to attempt to proceed summarily under the *Family Law Act*. For further discussion of the circumstances where a summary trial may be appropriate, see chapter 11 (Procedural Alternatives in Family Law) of the *Family Law Sourcebook for British Columbia*, 3rd ed. (CLEBC, 2002–).

### 1. CREDIBILITY AND EVIDENCE [§11.3]

There is no hard and fast rule as to whether family law issues will be appropriate for determination by summary trial. However, a key factor will be the nature and quality of evidence placed before the court; and, the greatest restriction on the availability of the summary trial procedure is issues of credibility.

Where a case would be determined mostly by an assessment of credibility, or where it would not be possible to resolve a conflict in the evidence necessary to determine the issues in dispute, the application generally will be dismissed on the ground that the issues cannot be justly determined short of a full trial. See, for example, *Castellan v. Muncey Estate*, 2004 BCCA 128; *Strom-Postnikoff v. Postnikoff*, 2012 BCSC 1495; and *C. (R.) v. C. (D.)*, 2017 BCSC 750, where there were conflicts in the facts relating to "central disputes in the evidence".

A court can resolve credibility issues by examining objective or independent evidence. See *Di Guistini v. Toth*, 2016 BCSC 334, where the court determined sole custody and guardianship by summary trial, despite some factual disputes, as there was sufficient independent evidence to resolve the issues.

The court also may make findings of fact on conflicting affidavit evidence (*Placer Development Limited v. Skyline Explorations Ltd.*, 1985 CanLII 147 (BC CA)).

Where discrepancies in the parties' affidavits are minor and do not place before the court detailed, conflicting facts, summary resolution may be suitable (*Reay v. Reay*, 2016 BCSC 92).

In some circumstances, issues of conflicting evidence can be overcome using examinations for discovery under Rule 9-2 before the hearing, or alternative procedures available under Rule 11-3, such as cross-examinations on affidavits under Rule 11-3(12)(b). The court in both *P.A.L. v. L.A.L.*, 2015 BCSC 2369 and *S.L.B. v. M.D.R.B.*, 2015 BCSC 478 (Chambers) determined disputed issues relating to

custody, guardianship, parenting schedules, and family violence after conducting cross-examination on affidavit evidence.

The court will determine whether sufficient evidence exists to do justice between the parties on a summary trial. If the evidence is insufficient, even if the insufficiency results from the fault of the respondent, judgment under Rule 11-3 will not be given. See *Heemskerk v. Musgrove*, 1996 CanLII 3334 (BC CA), where the respondent failed to produce any response materials and the court held that the summary trial should have been adjourned to allow the respondent to file materials.

Note that—despite the decision in *Heemskerk v. Musgrove*—parties are obliged to take every reasonable step to put their cases in the best position possible for a summary trial. Failure to take such steps cannot frustrate the summary trial process and the respondent cannot simply insist on a full trial in the hopes that, with the benefit of *viva voce* evidence, something might turn up (*Jeerh v. Jeerh*, 2015 BCSC 1614 at para. 86).

The court may decline to proceed with a summary trial when:

- the issues and evidence are too complex (*Canadian Commercial Bank v. Park Meadow Estates Ltd.*, 1985 CanLII 554 (BC SC); *Waters v. Michie*, 2011 BCCA 364);
- material evidence exists that is not before the court (*Leighton & Associates v. Native Brotherhood of B.C.*, [1984] B.C.J. No. 1253 (QL) (Co. Ct.) (Chambers));
- there is no independent evidence to allow for the resolution of the conflicts (*Strom-Postnikoff v. Postnikoff*, 2012 BCSC 1495);
- the plaintiffs had not had the opportunity to uncover all of the evidence that might be important to their case (*Central Mountain Air Ltd. v. Prince George (City)*, 2012 BCSC 1221 (Chambers) at para. 22);
- the material before the court is too voluminous: "It is unfair to scoop-shovel volumes of disjointed affidavits and exhibits upon the chambers judge and expect [them] to make an informed decision" (*Inspiration Management* at para. 58). *Chu v. Chen*, 2002 BCSC 906 suggests some guidelines for the volume of material appropriate for summary trial; or
- it is unjust to decide the case summarily, even if on the whole of the evidence it is possible to find the necessary facts (*Saran v. Cartonio,*

*Inc.*, 2020 BCSC 556 (Chambers), leave to appeal refused 2020 BCCA 252 (Chambers)).

See also the cases discussed under "Cost, Time, and Efficiency" and "Additional Examples" in this chapter.

### 2. SEVERABILITY [§11.4]

It is possible to resolve only some of the matters at issue by a summary trial and litigate the remaining matters at a full trial or through an alternative dispute resolution process. In *B.D.D. v. G.T.S.*, 2021 BCSC 1080, the court made orders for division of family property and debt by way of a summary trial, while issues involving parenting and support were the subject of existing interim orders and could await trial. In *Sotham v. Got*, 2020 BCSC 625, the court found that the issue of an agreement's enforceability was discrete and severable from the balance of the litigation, and the determination would advance the litigation (see also *Hudema v. Moore*, 2021 BCSC 587 (Chambers), affirmed 2021 BCCA 482).

However, the Court of Appeal has also criticized the use of a summary trial to litigate only a portion of the issues in an action, as it can lead to a piecemeal approach to litigation (*Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138; and see *Prevost (Committee of) v. Vetter*, 2002 BCCA 202, where the court held that an issue inextricably intertwined with others will not be suitable for separate determination).

In *W. (K.M.) v. W. (M.D.)*, 2016 BCSC 228, due to insufficient evidence, the court declined to summarily determine corollary relief claims and refused to sever the granting of a divorce from the ancillary issues because to do so would "erode the principles that govern severance of issues" (at para. 41).

Determining whether a trust interest was a family asset in isolation from other issues could ""embarrass" the further trial of the proceeding" in *McCarlie v. Bogoch*, 2002 BCSC 560 at para. 32.

In *Kaler v. Kaler*, 2013 BCCA 57 and *Hutchinson v. Hutchinson*, 2018 BCSC 954, determination on a discrete issue would not resolve the ultimate issue and would fail to assist in the efficient resolution of the family law case.

See also the cases discussed under "Additional Examples" in this chapter.