

CANADA / JUDGMENT

A.D.J. v. F.J.

2022 BCSC 1974

COURT

Supreme Court of British Columbia

DECIDED

10 November 2022

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2022 BCSC 1974 A.D.J. v. F.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.D.J. v. F.J.,

2022 BCSC 1974

Date: 20221110

Docket: E132356

Registry: Vancouver

Between:

A.D.J.

Claimant

And

F.J.

Respondent

Before: The Honourable Justice Francis

Reasons for Judgment

Counsel for the Claimant:

M. Guy

A. Attri, Articled Student

Counsel for the Respondent:

F. Lamer

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 26-29, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 10, 2022

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I. introduction

- [1] The parties separated in 2011 after a fifteen-year marriage. Despite early success in resolving some of their differences by way of Minutes of Settlement dated June 30, 2011 (the "MOS"), the parties have remained locked in acrimonious litigation for the last nine years. In November and December 2021, I heard an 18-day trial of the outstanding issues between the parties. The issues included arrears of child support, ongoing child support, variation of spousal support under the MOS, unpaid special and extraordinary expenses, division of family property, and division of family debt. My reasons for judgment are indexed at 2022 BCSC 600 (the "Reasons for Judgment").
- [2] The parties have come back before me on two matters. First, the respondent F.J. (the "Mother") seeks to re-open argument on three issues, and asks the Court to make new findings with respect to those issues. Second, both parties seek a determination with respect to costs.

II. Application to re-open

A. Issues

- [3] The three issues upon which the Mother seeks to re-open the trial are:
- a) The Mother submits that the Reasons for Judgment contain an error, insofar as I made a finding of fact that the claimant, A.D.J. (the "Father") made a June 2019 child support payment in the amount of \$5,000 when in fact he did not.
 - b) The Mother submits that the Reasons for Judgment are incorrect in stating that child support arrears for 2011 and 2012 were not in issue because the Mother put them in issue in her written argument and sought arrears for these years.
 - c) The Mother submits that the Court overlooked the Mother's submission on the Father's 2010 income pursuant to the Federal Child Support Guidelines (the "Guidelines") and, as a result, reached an incorrect conclusion on the Father's income (the "Guideline income") for that year. This is the most consequential issue raised by the Mother, because the 2010 Guideline income of the Father was considered by the Court in determining whether, under stage one of the analysis set out in *Miglin v. Miglin*, 2003 SCC 24, the MOS complied with the objectives of the Divorce Act, R.S.C. 1985, c. 3. The Mother submits that if the correct Guideline income is imputed to the Father, the MOS does not comply with the objectives of the Divorce Act, and the Court must recalculate spousal support under the Spousal Support Advisory

Guidelines ("SSAG") for 2011 to 2021.

B. Legal Authorities

- [4] A judge of this Court has jurisdiction to re-open a trial after the conclusion of argument but before entry of the order. This discretion should be exercised rarely and only when the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice: *Bajwa v. Habib*, 2020 BCCA 230 at para. 48.
- [5] The fundamental consideration in exercising the discretion to re-open a trial is whether a miscarriage of justice would occur if the trial were not re-opened: *Stevens v. Plachta*, 2006 BCCA 479 at para. 15, citing *Bell v. Bell*, 2001 BCCA 148.
- [6] A judge should address two primary considerations in deciding whether to re-open: first, is it probable that a miscarriage of justice would occur without re-opening and, second, would a re-hearing probably change the result? In general, a party should not be permitted to re-open if the sole purpose is to re-argue or re-cast its case: *Grewal v. Grewal*, 2016 BCCA 237 at para. 71.
- [7] In *Moradkhan v. Mofidi*, 2013 BCCA 132, Madam Justice Garson listed the principles applicable on an application to re-open and noted at para. 31:

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

- [8] One of the reasons why the authorities have laid out a relatively strict test for re-opening a trial, is that to do so creates risks to the finality of judgments, and risks a party being given an opportunity to make their case twice, which distorts the trial process: *Spoor v. Nicholls*, 2001 BCCA 426.
- [9] In *Hansra v. Hansra*, 2017 BCCA 199, the Court of Appeal considered the above noted authorities, as well as the Supreme Court of Canada's decision in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 and, citing *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670, it held at para. 59 that the following additional factors are relevant to determining whether it would be in the interests of justice to allow a matter to be re-opened:

considerations of finality, the apparent cogency of the evidence, delay, fairness and prejudice.

C. June 2019 Support Payment

[10] In the Reasons for Judgment, I found that the Father paid the Mother child support in the amount of \$30,000 in 2019. The Mother submits that this was in error, and that I "overlooked evidence to the effect that the Father had not made the June 2019 child support payment so that, in fact, the amount of child support paid by him in 2019 was \$25,000 instead of \$30,000." She characterizes this as a discreet error on the part of the Court that ought to be fixed.

[11] The difficulty with the Mother's position is that the evidence she suggests was overlooked by the Court was not put before the Court at trial. When the Mother, who was self-represented at trial, was cross-examining the Father, the following exchange took place:

MOTHER: I will ask you, Mr. [A.D.J.], in your list of support payments, June of 2019, you have cheque number 406 for \$5,000 that was the child support that you paid; is that correct?

FATHER: Yes.

MOTHER: I'm going to ask, Mr. [A.D.J.], that we're going to have to -- we do have the bank statements, and I guess this afternoon I'll bring that bank statement because my submission and my testimony is going to be is that that last cheque didn't get -- didn't get paid because you stopped payment on it in June. Does that sound familiar?

FATHER: Sure. No, I don't remember that, but I'm happy to see the evidence. I don't recall that. I recall that these payments were made or post-dated cheques were made to you. I don't recall ever putting a stop payment on it, and this - these payments were agreed upon in our CAD mediation. If you go back to 2018 -- 2018 boys' schedule, you will see that the payments changed in May of 2018. So -- was it May? Sorry, June of 2018. So all of these cheques were provided to Ms. [F.J.] postdated, and they were for the 12 months. So I'd be happy to figure out why it was, but to my knowledge, I've never -- I've never put a stop payment on a cheque like that, but you can show it to me.

MOTHER: My Lady, would it be acceptable if I asked Mr. [A.D.J.] over the lunch break to check his bank records and bring -- we don't have his bank records in his list of documents, but perhaps he could provide us with a copy of the bank statement that shows that -

THE COURT: Well, you say you have evidence that he did put a stop payment.

MOTHER: I have my bank record.

THE COURT: So you can tender that in your case.

MOTHER: Right.

THE COURT: That's -- that's how you would provide that.

MOTHER: Okay. Great.

- [12] Notwithstanding the Court's suggestion that she tender bank records to prove a point of fact that was in issue between the parties, the Mother did not tender any evidence that was relevant to the issue of whether a stop payment was put on the June 2019 child support payment.
- [13] On the state of the evidence before me at trial, I found that the Father paid \$30,000 of child support in 2019, which included a \$5,000 payment for June 2019.
- [14] The Mother seeks to re-open the trial to enable her to put bank records before the Court that show that no \$5,000 payment came out of the Father's account number [REDACTED] in June 2019, nor was any \$5,000 amount deposited into the Mother's account number [REDACTED] in June 2019. The Mother submits that these two bank statements prove that the Father put a stop payment on his child support payment in June 2019. If the trial is re-opened on this point, and these statements are admitted, then the Father seeks to admit new evidence, namely an affidavit from his banker that says that there is no record of a stop payment being placed on the June 2019 child support payment.
- [15] The Mother submits that "it would be a miscarriage of justice to fail to correct a small mistake of this nature in [the] circumstances of this case in the face of clear evidence of a failure to pay." I would agree with the Mother, if it were clear that a small mistake was made in the Reasons for Judgment on the question of whether the Father made a June 2019 child support payment. However, it is not clear on the evidence before me that a small mistake, or any mistake, was made. As such, if I were to re-open the matter to consider the new evidence of a failure to pay, namely the bank records that the Mother seeks to tender, I am not persuaded that the new evidence would have probably changed the result.
- [16] The Mother asks the Court to find that the June 2019 payment was never made because the Father put a stop payment on the June 2019 payment; the Father denies that he put a stop payment on the June 2019 payment and has an affidavit from his banker to support this. The bank statements, being simply a single month's statement from a single account for each party, are not conclusive evidence that a June 2019 payment was not made. They only demonstrate that no payment was made from one particular account to another account in the month of June 2019.
- [17] However, even if I were to find that the new evidence would have changed the result, in this case, there is no basis on which the Mother can be said to have exercised sufficient due diligence to be entitled to re-open on this issue. Not only was she in possession of the bank statements at trial, she was expressly invited by the Court to tender them into evidence and she did not.
- [18] While the considerations set out above are important, in my view the overarching principle of finality bears special consideration in high conflict family law matters such as this one. Since the Notice of Family Claim was filed in August 2013, there have been approximately 18 applications or appeals filed by the parties in this matter. The Mother filed her 39th affidavit in support of the application herein. The application record for the four-day hearing before

me comprised 14 binders of evidence containing over 10,000 pages. Each party accused the other of "scorched earth" litigation. Irrespective of who is to blame for the expensive and protracted nature of this dispute, at the centre of this proceeding are three children whose lives have been irrevocably marked by the acrimony of ongoing litigation between their parents, not to mention the depletion of family wealth used to fund it. At some point, it needs to stop.

- [19] I decline to exercise my discretion to re-open this matter with respect to the June 2019 child support payment.

D. Child Support Arrears for 2011 and 2012

- [20] The Mother submits that the Court misunderstood her submissions when I concluded in the Reasons for Judgment that neither party took issue with child support payments for the years 2011 and 2012. She wishes to seek an award of child support arrears for 2011 and 2012 and asks the Court to re-open argument to enable her to do so.
- [21] Counsel for the Mother submits that a miscarriage of justice would occur if the Court failed to consider the Mother's claim for child support arrears for 2011 and 2012, because this is something she sought at trial and, due to an oversight on the part of the Court, it was not considered.
- [22] In considering the Mother's application to re-open on this issue, I must first consider the relief that the Mother actually pursued at trial. The Mother was self-represented at trial, she is not legally trained, and, as is often the case with self-represented individuals, it was not always clear what relief she was seeking and what the basis for that relief was. If in fact she sought arrears of child support for 2011 and 2012 at trial, and I failed to consider her submissions on that point, I agree with her counsel that this could be a basis for reconsideration of my determination not to award child support arrears for 2011 and 2012.
1. The Mother's Submissions on Arrears for 2011 and 2012

- [23] The Mother did not seek any arrears of child support at trial. Nor did she seek to vary the child support provisions in the MOS. Instead, she framed the relief sought in her written and her oral submissions at trial as a review of child support pursuant to the MOS. She pointed out that the MOS allowed for a review of both child support and spousal support after three years.

- [24] The relevant provision of the MOS with respect to child support, which was relied on by the Mother, was:

As of June 1, 2013, child support should be reviewed annually and adjusted in accordance to the sums, formulas and principles delineated in the Federal Child Support Guidelines and having regard to the actual income of each parent.

- [25] Her written submissions delivered at the close of trial stated at page 7:

In contemplation of our marriage ending and our establishing separate homes, we entered into the June 30, 2011 Minutes of Settlement (the "MOS") addressing child support with an annual review clause of child support after 2013 but with percentage income variations that would trigger an earlier review .

The contractual inclusion of a right of review of all of the terms of the agreement, namely the parenting arrangements, child and spousal support, and without the inclusion of any limitations on the grounds of timing of the review, was required .

[Emphasis in original.]

[26] Later, at page 22 of her written submissions:

The contractual term relating to the review of support arrangements provided for in the MOS flows from, and is made necessary, because of the significant unknowns and uncertainty at the time the agreement was negotiated .

[27] However, at the same time that she expressly relied in argument on what she characterized as a right of review of child support after 2013, as conferred by the MOS, she also made reference to the years 2011 and 2012 in her written submissions at page 12:

The issues that present are discrete and solely financial in nature as follows:

- a) Determination of our respective guideline incomes for retroactive and prospective spousal and child support purposes for the years 2011 through to the present date, which includes a consideration of
- c) The corresponding award of basic child support retroactive and prospective for the years 2011 to the present date under the Guidelines which includes a consideration of the payor's spouse being over \$150,000.

[28] At page 79 of her submissions, the Mother prepared a table that contained her calculations of the Guideline income of the Father and the consequent arrears of child support that he said he owed. This table commences with the period June 2012-May 2013 and does not appear to calculate, or seek, arrears for any period prior to June 2012.

2. Conclusion on What the Mother Sought at Trial

[29] In the Reasons for Judgment, I found that the Mother's request for a review of child support was misplaced, and that what she was really seeking was arrears of child support, because the MOS contained a mechanism by which child support could be annually adjusted each year after June 1, 2013. However, based on the fact that the Mother expressly sought a review pursuant to the MOS, it could only be the case that the Mother was seeking to have child support reviewed after June 1, 2013 because the provision she relied upon gave a right of review as of that date.

- [30] In the Reasons for Judgment, in considering the appropriate framework for the relief sought by the Mother with respect to child support, I concluded as follows:
- [103] Ultimately, the Court did not have the benefit of submissions from either party as to the appropriate analysis to take in a case where the parties have an agreement with respect to child support, such agreement contains a mechanism for annually adjusting child support in accordance with the Guidelines, and the appropriate adjustments were not made such that there was a shortfall between the amounts mandated by the Guidelines and the amounts actually paid.
- [104] While the Mother has sought a retroactive review, I have considered whether this part of the mother's claim is better characterized as an action for arrears than a retroactive award. In *MacCarthy v. MacCarthy*, 2015 BCCA 496, the Court of Appeal held that an application for child support in the face of an order that contained a clause that child support would be automatically adjusted on an annual basis, and a shortfall in those adjustments, was an application for arrears, not an application for a retroactive award: at paras. 51-53. A similar approach was taken by Justice Johnston in *Velthuis v. Velthuis*, 2021 BCSC 6 at paras. 52-58.
- [107] In the circumstances, I find that the child support issue is best framed as one of arrears. The MOS contemplated that, in each year after 2013, child support would be adjusted in accordance with the Guidelines and the living arrangements of the children. The Father periodically unilaterally adjusted child support payments on the basis of his own assessment of those factors. In doing so, he implicitly accepted that child support was to be adjusted in accordance with the changing income of the parties and the changing living circumstances of the children, and payable in accordance with the Guidelines. There is a discrepancy between what ought to have been paid, and what was actually paid, in each year in dispute, namely 2013 through 2021. As in *MacCarthy* and *Velthuis*, that shortfall is most accurately conceived of as arrears of child support payable under the MOS.
- [31] Based on the Mother's request for a review in reliance on the provisions of the MOS that on her submission granted her a right of review after June 2013, it was apparent to the Court that the only years for which the Mother could be seeking a review were those years for which the MOS contemplated a review, namely 2013 and beyond.
- [32] However, as pointed out by her counsel, the Mother's written submissions also contained statements to support the conclusion that she was seeking a review/retroactive award of child support for the years 2011 and 2012. One of the items she listed under "Issues" at page 12 of her submissions was "the corresponding award of basic child support retroactive and prospective for the years 2011 to the present date under the Guidelines." In the table on page 79 of her written submissions, she included a calculation of child support payable under the Guidelines for periods commencing June 2012 and running to May 2019.
- [33] There is a clear conceptual distinction between a retroactive award of child support and an award for arrears already payable pursuant to an agreement or order. In the written submissions on this application, the Mother's counsel asked the Court to "re-open trial to

add \$28,803 to the award of arrears of child support in 2011 and 2012". However, no arrears are owing under the MOS for 2011 and 2012. There is no allegation that the 2011 and 2012 amounts payable under the MOS were not paid. Unlike subsequent years, where the payment of child support was to be adjusted in accordance with the Guideline income of the parties, child support for 2011 and 2012 was fixed in the MOS. If the Mother is seeking to change child support payable for these years, she is not seeking arrears, she is seeking a retroactive variation of child support payable under the MOS for 2011 and 2012.

- [34] Therefore, to the extent that the Mother is seeking additional child support for 2011 and 2012, notwithstanding her submission that she seeks arrears for these years, I interpret her application to be an application to re-open trial so she may argue for a retroactive variation of the child support agreed to in the MOS for 2011 and 2012. In order to be entitled to do so, she must satisfy me that she attempted to seek a retroactive variation of child support for 2011 and 2012 and her submission was overlooked by the Court.
- [35] In the face of the Mother's express reliance on the post-2013 right of review conferred by the MOS, the only reasonable conclusion to be drawn from her submissions at trial is that the Mother sought only to have child support reviewed for the years 2013 and onward. Child support for 2011 and 2012 was not put in issue by the Mother at trial.
3. Would It Be a Miscarriage of Justice Not to Revisit Child Support for 2011 and 2012?
- [36] Even if I am mistaken about the order sought by the Mother and the fact that her claim for arrears could only apply to the years 2013 onward, in my view it is not in the interests of justice to re-open on this issue.
- [37] On the re-opening application, counsel for the Mother made no submissions on the issue of whether the test for a retroactive variation of child support had been met for 2011 and 2012, nor did they refer to any of the case authorities on retroactive awards. The Mother simply asked for arrears for 2011 and 2012. Having heard no submissions, and being pointed to no evidence to support a retroactive award of this nature, I am not persuaded that a reconsideration of this issue would probably change the result.
- [38] Further, as I noted in relation to the June 2019 support payment, the principle of finality is particularly important in this case. It is simply not in the interests of justice to re-open argument to enable this protracted litigation to continue on this point.

E. 2010 Guideline Income

- [39] The Mother takes issue with the Court's finding about the 2010 Guideline income of the Father, although the Mother's position on the quantum of the Father's 2010 Guideline income changed over the course of the hearing of this application.

- [40] A reconsideration of the Father's 2010 Guideline income would have repercussions beyond the year in question. The Mother submits that, when the Father's actual 2010 Guideline income is considered, the 2011 MOS fails to comply with the objectives of the Divorce Act. This means that the spousal support provisions in the MOS must be set aside for failing to meet the first step of the Miglin test.
- [41] The initial position of the Mother on this application was that the Court failed to consider an important argument made by the Mother with respect to the Father's 2010 Guideline income, which was that the Father's income ought to have been \$47,500 more than the \$269,555 imputed by the Court, because the Father's income was split with the Mother in 2010, and his Guideline income should be determined with reference to his line 150 income, plus the income the Mother received that year. The Mother argued that the Court should find that the Father's 2010 Guideline income was \$317,055.
- [42] Counsel for the Mother submits that his client made this argument at trial in supplemental written submissions, filed at the request of the Court, that were intended to deal with allowable employment expenses of the Father. In those submissions the Mother stated that, in the MOS, the spousal and child support figures were calculated using a Guideline income for the Father that was net of tax.
- [43] I am not persuaded that the supplemental written submissions of the Mother can reasonably bear the interpretation that the Mother's counsel now wishes to place on them. In the supplemental written submissions, the Mother does not ever say that \$47,500 should be added to the Father's income because the Guideline income used to calculate support under the MOS failed to account for \$47,500 that was received as income to the Father in 2010 but treated for tax purposes as income to the Mother that year. Rather, the Mother states, incorrectly, that the Guideline income used for calculating support under the MOS was net of income tax.
- [44] In any case, even if the Mother had raised the alleged shortfall of \$47,500 in the Father's Guideline income at trial, and the Court had overlooked the issue, that issue was rendered moot over the course of the re-opening application. This is because the Mother resiled from her position that the Father's 2010 Guideline income ought to be increased by \$47,500. She did so after counsel for the Father pointed out that, in the Father's 2010 tax return, his line 150 income of \$279,555 included the \$47,500 of income that was paid to the Mother. Therefore, it would be double counting to impute an additional \$47,500 to his 2010 Guideline income.
- [45] Notwithstanding her change of position on the \$47,500 of income in 2010, the Mother continues to maintain that the trial should be re-opened to enable her to argue that the Court erroneously calculated the Father's 2010 Guideline income. Her alternative basis for re-opening the trial on this issue is a June 15, 2011 letter from counsel for the Mother, sent in the weeks leading up to the execution of the MOS (the "2011 Letter"). Relying on the 2011 Letter, the Mother argues that the Father's Guideline income for 2010 should have been

imputed at \$331,059, which, according to the 2011 Letter, is his average gross income for the prior three years.

[46] The 2011 Letter was in evidence at trial. It was not relied upon by the Mother for the purpose she now seeks, namely to support her argument that the Father's Guideline income for the purposes of the MOS should have been \$331,059. It is difficult to conceive of this submission as anything other than an effort to re-argue or re-cast the Mother's case, by taking evidence that was before the Court at trial and asking the Court to draw a new inference that was not argued at trial. In doing so, the Mother seeks the proverbial "second kick at the can" which, in our legal tradition, is not allowed: *Sykes v. Sykes* (1995), 1995 CanLII 2387 at para. 12, 6 B.C.L.R. (3d) 296 (C.A.).

[47] However, even if I were to accede to the Mother on this point, and re-open the proceeding to allow her to argue that, based on the 2011 Letter, I should conclude that the Father's Guideline income for 2010 was \$331,059, I would not make the finding she seeks. This is because I do not agree that the 2011 Letter has any bearing on the analysis that I was required to undertake in determining whether the MOS met the objectives of the Divorce Act for the purposes of the Miglin analysis.

[48] In the 2011 Letter, Mara Stickland, then counsel for the Mother, discusses a rationale for using certain figures to determine the Father's income for the purposes of the MOS. She says:

Income - an average of the last three years income tax returns shows [the Father's] income from all sources at \$339,051.96 (gross) or \$221,829.20 (net). [The Mother] left the work force after the birth of their third child in April 2005. The [Father and Mother] have income split over the last several years and we have included the income attributed to [the Mother] (as reflected in her income tax returns) in the overall figures above.

[49] The 2011 Letter is evidence that a methodology was proposed by Ms. Stickland for calculating the Guideline income of the Father. It is not, in and of itself, evidence of the Father's Guideline income for 2010 or any other year. At trial, the court had to determine, for the purposes of the Miglin analysis, whether the MOS complied with the objectives of the Divorce Act. Part of that analysis involved a consideration of the Guideline income of the Father in 2010, the year before the MOS was executed, on the basis of his tax filings and other relevant evidence. The views of Ms. Stickland as to how best to calculate that income, in a letter to opposing counsel in advance of the MOS being executed, are of no relevance to this analysis. Therefore, even if I were inclined to re-open argument in order to allow the Mother to argue that, on the basis of the 2011 Letter, I should revisit the Father's 2010 Guideline income and my consequent analysis of whether the MOS meet the objective of the Divorce Act, I would not accede to the Mother's submission on this point and the result of my deliberations would not change.

- [50] However, in the course of making submissions on the re-opening of the Father's Guideline income, the Mother did point to one issue that, in my view, falls into the category of what Garson J.A. described in *Moradkhan* as "a relatively discreet error in math or some mechanical consideration of the evidence" that is clearly in error. While I do not accede to the Mother's submission that relevant evidence was overlooked with respect to the Father's Guideline income, I am of the view that an error was made by the Court with respect to the Mother's 2010 Guideline income. While the Mother's 2010 Guideline income was not squarely at issue at trial, it is relevant insofar as it bears on the quantum of spousal support payable under the SSAG and ultimately the analysis of whether the MOS meets the objectives of the Divorce Act. In that regard, the Court overlooked evidence that \$47,500 of income that was taxed in the Mother's hands in 2010 was not indeed income to her. This oversight impacted the calculation of spousal support under the SSAG for 2011.
- [51] The Mother is correct that, when the Court made the statement at para. 12 in the Reasons for Judgment that "[t]he monthly spousal support of \$4,000 provided for under the MOS was, based on the Father's 2010 income, in the mid-range under the SSAG", this was based on an analysis of the SSAG in which the Father's income was imputed at \$269,555 and the Mother's income was imputed at \$48,700. Having had the Court's attention drawn to the evidence that the Mother's actual 2010 income was \$1,200, I must consider whether the MOS still meets the objectives of the Divorce Act for the purposes of step 1 of the Miglin analysis.
- [52] Mr. Lamer helpfully provided the Court with DivorceMate calculations for precisely this scenario. The 2010 SSAG calculations, if the Father's income is \$269,555 and the Mother's income is \$1,200 are as follows: low--\$3,045; mid--\$5,501; high--\$6,046.
- [53] According to the DivorceMate calculations, the family's net disposable income ("NDI") for 2010 would be equalized if spousal support were paid at the low end of the SSAG in the amount of \$3,045. This would result in each party's monthly NDI being approximately \$7,823. This is of particular significance since the Mother testified that the parties wished to roughly equalize their NDI by way of the support provisions in the MOS. The spousal support payments to the Mother under the MOS, at \$4,000 a month, are roughly \$1,000 a month more than the low amount under the SSAG.
- [54] The Mother submits that even if the Father has a 2010 Guideline income of \$269,555, as found by the Court, the spousal support payable under the MOS falls short of the objectives of the Divorce Act because it would be in the low range, rather than the middle range, of the "with child support" formula under the SSAG. This argument rests on the erroneous notion that, in order to comply with the objectives of the Divorce Act, spousal support must be payable in an amount equivalent to the mid range or higher of the SSAG.
- [55] The mid range of the SSAG is not the default, nor is an award at the low end of the range outside the scope of the Divorce Act objectives. In the Spousal Support Advisory Guidelines: Revised User's Guide (April 2016), the authors note as follows:

9 Choosing Location Within the Range (SSAG Chapter 9)

Determining the ranges for amount and duration under the SSAG formulas is only the beginning of the real analysis by lawyers, mediators and judges. The ranges are quite broad, under both formulas, especially where the disparity in incomes is large or the marriage is long. Too often, the lawyer for the recipient asks for the high end of the range, the lawyer for the payor offers the low end, and then the court opts for the mid-range, all with little in the way of analysis or explanation.

There has been a distinct tendency in the case law to "default" to the mid-range for amount, an approach which should be avoided, in our view. On duration, we see much less of a tendency to default to the middle of the range, and more explanation for the outcome.

The mid-point of the SSAG ranges for amount should NOT be treated as the default outcome. It is not the "norm", with the upper and lower ends of the range reserved for exceptional cases. Too often judges treat the mid-point as such, especially under the with child support formula. Our review of SSAG cases has revealed that in 60 per cent of all the reported with child support cases spousal support is ordered at the mid-point. A mid-point outcome is typically treated as if it does not require any explanation, with outcomes above or below being more likely to result in reasons. For a few decisions that carefully explain a mid-range outcome, see *Reid v. Carnduff*, 2014 ONSC 605 and *Monahan-Joudrey v. Joudrey*, 2012 ONSC 5984;

If anything, the with child support cases should more often resolve in the upper half of the range, as the formula already adjusts for "average" ability to pay. Most of these cases are strongly compensatory and there is great "need" in the home of the primary carer for the children, which should push amounts higher in the range. In shared custody cases, by contrast, the default outcome in bi-nuclear cases (no new partners, no new children) should be the spousal support which generates a 50/50 split of net disposable income (NDI), explained in more detail above under "The With Child Support Formula".

[Underlining added; bolding removed.]

[56] I am unable to find that a spousal support agreement that mandates shared parenting and has a roughly 50/50 split of NDI violates the Divorce Act objectives. Therefore, upon reconsidering stage one of the Miglin analysis after correcting the Court's error with respect to the Mother's 2010 Guideline income, I remain of the view that the MOS complies with the objectives of the Divorce Act and should not be interfered with.

F. Conclusion on Application to Re-Open the Trial

[57] The Mother's application to re-open the trial is dismissed.

III. Costs

[58] The Mother seeks her special costs against the Father. The Father originally brought an application seeking his special costs against the Mother, but abandoned that position and, at the hearing on costs, submitted that the parties should be ordered to bear their own costs.

A. Legal Framework

[59] Claims for costs in family law proceedings are governed by Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules], which states:

Costs to follow event

(7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[60] At its most basic, the successful party is the plaintiff who establishes liability and obtains a remedy, or the defendant who obtains dismissal of the plaintiff's case. This general principle is more difficult to apply in the context of family cases, in which a more flexible "substantial success" test is more appropriate: *Litt v. Gill*, 2016 BCCA 288 at para. 53.

[61] In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, Justice Bouck described substantial success as 75 percent or better, to be determined by the trial judge looking at the disputed matters globally, and weighing their relative importance to the parties.

[62] In considering costs, the court should consider the underlying purpose of costs awards. In *Giles v. Westminster Savings and Credit Union*, 2010 BCCA 282, the Court of Appeal discussed the purpose of costs (in that case, pursuant to Rules 57(9) and 57(1) of the Rules of Court, 1990, B.C. Reg. 221/90):

[74] The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:

- "[D]eterring frivolous actions or defences": *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 1988 CanLII 186 (BC CA), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;

- "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 1995 CanLII 1537 (BC CA), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);

- "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526 (CanLII), 86 B.C.L.R. (4th) 343 at para. 33;

· "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation", and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Pawanjitaper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16 (CanLII), 88 B.C.L.R. (4th) 17 at para. 16.

[63] In *Fotheringham* at para. 46, Bouck J. set out a four-step approach for determining how costs should be awarded in a multi-issue proceeding:

1. First, by focusing on the "matters in dispute" at the trial. These may or may not include "issues" explicitly mentioned in the pleadings.
2. Second, by assessing the weight or importance of those "matters" to the parties.
3. Third, by doing a global determination with respect to all the matters in dispute and determining which party "substantially succeeded," overall and therefore won the event.
4. Fourth, where one party "substantially succeeded," a consideration of whether there are reasons to "otherwise order" that the winning party be deprived of his or her costs and each side then bear their own costs.

B. Analysis

[64] In this multi-issue family law case in which both sides have made allegations of reprehensible conduct against the other, I find that the four-step approach taken by Bouck J. in *Fotheringham* provides a helpful framework for considering costs.

1. What Were the Matters in Dispute at the Trial?

[65] The trial involved four primary issues: child support (retroactive/arrears and prospective), unpaid s. 7 expenses, division of family property and debt, and entitlement to retroactive and prospective spousal support.

[66] On child support, the primary issue was a shortfall in child support paid by the Father to the Mother from 2013-2019. The Father took the position that he owed no further child support for this period. The Mother submitted that the Father did not pay child support in accordance with the Guidelines.

[67] On section 7 expenses, both parties came to court with a multiplicity of expenses they claimed to have incurred on behalf of the children and for which they sought contribution from the other party.

- [68] On division of family property and family debt, there were a number of issues. The parties disagreed about the division of the registered and non-registered bank accounts held by the parties, and about the value of the Father's interest in the RBC Dominion Securities ("RBC DS") business succession plan (the "BSP"). They also disagreed about a tax debt that the Father claimed was a family debt. Amongst these issues, the valuation of the BSP was the most significant, in terms of the value of the asset and the court time required to resolve it.
- [69] On spousal support, the Mother sought a retroactive review of spousal support for the entire period of separation, as well as ongoing spousal support in accordance with the SSAG for an additional five years beyond the 2020 termination date set out in the MOS. The Father took the position that spousal support ought to have terminated in 2020 in accordance with the MOS.
2. What Was the Relative Weight or Importance of the Matters at Trial?
- [70] Substantial success is not determined by counting up the number of issues and allocating success on each, or by engaging in a mathematical calculation of dollar amounts achieved. In this case, the most significant issues for the parties, in terms of court time and monetary value, were retroactive/arrears of child support, retroactive and ongoing spousal support, and the value of the BSP. Other issues, such as s. 7 expenses, prospective child support, and the division of family debt, were of much less significance in terms of the amount of evidence led to speak to them, and the amount of time each party spent addressing them in argument.
- [71] The issue of retroactive/arrears of child support raised a number of sub-issues. The determination of the Guideline income of the Father, a matter relevant to both child support and spousal support, was a particularly time-consuming and important matter in issue in the trial. Also, the parties' inability to agree about where the children resided at various periods of time led to considerable evidence and argument being advanced on this issue.
- [72] There can be little doubt that the Mother was successful on issues relating to arrears of child support. She sought an order that child support be payable in accordance with the Guidelines for the period from 2013--2019 and she obtained such an order. Over \$229,000 of arrears were ordered payable by the Father to the Mother.
- [73] On the BSP, the Father took the position that it should be valued at zero. He was unsuccessful in this regard. While the Mother's calculation of the value of the BSP was higher than what the Court ultimately found it to be, the Court found that the Father's interest in the BSP, which was family property, had a value of \$552,500. This represented success for the Mother.

[74] On spousal support, the Mother enjoyed less success. She was unsuccessful in persuading the Court to depart from the spousal support agreed to in the MOS and to award her a greater amount of spousal support on a retroactive basis to 2011. She was successful in persuading the Court to order that spousal support should continue for an additional three years beyond the 2020 termination date set out in the MOS.

3. Global Determination of Which Party "Substantially Succeeded" Overall and Therefore Won the Event

[75] While the Mother was not successful on all issues, I have no hesitation in concluding that she was substantially successful in the trial. On what I have found to be the three major issues of most significance to the parties--arrearages of child support, valuing the BSP, and spousal support--she was completely successful on two (arrearages of child support and attributing a substantial value to the BSP), and she was partially successful on one (extension of duration of spousal support). On a global determination of all of the issues at trial, I find that she met the "75 percent success" threshold set out in the authorities and, absent other considerations, would be entitled to her costs of the proceeding.

4. Are There Reasons to "Otherwise Order" That the Winning Party Be Deprived of His or Her Costs and Each Side Then Bear Their Own Costs?

[76] In *Gold v. Gold*, 106 D.L.R. (4th) 452, [1993] B.C.J. No. 1792 at para. 20 (C.A.), the Court of Appeal considered the circumstances in which a successful party should be deprived of their costs in family litigation:

The question, then, is: when should the Court order otherwise? With respect, when the court should order otherwise is a matter of discretion, to be exercised judicially by the trial judge, as directed by the Rules of Court. To lay down any strict guidelines or even to attempt to give exhaustive examples is not, I think, helpful because the facts and issues in each family law case vary so greatly. Factors such as hardship, earning capacity, the purpose of the particular award, the conduct of the parties in the litigation, and the importance of not upsetting the balance achieved by the award itself are all matters which a trial judge, quite properly, may be asked to take into account. Assessing the importance of such factors within the context of a particular case, however, is a matter best left for determination by the trial judge.

[77] Misconduct in a proceeding may deprive a successful litigant of costs: *Forslund v. Forslund*, 1993 CanLII 217 at para. 25, 85 B.C.L.R. (2d) 328 (C.A.). Where both parties have engaged in deplorable conduct, and have turned "what should have been a straightforward case into a long drawn out battle", the court has awarded that each party bear their own costs: *Forzley v. Forzley*, 1997 CanLII 1830 at para. 74, 34 R.F.L. (4th) 105 (B.C.S.C.). In *Bhopal v. Bhopal*, 1997 CanLII 4223 at para. 10 (B.C.S.C.), where "both parties acted in a manner that considerably protracted, complicated, and confused the trial", the Court found that the balance achieved in the ultimate judgment would be upset by an award of costs to one party and ordered that the parties must bear their own costs.

[78] Knowingly giving false evidence at any stage of the proceedings can support a denial of costs: *Brown v. Lowe*, 2002 BCCA 7 at paras. 144-51.

[79] In *Cardwell v. Perthen*, 2007 BCSC 366, in depriving a successful party of their costs on the basis that they gave false evidence, Madam Justice Ballance noted at para. 13 that the consequences of knowingly deceiving the court ought not be measured on the basis of the importance of the deceptive evidence but rather on the act of deception itself.

That fact that some of those particular issues turned out not to be among the substantial ones in the overall scheme of the trial or that the attempted deception may not have protracted the litigation, are immaterial in considering whether such deception ought to militate against a favourable award of costs. It is the act of calculated deceit under oath at trial, which demands chastisement by the court. Such conduct is disdainful of the judicial process and is aimed at undermining it. Giving knowingly untrue evidence is, as Madam Justice Southin aptly put it, "a grave matter": *Brown v. Lowe*, 2002 BCCA 7, 2002 CarswellBC 72 (B.C. C.A.) at para. 149. Sanction in this case will take the form of departing from the usual rule and depriving Mr. Perthen of his costs in their entirety.

[80] In this case, both parties have levelled accusations about one another's reprehensible behaviour in the course of this proceeding. Many of the accusations relate to behaviour that does not reach the threshold of being relevant to costs. However, there are three matters raised by the Father relating to the behaviour of the Mother in litigation that, in my view, are particularly relevant to costs and merit consideration. They are: the forging of a signature on a letter that was appended to the Mother's affidavit, the Mother's failure to abide by court orders not to discuss the litigation with the children, and the Mother's conduct towards opposing counsel.

a) The Dan Nou Letter

[81] On September 27, 2016, the Mother swore her affidavit #5 in this proceeding. The affidavit provides evidence of her financial circumstances, including \$50,000 that she received from Dan Nou, a relative of the Father. Attached to the affidavit #5 as Exhibit "A" is a letter which is described by the affiant as "a letter from Mr. Nou dated June 10, 2013 relating to the \$50,000" (the "Dan Nou Letter"). The Dan Nou Letter says:

Dear [Mother],

Please accept this letter as confirmation of my gift and that the \$50,000 branch-to-branch transfer on April 10th, 2012 was from my account with the Royal Bank for the down payment for your business purchase.

I wish you every success in your new venture and will have to bring Meia to see it one of these days.

Sincerely,

Dan Nou

Paradigm Development

- [82] A handwritten signature is affixed to the Dan Nou Letter attached as an exhibit to the Mother's affidavit #5.
- [83] On April 7, 2017, Dan Nou swore an affidavit in this proceeding. He denies ever having seen the Dan Nou Letter and deposes that the signature on it is not his signature. He maintains that the letter was not signed by him and that his signature is a forgery.
- [84] At trial, the Mother admitted to forging Dan Nou's signature and says she did so under "duress". She claimed that Mr. Nou did sign the letter but she could not locate the signed version at the time she assembled the materials for her affidavit #5, so she forged his signature on her own copy and appended the forged document to her affidavit.
- [85] The Mother's evidence at trial was not clear about the whereabouts of the version of the letter actually signed by Mr. Nou:

So the letter he actually gave me went to the BDC. When I was preparing my affidavit in 2016, I couldn't find the letter. I wrote to him. He wouldn't give it back to me. I had a draft of the letter that I had sent to him in 2013, and I put that letter in my affidavit, which I have admitted to and said it was a poor choice and a mistake under duress.

- [86] On this application, the Mother's counsel says the version of the letter signed by Mr. Nou has "since been found." This is not something the Mother deposed to at trial, or in this application. In her affidavit #37 filed in this application, the Mother simply appends segments from the trial transcript, which include the passage quoted above, which contains an ambiguous description of the present whereabouts of the letter signed by Mr. Nou. The Mother's counsel's representation that the originally signed letter has "since been found" is unsupported in the evidence.
- [87] This is important because the Mother's primary basis for why costs consequences should not flow from her doing something which under any analysis was fraudulent and dishonest is that "no misrepresentation of fact occurred since he had in fact signed that letter". As such "no argument can be suggested to the effect that this was the kind of misconduct that has any impact on the integrity of these proceedings." I do not accept the Mother's assertion that Mr. Nou signed the Dan Nou Letter. He denied signing it and no letter signed by him has ever been produced. However, even if Mr. Nou did sign a version of the letter, the conclusion the Court must draw from the Mother's behaviour is the same. By forging his signature and knowingly appending a letter containing a forged signature to her affidavit, the Mother intentionally deceived the Court.

- [88] Like Ballance J. in Cardwell, I am of the view that, when a party is intentionally deceitful with the court, it is not material whether the matter about which they were deceitful was large or small in the context of the issues that the court had to determine in the proceeding. Rather, when a party intentionally deceives the court, they engage in conduct that "is disdainful of the judicial process and is aimed at undermining it." This is no small matter.
- b) Breach of Orders Not to Discuss Litigation
- [89] Pursuant to the November 21, 2013 order of Madam Justice Maisonville, made at the Judicial Case Conference, the parties were subject to the following conduct orders:
- a) By consent, neither parent shall involve the Children in discussions relating to custody, parenting time, scheduling, child support, or any other family law dispute, or use the Children as conduits for carrying messages to the other parent; and
- b) By consent, neither parent shall denigrate the other parent in the presence of the children.
- [90] Later, in her August 19, 2016 order, Master Muir ordered that "neither party shall discuss any of the issues in this litigation with the children, unless such a discussion is in the context of a counselling session."
- [91] Conduct orders forbidding the discussion of litigation with children are commonly made by our Court. They are important orders that should be assiduously followed by parties, because the Court is well aware that being drawn into their parents' litigation battle is profoundly damaging to the well-being of a child.
- [92] The Father points to evidence that demonstrates that, on a number of occasions, the Mother failed to conduct herself in accordance with these orders. Some examples include:
- a) In July 2015, the eldest child, Q.D., sent a text to his father saying "Mamas saying if I choose to live with you her income is gonna change and therefore she's gonna have to move houses".
- b) During a hearing before Master Muir in November 2015, Father's counsel made submissions that included mentioning that the youngest child, J.D., gave flowers to the Fathers' second wife at their wedding. The Mother immediately texted J.D. to ask him about this.
- c) In February 2016, Q.D. emailed the Mother and asked her to stop interfering in his communications with his Father. He countered what appeared to be a suggestion from the Mother that the Father was alienating Q.D. by saying, "This is not alienation that is called caring for my safety. Mum stop making big deals over everything you've got to chill out." Later in the same email he says, "My communication with papa is none of your business you're so hung up over it."
- d) The parties' middle child, M.D., informed the Father that the Mother had called him and apprised him of what was happening during a November 5, 2020 court hearing before Master Muir.

[93] In response to this evidence, counsel for the Mother did not deny that the Mother had repeatedly discussed litigation matters with the children. The Mother's written submissions on this point showed a troubling lack of concern for the very serious reasons behind these kind of conduct orders, and the consequences of them not being followed:

Orders of this nature are of course easy to grant but very difficult to invigilate in the crucible of daily life. That is particularly so with teenagers who become inquisitive about the disputes that exist between their parents.

[94] It does not assist the Mother, in the face of evidence of her violation of a conduct order of this nature, to refer to the difficulty of following such orders in the "crucible of daily life." A court order that is challenging to follow is no less binding on a party than one that is easily complied with.

[95] On a consideration of all of the evidence, I am satisfied that the Mother was unable to resist the temptation to discuss the ongoing litigation, parenting time, and support with the children. She repeatedly did so, and in doing so she was in violation of orders of this Court.

c) Conduct with Opposing Counsel

[96] The Mother sent a number of letters and emails to counsel for the Father that were incendiary and inappropriate. In these letters she called into question the professionalism of the lawyers and made misconduct allegations against them:

- a) In an October 2017 email to Ms. Jamal, then counsel for the Father, the Mother called her "self-absorbed, incorrigible and lacking professional maturity" and told her that she forgave her for "being petty" and for her "bad lawyering".
- b) In a January 27, 2021 letter to Ms. Jamal, the Mother accused Ms. Jamal of not being truthful with the Court.
- c) In a February 17, 2021 letter, the Mother accused Ms. Jamal of "highly unethical and inappropriate" conduct.
- d) In a May 28, 2021 letter, the Mother accused Ms. Jamal of making "serial misrepresentations" of the facts and the law to Court.
- e) In an August 12, 2021 email, she accused Ms. Guy, who at that point had been the Father's counsel for approximately two months, of being unprofessional, failing to meet her duty of candor, seeking to gain improper advantage, and engaging in sharp practice. The Mother stated:

Regrettably, you have left me no choice but to involve the governing body of your profession to provide whatever assistance is available to ensure my and my children's rights are protected and your responsibilities are upheld. I have no confidence that you understand or comprehend the gravity of the situation that you have created and it does not appear that there is anyone in your firm that is capable of addressing and remedying your conduct.

- [97] I have reviewed a large number of the emails and letters exchanged between the Mother and opposing counsel. The Mother was a voluminous correspondent in this litigation. She would often send many letters and emails to opposing counsel in the course of a week. When her letters did not receive an immediate response, it was not unusual for her to attack the competence and professionalism of opposing counsel.
- [98] Many of the mother's most incendiary communications took place in the spring and summer of 2021, as the parties were preparing for the November 2021 trial. During this period, the Mother repeatedly set down applications without consulting opposing counsel in advance about hearing dates. On July 27, 2021, she served the Father's counsel with application materials for a July 30, 2021 application, knowing that the Father's counsel was in a trial at this time and would be unavailable.
- [99] Counsel for the Mother sought to minimize any incivility from the Mother towards counsel as an understandable reaction to the stress of litigation. Pointing out that the Mother was fighting for her financial life, and facing repeated non-disclosure of relevant documents from the Father, counsel suggests that the Mother's intemperate correspondence with counsel was a lapse in judgment for which she should not be sanctioned.
- [100] If the Mother's incivility and allegations of professional misconduct were restricted to a single piece of correspondence, I would be inclined to agree with her counsel that a self-represented person ought not be punished in costs for isolated acts of lost composure. However, the Mother's behaviour towards counsel was not isolated, it occurred throughout the litigation, and it was directed at both Ms. Jamal, the Father's former counsel, and Ms. Guy, the Father's counsel as of June 2021.
- [101] The Mother, while not legally trained, is an intelligent, prepared, and thoughtful litigant. She chose her words carefully in court, presented herself with the utmost professionalism, and was never prone to outbursts of emotion. I cannot therefore conclude that her letters to counsel were the product of an overwhelmed and emotionally fragile person who had reached her breaking point, as suggested by counsel for the Mother. On the contrary, I can only conclude that her behaviour with opposing counsel, which included undermining personal attacks on the professionalism and competence of counsel, along with the repeated setting down of applications without consultation, was part of an intentional litigation strategy.
- [102] Personal attacks against a lawyer, particularly attacks on their competence and ethics, can have significant personal and professional consequences for the recipient. Such attacks are not excusable simply because the attacker is not legally trained. As Mr. Justice Donald noted in *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2015 BCCA 424:

- [11] It remains only to say this. Self-represented litigants have no licence to employ accusations of dishonesty as a feature of their rhetoric unless such accusations are firmly grounded in the evidence, are relevant to the proceedings, and are responsibly made. By "responsibly", I mean measured, careful, and faithful to the evidence. Self-represented litigants must understand that the court is not a free fire zone where anything can be said regardless of the harm to others and their reputations.
- [103] In my view, the Mother treated this litigation as a free fire zone, without any regard for the consequences of her actions. This, combined with the other concerning elements of her conduct in this litigation, have caused me to conclude that it would not be appropriate for her to receive her costs, notwithstanding her substantial success in the litigation.
- d) Conduct of the Father
- [104] The Mother takes the position that the Father's conduct in this litigation is sufficiently egregious that she should be awarded special costs against him, notwithstanding any inappropriate behaviour on her part in the conduct of the litigation. She asserts that the Father engaged in persistent and deliberate non-disclosure; false testimony under oath; alteration of relevant documents; and misrepresentation to the court, the Mother, and the jointly appointed experts.
- [105] The allegations of egregious behaviour relate to the Father's delay in disclosing information and documents relating to a retirement savings plan the Father began participating in after separation, called the deferred share unit program (the "DSU"). The Father's contributions to the DSU were post-separation and therefore there was no argument that the Father's interest in the DSU was family property. However, at trial, the Court was asked to determine whether the Father's contributions to the DSU, which were not reflected as taxable income on his tax returns, should be added to his income for Guideline purposes.
- [106] In the Reasons for Judgment, I described the DSU and held that the Father's contributions to it were income for support purposes:
- [69] In each year since 2012, the Father has participated in a deferred share unit program offered by his employer (the "DSU"). The Father described the DSU as a program that allows him to convert a portion of his income into notional shares of RBC that are held pending his retirement. He described the DSU as akin to a deferred benefit or pension program. The portion of the Father's income that is diverted into the DSU in any particular year is not reflected in his T4 income.
- [70] The Father has diverted a portion of his income to the DSU in varying amounts ranging from under \$1,000 in 2012 to almost \$146,000 in 2017.

- [71] In my view, there is no question that the income that the Father diverted into the DSU is income that was available to him for the purposes of child support. While most certainly done for legitimate retirement planning reasons, the Father chose to take a portion of his income each year and put it into a savings plan. He was not compelled to participate in the DSU and these funds were available to him to use as he wished. Therefore, I find that the money the Father diverted to the DSU should be treated as part of his Guideline income.
- [107] The Father did not disclose his participation in the DSU, nor any statements of account for the DSU until August 2021, a few months before trial. This was done only after the Mother obtained an order compelling third-party disclosure that would have resulted in the Father's DSU statement being disclosed in any event.
- [108] The Father testified at trial that he did not disclose his DSU account because he only started participating in the program post-separation, therefore he believed that his interest in the DSU had no bearing on the division of family property. This is correct, but the Father's contributions to the DSU were relevant to these proceedings, not because the DSU is family property, but because the income that the Father diverted into the DSU was income available to him for support purposes and therefore relevant to the analysis of his Guideline income.
- [109] I have no trouble in finding that the Father failed to meet his disclosure obligations to the Mother and to the court by failing to disclose what was clearly a relevant piece of evidence. However, I am not persuaded that, as the Mother suggests, "he contrived to deceive this [C]ourt" by holding this evidence back.
- [110] Amongst the more serious accusations levied by the Mother against the Father is that he tampered with evidence and "doctored" documents to avoid disclosing the DSU. This charge stems from the fact that a single financial entity, Solium Capital Corp. ("Solium"), holds two different financial products that RBC DS makes available to its employees, the DSU and RBC partnership point shares. Solium generates account statements for RBC DS employees that contain information about both the DSU and partnership point shares.
- [111] Partnership points were described in the Reasons for Judgment as follows:
- [143] According to the Father, and to Steven Oulette, a branch director of RBC DS, investment advisors ("IAs") are awarded partnership points by RBC DS annually on the basis of IA performance. Points are converted to Royal Bank shares and vested for three years. After the three-year vesting period, the IA is paid out the market value of the shares, which is treated as T4 income to the IA.
- [112] It was never controversial that the partnership point shares held by the Father at the date of separation were family property subject to division. As such, the Father disclosed bank statements from Solium showing his partnership point shares in his list of documents dated March 4, 2014. An updated list of documents dated July 30, 2015 provided further statements from the Solium account disclosing the partnership point shares. In his

disclosure to Stephen Cheng, the joint expert retained to opine on the value of family property, the Father provided Solium statements that disclosed the partnership point shares. In various Form F8s filed over the course of the last nine years, the Father repeatedly disclosed the existence and value of the partnership points in the Solium account. In none of this disclosure did he disclose the existence, or the value, of the DSU.

- [113] The Mother submits that the Father's lack of disclosure is particularly egregious because the Solium statements would have contained information about both the partnership point shares and the DSU, and it would have been necessary for the Father to redact these statements in order to avoid disclosing the DSU. In other words, his failure to disclose the DSU was not inadvertent; it was a deliberate act of deception.
- [114] The Father ought to have disclosed the DSU at the outset as it was clearly relevant to ascertaining his Guideline income. His failure to do so was a dereliction of his responsibilities to the Mother and to the Court. Had he been substantially successful in this litigation, I would have found that the failure to disclose the DSU was sufficient to deprive him of his costs and to order that each party bear their own costs.
- [115] However, I am not persuaded that the Father engaged in the level of deception that the Mother suggests. I do not accept the Mother's charge that the Father "doctored" or "tampered" with the Solium statements in order to only disclose the partnership points and withhold information about the DSU. At trial, the Father explained the process by which he obtained the Solium statements online for the purposes of disclosure. He generated a report that disclosed the partnership points only because in his view, he did not need to disclose anything about the DSU because it was an asset acquired post-separation. He did not doctor or tamper with the account statements; he simply generated, printed, and disclosed a statement that contained only information about the partnership points. His decision not to disclose statements for an asset that he erroneously believed was not relevant, while imprudent, was not deliberately deceitful.
- [116] I am simply unable, on all the evidence, to characterize the Father's failure to disclose the DSU as an elaborate and dishonest scheme, as the Mother asks me to do. My view with respect to the DSU remains as it was at the end of trial, when I noted in the Reasons for Judgment at para. 231 that the Father "displayed a troublingly casual approach to his financial disclosure obligations, swearing multiple Form F8 financial statements that omitted significant information".

C. Conclusion on Costs

- [117] The Mother was substantially successful in this litigation, but in my view, for reasons discussed above, she engaged in conduct that was sufficiently deserving of sanction by the Court that she ought not receive her costs.

- [118] In Bhopal, Justice Stromberg-Stein noted that "[b]oth parties acted in a manner that considerably protracted, complicated, and confused the trial and the balance achieved in the ultimate judgment would be upset by an award of costs to one party." The same can be said of the parties in this litigation. In my view, the fairest allocation of costs in the circumstances, given the behaviour of both parties, is for each party to bear their own costs.
- [119] At this application, the parties both indicated that they wish to make submissions on costs of these applications. In the interests of proportionality, I make the following direction: should the parties be unable to agree on costs of these applications, they may make arrangements to appear before me for a one hour, 9:00 am hearing, on a mutually convenient day, to address costs. The parties shall each prepare a written argument of no more than ten pages that should be provided to the other party at least three days in advance of the hearing. No new affidavit evidence shall be tendered at the costs hearing.

"Francis, J."

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Prepared on 28 October 2026 · Esheria