $714,000 (including the West 13th Avenue condominium) while Mr. Shih has established a claim to excluded property valued at about $443,500 (including the West 4th Avenue condominium), a difference of $270,500. Providing Mr. Shih with a $100,000 greater share of the sale proceeds of the Braemar house would have the effect of eliminating $200,000 or nearly 75% of the difference in their excluded property, which would undermine the objectives of the excluded property regime in the *FLA*.

[164] Finally, this is not a case where one party will be left without significant assets. In this

case, applying the presumption of equal division, the parties will divide family property with a total value of about $1.8 million (including the value of the joint MIC prior to liquidation, but not including the RESP), leaving each of them with property of about $900,000. In addition, Ms. Shih will retain excluded property valued at about $714,000 and Mr. Shih will retain excluded property valued at about $443,500. This will leave Ms. Shih with property valued at approximately $1,614,000, while Mr. Shih will have property valued at approximately $1,343,500. This is not an unfair result.

[165] With one exception, the family property will be divided equally. The exception arises from my understanding that Ms. Shih agreed to pay Mr. Shih $5,000 out of the Braemar sale proceeds to compensate him for a reduction made to the sale price of the Braemar house with which he disagreed. If I am mistaken about that agreement, then the family property will be divided equally without exception. If there is any dispute between the parties as to whether this was in fact agreed, they may appear before me to make submissions on that point.

What are the parties' respective incomes and should income be imputed?

[166] Given the shared parenting regime, it is necessary to determine both parties' incomes for purposes of ascertaining their prospective child support obligations under the *Guidelines*. In addition, Ms. Shih advances a claim for prospective spousal support, which necessitates a determination of the parties' respective incomes.

Ms. Shih's Income

[167] Under s. 16 of the *Guidelines*, the starting point for the determination of a party's income is his or her line 150 income as set out in his or her T1 General Income Tax Return, with any adjustments required by Schedule III. Section 2(3) of the *Guidelines* requires the court to use the most current information available. However, if the court concludes that this approach would not result in the fairest determination of the party's income then, under s. 17 of the *Guidelines*, the court may consider the party's income over the past three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation of income, or receipt of a non-recurring amount during those years.

[168] In addition, s. 19 of the *Guidelines* confers a broad discretion on the court to impute income and provides a non-exhaustive list of circumstances where income may be imputed. Specifically, under s. 19(a), the court may impute income to a party who is intentionally under-employed or unemployed. Under s. 19(g) the court may impute income to a party who unreasonably deducts expenses from income. Under s. 19(2), the reasonableness of the expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.).

[169] Ms. Shih's mortgage broker income has varied over the years. In 2011, her line 150 income was $99,109, but a significant amount of that income was the result of income splitting with Mr. Shih. In that year, her gross income from her mortgage broker business was $20,000. In 2012, her line 150 income was $68,518. In that year she reported gross business income of approximately $47,000. In 2013, her line 150 income was approximately $80,000. In that year she reported gross business income of approximately $62,000, which was her best year as a mortgage broker. Ms. Shih had not completed her 2014 income tax return at the time of the trial. She testified that her gross business income in 2014 dropped to $40,105. She attributed this to the conflict and distraction arising from the separation and this litigation.

[170] Historically, Ms. Shih has deducted from her gross mortgage broker income business expenses in the range of approximately $13,000 to $16,000 and expenses associated with the use of a home office in the range of $8,000 to $14,000. In addition, each year she reports the $12,000 in employment income she receives from her mother and approximately $8,000 in net rental income from the West 13th Avenue condominium.

[171] Ms. Shih acknowledged that it would not be appropriate to determine her income with primary reference to her 2014 business income. The income from her mortgage broker business has fluctuated over the years and 2014, when her gross business income was only about $40,000, was a particularly poor year. She says it is reasonable to expect that she will earn gross business income of approximately $70,000 a year from the mortgage broker business in future. From that gross amount, she says it would be reasonable to subtract business expenses of $13,100 (the amount she deducted for taxes purposes in 2013) and $5,000 for expenses associated with her use of a home office (down from the amount of $8,500 she deducted for tax purposes in 2013 because she will be living in a smaller residence), for net business income of $51,900. To that amount she proposes to add net rental income of $8,000, plus the $12,000 in employment income she receives from her mother, for total income of $71,900 for support purposes.

[172] Mr. Shih says that the court should impute income of $188,721 to Ms. Shih for purposes of calculating prospective support. He accepts that it is reasonable to assume Ms. Shih will earn $70,000 in gross business income going forward and that it would be appropriate to deduct approximately $13,000 for business expenses, but he submits that there should be no deduction for expenses associated with her use of a home office. This would result in net business income of $57,000. To that amount, Mr. Shih submits should be added the $12,000 in employment income, the $8,000 in net rental income, $50,000 to reflect the gifts Ms. Shih has received from her parents, and $15,500 to reflect the expenses Ms. Shih's mother has also paid, including her home insurance and office rent. He says the latter two amounts must be grossed up because they are received by Ms. Shih on a tax paid basis. Using these inputs, the

DivorceMate software generates a total income amount, after the gross up, of $188,721.

[173] Thus, the issues to be resolved in determining Ms. Shih's income are whether an amount for expenses associated with the use of a home office should be deducted from her anticipated gross business income, and whether income should be imputed to her as a result of the financial benefits she has received from her parents.

[174] While Mr. Shih submitted that Ms. Shih should "not be permitted to write off the business use of home office", he did not provide any explanation of that position. It is apparent from Ms. Shih's tax returns that she has consistently deducted expenses associated with the use of a home office from her gross business income for tax purposes. Ms. Shih testified that she did work from home in the evenings and on weekends. There was no evidence upon which it could be determined that the home office expenses Ms. Shih has deducted are unreasonable. The business income amount that has historically formed part of her line 150 income has been net of those expenses. In the circumstances, I am satisfied that it is appropriate to make the $5,000 deduction for expenses associated with her home office as proposed by Ms. Shih.

[175] Although the receipt of gifts given in the normal course is not included in the *Guidelines* as an express example of a circumstance in which income will be imputed for purposes of child support, a court may consider whether the circumstances surrounding a particular gift are so unusual that they constitute an appropriate circumstance in which to impute income: *Bak*; *Flader v. Gutkin*, 2013 BCSC 414. In *Bak*, the Ontario Court of Appeal set out a number of factors to be considered including the regularity of the gifts; the duration of their receipt; whether the gifts were part of the family's income during cohabitation that entrenched a particular lifestyle; the circumstances of the gifts that mark them as exceptional; whether the gifts do more than provide a basic standard of living; the income generated by the gifts in proportion to the recipient's entire income; whether the gifts are paid to support an adult child through a crisis or period of disability; whether the gifts are likely to continue; and the true purpose and nature of the gifts (at para. 75).

[176] The factors, in *Bak*, that appeared to weigh most heavily against imputing income were that the payments the respondent received from his father in that case were more in the nature of support for a disabled adult child than in the nature of an allowance, they did no more than support a basic lifestyle, and the respondent had no right to the payments. Similarly, in *Flader*, Madam Justice Baker declined to impute income to Mr. Flader as a result of the financial support he received from his parents because, among other things, he was disabled, the funds were given to him primarily for medical treatment and supplies, and there was no legal obligation on the part of his parents to continue to support him financially (at para. 194).

[177] In *Korman v. Korman*, 2015 ONCA 578 at paras. 64-67, the Ontario Court of Appeal held that income should be imputed to Mr. Korman as a result of monetary gifts provided to him by his parents. There was a settled pattern of such gifts over many years and the gifts were substantial (between 1990 and 2009 the parents gifted at least $986,000). The court distinguished *Bak* because in *Bak* the parent provided financial assistance to support a disabled adult child whereas Mr. Korman supported himself and the monetary gifts helped him maintain a certain lifestyle. The court also noted that if Mr. Korman's parents' practice of making significant monetary gifts changed, it would be open to him to apply to for an adjustment.

[178] Having considered the cases and, in particular the factors listed in *Bak*, I am persuaded that it would be appropriate to impute some additional income to Ms. Shih to reflect the financial assistance she has received from her parents. This is not a case of Ms. Shih needing support due to a medical condition. Rather, she supports herself, and the financial assistance she has received permits her to maintain a certain lifestyle. I am not suggesting she lives an extravagant lifestyle, but the gifts have permitted her to contribute to the accumulation of property such as the family homes and RRSPs and, in doing so, have freed up income that has contributed to more than a basic standard of living. While I am not persuaded that the gifts are income in disguise, a pattern of almost annual gifts has developed, particularly over the last five or six years. Some of the gifts have been in very significant amounts. Ms. deVries' purpose in giving the gifts is to permit her children to spend the money on "fun" or otherwise as they see fit, and she intends to continue to give her children monetary gifts and, in doing so, will rely on advice from her children. Ms. Shih will continue to participate in the formulation of that advice.

[179] When considering whether it is appropriate to impute income in any particular case, a court must bear in mind the objectives expressed in s. 1 of the *Guidelines* to establish fair support based on the means of the parties in an objective manner that reduces conflict, ensures consistency and encourages resolution. In my view, a consideration of these objectives supports the imputation of some income to Ms. Shih because the nature of the financial assistance she receives from her mother significantly enhances her means and it is likely to continue.

[180] The next question is how much income to impute. Mr. Shih suggests $50,000 to reflect the lump sum payments Ms. Shih has received and $15,500 to reflect the fact that Ms. Shih's mother has also paid certain of her expenses, both of which should be grossed up. I am not persuaded that the evidence supports those amounts. While the payments have been made fairly consistently, at least over the last five years during which they have been made roughly annually, they have not been in consistent amounts.

[181] In the ten years since 2005, the lump sum payments have totalled $322,500. This is an average of $32,250 per year. In addition, Ms. deVries consistently pays Ms. Shih's house insurance at an estimated cost of $5,000, and the cost of her office rent which Mr. Shih estimated at a few hundred dollars a month. At $300 per month, this amounts to $3,600 per year plus the house insurance costs of about $5,000.

[182] In my view, it would be appropriate to impute additional income of $30,000 per year to Ms. Shih. The house insurance costs and office rent are likely to remain stable, in the range of about $8,000 per year. The amounts of the lump sum payments, however, have fluctuated widely. This is not a precise exercise to be calculated with mathematical certainty; rather, the objective is to achieve fairness. In my view, considering the nature and amounts of the lump sum gifts, an additional $22,000 to reflect those gifts would achieve fairness. I do not intend that the $30,000 be further grossed up. This is not income *per se*. It is an imputation of income, to achieve fairness. It would not be fair to gross up for income tax the entire amount of the anticipated future monetary gifts. For example, if Ms. Shih received a $50,000 gift from her mother and invested it, it would generate income of much less than $22,000. Imputing an additional $30,000 will, in my view, meet the objective of fairness.

[183] For the foregoing reasons, I find Ms. Shih to have an income, for support purposes, of $101,900, which comprises net business income of $51,900, net rental income of $8,000, employment income of $12,000, and an additional $30,000 in imputed income.

Mr. Shih's income

[184] Mr. Shih is not working by choice. In the circumstances, the parties agree that income must be imputed to him pursuant to s. 19 of the *Guidelines*. The dispute concerns how much income to impute.

[185] Ms. Shih says I should use Mr. Shih's three-year average income from 2012 to 2014, which she calculates at $232,700. This amount is derived from his line 150 income in 2012, his line 150 income in 2013, and the sum of his T4 income and his net rental income in 2014. As will be discussed later in the section of this judgment dealing with retroactive child support, Ms. Shih did not include any investment income earned by Mr. Shih in 2014 in calculating this average. Ms. Shih emphasizes that Mr. Shih's 2014 employment income was a low-water mark, throughout the marriage he consistently earned employment income that exceeded $200,000, and in 2011 he earned more than $600,000.

[186] Mr. Shih says I should impute income to him of $166,763, which comprises his 2014 employment income of $163,763 plus his net rental income of $3,000. He says it would be inappropriate to use his historical three-year average because he is not working and he "wants

to become involved in a tech start-up" rather than pursue an employment position. He says this will take some time and there is no guarantee that he will be able to achieve the levels of income he had in the past.

[187] In *Barker v. Barker*, 2005 BCCA 177 at para. 18, the Court of Appeal held that, given the express language of s. 19(1)(a) of the *Guidelines* that states income may be imputed to an under-employed or unemployed spouse "other than where the under-employment or unemployment is required by the needs of a child … or by reasonable educational or health needs of the spouse", a parent who chooses to be under-employed or unemployed "must justify that choice by the needs of the children or suffer the loss personally." The Court of Appeal also confirmed the test of "whether the parent is earning what the parent is capable of earning" (at para. 19).

[188] This does not mean that Mr. Shih is prohibited from ever changing his career path. As stated by Justice Halfyard in *Kennedy v. Kennedy*, 2014 BCSC 637 at para. 26:

> Persons who have been ordered to pay child support are entitled to make decisions to reduce their working time or to change their career path, provided those decisions are reasonable at the time they are taken, considering all the circumstances. In determining what is reasonable in the circumstances, the court will have regard to the age, education, experience, skills and health of the payor, as well as the availability of work, the freedom to relocate and other obligations. If the payor establishes that his or her decision was reasonable, then the court may decide not to impute a higher income to the payor, for all or some of the time period under examination. See *Donovan v. Donovan* at paras. 19 and 33. I take this to mean that a payor's change of career, if reasonable, may amount to an excuse for some periods of intentional underemployment, or unemployment.

[189] There was no suggestion that Mr. Shih quit his job or decided to change careers in order to satisfy the needs of the boys. To the contrary, he testified that his employment was flexible such that he was able to work from home, at least some of the time, and spend more time with the boys than a typical full-time job would permit. Similarly, there was no suggestion that Mr. Shih quit his job as a result of reasonable educational or health needs. Mr. Shih claims that he was forced to quit his job in order to represent himself at the trial. I reject that assertion.

[190] Mr. Shih says that the parties' assets were frozen and Ms. Shih would not cooperate in liquidating their jointly held MIC investment at Dundarave, with the result that he could not access the funds required to retain his counsel for the trial. However, there were no orders restraining the parties from dealing with their assets. There was some evidence that Ms. Shih was less than cooperative when she was asked to agree to liquidate the jointly held MIC, but there was no evidence to support a finding that Mr. Shih had no other options for obtaining funds. By way of example only, he continued to own the West 4th Avenue condominium and he could have borrowed against the equity in that condominium. He also continued to own the

Apple shares, which presumably could have been a source of funds with which to retain a lawyer. Frankly, given his history of consistently high employment income, he could have endeavored to borrow enough money to retain counsel and then quickly reduced the loan with periodic payments funded by his paycheques. He led no evidence suggesting that these were not realistic options.

[191] Further, Mr. Shih led no evidence of any unsuccessful attempts to obtain counsel for the trial without a monetary retainer. Given the assets to be divided in this case, it is likely he could have found someone who would have taken the case on an agreement to be paid out of the share of the property ultimately awarded to him. In this regard, it should be noted that Mr. Shih appears to have had no difficulty retaining counsel once he realised that he should apply to reopen.

[192] Finally, Mr. Shih's evidence about the flexibility of his job is inconsistent with his assertion that he could not continue to work and also represent himself at the trial.

[193] It is my view that Mr. Shih's decision to quit his job on the eve of trial was unreasonable and, more likely than not, motivated by a desire to minimize his support obligations. He provided no details of his plan to get involved in a "tech start-up", leaving the court without any basis upon which to assess the reasonableness of that plan in light of his age, education, experience, and skills, or the likelihood of success from such a venture.

[194] Given the fluctuations in Mr. Shih's income over the years, it is my view that it is appropriate to impute income to him in an amount equal to his average income over the past three years. The parties agree that is $232,700 per year.

Child Support

[195] The parties have agreed to a shared parenting arrangement where the children will reside with each of them roughly 50% of the time. Accordingly, child support is governed by s. 9 of the *Guidelines*, which provides that the amount of the child support order must be determined by taking into account (a) the amounts set out in the applicable tables for each of the spouses; (b) the increased costs of shared custody arrangements; and (c) the conditions, means, needs and other circumstances of each spouse and of the child.

[196] There is no evidence of any increased costs of the shared custody arrangement. No submissions were made by either party regarding any increased costs or any other circumstances that would impact on the child support order that should be made. In the circumstances, it is my view that child support should be paid in an amount that reflects the set-off between the amounts payable by each party under the *Guidelines*.

[197] At incomes of $232,700 per year for Mr. Shih and $101,900 for Ms. Shih, this results in a monthly child support payment by Mr. Shih to Ms. Shih of $1,643 (after set-off). Mr. Shih shall commence paying that amount to Ms. Shih on October 1, 2015 (following the end of the trial on September 25, 2015).

[198] In addition, Ms. Shih and Mr. Shih will share in proportion to their respective *Guidelines* incomes the costs of the children's special or extraordinary expenses within the meaning of s. 7 of the *Guidelines*.

Spousal Support

[199] Section 15.2 of the *Divorce Act* confers jurisdiction for the court to make an order for spousal support. Under s. 15.2(4), the court is required to take into consideration the condition, means, needs and other circumstances of each spouse including:

> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

[200] The objectives of a spousal support order are set out in s. 15.2(6):

> An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[201] In addition to considering the relevant statutory provisions and authorities, the court must also have regard to the *Spousal Support Advisory Guidelines* (the "*SSAG*"). While the *SSAG* are a useful tool for determining spousal support, they are guidelines and not the law: *Yemchuk v. Yemchuk*, 2005 BCCA 406; *McEachern v. McEachern*, 2006 BCCA 508.

[202] The threshold question to be answered in deciding on spousal support is whether the applicant spouse is entitled to it. It is only if Ms. Shih has established an entitlement that it is necessary to go on to consider the appropriate amount and duration of spousal support. Having said that, Ms. Shih's entitlement to spousal support was not seriously contested.

Rather, Mr. Shih merely argued that, given the income he proposed for each party ($166,763 for Mr. Shih and $188,721 for Ms. Shih), no spousal support would be payable to Ms. Shih in any event. I have found, however, that Ms. Shih's income for support purposes is $101,900 while Mr. Shih's is $232,700. In the circumstances, it is necessary to determine Ms. Shih's entitlement to spousal support.

[203] There are three grounds or bases upon which a spouse can establish entitlement. These are referred to as compensatory, non-compensatory, and contractual support: *Moge v. Moge*, [1992] 3 S.C.R. 813, (compensatory support); *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, (non-compensatory support); and *Miglin v. Miglin*, 2003 SCC 24 (contractual support). There is no basis in the evidence for contractual support and therefore I will consider Ms. Shih's entitlement under compensatory and non-compensatory grounds.

[204] In the recent case of *M.T. v. C.J.B.*, 2015 BCSC 1852, Mr. Justice Pearlman summarized the applicable principles:

> [193] The Court of Appeal explained the basis for compensatory support in *Chutter v. Chutter*, 2008 BCCA 507 at para. 50:
>
> > Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:
> >
> > > The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well−being. In such situations, spousal support may be a way to compensate such economic disadvantage.
>
> [194] Compensatory spousal support may also address economic advantages enjoyed by the other spouse as a result of the recipient spouse's efforts: *Chutter* at para. 51. The doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse": *Moge* at 864.
>
> [195] In *Chutter*, the Court said this concerning non-compensatory support:
>
> > [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (*Bracklow*, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse

> falls on his or her former partner, rather than the state (*Bracklow*, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.
>
> [55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:
>
> > "Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.
>
> [196] The assessment of means and need must take into account both the marital standard of living and the parties' standards of living following the marriage breakdown: *Chutter* at paras. 56-60.

[205] The fundamental questions in determining whether Ms. Shih has established an entitlement on compensatory grounds are whether she suffered an economic disadvantage arising from the marriage or its breakdown, or whether her efforts resulted in an economic advantage to Mr. Shih.

[206] Before the parties began cohabiting, Ms. Shih was employed at Telus in a marketing role earning about $80,000 a year. At the time the parties commenced cohabiting, she was working as a mortgage specialist with the Royal Bank. The parties' first son was born in August 2007 and Ms. Shih took a year-long maternity leave. During that time she qualified as a mortgage broker. Rather than returning to the bank, she started working as an independent mortgage broker in August 2008. Apart from her second maternity leave in 2009 and early 2010, she worked five days a week, approximately six hours a day, which allowed her to spend time with the children in the mornings and afternoons. She is currently working 35 to 40 hours per week.

[207] The parties cohabited for 8.5 years. Except for approximately 27 months spanning the two maternity leaves, Ms. Shih worked close to full time. She chose to change careers and become a mortgage broker not only because she thought it gave her some flexibility in terms of caring for the boys but also because she wanted to work with her brother. It was clear from her evidence as a whole that, irrespective of her childcare and family responsibilities, this is her preferred profession and she has no intention of returning to an employment position similar to the one she held at Telus, which would likely generate a higher income. Mr. Shih initially supported her career change but he soon changed his mind and would have preferred she go back to a marketing job, similar to the one she previously held at Telus, where he thought she would have as much or more flexibility and would earn more income. In these circumstances, it cannot be said that Ms. Shih suffered an economic disadvantage by choosing a lower paying

profession in order to assume primary childcare and family responsibilities.

[208] However, I do accept that Ms. Shih suffered some economic disadvantage arising from the marriage to the extent that she delayed the development of her mortgage broker business during the approximately 27 months she was on maternity leave. By doing so, she conferred an economic advantage on Mr. Shih insofar as he was able to devote the greater part of his time on his career. On this basis, I am satisfied that she has a compensatory entitlement.

[209] I am not satisfied that Ms. Shih has established a non-compensatory entitlement. A difference in the parties' incomes alone is unlikely to justify an award of support on non-compensatory grounds: *Lee v. Lee*, 2014 BCCA 383 at para. 60. As already noted, the concept of needs varies according to the circumstances of the parties.

[210] In this case, notwithstanding their different incomes, neither party will experience a significant decline in their standard of living due to the divorce. They did not live a lavish lifestyle during the marriage. (Ms. Shih testified about buying second hand furniture for the Braemar house and she drove and continues to drive a 2009 Honda van.) She will own significant assets as a result of the property division and, given her greater success in establishing excluded property, she will be left with property valued at approximately $1,614,000, while Mr. Shih will have property valued at approximately $1,343,500.

[211] The compensatory award will recognize and apportion the financial consequences arising from Ms. Shih's primary responsibility for the children during the two maternity leaves. In the circumstances of this case, it cannot be said that either party will suffer economic hardship from the breakdown of the marriage and Ms. Shih is already economically self-sufficient. For these reasons, while she has established entitlement on compensatory grounds I find she has not established entitlement on non-compensatory grounds.

[212] The next question is the amount and duration of the spousal support award. Based on the parties' respective *Guidelines* incomes and 8.5 years cohabitation, under the *SSAG* with child formula the range of monthly spousal support is from $1,272 at the low end to $2,014 at the mid-point and $2,757 at the high end. The *SSAG* formula provides for the payment of support by Mr. Shih to Ms. Shih for unspecified duration with a suggested minimum duration of 4.25 years and a maximum duration of 12 years from the date of separation.

[213] The location of a precise amount or duration within those ranges is driven by the circumstances of the parties in question and includes the strength of any compensatory claim; the recipient's needs; the age, number, needs and standard of living of any children; the needs and ability to pay of the payor; work incentives for the payor; property division and debts; and self-sufficiency incentives. Having considered these factors it is my view that this is a case

where an award at the lower end of the range in terms of both amount and duration is appropriate. For the reasons already expressed, Ms. Shih's compensatory claim is not particularly strong. She is not in need and will be left with significant assets as a result of the property division. Given her and Mr. Shih's incomes and assets, the children will continue to enjoy a comfortable standard of living. She is already self-sufficient.

[214] Accordingly, the order I make is that effective October 1, 2015 and continuing on the 1st day of each month thereafter for a period of five years, Mr. Shih will pay to Ms. Shih monthly spousal support in the amount of $1,300.

Retroactive Child Support

[215] In *D.B.S. v. S.R.G.*, 2006 SCC 37, the Supreme Court of Canada stated the legal principles applicable to claims for retroactive child support. The Court began its analysis by emphasizing that child support is the right of the child; that following the breakdown of the marriage, child support should, to the extent possible, provide children with the same standard of living they enjoyed when their parents were together; and that under the *Guidelines*, the specific amount of child support will vary as the income of the payor parent fluctuates (at para. 38).

[216] The factors that a court should consider before making an award of retroactive child support include whether the claimant has a reasonable excuse for why support was not sought earlier, the conduct of the payor parent, the circumstances of the children, and whether a retroactive award will cause hardship to the payor parent: *D.B.S.* at paras. 100, 105, 110 and 114.

[217] As I understand it, Ms. Shih submits that she is entitled to retroactive child support for the months between April 2014 and March 2015, when the boys resided primarily with her, and then on a set-off basis between April 1, 2015 and the commencement of the prospective support, which I have ordered to commence on October 1, 2015, during which time the parties shared parenting time roughly equally. Mr. Shih appears to concede that it would be appropriate to make an award of retroactive child support. The disagreement is with respect to the amount and arises from the parties' differing positions on their respective incomes and the manner in which they account for the contributions Mr. Shih did make during the separation.

[218] Although it appears that Mr. Shih conceded that it would be appropriate to make an award of retroactive child support, the parties' submissions on this issue were not entirely clear. Accordingly, I will address the factors in any event.

[219] In my view, Ms. Shih's delay in pursuing her claim for retroactive child support is not a

particularly significant factor. The parties were occupied in sorting out the parenting arrangements. Mr. Shih appears to have acknowledged and accepted his obligation by continuing to make the mortgage payments. In the circumstances of this case, it cannot be said he was taken by surprise.

[220] With respect to the conduct of the payor parent, in *D.B.S.* at para. 106, the Court characterized blameworthy conduct as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support." On the evidence before me I am not persuaded that Mr. Shih deliberately avoided his obligation to pay child support. Rather, the parties were focussed on resolving the parenting issues and they simply put the question of support on the back burner. This was likely due, in significant part, to the fact that neither Ms. Shih nor the boys had any needs that were not being met. As such, this is not a significant factor either.

[221] The next consideration is the circumstances of the children. There is no evidence that the boys suffered any hardship as a result of Mr. Shih paying less than the full amount of his child support obligations.

[222] I must also consider whether an order for retroactive child support will cause hardship to the respondent. Prospectively, I have found Mr. Shih to have a *Guidelines* income of $232,700. As a result of the property division, he will retain assets valued at more than $1.3 million. In these circumstances, I find that he would not experience significant hardship if retroactive child support were ordered.

[223] Thus, the factors do not strongly support a retroactive award but neither do they strongly suggest no retroactive award should be made. In this case, the deciding considerations, in my view, are the rights of the boys to support and the lack of financial hardship to Mr. Shih. In light of those considerations, I am satisfied that an award of retroactive child support should be made.

[224] No support payments (child or spousal) were made between the separation and the trial, but Mr. Shih continued to make the mortgage payments on the Braemar home until it sold in approximately late April 2015. He also paid the 2014 property taxes. He says he should get credit of half those amounts. In addition, Mr. Shih paid approximately $5,000 towards extended health premiums during the separation, and he says that amount should also be deducted from any retroactive support order.

[225] Mr. Shih paid the mortgage out of the income of approximately $30,000 that was generated on the jointly held MIC investment, which belonged to both parties. The parties agreed that the income earned on that joint investment would be paid to Mr. Shih and used by

him to pay the mortgage during the separation. Accordingly, as I understand it, Ms. Shih says that Mr. Shih should get credit only for the amount by which the mortgage payments exceeded that income. That appears to be $2,600. Mr. Shih does not appear to disagree with this, provided his income for purposes of calculating retroactive support is not calculated to include that $30,000 in investment income.

[226] In addition, Ms. Shih says that the extended health premiums are s. 7 expenses and should be shared in accordance with the parties' respective incomes. Further she points out that during the separation, she continued to cover the child care expenses of approximately $15,000 which, as s. 7 expenses, should also be shared in accordance with the parties' respective incomes.

[227] Ms. Shih submits that Mr. Shih's income for purposes of calculating retroactive support should be set at $166,781, which is the sum of his 2014 employment income of $163,400 and $3,381 in net rental income (in other words, not including the $30,000 in investment income that the parties agreed would be used to pay the mortgage). Mr. Shih proposed an income for himself of $196,400, which was in effect the same amount suggested by Ms. Shih but with the $30,000 in investment income included. Presumably he would not oppose the setting of his income at the lower amount of $166,781 for purpose of calculating his retroactive support obligations. In the circumstances, I set Mr. Shih's income for purposes of determining retroactive support at $166,781.

[228] Ms. Shih submits that her income for purposes of calculating retroactive support should be set at $60,257, which is the sum of her business income, net rental income and salary from her mother. Mr. Shih proposes an income for Ms. Shih of $167,221, which appears to comprise similar amounts for Ms. Shih's business income, rental income and employment income, plus an additional $65,500 to reflect the monetary gifts and other financial contributions she has received from her mother, which would then have to be grossed up. For the reasons already expressed, it is my view that an additional $30,000 should be imputed to Ms. Shih to reflect the gifts and other financial contributions she has received from her mother. On this basis I set Ms. Shih's income for retroactive support purposes at $90,257.

[229] On the basis of these incomes, I find that Mr. Shih had an obligation to pay child support to Ms. Shih, for the period from April 2014 to March 2015, in the *Guidelines* amount of $2,315 per month. In addition, after applying a set-off, he had an obligation to pay child support to Ms. Shih for the period from April 2015 to September 2015 during which the shared parenting regime was in place, in the *Guidelines* amount of $967 per month. The sum of those two amounts, over the 18 months in question, is $33,582.

[230] I also agree that the $5,000 in extended health premiums and the $15,000 in child care costs should be shared proportionally. On that basis, Mr. Shih would be responsible for 65% and he would owe Ms. Shih $9,750 for the child care. Ms. Shih would be responsible for 35% and she would owe Mr. Shih $1,750 for the extended health premiums. The net amount is $8,000 owed by Mr. Shih to Ms. Shih which, when added to the total retroactive monthly support amount, results in a total retroactive child support obligation of $41,582.

[231] Given I have not included the MIC investment income in the calculation of Mr. Shih's income, then I agree with Ms. Shih that he should receive a credit for the mortgage payments of only $2,600. However, to that amount would have to be added half the property taxes for 2014, which is approximately $3,500, for a total credit of $6,100.

[232] After deducting Mr. Shih's credit of $6,100, Ms. Shih is entitled to an award for retroactive child support in the amount of $35,482.

Retroactive Spousal Support

[233] In *Kerr v. Baranow*, 2011 SCC 10 at para. 207, the Court held that similar considerations to those discussed in *D.B.S.* in the context of child support apply to a court's exercise of discretion to make a retroactive award of spousal support. Those factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may cause the payor spouse. However, these factors must be weighed taking into account the different legal principles that apply to spousal support as compared to child support.

[234] Mr. Shih made no submissions with respect to whether it was appropriate to order retroactive spousal support. Rather, his position is that no spousal support is payable at the *Guidelines* incomes he submits I should find. Again, the primary disagreement is with respect to the quantum of support and arises from the parties' differing positions on their respective incomes and the manner in which they account for the contributions Mr. Shih did make during the separation.

[235] I have found that for the purpose of determining retroactive support, Ms. Shih's income is $90,257 and Mr. Shih's income is $166,781. At those income levels, the *SSAG* suggests a range of between $88 per month and $1,324 per month during the period when the children were residing primary with Ms. Shih, and a range of between $196 and $1,404 per month once the shared parenting regime was implemented.

[236] As already discussed, Mr. Shih continued to make the mortgage payments during the separation. While he has already been credited with the amount by which those payments

exceeded the joint MIC income, the fact remains that he was entitled to half that income and he used it to pay the mortgage on the house where Ms. Shih was residing. Of course, as a joint owner of the house, he benefited from doing so, but the benefit to Ms. Shih was disproportionate as she also continued to live there.

[237] Accordingly to Mr. Shih's Form 8 financial statement, the mortgage payments were approximately $4,100 per month or a total of nearly $50,000 during the period between April 2014 when Mr. Shih moved out and April 2015, when the house sold. After deducting the $2,600 that was credited to Mr. Shih in determining retroactive child support, $47,000 of those payments remains. Half of that amount, or $23,500, spread over the 18 months between April 2014 and September 2015 when the trial concluded and after which prospective spousal support is payable, amounts to roughly $1,300 per month, which reflects Ms. Shih's share of the mortgage expense.

[238] For the reasons already expressed, this is a case where a spousal support award at the lower end of the range is appropriate. At the income levels I have found that would be in the range of $200 or $300 per month for the retroactive period. Given the disproportionate benefit to Ms. Shih of the mortgage payments made by Mr. Shih, I decline to make any order for retroactive spousal support.

Costs

[239] The rule governing the award of costs in family proceedings is that costs should follow the event unless the court otherwise orders: *Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.), leave to appeal ref'd [1993] SCCA No. 441. Thus, the party achieving "substantial success" typically recovers regular costs.

[240] Substantial success is measured objectively, taking into account all the matters in dispute, the weight and importance of the issues to the parties, and the parties' relative success or failure on those issues: *Fotheringham v. Fotheringham*, 2001 BCSC 1321, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham* the court held that "substantial success is about 75% or better", but that the court does not have to descend into a mathematical examination (at para. 45). Rather, this value is meant to serve as a rough and ready guide when looking at all of the disputed matters globally (at para. 45).

[241] Ms. Shih was successful on the question of the parenting coordinator, but success was divided on the other parenting issues. Ms. Shih was successful on the question of the interpretation of the Consent Order. Ms. Shih was more successful than Mr. Shih on the issues concerning property division, but she was not entirely successful and Mr. Shih did establish a claim to some excluded property. Ms. Shih was successful on the question of Mr. Shih's

income, but Mr. Shih was successful on the question of imputing income to Ms. Shih. The income determinations largely drove the issues concerning child and spousal support. More time was spent on the property issues, but the support issues, which largely turned on the parties' respective incomes, were nearly as important as the property issues. While Ms. Shih was more successful overall, in my view she was not substantially

successful. Rather, in my view, success in this case is more accurately characterized as divided. Accordingly, the parties shall bear their own costs.

"WARREN J."