

2022 ONSC 7186
Ontario Superior Court of Justice

Taylor v. Oliver

2022 CarswellOnt 18427, 2022 ONSC 7186

Susan Marie Taylor (Applicant Wife) and Scott Oliver (Respondent Husband)

Alex Finlayson J.

Heard: September 26, 2022; September 27, 2022; September 28, 2022; November 21, 2022

Judgment: December 19, 2022

Docket: FC-21-459

Counsel: Constance Neilsen, for Applicant Wife
Joan M. Cushon, for Respondent Husband

Headnote

Evidence
Family law

Alex Finlayson J.:

PART I: NATURE OF THIS JUDGMENT

1 The parties in this family law case disagree about their date of separation. At an appearance on April 27, 2022, they agreed in a Consent Order to bifurcate the issue, and to have a focused trial before me about "the date of separation/valuation date". The trial proceeded over four days in September and November, 2022. The parties adduced evidence by way of affidavits, supplemented by oral examinations-in-chief and cross-examinations, and documentary evidence.

2 The wife's position is that the parties separated on May 1, 2018. Her chosen date is proximate in time to when she started the process of moving out of the matrimonial home.¹ The wife also relies on the contents of the parties' written communications with one another, the fact that they went on vacation together in 2016, the fact that the husband gave her a blue Jeep in 2016, and the fact that they socialized together at various points in time, to argue that they were not separated until May 1, 2018.

3 The husband says the separation happened on October 15, 2015, approximately 2 1/2 years earlier. The husband says that he moved out of the parties' shared bedroom around this time. He says this physical separation happened more or less concurrently with an argument between the two, during which he announced to the wife that he was "done". Although the parties continued to reside under the same roof thereafter, the husband interprets the parties' written communications and other interactions differently. He says the manner in which they interacted with each other changed, to that of two persons who were co-parenting, contrasted to before, when they interacted as a couple. He also has different perspectives about the 2016 vacation, his purchase of the blue Jeep in 2016, and the non-spousal nature of the parties' various social activities.

4 The husband's position that the parties separated on October 15, 2015 depends to some degree upon a narrative that within two weeks of that date, the wife gave him a letter and a draft separation agreement. He was adamant this occurred soon after the confrontation in which he allegedly said the relationship was over. And in the draft agreement that the wife prepared and gave to him, she too said the date of separation was October 15, 2015.

5 Although it is true the wife did write that date into the draft agreement, there is a significant dispute between the parties about the timing that the wife gave him the letter and the draft agreement. Other aspects of the letter and the draft agreement that the

wife gave the husband refer to events that happened well after October 15, 2015. These documents could not have been provided to the husband two weeks after the discussion he says occurred. And the wife has explained to the Court's satisfaction why she wrote down October 15, 2015 as the date of separation in the draft. So while there are discrepancies in both parties' evidence, in the end I have greater concerns about the husband's testimony respecting the events he says occurred in October of 2015.

6 Based on the totality of the evidence, I prefer the wife's date of separation. For the reasons that follow, this Court finds that the parties separated on May 1, 2018 with no reasonable prospect that they would resume cohabitation.

PART II: FACTS

A. Background

7 Both parties are 55 years old. The parties went to school together in Toronto, from about the age of 12. They were friends for many years, before they entered into a relationship with each other.

8 I am told that the parties dated during high school. After high school, they had other relationships. The husband has children from a previous relationship. The parties then reconnected in the first half of the 2000s and began living together in 2004. The parties married about eight years later, on June 30, 2012.

9 The husband is self-employed as a glass fabricator. The wife used to work for Scotiabank and then IBM, but she lost her job in 2011. While she made a number of applications for jobs afterwards, she did not really work outside the home for several years after leaving IBM.

10 The wife remained at home and had parenting responsibilities. In 2016 and 2017, the children became more involved in extra-curricular activities than had been the case in the past. The wife described herself as one of the primary "carpoolers" for their and others' children, to get them too and from these activities. The husband said that he always shared this responsibility with the wife. He also said he took on more responsibility in 2017 and 2018, when the wife began studying for the real estate course.

11 The wife began the real estate course in March of 2017. She completed it in August of 2018. It is agreed that since October of 2018, the wife now works as a real estate agent in Newmarket.

12 These parties continue to have positive feelings towards each other. They have treated each other respectfully, despite their separation. They have been able to co-parent their two children, Dylan, now age 17, and Devon, almost age 15. The fact that they have treated each other respectfully throughout their relationship and thereafter, has likely contributed to the uncertainty about when they actually separated.

B. The Husband's Move Into A Separate Bedroom In About October 2015

13 A significant factor on which the husband relies in support of his date of separation, is the fact that the parties maintained separated bedrooms since about October of 2015. Time-wise, this lines up with the date that the wife wrote into the draft separation agreement. Without intending to oversimplify the dynamics of this relationship, there were one, and possibly two main factors that contributed to problems in this marriage, and ultimately to its decline. One was a disagreement between the parties about their respective lifestyle choices. The other was finances. But both issues, and particularly the latter, were infrequently discussed between the two.

14 It is basically agreed that in or around October of 2015, the parties did have an argument. It is not agreed whether this argument was the final straw that precipitated the separation.

15 The argument was about their lifestyles, diets and alcohol intake. The wife decided she wanted to reduce her alcohol intake, and to change her diet, for better health. The husband had suffered from gout for a number of years. According to the wife, there were periods where he would be immobilized with pain. The wife felt that the husband drank too much. She felt that

he could benefit from changes to his lifestyle, too. She implored the husband to join her in making the lifestyle changes. While she perceived herself as a caring spouse, she now thinks that the husband felt nagged.

16 The husband did not feel the need to change. In his trial affidavit sworn July 31, 2022, the husband said that he could have perhaps tolerated the wife not working, but he could not tolerate her "constant demands and harassment that [he] change and turn [his] life upside-down because she wanted to change her lifestyle or her spending and secretly running up her credit cards which was inconsistent with her income (and [his]) and her willingness to work and contribute financially to [their] family".

17 By both parties' accounts, it was around this time that the husband moved into the spare bedroom. They remained in separate bedrooms, until the wife started the process of vacating the matrimonial home in May of 2018. When the wife left, the husband returned to the main bedroom.

18 But this is where the parties' accounts of what happened in or around the fall of 2015 diverge. According to the husband, there was a confrontation in the garage. The husband claimed that he told the wife that he was "done". When explaining why he continued to live under the same roof with the wife for a further 2 ¹/₂ years, he testified, "[w]ell, my thought on that obviously have children together and I was doing it for the parenting and parenting the children. I didn't want to leave my children alone. I would rather be with my children than instead of them needing help."

19 The wife denied that the husband said he wanted to separate. Quite to the contrary, the wife said that she had a conversation with the husband much later on, during which they expressed their commitment to one another. But after that conversation, the husband sent her a text message saying, "oh and just so you know, the pool is mine, the pool shed and the kid cave are mine". The wife said this reinforced to her that she was not an equal partner in the marriage.

20 Even on the husband's own account, the parties did not have a follow up conversation after this alleged confrontation occurred. The husband said "she's a stubborn person and I'm a stubborn person and just never had that conversation". Nor, according to the husband, did the parties discuss reconciling after that point. The husband claimed that the wife tried to talk to him several times, but he would not discuss it. He specifically said he "closed up to her and [he] didn't have a discussion with her".

21 The husband then took little to no other steps to separate. While the husband did point to certain changes in the tone and contents of the parties' text messages after October of 2015, there were few other significant changes to the manner in which the parties lived, until the wife moved out. They continued to share a home, continued to parent their children, continued to engage in certain activities together, and they continued to operate financially as they always had.

C. The Wife Begins to Vacate the Matrimonial Home Starting in May of 2018

22 The wife concedes that the relationship was in trouble and that there were aspects of a separation, or at least that a separation was on the horizon, before it actually happened. For example, in her Application, the wife said that parties acted as a separated couple prior to May 1, 2018 and were already taking steps towards a separation, but May 1, 2018 was the date upon which there was clearly no chance of reconciliation. From the wife's perspective, it was spring of 2018 when the problems in the relationship, and the husband's ignoring of the situation, reached a peak such that there was "just no going back even though [she] still loved him deeply".

23 The wife admitted that she had been looking for rentals prior to this point, but was unable to secure one until September of 2018. The wife asked the husband to move a trailer that they owned to a nearby trailer park, where they had spent time in the summers before. The husband agreed. From about May 1, 2018, until she was able to move into the rental in September, the wife stayed with the children in the trailer at the trailer park.

D. The Draft Separation Agreements

24 A significant part of the husband's position that the parties separated on October 15, 2015 included his evidence that their confrontation was followed by the wife delivering a draft separation agreement to him, within two weeks. In his trial affidavit

sworn July 31, 2022, the husband specifically stated that he "made up his mind when [he] moved out of the bedroom in mid October of 2015 and this was *solidified* when [the wife] delivered the draft agreement and letter a couple of weeks later." He further said that although neither of them signed the agreement, they "continued to live separately from the other and *honour* the terms of the agreement as if [they] had signed it". [my emphasis added]. During examination-in-chief, the husband's counsel asked him when he believed there was no chance of reconciliation. He said, "[w]ell, like I said just before she served me that letter of separation before that but actually when I moved downstairs".

25 The husband claimed that the wife left the draft on his bed, accompanied by the letter. Although he otherwise testified as to an absence of conversations between the two about a separation in general, he claimed to have spoken to the wife about the draft agreement, after she left it on his bed. He asserted that he told her then that he was not comfortable signing it, unless in the presence of a lawyer. He also felt that there should be two copies, but the wife had only left one. So instead, as the husband testified, he then took the agreement and put it somewhere in his shop. As I understand it, no lawyers were then hired until 2020.

26 Very much to the contrary, the wife testified that she obtained a draft separation agreement by downloading it off the internet almost two years later, in the fall 2017. Because the parties did not have internet access at home, she went to a local library to use the internet there. While online at the library, she found a template draft separation agreement, and began to work on it. Before she left the library that day, she emailed her unfinished work product to herself. This happened on September 28, 2017. The wife knows this date because she was able to locate and produce a copy of the email that she had sent to herself. The wife then worked on the draft further, from home, over time.

27 The template/draft had various 'fill in the blank' spaces to complete. In addition to the aforementioned email, two drafts of the agreement were tendered in evidence during this trial. The first draft was the incomplete document that the wife started to create at the library, which she then emailed herself. The second one was the one that she worked on further from home, and which was ultimately given to the husband.

28 In both drafts, the wife wrote that the date of separation was October 15, 2015. The husband has very much anchored his recollections and his evidence around this date. But the wife explained that she did not know why she put that date in the draft. She testified that the date had no significance to her. She said she was looking back in time in the document. She did recall that there had been a disagreement in the fall of 2015 when the husband "shut [her] out and that's where [they] stopped sharing a bedroom". Otherwise, she did not obtain legal advice about the significance of the date.

29 While the date of separation is the same in both drafts, there are differences as between the two documents. It is clear from the changes made between the first and second drafts, that a number of months had passed between the September 28, 2017 trip to the library and the date upon which the wife gave the draft to the husband. This has helped to inform me as to when the wife actually delivered the document to the husband. What is clear, is that it was not in October of 2015 as the husband said.

30 For example, in the first draft prepared while at the library, the wife listed the children's birthdays and corresponding ages at the time. They were 12 and 9. She also indicated that she was the owner of a blue Jeep. But the children were neither 12 and 9 in October of 2015, nor did the wife yet have the blue Jeep. That is because the husband did not buy it for her, until March of 2016.

31 In the draft that the wife eventually gave the husband, she now wrote that the children were 13 and 10. More time had passed, and the children had aged. Once again, like in the first draft, the blue Jeep, acquired only in 2016, is still mentioned.

32 There is a change between the drafts to the manner in which the wife referenced title to the matrimonial home. In the draft later given to the husband, the wife referred to title to the matrimonial home as being joint. But as I explain below, that was not the case in either October of 2015, or in September of 2017, when the wife started to work on the document in the library.

33 In the letter that accompanied the draft agreement, the wife asked the husband to let her "use the Jeep until [she could] find [her] own vehicle." She further wrote, "[t]he separation agreement allows for the sale of the house. I will sell it myself when I'm licensed in August". But the wife had not even started the real estate course in October of 2015. In fact, she would not do so for a further 1 ¹/₂ years. It is common ground that the wife completed the real estate course in August of 2018 [my emphasis added].

34 Despite these contents of the draft agreement and letter that the wife delivered, the husband was adamant that the delivery of the draft agreement occurred by late October of 2015. That was an integral part of his evidence about circumstances surrounding his date of separation. He continued to take this position during examination-in-chief, and would not concede otherwise in cross-examination, even when confronted with some of these contents in the draft agreement, which effectively made an October 2015 delivery impossible. Incidentally, if as I am finding, the agreement was not delivered in October of 2015, then it also made his statement, that the parties' honoured the agreement although unsigned, not possible.

E. The Financial Arrangements Between the Parties

35 The other significant factor, which is said mostly by the husband to have contributed to problems in the marriage, was the parties' finances. I summarize the evidence relevant to this, here.

(1) Property Ownership

36 In her trial affidavit sworn July 4, 2022, the wife said that the parties worked together to amass assets throughout their relationship. In particular, the wife said:

- (a) Beginning in late 2004, the parties lived in a home at 31 Parkland Court, in Aurora, Ontario;²
- (b) In late 2007, the husband acquired that commercial property. Title to it was held by his numbered company;³
- (c) In August, 2013, the parties acquired an investment property in Bradford, this time in the husband's name;
- (d) The parties acquired the matrimonial home in Uxbridge, Ontario, in November 2014. To acquire the matrimonial home, the parties listed both the first home and the investment property for sale. These sales closed in the fall of 2014 and in January 2015. The parties moved between these properties, until they were able to move into the matrimonial home;
- (e) The parties discussed undertaking renovations to the matrimonial home in between October 15, 2015 and May 1, 2018. For example, on March 23, 2016, the husband sent a text message to the wife proposing to build a bridge from their house to the pool. The wife responded that she wanted to do that too, and said "you are reading my mind again". She also said that she would like to have a solarium one day, too; and
- (f) The husband sold the commercial property in 2020, after both parties' dates of separation. The parties, still amicable with one another, agreed that the wife would act as the listing agent.

(2) The March 2018 Title Transfer

37 It is common ground that the matrimonial home is situated on 56 acres of land. The property is divided into two parcels of land of unequal size. The home is on the smaller parcel. The other parcel consists of the remaining acreage.

38 Until mid-March of 2018, title to the parcel on which the matrimonial home is situated was taken in the wife's name and the husband held title to the acreage. The wife said that the titles were taken in this way because the parties were concerned that the parcels would merge, if they both took title to both parcels jointly.

39 The parties used to have a private mortgage on the matrimonial home. In mid-March of 2018, the parties refinanced the mortgage through a bank to obtain a lower interest rate. It is common ground that the bank required the property on which the house is situated to be in both of their names at the time of this refinancing. It is common ground that the wife transferred title to "her" parcel into the parties' joint names as a result. It is also common ground that the husband continued to retain sole title to the other parcel with the acreage.

40 Although the husband's written submissions say, without elaboration, that the separation date is irrelevant to the division of the equity in this asset, the husband's evidence was also that the wife was "furious" about this title transfer, and she was

reluctant to sign the real estate documents at the time. There is some suggestion that perhaps the wife thought she had some kind of advantage as an already separated person holding sole title to the home, which she lost that day, thus favouring an October 2015 date of separation.

41 The wife denies that she was "furious". She did agree that she was upset, but for a different reason. It is common ground that the parties had been told that the monthly mortgage costs under the new financing were to be a certain amount, but on the date they were supposed to sign the documentation, they discovered a bank error that would have cost them hundreds of dollars more each month. This bank error that delayed the signing of the documentation by a day. Once the error was rectified, the wife signed the documents, the very next day.

(3) Financial Issues Relating to the Wife's Unemployment

42 With the wife out of the work force for a number of years, finances became a stressor in the marriage, again mostly according to the husband's evidence during the trial. The husband felt this was particularly acute after the parties sold their previous properties and upgraded their matrimonial home in late 2014. The cost to carry the new home is said to have doubled.

43 Yet the wife remained out of work for several more years, including well after the husband's date of separation. It was only in March of 2017 that the wife began studying to obtain a license to sell real estate. It is common ground that she completed the course in August of 2018. It is common ground that she didn't begin to work as an agent, until October of 2018.

44 The husband's counsel argued that the wife did not leave the home earlier, because she did not have a job. This is not entirely accurate. The wife did in fact leave before she had a job. She began the process of leaving the matrimonial home several months before she completed her course, had a license or obtained her first real estate job.

45 In any event, even the husband's own testimony is that he voiced his stress about their financial circumstances infrequently, and perhaps only once. Although the husband pointed to their finances as a significant stressor during this trial, the husband admitted that he did even not talk to the wife about getting a job, not once, after his proposed date of separation of October 15, 2015. This is hard to comprehend, if the parties were in fact separated by mid-October of 2015.

46 Instead, between October 15, 2015 and May 1, 2018 (and even thereafter), the wife remained financially dependent upon the husband. By both parties' accounts, there were really no significant changes to the way in which they managed their finances between October 15, 2015 and May 1, 2018.

(4) Changes to the Financial Status Quo After May 1, 2018

47 But there were changes to the finances after that point. For example, beginning in 2019, after the wife moved out of the matrimonial home, the husband says he paid \$1,000.00 per month to the wife for a time.

48 In 2020, the wife was evicted from the rental that she had obtained. She asked the husband if she could move back to the matrimonial home. He agreed. She moved back in around September of 2020. The parties are still living under the same roof to this day.

49 To be clear, neither party asserts that the wife's return was an attempt at reconciliation or the resumption of cohabitation. But what is clear, is that the parties continued with changes to the way they handled their finances. I am told they are now sharing expenses equally.

F. The Wife Did Work For the Husband's Business, Without Remuneration, At Least Until the End of 2016

50 The wife did work for the husband's business, for which she was not paid. This continued at least until the end of 2016.

51 The wife testified that the parties would go to work at the husband's shop together. She explained that she would greet 'walk-in' customers, and she would answer the phones. She occasionally did "reconciliations". She prepared invoices. She said

the parties would have lunch together when she attended the husband's shop. In cross-examination, she said she attended the husband's shop on a daily basis.

52 The husband minimized the work that the wife said she did. In his trial affidavit sworn July 31, 2022, he claimed that she "never" had anything to do with his business except for a brief time when she decided she could be the bookkeeper and started "hanging out" at his shop. He said this only lasted for a few months. During examination-in-chief, the husband said that to the extent the wife continued to help out with the business after 2015, it was "very minimal". He said she would come into to do an odd invoice, and that was she only there a "couple of times". He denied that they had lunch together after 2015. Even before 2015, he said they only ate lunch together about once per month or so.

53 But in cross-examination, the wife's counsel pointed out a number of text messages that referred to the wife doing work for the husband's business. The text messages referenced the wife doing invoicing and a reconciliation. For example, there are text messages February 3, 2016, June 2, 2016, July 20, 2016, August 16, 2016, November 7, 2016, and December 22, 2016 about this. In one such message, the husband asked the wife to do some work, after which he proposed the family would go out for lunch.

54 Counsel for the wife said she counted 20 references in text messages to the wife coming and going to the husband's shop (albeit not necessarily for work purposes each time). She also pointed out that the references to the wife going to the husband's shop decreased, after the wife started studying for the real estate course in 2017.

G. The Parties' Income Tax Filings

55 The husband filed his taxes indicating to the Canada Revenue Agency that he was married, up to and including on his 2017 tax return. The husband reported that the parties were separated for the first time on his 2018 tax return.

56 During examination-in-chief, the husband claimed that he had told his accountant that he was separated earlier. Despite that, he said the accountant completed his taxes listing him as married as late as tax year 2017, so that they could "income split".⁴

57 When asked why he only reported himself as separated on his 2018 taxes for the first time, the husband said "I'm going to put separated on it because it doesn't seem that there's a benefit because now she's working so not it doesn't make sense for me to do the income splitting anymore". He also said that she had moved out of the home by this point. Based on this evidence, in the husband's own mind, 2018 represented a change in their circumstances that impacted the finances.

58 The wife reported that she was married on her taxes for tax years 2015 and 2016. She explained that she filed her taxes for the first time by herself for the tax year 2017. Before that, the husband's accountant prepared her filings.

59 Although the instructions on the first page of a tax return direct one to indicate their spousal status as at the last day of the particular tax year of the filing, the wife explained that she considered herself separated by the spring of 2018. She completed her 2017 tax return in a subsequent year, and so she indicated her marital status accordingly.

H. The Blue Jeep

60 The husband surprised the wife by purchasing a blue Jeep for her in March of 2016. This was several months after the date that the husband says the parties separated. This is the blue Jeep I referred to above when discussing the contents of the draft separation agreements.

61 As part of the surprise, the husband first sent the wife a text message telling her that he was coming home early. That message was followed by another one from him containing a photograph of the Jeep and the words "U will never get stuck in the driveway any more".⁵

62 The wife responded to the husband, also by text, writing, "Wow... that's nice ... who's is it". A short conversation then followed between the two, wherein the wife, surprised, told the husband that he didn't have to spend money on her like that, and that she would pay him back, somehow.⁶

63 Despite this exchange, during cross-examination, the husband claimed that the purchase was not really a surprise, and that the Jeep was not a gift for the wife. Rather, he said the wife was aware he would be buying the Jeep, before he actually bought it. He also clarified that the Jeep was for the wife *and the children*, consistent with his theory that they were co-parenting, but no longer spouses.

64 I do not accept this evidence. In regards to the suggestion that the wife knew about the purchase beforehand, it is true that, at least in writing, the Jeep first came up in a conversation between the parties before. As it happened, there was a text message exchange between the parties on October 14, 2015, the *day before* the husband's date of separation. That day, the wife asked the husband to check out the Jeep on the way home. In cross-examination, the wife testified that she had asked him to do this, because she was aware that the husband's friend had a Jeep for sale. But there was no suggestion from either of the parties that they discussed buying it. And the parties' later text messages to each other, on the day the Jeep was purchased, reproduced above, indicate that the purchase was a surprise.

65 In regards to the question about whether the Jeep was a gift or not, title to this Jeep was initially taken in the husband's name upon its purchase. But it was the wife who drove it. The husband paid for the expenses associated with it while the parties were still together. The wife took over the cost of insurance and car repairs, after her move out of the matrimonial home in 2018. Title to the jeep was then transferred into the wife's name in 2020. The transfer was without consideration.

I. The Discussion with the Children About the Separation

66 The parties more or less told the children about their separation at the time the wife went to stay in the trailer, in around May of 2018.

67 The wife testified that she told the children that the husband would be staying in the house, and that she and the children would be staying in the trailer, but that they would be coming back and forth to visit. The wife said that the children, who were younger at the time, were used to spending time in the trailer during the summer, so this discussion was "kind of made friendly". The wife testified that the husband was present for this conversation but he did not participate in it, other than to say, "okay, well, I get the house".

68 In closing submissions, the husband's counsel argued that there was no conversation with the children in which they were told of the separation at all. But during his testimony, the husband did not specifically address this comment that the wife attributed to him about him 'getting the house'. In any event, the parties' accounts here are not incompatible with one another. The husband also said that the parties did not tell the children "right away". He further said that he did not "formally" tell the children. The latter is consistent with the wife's account of the kind of conversation that she said occurred. The husband testified that the children eventually "kind of figured it out". He did not explain what he meant by eventually.

J. The Family's Meal Pattern

69 The wife says the parties shared meals together as a family, and that this continued after October 15, 2015. There are a number of text messages between the parties wherein requests are made by one to the other, to pick up or bring home food for these meals.

70 The husband's explanation of these text messages is that the parties live relatively far away from stores and restaurants. As I understand the evidence, the parties would have to drive some distance from where they live to pick items up, so it was common for the husband to bring home items on the way home from work, and for the wife to make such requests.

71 In cross-examination, the husband maintained that while requests to bring home food had been made, they ate separately from one another. By the same token, it is agreed that the wife cooked separate dishes for herself, after the dietary changes.

K. The Parties' Social Activities Between October 15, 2015 and May 1, 2018

72 The wife said that the parties socialized as a couple, and as a family, between October 15, 2015 and May 1, 2018. She listed a number of occasions where she says this occurred.

73 The husband said that between October 15, 2015 and May 1, 2018, the only time they went anywhere together was for the sake of the children. He said they did not go out on their own, as a couple.

74 The various examples can be viewed through either lens. For instance, one of the examples, cited by the wife, was a family trip to the Dominican Republic in 2016, to attend the destination wedding of a member of her family. Although the husband claimed that the trip had been planned in advance of his date of separation, the documentary evidence may reveal otherwise. Plane tickets were purchased after his date of separation.

75 On the other hand, the husband claimed that he went on the trip to the Dominican to "babysit" so that the wife could attend the wedding. He said he did not want the boys to miss out on the trip.

76 The family shared a hotel room, but the parties did not sleep in the same bed together. Each parent slept in a bed with one of their boys. This could have been consistent with their sleeping arrangements already in place by the time of this trip. It could have also been because the family was all in one room together.

77 The wife cited some sporadic visits to a neighbour's home, for example to go swimming in their pool, as examples of ongoing social activities, too. The husband admitted that the neighbour invited them over about once per year, but he said he would not have attended, had the invitation merely been extended to them as a couple. Once again, he said these kinds of outings were family activities, not those of a couple. The neighbour was not called to testify by either of them.

78 The majority of the parties' socializing, both historically and after the husband's asserted date of separation of October 15, 2015, actually happened with members of the husband's family. The husband testified that his family would on average come for a weekend visit, two or three times per year. These visits occurred in the summer months, and for New Year's Eve. He said it was exciting for his family to be able to come to visit them at their home, which was a 'cottage-like' setting.

79 The husband testified that he was embarrassed during his family's summer weekend visit in 2016. He said he was ashamed to tell members of his family that the parties had separated, and so he slept with the wife in the same bed for a night. He then realized that that was "wrong", and so he shared a bed with his mother the next night. The husband testified that members of his family realized something was happening in the relationship as a result of this.

80 The husband believed that he had a discussion with certain members of his family around that time. He then testified that there might have been one more visit, but soon after that visit in the summer of 2016, the wife told him that she would no longer welcome members of his family into their home.

81 The husband's sister gave affidavit and oral evidence during this trial. In her trial affidavit sworn July 29, 2022, the sister said that there was a "clear divergence" in the wife's participation in family events. She also said that the wife has not "talked to any of us" except for "Anna", the husband's niece and her boys, since that summer of 2016 visit. She said it was obvious to her by the summer of 2016, that there were problems in the marriage. She claimed that both the husband and the wife told her that they were separated. The wife denied ever telling the sister that the parties were separated.

82 Likewise, the niece gave affidavit and oral evidence that she was aware of "serious problems in their marriage", which she dated to starting shortly after they moved into the matrimonial home. Similarly, she observed the parties sleeping in separate bedrooms during that weekend visit in the summer of 2016.

83 The husband's friend, Patrick Dill, gave affidavit and oral evidence at this trial. The husband's friend's evidence was that the husband had told him about the separation in 2015. He said he could recall this timing, because he experienced significant event at work. He remembered the two events being proximate in time.

84 The wife's friend, Nikesha Schliehauf, gave affidavit and oral evidence at this trial. The wife's friend deposed that she only became aware of concerns in the parties' relationship in around the summer of 2017. She recalled being with the wife on March 25, 2018 during which time the wife seemed quite shaken. It was at that point that the wife's friend thought the marriage would not last.

L. The Parties' Communications With One Another

85 A significant part of both parties' evidence centered around the parties' text message communications. I have already referred to some of those written communications between them where relevant to other topics.

86 More generally though, the wife says that their communications between October 15, 2015 and May 1, 2018 were those of a married couple. The husband disagrees. The husband testified that the parties would have had respect for each other and that is what is reflected in their text messages.

87 The husband's counsel, through her cross-examination of the wife, sought to paint the picture of a change to the tone and the contents of the parties' written communications, after October of 2015. For example, in cross-examination, counsel secured an admission from the wife that the parties exchanged "loving and playful" messages with one another throughout the first part of 2015. In so doing, counsel referred the wife and the Court to various text messages, including those written on December 18, 2014, January 21, 2015, February 10, 2015, February 22, 2015, February 25, 2015, April 18, 2015, May 25, 2015, May 27, 2015, June 19, 2015, July 11, 2015, August 25, 2015, August 29, 2015, September 14, 2015, and September 26, 2015. Counsel suggested that those kinds of messages seemed to stop after October 2015. In cross-examination, the wife said, "well, it was a little tense. Yes, I'm not going to lie, but we were still married."

88 But in her cross-examination of the husband, the wife's counsel then pointed to a text message sent on March 18, 2016 wherein the husband wrote "Luv daddy o Time 3". She pointed the husband to certain other messages after October 2015, too.

89 Counsel for the wife also secured an admission from the husband about the tone of their communications after October of 2015. The husband admitted that there were "still moments of laughter and levity and caring" in their text messages between October of 2015 and the spring of 2018.

90 Other examples pointed out by counsel for the husband were that the parties exchanged Valentine's Day texts in 2015. They did not do so in 2016, 2017 or 2018. However, the wife said that she and the husband went for a walk in the woods, and that they went skating around Valentines' Day in 2016. The husband did not recall the walk, but he agreed that they did go skating.

91 Finally, there were two photographs taken on November 20, 2015 and shared by text, of a birthday cake that the husband gave to the wife. This was after the husband's date of separation. But the husband explained that he bought the cake for the wife, because that was part of their normal historic routine. He explained that children would have noticed something was off, if he had not of done so.

PART III: APPLICABLE LEGAL PRINCIPLES

A. Applicable Statutory Provisions

92 In his written closing submissions, the husband argues that if the later date of separation prevails, the wife will be entitled to a "significantly higher" share of the husband's real estate, and a higher quantum and longer duration of spousal support, without recognition for the support she received while living in the matrimonial home between his date of separation of October 15, 2015 and hers on May 1, 2018. While this statement is made to suggest a certain lens through which the Court should assess

the wife's credibility, the converse could equally be said to be true. If what the husband has said is true about the financial impact from one date to the next, then he will stand to save financially, if his earlier date of separation prevails.

93 What this really argument does, is highlight the importance of the date of separation in family law cases: see also *O'Brien v. O'Brien*, 2013 ONSC 5750 ¶ 2. In regards to the divorce, section 8(2)(a) of the Divorce Act provides that "breakdown of a marriage" is established if the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding. In regards to spousal support under the Divorce Act, section 15.2(4)(a) requires the Court to consider the length of time the spouses cohabited. The length of the relationship is relevant where support is claimed under the Family Law Act, too: see for example section 29 and 33(9)(1)(i) of the Family Law Act. The length of the relationship is a factor that can impact the calculations under the Spousal Support Advisory Guidelines: see for example *Climans v. Latner*, 2020 ONCA 554. And in regards to calculating an equalization payment, the "valuation date" for in this case will be "the date the spouses separate and there is no reasonable prospect that they will resume cohabitation": see the definition of "valuation date" in section 4(1) of the Family Law Act. What the date is in turn impacts the disclosure and valuation exercises that need to be completed beforehand, in order to calculate the equalization payment.

94 Now the date upon which the time starts to be calculated for a divorce, and the valuation date for the purposes of equalization can be different: for example, compare the wording of section 8(3) of the Divorce Act and some of the cases that interpret the meaning of separation for the purposes of the "valuation date" in section 4(1) of the Family Law Act; see also *Al-Sajee v. Tawfic*, 2019 ONSC 3857 ¶38. Likewise, any past periods of separation during a relationship, followed by a reconciliation, and then a final separation, may impact the analysis about the length of cohabitation under section 15.2(4)(a) of the Divorce Act (or the applicable statutory provisions of the Family Law Act), and Spousal Support Advisory Guidelines calculations: see again *Climans v. Latner*; see also *Al-Sajee v. Tawfic* ¶17-40.

95 But in this case before me, both parties' submissions focused almost entirely on the meaning of separation for the purposes of determining the "valuation date" under section 4(1) of the Family Law Act. As there were no prior periods of separation, followed by periods of reconciliation in this case, there is no reason that Court's finding about the "valuation date" should not also be used to calculate the period of separation for the purposes of divorce, and the length of cohabitation, for spousal support. I did not understand the parties to be saying otherwise throughout this trial.

B. Other Applicable Legal Principles

96 The Court is being asked to analyze various historical events and interactions between the parties to determine their "date of separation/valuation date". This becomes more challenging when the parties are living under the same roof unhappily, in between two dates when a separation is said by both parties, after the fact, to have occurred. As McDermott J. wrote at ¶ 1 of *O'Brien v. O'Brien*, "...cohabitation and separation are often the products of a sometimes lengthy process, one integrative, the other destructive. And often the parties themselves are unsure as to exactly when they began to live together, or when a relationship ended."

97 So how then, does the Court decide? In *Chan v. Chan*., McGee J. succinctly set out the principles that govern an analysis. I adopt her statements of the law entirely.

98 First, there is an element of objectivity that must be imported into the analysis. In this case before me, each party has a different perspective. As I have already alluded to, some of the same evidence is capable of being interpreted differently.

99 At ¶ 24-25, McGee J., citing Corbett J. in *Strobele v. Strobele*., wrote that the goal of section 4(1) of the Family Law Act is "to fix the date on which the economic partnership should be fairly terminated." There are two aspects to the definition, being the date on which the spouses separate, and that there is no reasonable prospect that they will resume cohabitation. No one factor determines when the test has been met. There may be cases where one spouse knows that there will be no reconciliation, but the other does not, because the other does not yet understand that the former has come to this determination. But a "fair determination of the issue requires that an objective eye be cast upon the unique circumstances of the couple."

100 Second, at ¶ 25, McGee J. re-iterated the well-known proposition that parties can be separated while living under the same roof. She cited the leading case, *Oswell v. Oswell*, a decision of Weiler J. as she then was (and which was affirmed by (1992) 12 O.R. (3d) 59 (C.A.)) for this and other propositions.

101 In *Oswell v. Oswell*, the Court listed various indicia that assist courts to determine whether two spouses are living separate and apart under the same roof. Courts will consider:

- (a) whether there been a physical separation, which can be established by the spouses occupying separate bedrooms;
- (b) whether there has been a withdrawal by one or both spouses "from the matrimonial obligation with the intent of destroying the matrimonial consortium, or of repudiating the marital relationship";
- (c) the presence or absence of sexual relations, but this is not conclusive;
- (d) the discussion of family problems;
- (e) any communications between the spouses;
- (f) the presence or absence of joint social activities and the meal pattern; and
- (g) the performance of household tasks, but also having regard to the circumstances as they occurred during the marriage (for example, help may have been hired).

102 Third, as Weiler J. also wrote in *Oswell v. Oswell*, courts must also have regard to the true intent of a spouse, as opposed to a spouse's stated intent. To ascertain this, courts may consider the method in which the spouse filed income tax returns.

103 Finally, where a spouse makes plans for his or her assets as a separate person, courts consider this to be indicative that there is no real prospect of resumption of cohabitation.

104 The husband argues that Chappel J.'s decision in *Al-Sajee v. Tawfic* is analogous to this case before me. The husband says that case is similar because in it, there was a "big event" leading to a separation, followed by the parties sometimes interacting with each other for the sake of the children, but not because they had returned to being a couple.

105 With respect, I disagree with the husband's reading of *Al-Sajee v. Tawfic*, or the extent to which it is analogous.

106 While Chappel J. does set out the applicable legal principles at length, her decision is fairly fact specific and the outcome turned in large part on findings of credibility. In *Al-Sajee v. Tawfic*, the parties had previous periods of separation. There was then an assault said to have occurred in 2014, followed by criminal proceedings. The criminal charges resolved. The husband obtained an Islamic divorce. The parties maintained separate residences. The wife said there had been a religious remarriage. The Court found the wife's credibility to be significantly impugned on that point, referring to it to that evidence as "disjointed and not credible in the least". The parties also reported themselves as separated on various documents after 2014. In this case before me, the latter only started to occur around the time of the wife's date, not the husband's.

107 That said, I acknowledge that elements of both parties' stories in this case before me do not fully make sense. But as McGee J. cautioned at ¶ 29 of *Chan v. Chan*, "[e]very marriage is different and the courts must look to the various objective factors to determine if the parties are living separate and apart... Some marriages are by nature stormy and erratic. The Court must exercise caution and differentiate between a couple living together albeit with some unhappiness and dissention, on the one hand, and a situation where they are instead both living there but as two separate individuals.... A marriage may be at times stormy, but ongoing..."

PART IV: ANALYSIS, FINDINGS AND CONCLUSIONS

A. Findings and Conclusions About the Timing of the Draft Separation Agreement, and Its Import to the Husband's Argument that the Separation Occurred on October 15, 2015

108 Neither party's account of when the wife gave the husband the second draft agreement makes complete sense. Nevertheless, I do not find that the wife delivered the draft separation agreement to the husband by the end of October 2015. In my view, this significantly undermines the husband's account that they separated at the time.

109 The children were only 10 and 7 in the fall of 2015, when the husband claimed the wife gave him a draft separation agreement. But as already explained, both drafts identified that the children were older. During his testimony, the husband could not explain how or why the draft agreement, that he purportedly received in the fall of 2015, would have described the children as being older than they actually were. The husband was equally unable to explain how the draft he said he received by the end of October 2015 could have referred to the blue Jeep, as it was not even purchased until March of 2016.

110 There is also the fact that the draft agreement the husband received referred to the matrimonial home's title as being joint, which was not the case until March 2018. And there is the cover letter that accompanied the draft too, in which the wife proposed to be the listing agent, after getting licensed "in August". The husband's account, that the agreement was delivered to him by the end of October 2015, does not make any sense in this context either. It does not make sense that the wife would have, in a cover letter and draft agreement delivered in October of 2015, referenced selling a jointly owned home, that was not then jointly owned, with a real estate license, that she would not even start to study for, for another 1 1/2 years.

111 In re-examination, the husband's counsel attempted to rehabilitate the husband's inability to explain some of the above, by suggesting that perhaps the wife snuck into his shop and swapped out the draft separation agreements. But this proposition was never put to the wife during cross-examination or in any affidavit, it was not part of the theory of his case until that point, and there is no evidence upon which this Court could make such a finding. Moreover, counsel for the wife pointed out that the husband sold the shop before the parties even retained counsel, which she says is when the date of separation issue was first raised.

112 Additionally, on October 30, 2015, a date that coincided with the alleged delivery of the draft separation agreement according to the husband, the parties had the following exchange by text message, in which each said they loved the other:

W: How ya doing?

W: At the brick with my Devonshire couch againlol...obsess much?...hope you are doing better

H: Better now hearing from my wife just having lunch

H: Luv ya see u soon:

W: Awww..Enjoy..c ya soon...

W: Luv ya back...;))

H: On my way

W: Coolio

113 This does not sound like the talk of two spouses who had just had a major argument triggering a separation, solidified by the delivery of a draft separation agreement.

114 Now there are also problems with the wife's account. While it is true that the children were 12 and 9 in late September, 2017 when the wife emailed the first draft separation agreement to herself from the library, she then changed their ages to 13

and 10 by the time she delivered the draft to the husband. While the parties' younger child turned 10 in December of 2017, the older child did not become 13 until June of 2018.

115 The wife initially claimed in her trial affidavit sworn July 4, 2022, that she provided the husband the completed draft of the agreement in the fall of 2017. At the outset of her evidence-in-chief, she corrected the time of that delivery to the spring of 2018. But it is not clear what she meant by the spring of 2018 (ie. when in the spring). Unless there was an error as to the children's ages, or unless the wife put that the older child was 13 because he would be turning 13 soon, neither of which the wife testified, then perhaps draft was provided to the husband at some point after June 2018. And that is *after* she started staying in the trailer for the summer pending a rental. And the wife did not specifically say that she delivered the agreement after she moved out. To the contrary, I was under the impression that she delivered the draft agreement in the hopes that it would trigger a conversation, to avoid a separation.

116 Furthermore, I accept the wife's testimony that she inserted October 15, 2015 as the date of separation in the drafts without the benefit of legal advice and I accept that she lacked an understanding as to the significance of the date at the time. But on the other hand, legal advice or not, this date coincides with the husband's move into the separate bedroom, something which the wife conceded in her testimony. That suggests some awareness on her part, of a change in the state of the parties' affairs. Additionally, the unchallenged evidence is that the parties did not have a sexual relationship with one another after that time either.

117 But as the Court said at ¶ 13 of *Taylor v. Taylor*, 1999 CanLii 14969 (Ont. S.C.), "some or all of the indicia may have existed within the relationship in a state of normalcy". So what was "normal" must be viewed to determine what would constitute a departure.

118 Similarly, at ¶ 57 of *O'Brien v. O'Brien*, the Court noted that the parties did not have sexual relations after a particular date, upon which one party sought to rely as the date of separation. But they had already not had sex for some time, prior to that date, as it was.

119 So too in this case before me, such was the parties' "normal" state of affairs. The evidence before me is that the husband was not particularly affectionate towards the wife for some time. The wife testified that there were many times throughout the relationship where the parties did not share a bedroom or when they were not intimate with one another. And even though the parties were not intimate after the husband's move to the other bedroom, there is evidence that in 2016, the husband tried to initiate some sexual intimacy with the wife. That is after the husband's asserted date of separation.

120 In conclusion, I find that the parties maintaining separate bedrooms, and the dwindling of their sex lives, did not on their own make them a separated couple, when looked at in the totality of the evidence. I find there are far more unexplained inconsistencies in the husband's account as to the circumstances surrounding an alleged October 15, 2015 date of separation. I find the letter and the draft separation agreement were not delivered to him in 2015. Therefore, I also reject his evidence that they honoured its terms, even though it was unsigned. While I am not certain exactly when it was delivered to him by the wife, I find it to be more proximate in time to her asserted date of separation. I accept that that would have occurred in 2018.

121 An alleged 2015 delivery of the letter and draft separation agreement was a significant part of the husband's account to support his date of separation. He went so far as to say it solidified his decision to separate. But he did not get it in 2015. This significantly calls into question the husband's evidence of a separation in 2015.

B. Findings and Conclusions About the Parties' Physical Separations

122 It must also be remembered that there is evidence of two different physical separations in this case. But sometimes, where there has been continued cohabitation and the evidence of marriage breakdown is contradictory, there will be an unequivocal act by one of the parties which shows an intent to separate with no going back: see 14-16 of *Paulsen v. Paulsen*. Having now found the draft separation agreement was delivered closer in time to the wife's date of separation, I find the wife's move from the home to the trailer, in or around May 1, 2018, to be far more significant act of physical separation, than the 2015 move into separate bedrooms. That is because the 2018 move brings into focus other steps in the nature of separation that now really started to be taken, and which had not been taken after October of 2015.

C. Findings and Conclusions About the Parties' Financial Arrangements

123 For example, the totality of the evidence about the parties' finances favours such a conclusion. I say this for six reasons.

124 First, I prefer the wife's explanation as to what transpired surrounding the transfer of the matrimonial home into the parties' joint names. Despite the husband's testimony about the wife's alleged "furor", he admitted the bank error had occurred. More significantly, it does not make sense that the wife agree to the transfer title like this if in fact they were separated, or that a real estate lawyer, jointly acting for them both, would not have flagged their separation as an issue at the time of the transaction. It was also not explained to the Court why the wife had to transfer her title into the parties' joint names, yet the bank was content to leave the husband as the sole owner of the acreage. Finally, it does not make sense why the wife would then wait another four years until 2021, to launch this proceeding, if she had given up sole ownership of an asset that she had been strategizing to retain, following a 2015 separation, as counsel for the husband argued.

125 This transaction happened after the husband's date and before the wife's. Relying on the Court's comments in *Oswell v. Oswell*, this is not an example of the parties arranging assets as separated persons. Quite to the contrary, the parties undertook this financial transaction, to financially benefit both of them and their family going forward, by securing new financing at a lower interest rate. The separation had not yet occurred.

126 Second, it equally does not make sense the husband would not have applied more pressure on the wife to obtain employment given the financial stressors in the marriage that he said existed, if in fact they had separated on October 15, 2015. While the husband may have been a man of few words, he could have and ought to have spoken out about this, if he felt this way.

127 Third, I find that the wife's unpaid work for the husband's business continued well after the husband's stated date of separation of October 15, 2015. I find it unlikely that the wife would have continued to perform unpaid work for the husband, if they were separated. To the extent that she performed fewer services for the husband's business after 2017, it was because she began to spend time studying the real estate course.

128 Fourth, I find that the husband gifted the wife the blue Jeep in March of 2016. It does not make sense that the husband would have bought this in 2016, had the parties already been separated. While the husband took title in his name, he transferred title to the wife after she moved out. He paid for the expenses associated with the car until the wife's date of separation. The financial *status quo* respecting the vehicle changed after the wife's date of separation. The vehicle did not even exist at the time of the husband's.

129 Fifth, the manner in which the parties filed their taxes is a significant factor that favours a May 1, 2018 date of separation. The wife's explanation as to how and when she completed her taxes makes more sense. The husband attempted to place the blame on his accountant, but he did not call the accountant to testify. Without hearing from the accountant, it is difficult to accept that a tax professional would advise his client to make misrepresentations to the Canada Revenue Agency.

130 Finally, there was a marked change to the manner in which the parties managed their finances, after the wife went to the trailer in 2018. There was a period of time during which the husband paid some support. Again, the wife took over payment of the Jeep expenses and title to the vehicle was transferred to her. The parties also began to share expenses equally when she moved back into the matrimonial home, in 2020.

D. Findings and Conclusions About the Conversation with the Children

131 Another example is the conversation with the children. At ¶¶14-16 of *Paulsen v. Paulsen*, McDermont J. also found that the parties telling the children about the separation can be an unequivocal act. He found that it would go against common sense for the parents to tell their children of the separation, if they still thought reconciliation was possible.

132 In this case, although they weren't as direct as they could have been, I find the wife told the children about the parties' decision to separate in the "friendly way" that she described. This occurred at that time the wife and the children moved into the trailer for the summer in 2018.

133 I find that the husband was present for the conversation, but as was his habit, he did not play a big role in speaking during the conversation. I do not accept the argument, that no such conversation occurred, or that the wife is now trying to tailor her evidence to make the legal argument set out in [Paulsen v. Paulsen](#)

E. Findings and Conclusions About the Parties' Social Activities and the Meal Pattern

134 This evidence was mostly unhelpful. As I have already said, it could be interpreted through either lens. In my view, it did not tip the scales one way or the other.

135 To some degree, each party's views about how they participated in social activities and meals represents their 'after-the-fact' perspectives, looking back on things with hindsight. While their friends and family were able to offer up evidence about how they perceived the state of affairs, their evidence is subject to similar frailties. In some respects, each of the friends and family witnesses were confused or uncertain about timelines. They are also partisan.

136 I find that much of the husband's two family members' testimony was influenced by their observations that the parties were in separate bedrooms. That was a lens through which they gave other testimony, such as the fact that the wife started to distance herself from the husband's family. But as I have already said, separate bedrooms is not a determinative factor. And they were both less than certain, in their accounting about when certain conversations or statements, that there had been a separation, occurred.

137 I have particular concerns about the reliability of the husband's niece's evidence and memory. In her affidavit sworn August 2, 2022, the niece said that the husband told her the relationship was over that weekend in July of 2016. However, during her examination-in-chief, she only vaguely recalled the conversation, wherein he allegedly said he was "done" with the wife. She said that she did not pursue this conversation any further, as there were other family members around.

138 The niece then admitted in cross-examination that the wife never said to her that the parties were separated. She went on to say that the husband subsequently told her during a phone call that the wife had handed him a "separation letter". She initially said that it was around the time that she had learned about the separation. That evidence is difficult to reconcile, as she said that she learned about the separation in the summer of 2016, but I have found that the draft agreement was not delivered until much later. The niece then changed her evidence, and said the phone conversation could have been anytime before the wife moved out in 2018.

139 I did not find either of the two friends that each party called to testify to be particularly helpful. The husband's friend testified that he was not good with remembering dates. He could not remember the timing of a particular get together, which actually occurred much closer to the wife's date of separation than the husband's. But he did recall that at it, the entire family was together and "acting normally". This contradicted his earlier account, that he was told of the separation in 2015 and that the get togethers stopped after that.

140 Except to the very limited extent that she observed her friend to be upset in March of 2018, I did not find the wife's friend's evidence to be helpful. The wife was clearly the source of much of what her friend deposed in the affidavit of July 1, 2022.

F. Findings and Conclusions About the Parties' Written and Oral Communications

141 I agree with counsel for the husband, that there was some evidence of a change in the parties' written communications, after October of 2015. Certainly, the statements between the parties about loving each other and the like, mostly stopped. But similarly, those post-October 2015 communications are not dispositive either, when looked at in the totality of the other evidence, analyzed above.

142 And as I have also indicated already, even within the text messages, there also post-October 2015 discussions about renovating the matrimonial home, about the husband's gift of the Jeep to the wife, and about celebrating the wife's birthday, all of which occurred after the husband's date of separation. While the parties may have been less affectionate with one another over text after October 2015, these other messages may be read as counter-indicative of a separation as early as October, 2015.

143 There is a problem with the husband's position. It arises out of his lack of communication with the wife that he intended to separate, if he did so intend, both in writing, through words, and indeed by his other actions (other than moving to a separate bedroom). He did not anywhere in his text messages to the wife after October of 2015 say that they were separated. Likewise, the evidence at trial was fairly clear that the husband did not discuss deep issues in any great substance. Apart from the confrontation that he says he had with the wife in 2015, with which I have already dealt above, the husband admitted that he did not then discuss separation with the wife. Nor did he even discuss his upset with the wife that she was not working after October of 2015. Before that he may have raised it only once.

144 As I said earlier, I accept that the husband is a man of few words. But while the decision to separate need not be a mutual one (see *O'Brien v. O'Brien*), as McGee J. wrote at ¶ 37 of *Chan v Chan*, "[o]ne cannot separate in secret". How could the wife have reasonably known that the marriage had ended, given the husband's refusal to communicate with her? If in fact the husband's intention was to remain living with the wife under the same roof for the sake of the children as he said during this trial, that was never communicated to her.

145 Before leaving this subject, I wish to address the argument, raised by the husband's counsel, that there were missing text messages in the wife's pre-trial productions. The husband complained that his phones had been erased. I was told that the husband had to rely on the wife's productions of texts between them. And there was also a complaint that the wife did not produce any text messages for a period of time between 2017 and 2018, leading up to her date of separation.

146 I am still unclear, based on the very confusing in court discussion about this, whether the wife or her counsel agree that nothing was in fact produced during this time period. In any event, the husband's argument now as I understand it, is that the missing messages might have yielded more evidence to support his theory, that the parties were in a co-parenting relationship, and not a spousal one, after October of 2015. As the wife did not produce them, an adverse inference should be drawn.

147 Nevertheless, the husband still agreed that many of the other, voluminous text messages that were produced, were to be marked as exhibits. He admitted their authenticity. The amount of text messages in the trial material was frankly overwhelming. The record before me is insufficient for the Court to determine that anything nefarious occurred here with respect to the period where it is said there are missing text messages. I do not know why or how the husband's text messages disappeared. I certainly cannot find the wife was responsible based on the way that this was presented.

148 The Court intends to rely on the documentary evidence that was put before it. It is not drawing an adverse inference against the wife based on missing text messages. Regardless, to the extent that there were missing text messages as the husband's counsel maintained, that might have revealed more of the same, then I fail to see how they would have tipped the scales. I say this in light of the Court's treatment of the text messages that were adduced, above, that they are capable of being interpreted through either lens.

PART V: SUMMARY OF CONCLUSIONS AND ORDER

149 In conclusion, other than his move to the separate bedroom and the absence of a sexual relationship after October of 2015, there is no evidence that the husband took any steps to prepare for separation until after the wife's date. In particular, there is no evidence that he consulted with a lawyer, otherwise communicated with the wife about the separation either in writing or orally, participated in a discussion with the children, or took any steps to financially prepare, until 2018. And to the contrary, between October of 2015 and May of 2018, there are specific acts of an ongoing relationship, such as the filing of income tax returns indicating married, the purchase of the Jeep, and the matrimonial home title transfer.

150 By contrast, in or around the wife's date of separation of May 1, 2018, she moved out, delivered a draft separation agreement, had a discussion with the children, and changed the way she had been filing her income taxes, with the husband following suit. The parties made changes to their financial *status quo*, including how they paid their living expenses and the Jeep expenses, and the husband made some payments for the wife's support.

151 For those reasons, this Court concludes that the parties separated on May 1, 2018 with no reasonable prospect that they would resume cohabitation.

PART VI: NEXT STEPS

152 The parties now need to move forward with the litigation, or settle it. There should be a case conference, hopefully to discuss the merits of the underlying claims. Well in advance of the conference, the parties should complete their financial disclosure and any valuations. I ask counsel to try to sort these issues out cooperatively. Hopefully, the case conference being scheduled can focus on substantive issues, but if necessary I will discuss procedural issues, like disclosure and valuations with them, too.

153 I am setting a date for the case conference in this judgment. It shall proceed before me on April 4, 2023 at 11:30 AM, in person. I have chosen this date without input from the parties or counsel. If either of the counsel or the parties are not available, then counsel should coordinate another reasonable alternative date through the trial coordinator's office as soon as possible.

154 I urge the parties to settle costs of this trial. If they cannot, this may be spoken to at the case conference about a process to deal with costs.

155 Finally, I wish to thank counsel for their work in organizing this focused trial, and for their assistance during it, and for their submissions.

Footnotes

- 1 She has since returned as of September 2020, but there is no suggestion that the parties have resumed their relationship.
- 2 Title to this property was taken in the wife's name alone. The wife said she paid for the expenses solely for a year to enable the husband to obtain his commercial property out of which he then operated his business. The husband disagreed with the wife's characterization about the acquisition and financial maintenance of this property. For example, he said that the wife registered the house in her name alone. But this factual dispute is not relevant to the date of separation issue.
- 3 The wife claimed to have loaned the husband money for the purchase of the building, but said she was later paid back. She said she was given two common shares of the business in recognition of her contribution. The husband disagreed with the wife's description here too. For example, the husband said the source of this "loan" came from a line of credit attached to the Parkland Property, which he paid. But likewise, this factual dispute is also not relevant to the date of separation issue.
- 4 Although no one satisfactorily explained to the Court what "income splitting" was supposed to mean in this context, I presume this "income splitting" was supposed to be some kind of deduction from the husband's business income, and a corresponding payment to the wife, that she did not receive, for the work that the husband said she infrequently did for the business.
- 5 Both parties agreed that the husband purchased the jeep because the driveway to the matrimonial home was made of dirt, and the wife got stuck in the mud in the past trying to enter the driveway.
- 6 The wife testified that she had said that about paying for the Jeep, because the husband was responsible for paying the family's finances. She said she felt this was a lavish gift. She said she would have loved to pay him back, but she was not working at the time.