

CANADA / JUDGMENT

A.J.S.A. v. K.L.W.

2024 BCSC 453

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 453 A.J.S.A. v. K.L.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.J.S.A. v. K.L.W.,

2024 BCSC 453

Date: 20240319

Docket: E94892

Registry: Nanaimo

Between:

A.J.S.A.

Claimant

And

K.L.W.

Respondent

Corrected Judgment: The original judgment was edited to anonymize the names of the parties and the text of the judgment was corrected at paragraph 155 on April 23, 2024

Before: The Honourable Justice Marzari

Reasons for Judgment

Counsel for the Claimant:

S. Glanzberg

Counsel for the Respondent:

J. Aucoin

R. Hunter

Place and Date of Trial/Hearing:

Nanaimo, B.C.

December 5-8, 11-15, 18-21, 2023

Place and Date of Judgment:

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March 19, 2024

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INTRODUCTION

- [1] In this family law dispute, the claimant, A.J.S.A., and the respondent, K.L.W., seek a divorce from each other, and a final determination of division of property, parenting responsibilities, and spousal and child support.
- [2] The parties are agreed that they were in a marriage-like relationship commencing May 1, 2011. They were married on July 6, 2013. The parties have lived separate and apart since July 2021. From July 2021 to December 2021, they shared the family home on Linette Place in Nanaimo (the "Family Home") with their children in a nesting arrangement. This was a ten-year relationship, and I will refer to the entire period from May 1, 2011 up to separation as their "marriage."
- [3] Mr. A.J.S.A. was 39 years old at the time of the commencement of the marriage and 51 at the time of the trial. He is a financial advisor, and he co-owns a financial advising company known as the Saints Team Inc. ("Saints"). Saints was formed in 2005 as an amalgamation of Mr. A.J.S.A.'s financial advising practice and his father's financial advising firm, where his brother also worked as a financial advisor. Mr. A.J.S.A. and his brother gradually bought their father out of this business, and now the two brothers are equal shareholders. The growth in the value of Mr. A.J.S.A.'s interest in Saints during the course of the marriage is the most significant family property in contention requiring division.
- [4] Mr. A.J.S.A.'s income for the purposes of paying child support under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], and whether Ms. K.L.W. is entitled to spousal support, are also contested in this case.
- [5] Ms. K.L.W. was 26 years old at the time of the commencement of the marriage and 39 at the time of the trial. She is a registered nurse and is now working full-time. For most of the marriage, she was pregnant, on maternity leave, or working part-time while caring for the parties' children.

- [6] The parties have three children (the "children"): two older girls and one boy. They were 4, 7, and 9 years old at the time of separation and 6, 9, and 11 years old at the time of the trial. Since separation, parenting has largely been shared, and shared parenting and decision-making was formalized in a consent order that was made after mediation in April 2023. Both parties agree that this was an interim order, and both seek a variation of that order.
- [7] In this regard, Ms. K.L.W. alleges that Mr. A.J.S.A. has engaged in a pattern of controlling behaviour that amounts to family violence both before and after separation, and seeks additional parenting time and final decision-making authority with respect to all shared parenting responsibilities. Mr. A.J.S.A. denies the existence of family violence, and seeks to continue equal shared parenting time, but with him having final decision-making authority where the parties cannot reach agreement. The parties also disagree about whether they should continue using the services of a parenting coordinator ("PC").
- [8] There is a high level of conflict between the parties, and a series of conduct orders have been issued over time, particularly in relation to communications between the parties. The extent to which these conduct orders ought to continue is also at issue.

ISSUES

- [9] Both parties seek a divorce. There is no objection to Ms. K.L.W.'s name change request, and I shall refer to her as such in these Reasons.
- [10] The issues that require resolution in this trial are:
- 1) With respect to parenting:
 - a) What parenting regime is in the best interests of the children, having regard to the applicable factors?
 - b) Is there a pattern of family violence either pre- or post-separation that affects the best interests of the children in relation to parenting time and parenting responsibilities?
 - c) Who should have final decision-making authority with respect to parenting responsibilities? Should the parties continue to retain the services of a PC in this respect?
 - d) Should the current equal shared parenting regime be changed such that Ms. K.L.W. has primary parenting time?
 - e) Should the existing conduct orders continue, and/or should other conduct orders be made to assist the parties in minimizing the conflict the children are exposed to?
 - 2) With respect to support issues:
 - a) What is Mr. A.J.S.A.'s income available for child support purposes?
 - b) How should s. 7 special expenses be paid?

- c) Is Ms. K.L.W. entitled to spousal support on a compensatory or non-compensatory basis and, if so, in what amounts?
- d) Is Ms. K.L.W. entitled to retroactive child and spousal support to January 1, 2022?
- 3) With respect to the division of property:
 - a) What is the value of the family property and debt, including the increased value of Mr. A.J.S.A.'s interest in Saints over the course of the marriage?
 - b) Is Mr. A.J.S.A. entitled to an unequal share of Saints or the Family Home based on his contributions to them?
 - c) How should Mr. A.J.S.A.'s equalization payment to Ms. K.L.W. be structured with respect to the family property that he seeks to retain?

DIVORCE AND NAME CHANGE

- [11] The parties both seek a divorce order. They have been living separate and apart since July 2021. I am satisfied that the requirements for a divorce pursuant to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) are met in this case. I therefore grant an order of divorce that will take effect on the 31st day after the date of these Reasons, subject to my comments below.
- [12] During the trial, Ms. K.L.W. sought a name change under s. 5 of the Name Act, R.S.B.C. 1996, c. 328 to change her surname to her maiden name, "W.". I order that her surname be changed to W., and I refer to her as such in these Reasons.

PROCEDURAL HISTORY

- [13] In the two-and-a-half years since separation, the parties have been before this Court many times and have benefitted from ongoing efforts by this Court to help them resolve matters by consent where possible, and to address contentious issues where an agreement could not be reached.
- [14] Mr. A.J.S.A. has been the subject of a series of disclosure and conduct orders in this regard. While not a full review of the applications and orders made to date in these proceedings, the following orders are relevant:
 - 1) On April 5, 2022, the parties entered into a without prejudice interim consent order regarding shared parenting arrangements and child support of \$2,500 per month, prior to substantive disclosure (the "April 2022 Order").
 - 2) On September 22, 2022, Associate Judge Dick made a series of orders, ultimately by consent, with respect to conduct orders, the preparation of a joint Guidelines Income Report, a joint Business Valuation, and other relief (the "September 2022 Order").

- 3) On September 22, 2022, Associate Judge Dick also ordered that Mr. A.J.S.A. would purchase Ms. K.L.W.'s interest in the parties' recreational cabin on Sproat Lake (the "Sproat Lake Property") for \$329,000, in part with a cash payment and in part by rolling over \$160,000 in his Registered Retirement Savings Plan ("RRSP") accounts (acknowledged by Ms. K.L.W. to be excluded property) into Ms. K.L.W.'s RRSP account.
- 4) On December 1, 2022, in response to Ms. K.L.W.'s application, Associate Judge Dick made orders requiring Mr. A.J.S.A. to list and disclose documents, requiring the division of family furniture and belongings, further conduct orders, and payment of s. 7 expenses (the "December 2022 Order"). This order increased child support to \$4,330 monthly, and required Mr. A.J.S.A. to pay spousal support in the amount of \$4,230 monthly, starting December 1, 2022.
- 5) On March 28, 2023, after mediation, the parties agreed to continue shared parenting and shared parenting responsibilities with a PC to settle any differences they could not resolve themselves. The consent order was filed on April 11, 2023 (the "April 2023 Order"), and both parties agree that the order is interim in nature. The parties' PC was appointed on May 4, 2023 pursuant to this agreement for a one-year period.
- 6) On August 10, 2023, Associate Judge Dick ordered the parties to obtain a s. 211 report, and increased the interim child support payable by Mr. A.J.S.A. to Ms. K.L.W. to \$7,800 per month based on a Guidelines income of \$612,500 (the "August 2023 Order"). Mr. A.J.S.A. appealed this order and did not comply with it. The appeal had not been completed by the time of the trial in December 2022.

CREDIBILITY

- [15] Bradshaw v. Stenner, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013) discusses the oft-considered factors that are utilized when assessing the credibility of witnesses, including that "the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": Faryna v. Chorny, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).
- [16] Mr. A.J.S.A. and Ms. K.L.W. each make significant allegations that the other is not to be believed by this Court. The parties challenge the reliability and credibility of the other, and the witnesses called by the other party. Where relevant to a particular finding, I will address those allegations directly.
- [17] More broadly, I note that a concerning amount of Mr. A.J.S.A.'s evidence in direct examination was contradicted by his own financial records and the evidentiary record when it was put to him in cross-examination. His evidence was often internally inconsistent on matters related to parenting, such as his position on whether the middle child has Adult attention-deficit/hyperactivity disorder ("ADHD") and whether she should be able to see a pediatrician in relation to this diagnosis. Similar internal inconsistencies arose in his

evidence regarding the children's use of screen time during his parenting time, and on other matters.

- [18] Mr. A.J.S.A.'s direct evidence on property issues also proved incomplete or contradictory of his own communications in evidence. He was argumentative and often evasive, particularly in cross-examination but not exclusively so. His evidence would often start with a clear statement of fact that, with further questioning, would turn out to be based on minor technical distinctions conveying much less than the whole truth. Overall, I found that I could not rely upon Mr. A.J.S.A.'s evidence where it was contradicted by the evidence of other witnesses.
- [19] Mr. A.J.S.A. says that Ms. K.L.W. was equally unreliable and lacked credibility, but I do not find that to be the case. His questioning of Ms. K.L.W. through counsel often turned on minor technical distinctions, and suggested a standard of perfection that he himself did not comply with. Ms. K.L.W.'s willing concessions to corrections on her financial statement, and her reluctance to give Mr. A.J.S.A. particular credit for certain parenting achievements, does not affect the weight I am able to give to her evidence. Overall, I found Ms. K.L.W.'s testimony to be largely even-handed and consistent with the documentary record and the evidence of other witnesses.
- [20] Although I make my findings of fact on the whole of the evidence before me, including a combination of the documentary and testimonial evidence, where the parties' evidence conflicts, I have generally preferred Ms. K.L.W.'s evidence.

PARENTING

- [21] Mr. A.J.S.A. seeks a continuation of the equal shared parenting regime that has been in place since April 2022 and was agreed to by Ms. K.L.W. in March 2023. He says that he is a committed and passionate father, and that the children are entitled to equal parenting time between them. He denies any allegations of family violence or controlling behaviour on his part, and says that the incidents of concern to Ms. K.L.W. post-separation were isolated and regrettable, but do not reflect his overall parenting ability. He wishes to continue to share equal parental responsibilities with Ms. K.L.W. and to continue liberal communication between himself and Ms. K.L.W., which he believes is essential for effective co-parenting. While he wishes to continue to employ the services of the PC, he seeks final decision-making authority with respect to any matters upon which he and Ms. K.L.W. are unable to agree.
- [22] By contrast, Ms. K.L.W. seeks a change to the current parenting regime that would have the children in her care more of the school week during the school year, and to have final decision-making with respect to matters upon which she and Mr. A.J.S.A. cannot agree. She alleges that Mr. A.J.S.A. was physically and verbally confrontational during the marriage and has since engaged in an ongoing pattern of controlling behaviour towards her that has now escalated into harassment post-separation. She argues that joint decision-making creates a

constant site for Mr. A.J.S.A.'s controlling and harassing behaviour toward her, and that the children are affected by this conflict, both through direct exposure and the parties' inability to make parenting decisions in a timely and non-confrontational manner. She says that she was the primary caregiver to all three children throughout the marriage, and that Mr. A.J.S.A. has not demonstrated the parenting skills necessary to be an equal caregiver to the children, including his ability to support the children with their schooling and extracurricular activities, or to provide limits on their screen time use in his care.

[23] I turn first to the legal framework for this parenting dispute.

Legal Principles

[24] It is well established that the best interests of the children are the primary consideration of this Court when considering a parenting regime under the Family Law Act, S.B.C. 2011, c. 25 [FLA].

[25] The best interests of the child are defined in s. 37 of the FLA:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[26] With respect to parenting arrangements and responsibilities, s. 40 of the FLA provides that:

Parenting arrangements

40 (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.

- (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.
- (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by
 - (a) one or more guardians only, or
 - (b) each guardian acting separately or all guardians acting together.
- (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
 - (a) that parental responsibilities should be allocated equally among guardians;
 - (b) that parenting time should be shared equally among guardians;
 - (c) that decisions among guardians should be made separately or together.

[27] All of these factors have some role to play in my determination of the appropriate parenting regime in the best interests of the parties' children. Many of these factors intersect and overlap. I will focus on four factors of particular relevance in this case: 1) the history of the care of the children; 2) the ability of each parent to meet the needs of the children; 3) family violence and 4) the children's experiences (to the extent they can be known by the evidence). I will also address the maximum contact principle as it applies to this case.

History of the Care of the Children

- [28] Despite Mr. A.J.S.A.'s occasional suggestions to the contrary, the evidence establishes that Ms. K.L.W.'s primary role in the marriage was to prioritize the needs of the children and run the household. According to Mr. A.J.S.A.'s testimony, any decision with respect to Ms. K.L.W. working, including what nursing positions she might take and the hours involved, was subject to a joint discussion. Though he said he did not exercise a veto in this regard, Mr. A.J.S.A.'s evidence alone suggests he exercised a level of control in this regard. Ms. K.L.W. could take the nursing lines she wanted, as long as it would also work for the family. On the evidence of both parties, Ms. K.L.W.'s career choices were subject to her being available for the children and family's needs first, including ensuring that she was available to the children, including when Mr. A.J.S.A. travelled for work.
- [29] Mr. A.J.S.A.'s work regularly required him to spend two nights a week in Victoria to service his clients in that City since his move to Nanaimo in 2004, and he has continued to do so fairly consistently post-separation. On other days, he worked from home and was available to the children if they needed to stay home, but the parties also placed the children into daycare and after-school care to allow Ms. K.L.W. to take on some work shifts while Mr. A.J.S.A. was also working.
- [30] Overall, I find that the evidence establishes that Mr. A.J.S.A. was, and is, a loving parent who cares a great deal for his children. However, I find that he left much of the parenting work to Ms. K.L.W. throughout the marriage, including morning, dinner, and bedtime routines, and caring for the children when they were not in daycare and she was not working. Ms. K.L.W. also coordinated the children's school and extracurricular activities, and she continues to take a lead role in these areas.
- [31] I find that Ms. K.L.W. was the primary caregiver to the children throughout their lives up to the time of separation. Since then, parenting time has been largely shared, but it is apparent that Mr. A.J.S.A. continues to need to contact Ms. K.L.W. frequently to address parenting issues that arise during his parenting time, and to rely upon her to keep him informed of the children's parenting needs and appointments. I find that much of the heavier lifting of coordinating the children's schedules and supporting them in their learning and activity needs continues to be borne by Ms. K.L.W.

Ability to Meet the Needs of the Children

- [32] Since separation, the evidence establishes that Ms. K.L.W. continues to perform more than an equal share of the parenting obligations. Although Mr. A.J.S.A. is involved in sending emails to the children's teachers and other caregivers, I accept Ms. K.L.W.'s evidence that the children do not keep up with their homework when they are with Mr. A.J.S.A., and that she continues to provide the needed structure for the children to manage the demands on them from school and their extracurricular activities.

- [33] Overall, I am satisfied that Ms. K.L.W. provides a structured and loving environment for the children. Her overall demeanor was generally calm under pressure on the stand, and she demonstrates great sensitivity to the unique needs and strengths of each of the children. She has also had years of practice in providing them with regular routines that allow them to move through the more challenging parts of their day.
- [34] I find that the children are in an equally loving, albeit much less structured, environment when they are with Mr. A.J.S.A.. He did not describe any routines for the children or strategies to assist them, and he described struggles with getting the children to school. He described an excellent learning application that the middle child is able to use to help her with her learning challenges, but (up until mid-trial) he has not imposed any limits on the children's screen time. He suggests that the many hours (frequently in the range of 7-12 hours) that the children spent on their iPads on the dates in evidence during the months of March, April, and May 2023 during his parenting time were just them listening to music or playing learning games. However, the evidence indicates that these were not the main applications being used by the children. Furthermore, I do not accept his evidence that he was effectively monitoring their use before the issue was brought to his attention, and, even then, I find that he is not directly engaging with the children and what they are doing during much of his parenting time, including when they are on their iPads.
- [35] There are many examples in the evidence of Mr. A.J.S.A. needing extra support from Ms. K.L.W. during his parenting time, which lead to the problematic level of communications he engages in. It appears that Ms. K.L.W. is often required to pick up one or more of the girls before a dance event, because Mr. A.J.S.A. is not yet able to support the girls in their preparations. Since becoming a single father, Mr. A.J.S.A. has described himself as learning a lot about raising girls, which is laudable but also indicative of the catching up that he still needs to do. He believes that it is easier to raise the youngest child because he is a boy.
- [36] Nevertheless, I find that Mr. A.J.S.A.'s ability to assist the youngest child and ensure that he makes it to school on time has led to the youngest child missing school, or being late for school, during Mr. A.J.S.A.'s parenting time. On one occasion, Mr. A.J.S.A. lost his temper with the youngest child to the point that the eldest child apparently felt compelled to record the incident. That recording, which was admitted without objection, includes the youngest child sobbing, and Mr. A.J.S.A. yelling and accusing him of lying "like [his] family is teaching him to lie." Mr. A.J.S.A. says that this was a one-time incident, brought on by the stress of having a child that was not ready for school, where he regrettably lost his temper, for which he partially blames Ms. K.L.W.
- [37] The middle child has learning differences that require different approaches to learning and to the structure of her day. At trial, Mr. A.J.S.A. acknowledged her diagnoses of dyslexia, dysgraphia, dyscalculia, and ADHD. However, in both his testimony and communications in evidence, he expressed significant doubts about the accuracy of these diagnoses. His response to this child's elementary school teacher's significant efforts to support her in the classroom were highly antagonistic. His adamancy that this child not see a pediatrician in

relation to this diagnosis has led to significant delays in getting a referral from the children's family doctor for this purpose. The obstacle in that instance, however, seems to relate to a conflict with Ms. K.L.W. getting to choose the pediatrician, as much as it does with his doubts about the diagnosis.

- [38] In the summer of 2023, the parties' PC recommended that they each obtain a parenting coach. While Ms. K.L.W. did retain a parenting coach, Mr. A.J.S.A. testified that this was merely a recommendation and he did not. However, he testified at trial that he was still considering retaining someone. In response to my request that he report back to me with his progress in this regard, I understand that he has since found a parenting coach who has agreed to take him on starting in February 2024. I take into consideration that this coaching may become a good resource for Mr. A.J.S.A. in navigating the deeper waters of independent parenting in which he now finds himself.
- [39] I note that the counselling records in evidence also indicate that Mr. A.J.S.A. can be an enthusiastic and receptive listener when parenting issues are raised with him, and I find that it is reasonable to expect that Mr. A.J.S.A.'s skills and experience will continue to improve over time.

Family Violence

[40] The FLA defines family violence as follows:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[41] Section 31 of the FLA sets out required considerations in assessing the best interests of the children in relation to family violence:

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[42] The broad and inclusive language of these family violence provisions recognizes that harm to children may extend beyond physical violence: *Morgadinho v. Morgadinho*, 2014 BCSC 192 at para. 59. Furthermore, a single act of family violence may suffice to conclude a likelihood in the future: *Dawson v. Dawson*, 2014 BCSC 44 at para. 44.

[43] Family violence need not be directed at a child to harm that child. In the recent decision of *Barendregt v. Grebliunas*, 2022 SCC 22, the Supreme Court of Canada provided further guidance regarding the scope of family violence as it relates to parenting determinations:

[143] The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable. Research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives: Department of Justice, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* (February 2014), at p. 12. Harm can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it: S. Artz et al., "A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth" (2014), 5 I.J.C.Y.F.S. 493, at p. 497.

- [44] In some cases, a pattern of coercive and controlling behaviour is sufficient to find that family violence has occurred and to consider its impact on the safety and well-being of the children involved. For example, in *R.C.T. v. A.K.T.*, 2023 BCSC 654, Justice Donegan found that a pattern of coercive and controlling behaviour, including threats of physical force, demeaning remarks, and abusive communications, both before and after separation, constituted psychological and emotional abuse.
- [45] Ms. K.L.W. says that a similar pattern of behaviour has been established in this case. She says that it pre-existed separation but has escalated since then. She argues that Mr. A.J.S.A. has very little insight into his actions and the way in which his actions and the ongoing conflict are harmful to the children.

Parties' Positions

- [46] Mr. A.J.S.A. says that he is a loving father who is deeply engaged with his children. He is a passionate person who feels things deeply and responds accordingly. Furthermore, part of his nature and the nature of his work demands precision, accuracy, and responsiveness. He says that the lack of precision, accuracy, and responsiveness in Ms. K.L.W.'s communications with him (and those of other care providers to the children such as the children's after-school care providers) are the source of the conflict that plagues this family. Specifically, he says that if Ms. K.L.W. improved her responsiveness to him and provided answers to his questions with more precision, this conflict would be diminished. He believes that good co-parenting requires constant communication and blames the ongoing conflict in the relationship on Ms. K.L.W.'s unwillingness to fully engage with him regarding parenting issues with alacrity and on a daily basis.
- [47] Moreover, Mr. A.J.S.A. says that he has a right to question and challenge Ms. K.L.W. (and others that are involved with the children's education and care) with respect to the children's care. This is part of his parenting style, and he argues that it is only problematic because his right to raise concerns and challenges is not respected by others but is instead perceived negatively.
- [48] Ms. K.L.W. says that Mr. A.J.S.A. has always had a temper and a need for control, which manifested during the course of their marriage. Since separation, she says that he has continued to attempt to control her through his volume and tone of communication. She says that this is effectively a form of family violence, and that the children are negatively affected by it.

Findings

- [49] The evidence establishes that Mr. A.J.S.A. is known by his friends to be quick to anger. He has been in physical altercations with his close friends and suspended from his hockey league multiple times.

- [50] In his evidence, Mr. A.J.S.A. agreed that there had been a lot of fighting between himself and Ms. K.L.W. in 2019, but he did not have a specific recollection of any particular fight in 2016 or 2019. While he denied calling Ms. K.L.W. vulgar names, he acknowledged limits to his memory. I found Mr. A.J.S.A.'s evidence in this regard vague and evasive, and I have preferred the evidence of Ms. K.L.W. (and her sister when she was present) in relation to specific incidents in evidence.
- [51] Ms. K.L.W. says that Mr. A.J.S.A.'s temper was generally not directed towards her until an incident in Mexico in 2016 when he got drunk and yelled at her and called her foul and demeaning names. She found this incident frightening, and his father and brother intervened. Later that year, Mr. A.J.S.A. accused Ms. K.L.W. of kissing a stranger at a concert and dragged her by her arm from the concert. She was again frightened and she locked herself in the bathroom until he calmed down. I find that this latter incident was an act of coercion and control that amounts to family violence.
- [52] When Ms. K.L.W. became pregnant with the parties' youngest child in late 2016, and then when he was a newborn, things settled down. However, at some point in 2019, Mr. A.J.S.A. began showing signs of aggressive and confrontational behaviour, particularly when he was drinking. I find that an incident occurred at the Sproat Lake Property that year when Mr. A.J.S.A. was drinking heavily. He began slamming cupboard doors, and he called Ms. K.L.W. a "cunt" and a "gold-digging whore" and threw a glass into the sink. Ms. K.L.W.'s sister ran next door to ask their neighbours to intervene, but Mr. A.J.S.A. pushed the neighbour out of the cabin and locked the door. I find that Ms. K.L.W. subsequently barricaded herself into a room with the youngest child, who was still a toddler at that time. Her sister barricaded herself into the other bedroom with the girls. They were frightened and stayed up all night, texting each other, and then left with the children at 6 a.m. the next morning. I find that this incident amounts to family violence, which the children experienced directly.
- [53] The parties separated after this incident for a couple of weeks, after which Mr. A.J.S.A. promised to stop drinking and go to counselling. The parties then reconciled. However, I find that Mr. A.J.S.A. began drinking again in 2020 and stopped seeing his counsellor. He could get very angry when he was drinking. Around this time, the eldest child, who was 8 or 9 at the time, became very sensitive to her father's moods and began informing Ms. K.L.W. of Mr. A.J.S.A.'s mood when Ms. K.L.W. came home from work. This is highly troubling and indicative of the children experiencing the effects of family violence.
- [54] On their anniversary weekend in July 2021, while they were in the process of moving into the Family Home, the parties spent the weekend at the Sproat Lake Property with their friends. I accept Ms. K.L.W.'s evidence that, over lunch with friends at a pub, Mr. A.J.S.A. accused her of wanting to "fuck" someone at a different table at the pub. I also accept Ms. K.L.W.'s evidence that he then threw a glass of wine in her direction. I find that this incident was an act of coercion and control that is indicative of a pattern of behaviour that amounts to family violence.

- [55] After this incident, Ms. K.L.W. told Mr. A.J.S.A. that the marriage was over, and she left with the children to go back to their home in Nanaimo.
- [56] At that time, the parties had three children and two dogs. They began alternating time at the Family Home, with Mr. A.J.S.A. travelling to Victoria two nights a week for work and going to the Sproat Lake Property when Ms. K.L.W. had the children at the Family Home, and Ms. K.L.W. living at her mother's house when Mr. A.J.S.A. was with the children. I find that the children experienced a considerable amount of conflict between the parties during this period. This conflict culminated on Christmas Eve of 2021, when Mr. A.J.S.A. shoved Ms. K.L.W.'s bags at her and told her to leave the Family Home.
- [57] Ms. K.L.W. then moved into her mother's basement suite with the three children and two dogs, where she lived until the summer of 2022. I find that during this time, and until the December 2022 Order, Mr. A.J.S.A. would not agree to a division of the household items or furniture, leading Ms. K.L.W. to scrape together furniture, toys, and books from friends, family, and thrift stores.
- [58] I reject Mr. A.J.S.A.'s evidence that he provided everything that Ms. K.L.W. requested, but that she did not properly request things. The email exchanges in evidence establish that Ms. K.L.W. was asking for household items throughout this period, and Mr. A.J.S.A.'s responses were unhelpful (for example, demanding greater precision in her lists and questioning her listing abilities). He continued to take this position in court. He did not provide the household items requested until after the December 2022 Order was made. Even then, he did not comply with this Court's order requiring that Ms. K.L.W. be allowed to enter the Family Home and for the parties to alternate choosing household items. Instead, he purported to accept her previous lists, and then placed the items he considered to be adequately described in the garage for her to pick up. I accept Ms. K.L.W.'s evidence and argument that this did not result in an equal division of the family household items, and Mr. A.J.S.A. continues to retain items of particular significance to her.
- [59] Mr. A.J.S.A. took a similar overly-technical view of more specific orders made in December 2022. Associate Judge Dick ordered Ms. K.L.W. to provide Mr. A.J.S.A. with digital copies of family photographs in her possession. She also ordered Mr. A.J.S.A. to provide a special painting gifted to Ms. K.L.W. by her stepfather that was located at the Sproat Lake Property. Mr. A.J.S.A. testified that Ms. K.L.W. did not provide him with those photographs. However, his email communications to Ms. K.L.W. at this time indicate that he did receive a series of links from Ms. K.L.W. containing files of family photographs, but that he was unprepared to open them and save them for himself until such time as he had examined them for her compliance with the Order. He indicated that he would not be providing the painting to Ms. K.L.W. until he was so "satisfied." He was still telling her that he had not had time to verify those files three weeks later. Ultimately, when he did open the links, some had expired. Although Mr. A.J.S.A. says that Ms. K.L.W. must have withdrawn the links; I accept Ms. K.L.W.'s evidence that she did not do so, and it was his own delay in opening the files that led to the photo links' failure when he eventually opened them.

- [60] Overall, I find that the emails and other communications between the parties in evidence demonstrate a very concerning pattern of communication between the parties since separation. Mr. A.J.S.A. sends Ms. K.L.W. multiple confrontational and often lengthy communications in a day, and has continued to do so even after a series of conduct orders limiting the number of communications he can send in a week, short of an emergency. He has interpreted the term "emergency" in the December 2022 Order as "emergent" and he uses texts and emails (that are allowed only in the case of an emergency) for anything arising during the week, so as not to "waste" his court-limited number of communications through the Our Family Wizard application.
- [61] The tone of Mr. A.J.S.A.'s communications is equally problematic. In his communications to Ms. K.L.W., he uses all caps and large fonts to effectively yell over email. Many of the written communications in evidence are confrontational and demeaning. Rather than answering questions concerning critical and time-sensitive decisions related to the children, Mr. A.J.S.A. often responds with demands and ultimatums, emphasizing Ms. K.L.W.'s perceived shortcomings rather than resolving the parenting issue raised.
- [62] Mr. A.J.S.A. seeks orders that Ms. K.L.W. be required to respond more promptly to his communications, and he suggests that her practice of limiting how often she checks and responds to messages from him to only twice a day is inadequate and indicative of her poor parenting ability to effectively co-parent the children. In closing submissions, he further argues that the parties' communication problems are Ms. K.L.W.'s fault, because she does not respond to him with the precision and alacrity that he requires.
- [63] Having heard both parties' evidence in this regard, and having reviewed the written communications in evidence, I find that both the quantity and substance of Mr. A.J.S.A.'s communication post-separation amounts to harassment and is indicative of ongoing attempts to control Ms. K.L.W.
- [64] I also find that Mr. A.J.S.A. demonstrates no self-awareness of the inappropriateness of his communications and has not taken steps to prevent this behaviour from continuing. To the contrary, he has not complied with the conduct orders made by this Court limiting his communications to use of Our Family Wizard only. As noted above, Mr. A.J.S.A. parses the December 2022 Order closely and considers that it allows him significant latitude to send emails and texts on anything newly arising.
- [65] He also treats communications with third-parties copied to Ms. K.L.W., such as the children's teachers, health care providers, or the PC, as not counting towards his court-ordered limits on communication with Ms. K.L.W. Many of the emails in evidence fall under this category and raise the same concerns in terms of their quantity, tone and substance.

- [66] The evidence establishes that the children have been affected by this conflict, both before and after separation. The fact that the eldest child was greeting her mother coming home from work with an assessment of her father's mood is damaging evidence in this regard. This same child has taken it upon herself to record her father's outbursts, particularly those directed to the youngest child of whom she appears to be protective, and to send them to her mother. I accept Ms. K.L.W.'s evidence that this was not at her request.
- [67] In addition to being regularly exposed to ongoing verbal conflict between the parties, there is also evidence that Mr. A.J.S.A. is bringing the children directly into the conflict, and using his parenting time and communications with the children to engage in unnecessary conflict with Ms. K.L.W. The children have also been affected by his failure to provide Ms. K.L.W. with a division of the household items, furniture, and toys from their Family Home. Finally, the children have been affected by the conflict in communications that leaves issues that are important to them, such as what school they will attend or who will take them to an important dance event, unresolved until the last possible moment.

The Children's Experience

- [68] Since January 2023, the children have attended counselling. In lieu of calling the children's counsellors, the parties relied upon emails and a series of written responses from the children's counsellors. Although these responses are not sworn testimony, both parties relied upon them and agree that I can rely upon them for the truth of their contents. They are also the closest thing I have to a report on the children's perspectives, given that the ordered s. 211 report was not prepared.
- [69] Those reports are reassuring in that they indicate that the children love each of their parents and wish to continue to spend time with both of them. They raise no direct concerns regarding the incidents of family violence noted above. However, they indirectly indicate a number of concerns that I find are likely related to the high level of ongoing conflict between the parties.
- [70] For example, the counselling reports for the youngest child indicate that, in the first few months of counselling, he was suffering from a form of selective muteness. The report indicates that he is highly sensitive to the "big emotions of others around him" and suggests that counselling for his parents "to be less emotionally activated" might be more beneficial than continuing his own counselling.
- [71] In the first half of 2023, all three children have suffered from stomach-aches that appear to have been largely anxiety or avoidance related. For the youngest two children, these stomach-aches were causing them to miss school and counselling from time to time. All three children are identified as suffering from anxiety related to their parents' inability to communicate, as well as the uncertainty and instability caused by their parents' conflict.

- [72] The eldest child has expressed in counselling that she has witnessed her parents arguing and that she feels caught in the middle of her parents' conflict. The eldest child has also raised with her counsellor the difficulty with the shorter 2-2 portion of their 2-2-5-5 parenting rotation, which inhibits her ability to communicate with her parents about difficult issues for fear of ruining the short time she has with them. The middle child's counsellor raises a similar issue regarding the child's difficulty with communicating difficult issues.
- [73] Since completing counselling in the fall of 2023, and with the move from a French immersion program to an English program for the two youngest children, the counsellors note significant progress for all three children. The children's report cards also indicate that the two younger children are doing better this school year.

Maximum Contact Principle

- [74] While a healthy connection to each of their parents is generally considered beneficial to children, the maximum contact principle is not a factor included in the FLA in determining the best interests of the child.
- [75] Section 16(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) provides that "In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child." The Supreme Court of Canada recently commented on this provision in *Barendregt* as follows:
- [134] Although Gordon placed emphasis on the "maximum contact principle", it was clear that the best interests of the child are the sole consideration in relocation cases, and "if other factors show that it would not be in the child's best interests, the court can and should restrict contact": Gordon, at para. 24; see also para. 49. But in the years since Gordon, some courts have interpreted what is known as the "maximum contact principle" as effectively creating a presumption in favour of shared parenting arrangements, equal parenting time, or regular access: *Folahan v. Folahan*, 2013 ONSC 2966, at para. 14 (CanLII); *Slade v. Slade*, 2002 YKSC 40, at para. 10 (CanLII); see also F. Kelly, "Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts" (2011), 49 Osgoode Hall L.J. 277, at pp. 278 and 296-98. Indeed, the term "maximum contact principle" seems to imply that as much contact with both parents as possible will necessarily be in the best interests of the child.
- [135] These interpretations overreach. It is worth repeating that what is known as the maximum contact principle is only significant to the extent that it is in the child's best interests; it must not be used to detract from this inquiry. It is notable that the amended Divorce Act recasts the "maximum contact principle" as "[p]arenting time consistent with best interests of child": s. 16(6). This shift in language is more neutral and affirms the child-centric nature of the inquiry. Indeed, going forward, the "maximum contact principle" is better referred to as the "parenting time factor".

[Emphasis in original.]

[76] Although the parties have indicated at trial that they are relying on the FLA and not than the Divorce Act in relation to the parenting analysis, I consider that the best interests of the children in this case are also informed by the above guidance.

Parenting Time

[77] Relying on *Yu v. Jordan*, 2012 BCCA 367 at paras. 47-57, the parties agree that the April 2023 Order providing for equal shared parenting time and shared parenting responsibilities was an interim order, and that I need not find a material change in circumstances before varying that order.

[78] I accept this analysis. In any event, I consider that the evidence before me establishes that the current parenting time and responsibility regime is not in the best interests of the children.

[79] In particular, I find that the children would significantly benefit from longer stretches with Ms. K.L.W. in a more structured environment, particularly during the school week when they need support with their school work. I also consider that the 2-2-5-5 pattern is not in their best interests, and that a parenting schedule with fewer mid-week transitions will help the younger children who are struggling with anxiety and transitions during the school week.

[80] In making this finding, I am aware that the children are improving in school under the current regime, and that the middle child in particular has been improving since leaving the French immersion program and having regular Orton-Gillingham tutoring and an individual education plan to support her learning differences.

[81] I am also not convinced that this is a case where shared parenting is not workable. Mr. A.J.S.A. is a loving parent, and Ms. K.L.W. does not question the children's safety with him. She says that he is a good father when he has support. I agree with this assessment, and I consider a small shift, while still maintaining a shared parenting regime, is in the children's best interests.

[82] I therefore order that parenting time going forward shall be on a 3-2-5-4 rotation, with Ms. K.L.W. having the children Monday, Tuesday, and Wednesday nights (to Thursday morning) in the first week, and Mr. A.J.S.A. having the children Thursday and Friday night (to Saturday morning) of that week. Ms. K.L.W. will then have the children Saturday morning to Thursday morning, and Mr. A.J.S.A. will have them Thursday through to Monday morning of the second week.

- [83] Transitions on Mondays and Thursdays shall be at school or at any extracurricular activity scheduled before school. On Saturdays, or if there is no school on a transition weekday, transitions will be at 9 a.m. or at an extracurricular activity scheduled for that transition morning, such as dance, skating, or gymnastics, with the parenting party dropping the children off at the activity. As the children grow older, they may also choose to walk between the two homes for their non-school transitions.
- [84] Generally speaking, the children should be dropped off at school, their activities, or at the other party's house with everything they need for school the next day. There should be no need for the parties to attend at the other party's home. If a child needs something from the other house, they can communicate directly with their parent to arrange that.
- [85] The parenting time for school breaks in December and March shall be shared equally week on/week off, and in the summer, each parent will be entitled to two full non-consecutive weeks with the children, which the parties may agree to make consecutive. The PC can determine the parties' holiday schedule for 2024, after which the choice of weeks shall alternate between the parties.
- [86] Requests for alterations to this schedule shall be communicated through Our Family Wizard. The parties shall use the Yes/No option to respond to these requests.
- [87] Our Family Wizard scheduling functions shall also be used for the purposes of scheduling school breaks and vacation weeks.
- [88] I turn then to parenting responsibilities.

Parenting Responsibilities

- [89] One of the factors I must consider in relation to the best interests of the children is whether the parties are able to communicate effectively in the best interests of the children.
- [90] I find that the pattern of communication Mr. A.J.S.A. engages in has been extraordinarily ineffective at resolving important parenting decisions. Even those decisions that have ultimately been resolved, including moving the two younger children out of French immersion to address their learning needs, were accomplished with more delay, conflict, and uncertainty than is good for the children. As at the date of the trial, Mr. A.J.S.A. had still not agreed to allow the middle child to get a referral to a pediatrician to discuss her learning differences, and had actively obstructed Ms. K.L.W.'s efforts in that regard.
- [91] The parties have now tried shared parenting responsibilities with the assistance of a PC and orders from this Court regarding appropriate communications. I find that the use of the PC has not been effective at resolving the conflicts between the parties in a timely way. Nor has it broken the pattern of controlling and harassing communications Mr. A.J.S.A. sends to Ms. K.L.W. To the contrary, the emails with the PC, which are required to be copied to both parties, have become another site for demeaning and harassing communications.

- [92] I find that continuing these efforts and this pattern of communication are not in the best interests of the children. Other than routine parenting decisions made while the children are in the day-to-day care of one party pursuant to s. 41(a) of the FLA, the parties each ask that I grant them final decision-making authority when they are unable to resolve areas of conflict between them with respect to the children.
- [93] I agree that such an order is required in this case, given that other reasonable alternatives have failed.
- [94] I find that it is in the best interests of the children that Ms. K.L.W. should have this final decision-making authority in light of her history as the primary caregiver to the children, her ongoing role as the main organizer and facilitator of the children's activities and schooling, and her non-confrontational approach to communications.
- [95] The parties shall use Our Family Wizard to post and calendarize significant events in the children's lives, including report cards, parent-teacher conferences, birthday party invitations on the other parent's parenting time, sporting or dance events, and doctor's appointments, etc. For non-routine doctor's appointments (e.g., appointments with specialists or a pediatrician for the middle child), Ms. K.L.W. shall not schedule any appointments on Mondays and Tuesdays when Mr. A.J.S.A. is generally not available to attend, without consent or a court order. She will also provide him with a week's notice of any such appointments. This shall not apply to appointments with the children's regular family doctor, including to obtain referrals to specialists. The parties may also schedule other routine appointments on their own parenting time, or during the other parent's parenting time with consent.
- [96] For parent-teacher conferences or meetings with other caregivers, the parties shall request separate conferences to the extent that this can be accommodated. I hope that this will prove unnecessary in the longer term, but I find that it is necessary for the foreseeable future.
- [97] The PC has been retained until May 2024. She will no longer be involved in making final determinations with respect to parenting responsibilities, but she may still assist the parties to consult each other on parenting decisions until the end of her mandate, and to determine the children's holiday schedules for the spring, summer, and winter breaks in 2024. She also has a determination pending before her on whether there should be consistent screen time limits in both homes and what they should be. Both parties have sought a consistent approach between the homes, and greater consistency between the children's homes is clearly supported in the counselling evidence. I am hopeful that this determination will be completed before the end of the PC's mandate.

Conduct Orders

- [98] Many of the conduct orders already in place, including that the parties shall not speak negatively about the other parent to, or in front of, the children, are still required and shall remain in place.
- [99] The communication-related orders have not been sufficient to adequately reduce the flow of communications between the parties, or the conflict that they generate. I therefore make the following orders in place of previous orders related to party-to-party communications, including those in the September 2022, December 2022, and April 2023 Orders:
- 1) For all daily non-emergency events, such as sharing third-party documents like the children's test results from school exams, posting photographs, calendarizing extracurricular activities, receipts for s. 7 expenses, or sharing birthday party invitations, the parties shall exclusively use the corresponding features of Our Family Wizard. None of these routine events should require enquiries of the other parent. Rather, they should be purely informational postings;
 - 2) When consultation is required with respect to a decision concerning a parenting responsibility, such as a change in school program, the middle child's treatment options, or adding to or ending one of the children's extracurricular activities, the parties may use the general communication function of Our Family Wizard. Communications shall be civil and no longer than necessary to convey each parent's position and concern;
 - 3) Mr. A.J.S.A. shall be limited to initiating no more than two messages a week and posting no more than one responsive message to any message sent by Ms. K.L.W. Ms. K.L.W. shall be entitled to use the function on Our Family Wizard that gathers his communications and makes them available once per day at a time of her choosing. Unless the issue Mr. A.J.S.A. raises is an emergency in the true sense of that word, she shall respond to the parenting issue within two days, and Mr. A.J.S.A. shall do the same;
 - 4) The parties shall not communicate by email. This includes through carbon copy or blind copy communications with third-parties; and
 - 5) The parties shall only communicate by text or phone in the event of a true emergency relating to the children, such as a child needing medical attention or a child going missing. Otherwise, the parties are expected to be able to handle situations as they arise while the children are in their care, and to post any important information regarding such situations that the other parent ought to be aware of on Our Family Wizard.

SUPPORT ISSUES

- [100] Because I have made parenting orders that maintain a shared parenting regime, both of the parties' income for support purposes must be determined in accordance with the Guidelines.

Ms. K.L.W.'s Guidelines Income

[101] Ms. K.L.W. is a registered nurse and earns income only as a T4 employee, making her income straightforward for support purposes. Since separation, she has returned to full-time work for the first time since the parties' first child was born in 2012. The parties are agreed that her Guidelines income is as follows:

- 1) 2021: \$61,038;
- 2) 2022: \$92,173; and
- 3) 2023: \$114,000.

[102] I am satisfied that the child tax benefit and other child benefits Ms. K.L.W. received are not treated as income for table amount purposes under the Guidelines: Schedule I, note 6.

Mr. A.J.S.A.'s Guidelines Income

[103] The parties retained Ron Tidball, a certified business valuator and Guidelines income calculation expert, as their joint independent business valuator to value Mr. A.J.S.A.'s three corporations and to calculate his Guidelines income.

[104] Since separation, Mr. A.J.S.A. has continued to work as a financial advisor as a part-owner of Saints. He is the sole shareholder of AJSTA Enterprises Inc. ("AJSTA"), which is his holding company, into which he draws income and dividends from Saints. Mr. A.J.S.A.'s income is a combination of T4 income and dividends paid to him through AJSTA, in part based on the recommendations of his personal accountant, Jared Cross, who assists him with minimizing taxes from income drawn from Saints into AJSTA and, in turn, from AJSTA into his own hands.

[105] In his expert reports, Mr. Tidball calculated Mr. A.J.S.A.'s Guidelines income available for support purposes based on the pre-tax corporate income available to him through Saints as follows:

- 1) 2021: \$611,667; and
- 2) 2022: \$707,201.

[106] Mr. Tidball also calculated Mr. A.J.S.A.'s pre-separation income on the same basis. According to Mr. Tidball, his available pre-tax corporate income has almost doubled since 2019 and 2020, when the pre-tax corporate income available to him from Saints would have been closer to \$370,000, while it was closer to \$260,000 in 2018.

[107] Mr. A.J.S.A. takes issue with Mr. Tidball's Guidelines income calculation on a number of grounds, and he cross-examined Mr. Tidball on his methodology and conclusions. Fundamentally, he disagrees that half of Saints' net income is presumptively available to him for support purposes merely because he owns 50% of Saints. He argues that "[i]t is obvious the shareholders should not have to remove all the retained earnings year after

year" to satisfy child support obligations. He argues that if he accessed all of this income, there would be insufficient working capital in Saints. He also argues that his future income is as unpredictable as the markets he works with, and his business is fraught with other risks, including the loss of clients, changing interest rates, and fees not accounted for by Mr. Tidball.

- [108] Mr. A.J.S.A. also raised more specific concerns with Mr. Tidball's opinion, including that Mr. Tidball removed most of AJSTA's claimed Canada Revenue Agency ("CRA") expenses from the income available to Mr. A.J.S.A. (including his home office expenses), and that Mr. Tidball improperly considered profitability in 2021 and 2022 as regular income when those profits were based on a one-time "confluence of events." He says that his assets under management ("AUM") actually declined in 2022. Mr. A.J.S.A. also questioned Mr. Tidball on changes to his spreadsheets and inconsistencies in his methodologies as between his 2020-2021 and 2021-2022 income calculations.
- [109] On his own evidence, Mr. A.J.S.A. has benefitted from a recent "confluence of events" that have resulted in significantly higher incomes to Saints, AJSTA, and himself since separation. These include the following events in 2021:
- 1) Mr. A.J.S.A. and his brother had recently completed the buyout of their father's shares, resulting in higher earnings in Saints compared to the previous years;
 - 2) Saints also purchased two books of business that were fully paid off in 2020 and 2021, resulting in significant extra earnings in the 2021 fiscal year;
 - 3) Saints took over another book of business, and the gross revenue of the Gonzales book began to be paid to Saints in late 2020 and is reflected in the fiscal year 2021; and
 - 4) The market itself went up 14% in 2021 and drove the Saints' AUM higher.
- [110] Mr. A.J.S.A. says that the above factors brought in approximately \$600,000 more to Saints in the 2021-2022 fiscal year. He also acknowledges that the first three factors are expected to continue to result in higher earnings in future years, particularly when compared to earnings before separation.
- [111] However, Mr. A.J.S.A. says that there is no need to go beyond his T4 income to determine his income for support purposes. He says that the income he receives through AJSTA is \$390,000 per year, based on the last three years of commissions paid from Saints to AJSTA. He argues that the additional \$450,000 in dividends he took out in 2022 was a one-time occurrence to address his anticipated costs of buying out Ms. K.L.W.'s interest in family property, and should therefore not be considered part of his regular income. While he declared approximately \$200,000 of this amount as income in 2022, this was part of an overall tax strategy that he says kept more money available to him and the children. He argues that his support obligations should exclude this draw and be based on his regular Line 15000 income instead.

- [112] If the Court does not accept his Line 15000 income as fully reflecting his income available for support purposes, Mr. A.J.S.A. then argues that only the amounts paid by Saints into AJSTA in any given year should form the basis of his income, less 50% of AJSTA's gross declared expenses, averaged over the last three years. He says that this results in an income of \$430,000 for 2020-2022, and that this figure should also be his presumed income for 2023 and going forward.
- [113] As noted above, Mr. A.J.S.A. has not disclosed Saints' financial information or earnings to Mr. Tidball (or to Ms. K.L.W.) since the end of August 2022. Mr. Tidball was therefore unable to provide updated income calculations for 2023 or the fiscal year-end for his corporations in August 2023.
- [114] Ms. K.L.W. asks that I make an adverse inference that Mr. A.J.S.A.'s income has continued to increase based on his refusal to provide any updated financial information regarding his or Saints' income since August 2022. An inference that Mr. A.J.S.A.'s income will continue to increase is also supported by Mr. Tidball's opinion that the income available from Saints to Mr. A.J.S.A. has not declined year-over-year, and that an upward trend will likely continue.
- [115] Given the financial records before me, as well as Mr. A.J.S.A.'s own evidence regarding the events in 2020-2021 that resulted in higher earnings, I find that this conclusion is more likely than not to be true.
- [116] Ms. K.L.W. says that I should accept Mr. Tidball's assessment of Mr. A.J.S.A.'s income. She argues that most of his complaints about Mr. Tidball's conclusions are complaints about the Guidelines themselves, which specifically direct the consideration of available business income when declared T4 employment income is not a full or accurate reflection of the funds available to a support payor.

Determination

- [117] The Supreme Court of Canada's decision in *D.B.S. v. S.R.G.*, 2006 SCC 37 identifies the following core principles underlying child support obligations (at paras. 38, 107):
- a) Child support is the right of the child;
 - b) The right to support survives the breakdown of a child's parents' marriage;
 - c) Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together;
 - d) The specific amounts of child support owed will vary based on the income of the payor parent; and
 - e) A payor parent who knowingly avoids or diminishes their support obligation to their children should not be allowed to profit from that conduct.

- [118] The calculation of a spouse's income for child support purposes is governed by ss. 16-20 of the Guidelines. The starting point is that a party's annual income for support purposes is determined using the sources of income set out under the heading "Total Income" at Line 15000 of the CRA T1 general form.
- [119] However, where the court is of the view that the Line 15000 income "would not be the fairest determination of that income," then the court may do a number of things: Guidelines, s. 17(1).
- [120] If the court is satisfied that a payor spouse's income varies and does not demonstrate a clear upward or downward trend, then "the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income, or receipt of a non-recurring amount during those years": Guidelines, s. 17(1). Often, the court will average those three years, but s. 17(1) provides the court with broad discretion to consider a greater span of years, or to find that some years are more reliably indicative of the amounts available to that spouse to pay support obligations: *Reid v. Reid*, 2017 BCCA 73 at para. 122, citing *Harras v. Lhotka*, 2016 BCCA 246 at para. 21. While this discretion is broad, "it is not to be exercised arbitrarily": *Reid* at para. 122.
- [121] However, averaging income pursuant to s. 17(1) is generally inappropriate where there is a sustained decline or increase in income over time, as opposed to a fluctuation. The principles of income-averaging were recently discussed by the Court of Appeal for British Columbia in *Philips v. Saunders*, 2020 BCCA 265:
- [24] The discussion that follows in *Harras* supports the view that s. 17 averaging is appropriate where there are large annual fluctuations in income (*Dornik v. Dornik*, 1999 BCCA 627; *Cornelissen v. Cornelissen*, 2003 BCCA 666) and inappropriate where there is evidence of consistently declining or consistently increasing income (*de Bruijn v. de Bruijn*, 2011 BCSC 1546; *Jakob v. Jakob*, 2010 BCCA 136)
- [122] With respect to a steadily increasing pattern of income, as is evident in Mr. A.J.S.A.'s case, the Court of Appeal for British Columbia in *Jakob v. Jakob*, 2010 BCCA 136 at para. 45 found that averaging incomes results in an error in principle in some cases. The Court then cites Justice MacKenzie's comments in *Kim v. Kim*, 2006 BCSC 1330 as follows:
- [24] ... where there is a steady increase in income, even taking the average income is not appropriate as a steady increase is not a fluctuation. When income is increasing, it is not appropriate to choose any other than the most recent income: *K.K.S. v. C.S.S.*, 2004 BCSC 26, at [paragraph] 18.
- [123] Section 18 of the Guidelines provides that where a spouse is a shareholder, director, or officer of a corporation and their Line 15000 income does not fairly reflect all the money available to that spouse for the payment of child support, the court may, in addition to relying on s. 17, include all or a part of the corporation's "pre-tax income."

[124] With respect to the availability of a corporation's pre-tax income for support purposes, the jurisprudence places the onus on the payor spouse to establish, through evidence, the reasonableness of deductions and the need for working capital to sustain the corporation that should be excluded from this calculation: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52, leave to appeal to SCC ref'd, 33101 (11 June 2009); *Wiebe v. Treissman*, 2017 BCSC 1523 at para. 94; *C.M. v. V.M.*, 2016 BCSC 2144 at paras. 39-40; and *M.T. v. J.S.*, 2023 BCCA 64 at paras. 8-9. In the absence of "clear and substantiated evidence" that the corporation's pre-tax income is needed to sustain the company as a viable enterprise, and it is therefore not available to the payor spouse, the court should presume that all of the pre-tax corporate income is available to the payor for child support purposes.

[125] For example, this Court stated in *Wiebe*:

[94] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. It is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense. It is not the other party's responsibility to hire, nor is it the court's obligation to appoint, an accountant or other professional to assess and challenge the reasonableness of the deduction, although of course both are at liberty to do so in appropriate circumstances. For a recent affirmation of these principles, see *Cunningham v. Seveny*, 2017 ABCA 4.

[Emphasis in original.]

[126] In *Hausmann*, the Court of Appeal for British Columbia endorsed the view that the payor spouse must provide "clear" evidence that the corporation's pre-tax income is needed to sustain the company as a viable enterprise and is therefore not available to the payor: at para. 51. Otherwise, the court may presume that all of the pre-tax corporate income is available to the payor for child support purposes. In *Hausmann*, the Court of Appeal found:

[51] ... there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor. As discussed in *Jeffery v. Motherwell*, 2006 BCSC 140, 36 R.F.L. (6th) 377, at para. 13:

Kowalewich has been applied on other occasions by judges of this court and is binding authority. One of those cases *Bartkowski v. Bartkowski* (2003), 37 R.F.L. (5th) 242 (B.C.S.C. [In Chambers]), albeit dealing with very different factual circumstances in that the payor contended that his line 150 income was inflated to take advantage of tax benefits, the court said this about the authorities post *Kowalewich*:

I am of the view that these cases reveal an emerging presumption that the corporation's pre-tax income will be assumed to be available to the shareholder payor for the payment of child support unless compelling evidence is led by the payor spouse to support the conclusion that re-investment is necessary to sustain the company as a viable enterprise. ... (para. 51)

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While Bartkowski says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by Kowalewich.

[52] I respectfully agree with the above comments in *Jeffery v. Motherwell*.

[Emphasis added.]

[127] Most recently in *M.T.* at para. 17, the Court of Appeal for British Columbia found that the trial judge erred in conflating the test for reasonableness of an expense for the purposes of determining Guidelines income with the test for reasonableness under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). In so finding, the Court of Appeal added back 50% of the challenged deductions to the respondent's income because they conferred a personal benefit.

[128] I have carefully reviewed Mr. Tidball's report with respect to the income available to Mr. A.J.S.A. for support purposes, including his oral evidence in direct and cross-examination. Overall, I am satisfied that Mr. A.J.S.A.'s declared T4 income is only a subset of the income available to him through Saints and AJSTA, and that he takes, and retains, income in various forms from both of these corporations depending on their tax consequences to him in any given year. I therefore find that an income calculation based solely on Mr. A.J.S.A.'s declared Line 15000 income does not represent a fair or accurate account of his available income.

[129] Given that Mr. A.J.S.A. earns all of his income through the corporate income of corporations he controls, I find that ss. 18 and 19 of the Guidelines properly apply to his income calculation. This requires a consideration of Saints' pre-tax income and a review of expenses deducted from that income to non-arms length persons (such as his holding company) and for expenses deducted from income from which the spouse derives a personal benefit. I note that s. 19(2) of the Guidelines specifically provides that "the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act."

[130] I find that Mr. Tidball followed the methodology contemplated in the Guidelines for the purposes of calculating Guidelines income, in which he has acknowledged expertise. In doing so, he has also made allowance for a retained cash position of \$532,607 (based on retained earnings as at August 31, 2017) to sustain Saints' operations, even while expressing doubt that this particular corporation needs that level of working capital given its non-capital-intensive nature. He has also identified the dividends paid to Mr. A.J.S.A. and his brother of \$450,000 each in 2022 and properly excluded them from his calculation of pre-tax corporate income, understanding that these dividends are based on retained earnings that are potentially retained over multiple years and not only from income earned in the

2021-2022 fiscal year.

- [131] I am satisfied that the discrepancy between Mr. Tidball's spreadsheets for the 2020-2021 tax year and the 2021-2022 tax year was based on a favourable assumption available to Mr. A.J.S.A. in 2020-2021 that was no longer available in 2022. I am also satisfied that Mr. Tidball's assumptions were generally favourable to Mr. A.J.S.A. in this regard and with respect to other aspects of his report.
- [132] However, Mr. Tidball did not assume that Mr. A.J.S.A.'s claimed expenses for his home office, cell phone, car insurance, and various fast food and other incidentals, were unavailable to him for support purposes. I find that the claimed expenses deducted for income tax purposes were properly added back to Mr. A.J.S.A.'s income for support purposes under the Guidelines. T4 employees do not get to deduct such expenses that may be equally related to their ability to earn income. The income available to a spouse for Guidelines purposes properly excludes claims for expenses that are generally paid out of a spouse's income and confer a benefit to themselves.
- [133] In any event, despite Mr. A.J.S.A.'s objections as to the reasonableness of expenses he deducts within AJSTA, he provided little evidence to substantiate the need for these deductions or their required amount, or how they differed from the deductions already made with respect to Saints' claimed business expenses (all of which were left intact by Mr. Tidball).
- [134] Mr. Tidball's report is based not only on the distributed earnings of Saints in the above years, but also its undistributed earnings earned in each year. This is confusing to Mr. A.J.S.A. because he says he would never draw all of the earnings, and that he would need his brother's consent to draw his 50% share, which he says would not be granted. In this regard, he relies on the financial statements showing that Saints has approximately \$1.5 million in annual expenses as shown on its 2022 financial reports. He argues that this full amount must be retained as working capital in order not to compromise Saints' integrity.
- [135] Mr. Tidball disagrees and notes that Saints' revenues have always covered its expenses, based on the many years of financial records disclosed. Furthermore, a review of those financial statements shows that more than half of these expenses in recent years are commissions paid out to Mr. A.J.S.A., his brother, and others, based on their commissions earned. Overall, I find that the evidence, including Saints' financial statements, does not support the assertion that more than \$500,000 must be retained in Saints as working capital every year. I therefore accept Mr. Tidball's opinion and evidence on this point.
- [136] Nor do I consider it necessary or appropriate to discount the amounts available to Mr. A.J.S.A. on the basis that his brother controls the amount of income that he can remove from his 50% interest in Saints. No shareholder agreement was provided in relation to this, and Mr. A.J.S.A.'s brother was not called as a witness. Rather, I accept Mr. Tidball's expert assessment of the availability of this income to Mr. A.J.S.A. as a matter of business valuation. I also note that a similar approach of imputing the pre-tax income available from

a family company as roughly proportionate to the interest of the payor spouse's interest in the family company under the Guidelines was endorsed by Justice Butler in *Shapiro v. Simpson*, 2015 BCSC 1361, where a payor spouse was a 1/3 owner in a family company with his brother and mother: at paras. 26, 31, 36-38.

- [137] Finally, I find that averaging Mr. A.J.S.A.'s income is not appropriate in this case. The evidence shows a steady and sustained increase in the income available to him from Saints. The evidence also strongly supports an inference that Saints' income will continue to grow as it pays off additional books of accounts that have been acquired more recently. I find that had the financial statements disclosed a decrease in Saint's income, Mr. A.J.S.A. would have likely disclosed his financial statements for 2022-2023 prior to trial in support of his case.
- [138] In conclusion, I accept Mr. Tidball's calculation of Mr. A.J.S.A.'s Guidelines income available for support purposes as \$611,667 in 2021 and \$707,201 in 2022, and I find that this income likely increased again in 2023.

The Regulatory Complaint

- [139] Mr. A.J.S.A. also says that his ability to earn income in the future has been reduced because of a complaint Ms. K.L.W. made to his regulatory body after he attached some of her financial records (that he had access to as her financial advisor) to an affidavit in this family matter. He says that although the complaint was dismissed, he had to pay legal fees to defend himself during the regulatory inquiry, and he is now more vulnerable to a further complaint that may affect his ability to earn income, particularly complaints by Ms. K.L.W. The whole incident was highly upsetting and offensive to him.
- [140] Outside of the full context of this case, Ms. K.L.W.'s regulatory complaint might appear to be an overreaction to a minor error on Mr. A.J.S.A.'s part, resulting in unnecessary procedural delays and legal costs for him. However, when viewed in the context of all of the evidence, I find that Ms. K.L.W. might reasonably have perceived Mr. A.J.S.A.'s error as part of a disturbing pattern of his non-disclosure of financial information in the family litigation, together with his continuing exercise of control over her financial information and affairs.
- [141] Had Mr. A.J.S.A. previously listed all of the financial documents belonging to Ms. K.L.W. that were in his possession and control (including those that he had access to as her financial advisor), there would have been no issue. These records would have been listed documents available to either party. The issue only arose because he continued to have direct access to Ms. K.L.W.'s financial records as her financial advisor, that Ms. K.L.W. herself did not have direct access to, and he attached a part of those records to an affidavit when it was strategically beneficial to him in the context of the litigation.
- [142] Given the context of the relationship and his ongoing efforts to exert control over Ms. K.L.W., I find that it was not unreasonable for Ms. K.L.W. to make the inquiries she did--first to his company, and then to his regulator--as to the limits of Mr. A.J.S.A.'s access to her financial records. I accept Ms. K.L.W.'s evidence that her inquiry led to the regulatory body

opening an investigation of its own accord because of the seriousness with which they took her report. Nor did they allow Ms. K.L.W. to withdraw the complaint, which she attempted to do so as soon as it became apparent that it would complicate the resolution of this family case.

- [143] Furthermore, I find that the regulatory body did not dismiss the claim, as suggested by Mr. A.J.S.A., but rather closed the file only after providing corrective direction to Mr. A.J.S.A. regarding the protection of the confidentiality of his clients' information. Mr. A.J.S.A.'s evidence that he did not know what corrective measures he was directed to take because he received, but did not read, the letter issued to him by his regulatory body is difficult to believe. If true, it is concerning. His insistence at trial that he did nothing wrong because he was still Ms. K.L.W.'s financial advisor at the time he accessed and attached her financial information to his own affidavit suggests that he still has not fully understood the concern raised by both Ms. K.L.W. and his regulatory body.
- [144] In any event, I am satisfied that Ms. K.L.W. did not make this complaint for strategic or vindictive reasons, and that there was a valid basis for her concern about Mr. A.J.S.A.'s ongoing control of her financial information. Nor am I concerned that Ms. K.L.W. may make further regulatory complaints against Mr. A.J.S.A. that might affect his ability to earn income. She has ensured that her financial information has been transferred from Mr. A.J.S.A., and she is committed to not pursuing the complaint any further. Nor do I have any concerns that Mr. A.J.S.A. is likely to commit a similar infraction in the future with any other clients leading to a potential loss of income on his part.

Child Support

- [145] Although I have made some adjustments to the parties' parenting time, the parties still have a shared parenting arrangement under the Guidelines. Both parties must therefore pay child support to each other, and Ms. K.L.W.'s support obligations should be set off against Mr. A.J.S.A.'s obligations.
- [146] Mr. A.J.S.A. initially argued that the Guidelines are not strictly applicable because his income is over \$150,000, and that he should not be required to pay child support in accordance with the Guidelines for his full income.
- [147] However, his income is still well below what this Court has generally indicated as the income "ceiling" for departing from the Guidelines: see e.g. *Hollenbach v. Hollenbach*, 2000 BCCA 620, where the payor's income was \$711,544, and *Hathaway v. Hathaway*, 2014 BCCA 310, leave to appeal to SCC ref'd, 36101 (12 March 2015), where the payor's income was approximately \$1 million and the Guidelines were still applied. See also Todd R. Bell & David C. Dundee, "Child Support: Tips (and Traps) and Updates" (Paper delivered at the Family Law Conference, 6 July 2017) for a helpful summary of British Columbia cases on this issue. Mr. A.J.S.A. did not pursue this position in closing submissions.

[148] Based on Ms. K.L.W.'s income of \$114,000 for 2023 and Mr. A.J.S.A.'s income of \$707,201 in 2022 (with 2023 income still to be determined in 2024), I find that Mr. A.J.S.A. is required to pay Ms. K.L.W. \$11,494 in child support, and that Ms. K.L.W. is required to pay Mr. A.J.S.A. \$2,217 in child support, for a net payment by Mr. A.J.S.A. to Ms. K.L.W. of \$9,277 per month commencing January 1, 2024 pursuant to the Guidelines. As I am unaware of the amounts Mr. A.J.S.A. has been paying since December 2023, any payments already made in January and February of 2024 will be immediately supplemented to address any discrepancies.

[149] I will deal with retroactive support for 2022 and 2023 below.

Section 7 Special or Extraordinary Expenses

[150] Special or extraordinary expenses are provided for in s. 7(1) of the Guidelines. Generally, s. 7 expenses must be necessary based on the child's best interests, and reasonable relative to the means of the parents and the family's spending pattern before separation: J.D.G. v. J.J.V., 2016 BCSC 2389 at para. 325.

[151] The children are active in a variety of extracurricular activities with the support of both of their parents. All three children are enrolled in after-school programming. Both girls attend a dance program, and the eldest attends this program five times per week. The children are also enrolled in gymnastics. The youngest child has started skating and is interested in playing hockey. The middle child attends special tutoring three times per week. There is some indication that the youngest child is interested in playing hockey, and the parties both indicated a desire to support this. Between the spring and fall of 2023, all three children also attended counselling. The December 2022 Order sets out the parties' agreements with respect to s. 7 expenses, and the division, at that time, of a 75/25 split as between Mr. A.J.S.A. and Ms. K.L.W. While the parties have generally agreed on these activities to date and the costs, the manner of payment has been an ongoing source of conflict.

[152] In particular, Ms. K.L.W. has asked care providers for the children, including the children's after-school care provider, to split the costs at their source in accordance with the 75/25 split set out in the December 2022 Order, and to receive and issue tax receipts to the parties individually for their respective share of these costs. Mr. A.J.S.A. was extraordinarily upset with the children's after-school care provider for agreeing to split the costs on this basis without consulting him first. This resulted in Melissa Burke, the owner and operator of the after-school program, receiving what she described as a barrage of emails from Mr. A.J.S.A., which she considered to be aggressive, insulting, and confrontational. At the time of trial, Mr. A.J.S.A. has remained angry with Ms. K.L.W. and the after-school care providers for pursuing this at-source split billing arrangement.

[153] Mr. A.J.S.A. says that he should be billed, and pay for, 100% of the s. 7 expenses up-front, and that he will then tell Ms. K.L.W. what her share is and collect those funds from her. He argues that the care and service providers cannot be trusted to get the division of fees correct, and it just takes him more time to correct them, than if he were to pay the full

amounts up-front and recover Ms. K.L.W.'s contributions from her directly. He says that this should still not interfere with her ability to get tax receipts for her share of the contributions, as he is prepared to compensate for this as well.

- [154] Ms. K.L.W. raises the concern that Mr. A.J.S.A.'s true intention for wanting to cover 100% of s. 7 expenses, and then seek reimbursement from her, is to increase, and not lessen, the opportunities for him to send her harassing communications, and to exert control over her finances.
- [155] Regardless of Mr. A.J.S.A.'s motivations, I find that it is clear that the parties need to have fewer points of interaction to reduce the conflict that they and the children are exposed to. Nor am I convinced that it is simpler for Mr. A.J.S.A. to pay the full amount, perform his own calculations of the parties' relative contributions, demand Ms. K.L.W. to pay the share he calculates, and then compensate her for the adverse tax consequences of the receipts coming solely to him.
- [156] I therefore direct the parties to request that all s. 7 services be split at their source wherever this is an option, and that the parties shall pay their share directly to the service provider, wherever possible, and obtain their tax receipts accordingly.
- [157] Where s. 7 expenses cannot be split at the provider level, the paying party will post the expense to the expense section of Our Family Wizard, and the other party's proportionate share will be paid within seven days.
- [158] For medical expenses covered by insurance, Ms. K.L.W. shall bill these expenses to her insurance first and then provide the remainder to Mr. A.J.S.A. for insurance purposes. Anything not covered by insurance shall be split in accordance with the parties' proportionate shares.
- [159] The scope of the s. 7 expenses shall be determined on the same basis as set out in the December 2022 Order. At this point, RESP expenses fall into the category of non-approved s. 7 expenses. Mr. A.J.S.A. has continued to maximize the contribution limit for the children's Registered Education Savings Plans ("RESPs") without seeking any contribution from Ms. K.L.W. This is laudable. On the pleadings and evidence before me, I am not prepared to declare that the RESPs are a s. 7 expense, or that Mr. A.J.S.A. must continue to pay these expenses, or that Ms. K.L.W. is required to contribute to them.
- [160] The terms of the December 2022 Order regarding s. 7 expenses will therefore continue in this final order, with the exception that, in accordance with their incomes, Mr. A.J.S.A. shall be responsible for 80% of the children's special expenses, and Ms. K.L.W. shall be responsible for 20% of those expenses going forward.

Spousal Support

- [161] Ms. K.L.W. claims spousal support from Mr. A.J.S.A. on both a compensatory and a non-compensatory basis, as outlined in *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC ref'd, 33002 (28 May 2009). Mr. A.J.S.A. says that she has not established a basis for compensatory support, and that even if she was entitled to non-compensatory spousal support, no support is payable under the Spousal Support Advisory Guidelines [SSAG] because of the significant child support and s. 7 special expenses he is already paying.
- [162] I find that this marriage, where the parties agreed that Ms. K.L.W. ought to work part-time from the time their first child was born (approximately one year into the relationship), engages the requirement of compensatory spousal support pursuant to the principles set out in *Chutter*. I note that it is not necessary for Ms. K.L.W. to prove on a balance of probabilities the existence of any particular loss of opportunity she has suffered: *Chutter* at para. 67.
- [163] Furthermore, once a party has established entitlement to support, the SSAG should generally be followed for the purposes of quantifying that support. Exceptional circumstances are required to justify a substantial departure from the SSAG: *Sebok v. Babits*, 2022 BCCA 2 at para. 24.
- [164] The evidence establishes that both parties agreed that Ms. K.L.W. would work substantially fewer shifts outside the home to be available to the children and manage the household. As a result, she did not accumulate seniority, leave, or pensions at the same rate she would have if she were a full-time registered nurse during most of the parties' marriage. This loss was particularly acute after the birth of the third child, when the parties agreed that Ms. K.L.W. would stop working a regular set of shifts and moved to casual work.
- [165] In doing so, she supported Mr. A.J.S.A. in being able to pursue Saints' work, and to earn the revenues and accumulate wealth and assets in those corporations during the marriage.
- [166] With respect to non-compensatory grounds, the evidence establishes a stark disparity between Ms. K.L.W.'s income post-separation and that of Mr. A.J.S.A.. While his efforts to build his career throughout the marriage, with the assistance of Ms. K.L.W. managing their home and being primarily responsible for the children, paid off in a significant way for Mr. A.J.S.A. post-separation, the same cannot be said for Ms. K.L.W. While she is fortunate to be qualified to work in a field that allowed her to return full-time to the workforce, her income remains significantly lower than Mr. A.J.S.A.'s income post-separation. I therefore find that she is also entitled to spousal support on a non-compensatory basis.
- [167] In terms of the scale and duration of that support, Ms. K.L.W. is still relatively young and is working in a profession that will allow her to advance. She will also receive 50% of the growth of the assets in Saints over the course of the marriage as part of the property division in this case, which is significant. I therefore award her spousal support at the lower end with a five-year duration, which is the lowest duration under the SSAG.

- [168] Mr. A.J.S.A. says that, even if Ms. K.L.W. is entitled to spousal support, the SSAG provide for no support to be paid given his contribution to s. 7 expenses, including his annual \$7,500 contribution to the children's RESPs. Ms. K.L.W. says that s. 7 expenses ought not to be included in the calculation, and certainly not the RESPs.
- [169] I have not been provided with any authority that would allow Mr. A.J.S.A. to deduct his contributions towards the RESPs, particularly where they are not an agreed-upon or ordered s. 7 expense.
- [170] However, I agree with Mr. A.J.S.A. that the parties have and will continue to support significant special expenses for the children, which included counselling expenses in 2023, and will include ongoing tutoring costs for the middle child, and costs for after-school, skating, gymnastics, and dance programs. In 2022, the evidence indicates that these expenses were approximately \$25,000 and that they doubled in 2023.
- [171] Some of these expenses may decrease from 2023 levels (e.g., counselling is no longer recommended or required for the children and that was a significant expense in 2023). However, both parties expect a general increase in special expenses as the middle child seeks to increase her dance level and involvement, and as the youngest child pursues his own extracurricular pursuits, which may include hockey programs. Based on both parties' evidence, I find that an annual estimate of \$50,000 for special expenses, excluding RESPs, is an appropriate basis upon which to consider spousal support obligations going forward.
- [172] The parties have provided me with various DivorceMate calculations. In a shared parenting scenario, which I have ordered, and based on the parties' Guidelines incomes as I have found them, and the s. 7 expenses in 2023, Mr. A.J.S.A.'s spousal support is \$1,922 at the low end. I consider the low end the appropriate range given Ms. K.L.W.'s relatively young age and strong current and future employment prospects. I also note that her contribution to the family wealth during the marriage is also partially realizable in this case through property division. I round that to \$2,000 per month to account for several variables, including fluctuations in special expenses, and because I am limiting the support terms to the low end in Ms. K.L.W.'s case.
- [173] The obligation to pay spousal support usually arises upon separation. However, in this case, where the parties did not economically separate until the end of December 2021, I find that the obligation arose on January 1, 2022. Some spousal support has been paid in the interim period, which I will address in relation to the retroactive support awards.
- [174] Commencing January 1, 2024, I order that Mr. A.J.S.A. shall pay Ms. K.L.W. spousal support of \$2,000 per month until December 31, 2026.

Retroactive Support

Retroactive Child Support

- [175] The Supreme Court of Canada has recently reviewed the law on retroactive support orders in *Colucci v. Colucci*, 2021 SCC 24. *Colucci* confirms that the guidance from D.B.S. still applies to applications for retroactive variation of child support, namely that such variations "should generally extend no further than three years before the date of formal notice": *Colucci* at para. 39. Effective notice requires disclosure of a material change in circumstances. *Colucci* also provides guidance on what type of hardship might deprive a child of retroactive support, but sets a high bar.
- [176] Mr. A.J.S.A. says that the D.B.S. principles do not support a retroactive support award in this case. I disagree. There is no issue of delay with respect to Ms. K.L.W.'s claims for spousal and child support, and Mr. A.J.S.A. did not testify about any particular hardship he would experience if he were required to pay support, other than that such an order would require him to draw more funds from Saints than he considers prudent, or than he thinks his brother would like. This does not meet the high bar in *Colucci*. I find that Ms. K.L.W. is entitled to retroactive adjustments to the interim child support and spousal support paid to date based on my findings of the parties' income at trial.
- [177] Ms. K.L.W. seeks an award of retroactive child support from January 2022 to the date of the trial. Although Mr. A.J.S.A. did not pay any support from the date of separation in July 2021 to December 2021, she agrees that she continued to live in the Family Home in a financial arrangement not dissimilar from one before separation.
- [178] She says that parenting was not shared in January and February 2022 when Mr. A.J.S.A. barred her from the home and when she lived in her parents' basement with the children. She therefore seeks retroactive support on the basis of her having primary parenting. Parenting returned to shared parenting in March 2022 after Mr. A.J.S.A. brought an application for parenting time, and the parties agreed to a shared parenting regime pursuant to the April 2022 Order.
- [179] There was very little direct evidence on the precise parenting arrangements during this brief two-month period. Furthermore, given that Mr. A.J.S.A. sought shared parenting during this time and obtained a consent order to that effect shortly thereafter, I am not prepared to presume that a non-shared parenting regime should be the basis for retroactive support during this period. I therefore consider that retroactive support in 2022 and 2023 ought to be paid on the basis of a shared parenting arrangement.
- [180] In 2022, Mr. A.J.S.A. had a Guidelines income of \$707,201, and Ms. K.L.W. had a Guidelines income of \$92,173. Setting off their respective child support obligations that year on the basis of shared parenting for the entire year, Mr. A.J.S.A. was required to pay a net amount to Ms. K.L.W. of \$9,646.

[181] Starting with the April 2022 Order, Mr. A.J.S.A. agreed to, and was ordered to pay \$2,500 per month in child support on an interim basis, which I understand he paid retroactively starting in January 2022. He continued to pay \$2,500 per month in child support through to December 1, 2022, at which point, he began paying \$4,330 per month in interim child support and \$4,230 in interim spousal support pursuant to the December 2022 Order.

[182] Pursuant to the August 2023 Order, Mr. A.J.S.A. was required to pay \$7,800 per month in interim child support starting September 1, 2023. However, he did not increase the child support he was paying in response to that order. Instead, he paid the same amount he had paid pursuant to the December 2022 Order, but ceased to differentiate between the amounts he paid for child support (\$4,330) and the amounts he paid for spousal support (\$4,230). For the purposes of the calculations I must make here, I allocate his payments post-September 2023 in the same way they were allocated by the December 2022 Order before that date.

[183] Based on the parties' 2022 and 2023 Guidelines incomes, I find that the net amount in child support Mr. A.J.S.A. should have been paying (less his payments in those years) is as follows:

January 1 to December 31, 2022

\$9,646/month x 12 months

Less child support paid in 2022

Arrears in 2022

\$115,752

(\$31,830)

\$83,922

January 1 to December 31, 2023

\$9,277/month x 12 months

Less child support paid in 2023 (\$4,330 per month x 12 months)

Arrears in 2023

\$111,324

(\$51,960)

\$59,364

[184] Mr. A.J.S.A.'s total arrears in child support owing as of December 31, 2023 is therefore \$143,286.

[185] There is no request that I readjust s. 7 expenses retroactively on their proper proportions based on Mr. A.J.S.A.'s Guidelines income. However, Ms. K.L.W. does request payment of outstanding s. 7 expenses based on the agreed-upon 75/25 split in December 2022. On the evidence before me, Mr. A.J.S.A. has not fully paid his proportionate share of some of the counselling invoices for the children. I accept Ms. K.L.W.'s evidence that the total amount of outstanding s. 7 expenses payable by Mr. A.J.S.A. to Ms. K.L.W. in this regard is \$1,771.08, being 75% of the total unpaid counselling invoices.

Retroactive Spousal Support

- [186] With respect to retroactive spousal support, a similar analysis to that applied to retroactive child support is applicable: *Kerr v. Baranow*, 2011 SCC 10 at paras. 206-208. Those considerations include: the needs of the recipient; the conduct of the payor; the reason for the delay in seeking support; and any hardship the retroactive award may occasion on the payor spouse: *Kerr* at para. 207. However, there are different legal principles and objectives that underpin spousal support as compared with child support, and these facts must be weighed and considered in light of those differences.
- [187] Mr. A.J.S.A. argues that retroactive spousal support should not be paid because he has been in a worse financial position post-separation than Ms. K.L.W. because of his significant debt load related to the mortgage for the Family Home, the Sproat Lake Property, and his various vehicle loans, including a boat and recreational vehicle ("RV").
- [188] I find that this disparity in debt is largely because Mr. A.J.S.A. has thus far retained all of these family assets for his own use, rather than agreeing to or seeking their sale. While Ms. K.L.W. does not yet have any significant debt, she also has very few assets and no real property. Given Mr. A.J.S.A.'s considerably better asset position, and his very significantly greater income, I cannot agree that he has been worse off post-separation, or that Ms. K.L.W. does not have a basis for retroactive spousal support.
- [189] I have already indicated that Mr. A.J.S.A. must pay Ms. K.L.W. \$2,000 per month going forward based on the parties' 2023 Guidelines incomes and s. 7 special expenses. As Mr. A.J.S.A. has actually paid more than this amount in spousal support to Ms. K.L.W. in 2023, I will factor this into the retroactive award.
- [190] Mr. A.J.S.A. began paying spousal support on December 1, 2022 when he made the first payment of \$4,230. Before that date, he had not paid anything toward spousal support.
- [191] In 2022, Ms. K.L.W. made less income than in 2023. The children's special expenses were also approximately half of what they were in 2023. Based on the DivorceMate calculations counsel have provided me, and using the parties' Guidelines incomes and 2022 special expenses, I find that Mr. A.J.S.A. was required to pay Ms. K.L.W. \$3,676 per month at the low end in 2022, or \$44,112 for that year.

[192] In 2023, Mr. A.J.S.A. was required to pay \$2,000 per month as set out above, or \$24,000 for that year.

[193] I therefore find that Mr. A.J.S.A. owed Ms. K.L.W. a total of \$68,112 for spousal support in 2022 and 2023, of which he paid \$54,990.

[194] Ms. K.L.W. is entitled to a payment of \$13,122 for retroactive spousal support.

[195] In sum, Mr. A.J.S.A. shall pay Ms. K.L.W. the following amounts for retroactive support:

- 1) Child Support: \$143,286;
- 2) Section 7 Expenses: \$1,778; and
- 3) Spousal Support: \$13,122.

[196] Because Mr. A.J.S.A. is seeking to retain all of the family assets, there are no assets against which to set these obligations off.

Future Support Adjustments

[197] Mr. A.J.S.A. also seeks an order that support not be reviewed again in 2024, and that the parties not be able to review income or support without a 15% change in income in either direction.

[198] As attractive as keeping these parties out of court may seem, a 15% change in Mr. A.J.S.A.'s income amounts to a change of more than \$100,000. Furthermore, he has not disclosed his income in 2023 or Saints' and AJSTA's financial information since August 2022. I am therefore not confident that the support he is required to pay for 2024 under the Guidelines, which is currently based on his 2022 income, will not require an adjustment in 2024, or what the difference or variation might be after a review.

[199] Ms. K.L.W. seeks orders that the parties be required to annually disclose their income tax information, and that Mr. A.J.S.A. be required to disclose the year-end financial statements of his corporations in a timely way. She then seeks an order giving each party a time-limited period to request a review based on this disclosure, and that if no review is requested, that the parties be deemed to have accepted current support levels and current support will be deemed to be in compliance with the Guidelines and SSAG. If a review is requested, she seeks an order that the parties attend mediation.

[200] I am not prepared to deem support to be in compliance with the Guidelines or SSAG if it is not, nor am I prepared to order mediation when that was not argued before me. However, I agree that it is necessary to set out timelines for the parties to disclose financial information essential to determining support under the Guidelines, and to also provide deadlines for requesting reviews after disclosure is made to avoid costly retroactive support determinations. I set out these orders below.

DIVISION OF FAMILY PROPERTY

Statutory Framework

- [201] Both parties seek a division of family property pursuant to the FLA. Section 81 of the FLA provides that on the date of separation, each spouse is entitled to an undivided half interest in all family property, and is equally responsible for family debt regardless of their use or contribution to it.
- [202] Family property is defined in s. 84(1)(a) as all real and personal property that is owned or beneficially owned by either spouse on the date of separation, unless the property is excluded from family property under s. 85(1). Any real or personal property owned by at least one spouse at the time of separation is family property. The value of the family property is generally the fair market value at the date of the trial, subject to agreement or as otherwise ordered: FLA, s. 87; and *D.Z. v. M.Z.*, 2022 BCSC 706 at para. 152.
- [203] Where a property is established to be family property, exclusions may apply pursuant to the FLA, including amounts contributed solely by one spouse. Although the original value of excluded property is not family property, any increase in its value from the time of the marriage to the time of the trial is family property: FLA, s. 84(2)(g).
- [204] Family debt is defined at s. 86(a) as including all financial obligations incurred by a spouse during the period of the relationship. Debt incurred after the date of separation is only family debt if it is incurred for the purpose of maintaining family property: FLA, s. 86(b).
- [205] Under s. 87(b)(ii) of the FLA, the presumptive date for valuing family property and debt is the date of the trial. Generally, departing from the presumptive date of valuation is effectively a reapportionment of family property and debt, which can only be achieved through an application of s. 95 of the FLA and a finding that an equal division would result in "significant unfairness": see *Namdarpour v. Vahman*, 2019 BCCA 153 at paras. 52, 62; and *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76.
- [206] The court may consider the following factors in ordering an unequal division of family property and debt under s. 95(2) of the FLA:
- (c) a spouse's contribution to the career or career potential of the other spouse;
 - ...
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

[207] The parties' relative contributions to family assets and debts during the marriage is largely irrelevant to reapportionment under s. 95(2) of the FLA. Although the FLA does not preclude relative contributions as a factor that might be considered under s. 95(2)(i) as one of "any other factor[s] that may lead to significant unfairness," the circumstances in which it may be considered and relied on are now substantially constrained.

[208] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, the Court of Appeal distinguished the approach to be taken under the FLA from its predecessor:

[43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c) and to post-separation increases in value beyond market trends caused by one spouse (95(s)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.

[44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.

[209] The family property that remains at issue in these proceedings is as follows:

- 1) The Family Home;
- 2) The value of Mr. A.J.S.A.'s interest in Saints at the time of the commencement of the marriage, and at the time of separation and the trial;
- 3) The parties' vehicles, including a boat and an RV; and
- 4) The parties' bank accounts, RRSPs, and pensions.

[210] The parties agree that they also have family property that is not at issue in these proceedings.

[211] Both parties plead an equal division of family property and debt. However, at trial, Mr. A.J.S.A. has advanced a claim for the reapportionment of Saints, the Family Home, and the boat and RV, based on his contributions to these assets either before or after separation.

The Family Home

[212] In 2004, Mr. A.J.S.A. purchased a home on Kaitlyns Way in Nanaimo ("Kaitlyns Way"). Ms. K.L.W. moved into Kaitlyns Way on May 2011, and this is where the first two children were born. No evidence was adduced as to the value or equity in Kaitlyns Way at the commencement of the parties' relationship.

[213] In October 2014, the parties purchased a new home on Somerside Place in Nanaimo ("Somerside") for \$450,000. Ms. K.L.W. gave oral testimony that she contributed approximately \$15,000 from an excluded RRSP she held as a result of an inheritance from her grandfather, but which she does not claim as excluded property in this proceeding. Mr. A.J.S.A. says that her contribution was only \$6,000, and there is evidence of a withdrawal of this amount from Ms. K.L.W.'s RRSP at the time. He also says that he provided \$10,000 from his "savings" and cashed out \$25,000 of his RRSP, which he considered to be excluded property, to pay the down payment. However, there is no evidence capable of establishing that the source of those funds pre-existed May 2011. In any event, I find that all of these funds were invested in family property, and there is no evidence of an intention by the parties to keep their respective contributions separate from the family property.

[214] In 2017, the parties sold Kaitlyns Way and purchased the Sproat Lake Property (a recreational property on Sproat Lake) with another couple. After paying off a \$326,213 line of credit on Kaitlyns Way, the parties used \$62,122 of the proceeds from Kaitlyns Way to fund this purchase. Mr. A.J.S.A. also used some of the proceeds from Kaitlyns Way to pay off income tax debt he had accumulated.

[215] Mr. A.J.S.A. claims the net equity of approximately \$62,000 from Kaitlyns Way as his own excluded property. Ms. K.L.W. objects on the basis that there is no evidence of the excluded value of Kaitlyns Way at the time of the commencement of the marriage in 2011, and that Kaitlyns Way must have been highly leveraged during the marriage, given the small amount of equity in the home and its significant line of credit at the time of the sale. She also argues that this equity was then reinvested into family property (Sproat Lake Property) and family debt (Mr. A.J.S.A.'s income tax debt).

[216] The burden is on Mr. A.J.S.A. to establish excluded property as at the commencement of the relationship: FLA, s. 85(2). I agree with Ms. K.L.W. that the relatively small amount of equity in Kaitlyns Way six years into the marriage and more than ten years since its purchase, together with the significant line of credit, suggests that any pre-existing equity in that property was likely dissipated during the course of the marriage. Mr. A.J.S.A. was obliged to prove otherwise, and he has not done so. The immediate investment of those funds into presumed family debt (for income taxes) and joint family property also tends to

weaken the exclusion claim. I find that Mr. A.J.S.A. has not proven that this net equity constitutes excluded property.

- [217] The parties paid \$495,000 for their share of the Sproat Lake Property and took out a mortgage on it jointly with their co-owners. After the parties' separation in 2021, the parties had the Sproat Lake Property appraised, and Mr. A.J.S.A. paid out 50% of the net value at the time to Ms. K.L.W. pursuant to the consent order discussed above. It is agreed that the \$160,000 portion of Mr. A.J.S.A.'s RRSP used for this purpose was his excluded property, being roughly the amount he had in his RRSP account in 2011. The Sproat Lake Property consent order is determinative of the value and interest of the parties in the Sproat Lake Property, but without prejudice to the ultimate division of assets.
- [218] In 2021, the parties sold Somerside and purchased the Family Home on Linette Place in Nanaimo. The purchase price was \$990,000, of which \$194,791 in equity from Somerside was applied, and a highly leveraged mortgage was obtained.
- [219] The parties separated within a week of moving in to the Family Home.
- [220] As noted above, the parties continued to share the Family Home for some months after separation. However, in December 2021, Mr. A.J.S.A. demanded that Ms. K.L.W. move out, and she moved into her mother's basement suite with the children in January 2022. Mr. A.J.S.A. continued to live in the Family Home and pay all expenses related to it.
- [221] In June 2022, Ms. K.L.W. moved into a new townhome in the same neighbourhood as the Family Home, allowing the children to easily transit between their homes. At that time, she had not yet received the proceeds from the division of the Sproat Lake Property or the Family Home. As a result, she was unable to complete the purchase herself, and her mother and stepfather downsized their own home and completed the purchase in her place. Accordingly, they are the owners on title to this property, and Ms. K.L.W. pays them rent in the range of \$3,000 per month for the mortgage and other expenses. In the interim, her mother and stepfather have postponed their retirement until such time as Ms. K.L.W. is able to obtain her share of the family property and repay them for the down payment on the townhouse.
- [222] In the interim, Mr. A.J.S.A. has continued to occupy the Family Home and wishes to purchase Ms. K.L.W.'s interest in it. In April 2023, the parties obtained a joint appraisal of the Family Home at \$1,012,000, and I find that this provides the best evidence of the current value of that property. As at the date of the trial, the mortgage is \$758,475. Mr. A.J.S.A. has been paying approximately \$3,500 for the mortgage on this property since separation, as well as property taxes, insurance, and all other expenses. He hopes to pay out Ms. K.L.W. at 50% of the net equity as at the date of the trial. However, he seeks a reapportionment of \$50,750 back to himself based on the mortgage payments he has made since separation.

- [223] In response, Ms. K.L.W. says that Mr. A.J.S.A. did not plead a reapportionment of the value of the Family Home based on his payment of the mortgage. She argues that if such a reapportionment were to be granted, it should be offset against her equally unpleaded claim in occupational rent for a similar amount. She also argues that between their July 2021 separation and her removal from the Family Home at the end of 2021, she was not receiving any form of child or spousal support, and Mr. A.J.S.A. appropriately continued to pay for the family's shared mortgage and housing costs.
- [224] The evidence establishes that Ms. K.L.W.'s housing expenses for a smaller townhome are similar to Mr. A.J.S.A.'s mortgage costs since June 2022. Both parties have therefore been paying roughly similar amounts to maintain a home for the children. If I were to reapportion the value of the Family Home on the basis of Mr. A.J.S.A.'s mortgage and maintenance payments, those amounts would be similar to the amounts I might order for Ms. K.L.W.'s occupational rent.
- [225] However, I find that Mr. A.J.S.A. has not made out a claim for reapportionment based on his mortgage payments on the Family Home. I do not consider it significantly unfair that Mr. A.J.S.A. continued to make the mortgage payments for that property while occupying it. This is particularly true for the period of separation to December 2021 when he paid no child or spousal support, and none is being claimed. However, I also find that after that date, his mortgage payments were not an unreasonable cost for the use of the Family Home. Furthermore, approximately half of his mortgage costs contributed towards net equity in that property, which is also of some ongoing benefit to him as he is retaining that property.
- [226] Ms. K.L.W. is prepared to divide the value of the Family Home as at January 2023 when the mortgage debt was \$782,259 and the net equity was \$229,741. This figure gives Mr. A.J.S.A. the benefit of the mortgage payments he has made on the Family Home in 2023 (which is about half of the contributions since January 2022). I consider this a reasonable and fair resolution that addresses any additional value or contribution Mr. A.J.S.A. made to paying off family debt, while having the advantage of living in the Family Home.
- [227] In sum, I find that Mr. A.J.S.A. shall pay Ms. K.L.W. \$114,870 to retain the Family Home.

Saints and Companies

- [228] As noted above, Mr. A.J.S.A. is an owner and operator of three corporations: Saints, Tame Software Inc. ("Tame"), and AJSTA (collectively, the "Companies"). Tame is a software company that originally held the licenses for financial software used by Saints, but has no current value.
- [229] Mr. A.J.S.A. holds Saints and Tame with his brother. The parties are agreed that, for the most part, AJSTA is simply a flow-through company and had no independent value from Mr. A.J.S.A.'s 50% share in Saints at the time of separation.

Companies' Value at the Time of Separation

- [230] Mr. Tidball was jointly retained to value the Companies and Mr. A.J.S.A.'s share in them. He concluded that, at the time of separation, Saints had a value of \$3.1 million, and that Mr. A.J.S.A.'s 50% shares in Saints were therefore worth \$1.55 million. Although Mr. A.J.S.A. levied many criticisms against Mr. Tidball's methodology and report, he agrees that this is a correct valuation of both Saints and his interest in Saints at the time of separation.
- [231] There is no valuation as at the trial date because Mr. A.J.S.A. did not provide Mr. Tidball with updated financial information for this purpose, including for the end of Saints' fiscal year in August 2023. Mr. A.J.S.A. says that this is because Saints' financial statements for the September 2022-August 2023 fiscal year were not completed, as they were not required to be provided to CRA until after the trial in December 2023.
- [232] Mr. Tidball did, however, provide a valuation for Mr. A.J.S.A.'s interest in the Companies at the end of the August 2022 fiscal year in the amount of \$1.813 million, indicating a significant increase in value since separation. This increase in value does not include the \$950,000 that Mr. A.J.S.A. and his brother drew from Saints during the 2022 fiscal year. Mr. A.J.S.A. disputes this 2022 valuation on a number of grounds.
- [233] Mr. A.J.S.A. cross-examined Mr. Tidball, and I am satisfied on Mr. Tidball's evidence and upon reviewing his reports, that his valuations are sound and compelling evidence of the value of Mr. A.J.S.A.'s interests in the Companies in August 2022. If anything, they are generous to him. For example, Mr. Tidball made assumptions that the securities held by Saints and declared at book value have not increased in value. I am also convinced, on the basis of Mr. Tidball's reports, that it is more likely that Saints' value increased in the 2022-2023 fiscal year ending in August 2023, and that value is likely to continue to increase further in the coming year.
- [234] For the purposes of the division of this asset, I am satisfied that this is a situation where it is appropriate to use the agreed-upon valuation of the Companies as at the date of separation rather than at trial. Both parties argue that this earlier date should be used for the valuation of Mr. A.J.S.A.'s interest in the Companies.
- [235] I find that using the separation date, rather than the trial date, is the most just basis for the valuation date for a number of reasons, most significantly because Mr. A.J.S.A.'s income available for support since separation has been calculated and determined on the basis of income generated by Saints since separation. A division of his interest in the Companies at the time of the trial would therefore be significantly unfair because it risks double-counting income available to Mr. A.J.S.A. for both property division and support purposes. In addition, since separation, he has received very substantial income and dividends from Saints, including a \$475,000 distribution, which is a significant depletion in this family property post-separation.

[236] I therefore find that the value of Mr. A.J.S.A.'s interest in the Companies for the purposes of property division is \$1.55 million, as stated in Mr. Tidball's report and agreed by the parties.

Companies' Value at the Time of the Commencement of the Marriage

[237] Mr. Tidball assesses the value of Mr. A.J.S.A.'s interest in the Companies at the time of the commencement of the marriage in May 2011 as \$325,000. He concludes that the increase in the value of Mr. A.J.S.A.'s interest in the Companies is \$1.225 million.

[238] Mr. A.J.S.A. does not accept this conclusion. In particular, he makes the following arguments for a reduced valuation of the portion of Saints constituting family property:

- 1) He argues that Mr. Tidball has undervalued his interest in the Companies as at the commencement of the marriage by excluding the value of his father's preferred shares in Saints worth \$666,000 at that time. If his father's shares were included, he says that his interest in the Companies at the time of the marriage was \$790,000;
- 2) In the alternative, he argues that, even if his interest in Saints at the time of the marriage did not include the value of his father's preferred shares, the value of his father's preferred shares should be reapportioned to him to reflect the value that he (and his father) contributed to the Companies before and during the marriage; and
- 3) Finally, he seeks a 10-25% discount on the value of his shares in Saints on the basis that Saints is jointly controlled with his brother.

[239] In addition, the parties differ on how the division of this family property should be accomplished.

[240] I will address each issue in turn.

A. Mr. A.J.S.A.'s interest in the Companies in May 2011

[241] After reviewing Mr. Tidball's report and considering his oral testimony, including in cross-examination, I am satisfied that Mr. Tidball correctly excluded the value of Mr. A.J.S.A.'s father's interest in Saints from Mr. A.J.S.A.'s own interest in Saints in May 2011.

[242] This finding does not discount the significant value that his father contributed to Saints; rather, it simply acknowledges that this value was held by his father in May 2011, and not by Mr. A.J.S.A. himself.

[243] I therefore find that Mr. A.J.S.A.'s excluded value in Saints at the time of the marriage was \$325,000.

B. Should there be a reapportionment of the value of the Companies in Mr. A.J.S.A.'s favour to reflect his contributions to the Companies?

[244] Mr. A.J.S.A. bears the onus of establishing that it would be substantially unfair to reapportion his interest in Saints equally: FLA, s. 85(2). I find that he has not established that on the evidence.

[245] The evidence establishes that Mr. A.J.S.A. and his brother used Saints' earnings to pay off their father's preferred shares in Saints. The remaining \$666,000 held by his father in May 2011 was not gifted to them, but rather was paid for through Mr. A.J.S.A.'s efforts (and those of his brother) during the course of the marriage. The FLA presumes Ms. K.L.W. to have contributed equally to Mr. A.J.S.A.'s ability to earn these funds, pay out his father, and increase the value of his shares in Saints during the course of the marriage. Furthermore, the evidence tends to support that she did so, birthing three children and having primary responsibility for them, while he focused on Saints.

[246] Mr. A.J.S.A. has not convinced me that it is appropriate to depart from the parties' presumptive equal interest in the increase in the value of these shares during the course of the marriage, and I decline to do so.

C. Should Mr. Tidball's valuation be discounted to reflect that Saints is co-owned with Mr. A.J.S.A.'s brother, or that the fair market value may not be achieved for another reason?

[247] Mr. A.J.S.A. says that the valuation of his shares in Saints should be discounted by 10-25% because it is co-owned with his brother, and that any person purchasing his interest would not pay the "full value" assessed by Mr. Tidball. In this regard, he relies on his own testimony that draws from Saints are jointly decided between himself and his brother, as well as on Mr. Tidball's evidence in cross-examination that if there is evidence that his brother's interests could negatively affect his interests, a minority discount might be appropriate to the valuation.

[248] Mr. A.J.S.A. also relies on his own evidence that some of the value of his business is based on what he personally brings to his clients, and that a new owner of the business could not rely on keeping all of his clients. This was reinforced by the testimony of a number of witnesses he called, including a good friend and his accountant, who said that if Mr. A.J.S.A. sold his share of Saints to a third-party, they would have to evaluate whether to keep their investments with the new financial advisor.

[249] Ms. K.L.W. says that Mr. Tidball properly considered the minority discount issue in his business valuation of Saints and found that no discount was appropriate in this case. Mr. Tidball also stated that he had already included in his valuation the very real risks that not all investment accounts would be retained after a sale.

[250] I find that Mr. Tidball's evidence establishes that he applied a substantial 25% discount rate in his valuation of Saints on the basis that there are significantly more risks in the purchase of this type of business. In his reports and evidence, he notes that this discount rate is generous to Mr. A.J.S.A., and that there is other authority, including an article relied upon by Mr. A.J.S.A. in his cross-examination, that suggests a lower discount rate of 15% for this

type of business. Furthermore, the 25% discount rate corresponds to a valuation of 1.5 times annual commissions that Mr. A.J.S.A. and his brother utilized consistently in purchasing their father's interest and other books of accounts. That multiplier would be much higher if the risks associated with this type of business were lower.

[251] With respect to a minority discount, Mr. Tidball's evidence was that there is a strong presumption in business valuation that decisions in a family company are made in concert, and that the financial records of Saints and AJSTA support such a presumption. In particular, Mr. Tidball notes that Mr. A.J.S.A. regularly draws more commission income annually from Saints into AJSTA (his holding company) than his brother does. This tends to confirm that, objectively, his share value is not depressed by his brother's equal shares in Saints, and that his brother's interest does not negatively affect his own. Nor does Mr. A.J.S.A.'s evidence convince me otherwise.

[252] I find Mr. Tidball's expert evidence to be objective and compelling. It was fully grounded in the financial records disclosed by Mr. A.J.S.A..

[253] I would therefore not apply a discount factor beyond the 25% discount rate Mr. Tidball applied in valuing Saints.

[254] In conclusion, I find the increased value of the shares in the Companies held by Mr. A.J.S.A. during the course of the marriage that constitute family property to be \$1.225 million. Ms. K.L.W.'s share of that family property is \$612,500.

D. How should Ms. K.L.W.'s share of the Companies' increased value be divided?

[255] Mr. A.J.S.A. seeks an order that he pay out Ms. K.L.W.'s interest in Saints into a new corporation (incorporated at Ms. K.L.W.'s cost) as part of a butterfly transaction to reduce distributive taxes. He further seeks an order that the payout be done over the course of ten years as follows:

- a) \$30,000 per year, beginning September 2024 for fiscal years 2024, 2025, 2026, with a minimum of \$2,500 per month (total of \$90,000 over three years);
- b) \$42,000 per year, beginning September 2027 for fiscal years 2027, 2028, 2029, 2030, with a minimum of \$3,500 per month (total of \$168,000 over four years);
- c) \$48,000 per year, beginning September 2031, for fiscal years 2031, 2032, 2033, with a minimum of \$4,000 per month (total of \$144,000 over three years); and
- d) With Mr. A.J.S.A.'s discretion to transfer more than the minimum monthly or yearly amount at any time.

[256] I note that this proposal was based on Ms. K.L.W.'s entitlement being \$400,000 in total. Furthermore, Mr. A.J.S.A.'s proposal does not include any interest or compensation for a ten-year payout of something with a present value of \$612,500, nor does it set out how the commitment will be secured.

- [257] Mr. A.J.S.A. argues that his proposal is the only fair resolution. He argues that I cannot order Saints to pay out retained earnings or other assets because Saints is not solely owned. He says that even if his brother agreed to allow him to take these funds out directly from Saints, Saints would not have the necessary working capital to continue operating. He argues that Saints' expenses have gone up since 2011 such that it now requires \$1.5 million annually in working capital, and that "the business must come first."
- [258] Ms. K.L.W. initially sought a cash payout of her interest in this family property, acknowledging that there would likely be some adjustment for distributive taxes: D.Z. at paras. 161-163, 188. However, in closing submissions, when faced with the possibility that distributive taxes may be close to 49% based on Mr. Tidball's evidence, she agreed that a butterfly transaction may be preferable to recovery at that taxation level, provided that the full amount was placed into the new corporation before the divorce, or there was security for the full amount, to be paid within two years. She sought an order similar to that made in *Lux v. Lux*, 2023 BCSC 1435 at para. 203, that Mr. A.J.S.A. be required to bear the costs of such a transaction.

Determination

- [259] I note that Mr. A.J.S.A. pulled out \$475,000 in dividends from Saints in 2022 for the purpose of preparing to buy Ms. K.L.W. out of her interests in various family property, including Saints. He also worked with his accountant to minimize the taxes he had to pay on that dividend through his holding company, and remortgaged the Sproat Lake Property to finance his purchase of Ms. K.L.W.'s interest in that property with a more limited cash outlay. While he has not provided updated financial statements for the Companies after August 2022, I have no reason to believe that he has not been at least somewhat successful in his financial planning to minimize distributive taxes to the extent possible, particularly given his expertise in this area.
- [260] I do not know what additional revenues Saints made in 2022-2023, or what dividends may have been paid out to Mr. A.J.S.A. or his holding company, as Mr. A.J.S.A. has not disclosed his Companies' financial information since August 2022. As noted above, when taken together, Mr. Tidball's analysis, Mr. A.J.S.A.'s own evidence, and the financial information disclosed, indicate that at the time of separation, Saints had recently finished paying off a number of significant liabilities in terms of new and old books of accounts that are now generating income at an unprecedented level and will likely to continue to do so into the future.
- [261] With respect to whether Saints can afford to pay out Ms. K.L.W.'s interest in the corporation without encroaching on needed working capital, I note that the retained earnings shown on Saints' financial statements up to 2022 are healthy, and I have no expert evidence that would suggest that Saints is not in a position to pay Ms. K.L.W. out for her share of Mr. A.J.S.A.'s interest in Saints.

- [262] Both parties agree that providing Ms. K.L.W. with shares in Saints is unworkable. However, Mr. A.J.S.A. is not limited to using Saints' resources to compensate Ms. K.L.W. for her share of the increase in value of Saints during the marriage. He may also use savings from dividends he has taken out in recent years, for example.
- [263] Furthermore, the evidence establishes that Mr. A.J.S.A. has \$114,870 in equity in the Family Home that would be available to him if he were to sell that property rather than retain it. He may also has some equity in the Sproat Lake Property, though that property is mortgaged and co-owned.
- [264] Overall, I find that Mr. A.J.S.A. has not established that it would compromise Saints' financial integrity or future to require him to pay out Ms. K.L.W.'s interest in this family property. Furthermore, a ten-year period to pay out her 2021 share of Saints is unsupportable--any payout over such a period would have to be much higher to account for the fact that she is not getting the present value of her entitlement and runs a risk that there would be a default in the future. A discount rate has already been applied to this property on the basis of its value as at a certain date, and a different valuation would be required for a ten year pay out.
- [265] With respect to the proposed butterfly transaction, there is not a great deal of case law on this point, but it is clear that where such an order has been made, detailed expert evidence is necessary in the absence of the parties' agreement. I have neither.
- [266] Finally, both parties are seeking a divorce, and the evidence before the Court at trial is that a butterfly transaction must be completed before a divorce is completed to avoid distributive taxes. This includes the transfer of the assets themselves (though Mr. A.J.S.A.'s accountant suggested that the transfer of security for the full amount may be sufficient). These may be good options for negotiated settlements, but in the absence of the parties' agreement on terms, I am not prepared to craft such a transaction, particularly where the parties are so far apart as to how it will be structured and who shall bear the related costs.
- [267] In the absence of a butterfly transaction, I am satisfied that it is appropriate to consider reapportionment of this property pursuant to s. 97 of the FLA on the basis that the division of the increased value in Saints during the marriage will attract significant distributive taxes. Mr. Tidball suggests that these taxes are likely to be in the range of 49% if included into Mr. A.J.S.A.'s income.
- [268] The principles to be considered in this regard are set out in D.Z.:
- [161] Corporate and distributive taxes may be considered under s. 97 of the FLA where a division of family property will attract tax consequences: *Maguire v. Maguire*, 2016 BCCA 431 at paras. 38-39; *Sanai v. Mahmoud*, 2017 BCCA 155 at para. 32. Contingent tax liabilities may be considered on an "if and when" basis: *Stein v. Stein*, 2008 SCC 35; *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 69-70.

[162] The principles that apply to distributive taxes were summarized by Justice Savage in *McKenzie v. McKenzie*, 2015 BCSC 241 at para. 8:

- (1) where there is sufficient evidence to satisfy the Court of tax consequences or other costs inherent in a compensation order the Court should take these into account in setting the compensation amount;
- (2) the onus is on the payor to provide the trial judge with the necessary evidence of the tax consequences arising from the division of assets or other consequences of having to acquire the funds to pay the payee;
- (3) there is no absolute rule as to how the compensation order might be calculated, depending, as it does, on the type of assets to [be] divided, timing, the parties involved and other orders in the action;
- (4) the matter should be considered as of the date of trial, not as of the date the matter comes back before the court; and
- (5) the overriding principle is fairness.

[163] The court can pick a percentage it thinks reflects distributive taxes. The proper amount is not a precise accounting nor an exact science: *Cochrane v. Cochrane*, 2013 BCSC 2114 at para. 40. In *Cochrane*, it was proposed that there would be distributive taxes of 34% but the court noted that there was a strong likelihood that only a portion of the value to be distributed would be taken immediately with the balance taken at some later indeterminate time. The court selected 20% for distributive taxes.

[269] In this case, the evidence establishes that Mr. A.J.S.A. has been planning for the tax consequences of this distribution since 2022, and has made efforts to reduce the tax consequence that it will attract by holding funds in his holding company, AJSTA, for example. I also intend to allow Mr. A.J.S.A. to make these payments over more than one fiscal year, which may also assist in the reduction of the distributive taxes that will be required to be paid. Reapportionment to address distributive taxes is not a precise accounting or exact science, and I must consider what is fair in this regard.

[270] Taking all of this into account, I consider that a 40% reapportionment for distributive taxes back to Mr. A.J.S.A. is fair and appropriate in the event that the parties do not come to terms on a butterfly transaction before their divorce comes into effect. A 40% reapportionment of \$612,500 is \$245,000. I therefore make the following order with respect to the division of the value of Saints' shares:

- 1) In the event that the parties are unable to agree upon more favourable tax arrangements for the distribution of Ms. K.L.W.'s interest in the growth of Saints, Mr. A.J.S.A. shall pay Ms. K.L.W. \$367,500 for her interest in Saints according to the timeframes set out below.

- 2) Should the parties come to an agreement for Mr. A.J.S.A. to transfer Ms. K.L.W.'s 50% interest in the growth of Saints in the full amount of \$612,500 through a butterfly transaction, or if the parties are able to come to some other agreement that reduces the distributive taxes of Ms. K.L.W.'s interest in Saints before the divorce comes into effect, they may advise me of this agreement and seek a stay of the divorce order for this purpose.

Vehicles

- [271] Ms. K.L.W. is the registered owner of a 2019 Jeep Cherokee (the "Jeep") valued at \$35,000, which she purchased after trading in a 2021 Hyundai Palisade that she owned during the marriage, but that she could not afford to keep after separation. I find that the evidence establishes that the trade-in value she received for the 2021 Hyundai was less than the outstanding car loan on it, and that she received no additional value from the trade-in and purchase of the Jeep.
- [272] Mr. A.J.S.A. is the registered owner of a 2018 Dodge Ram ("Dodge") valued at \$32,000, which is encumbered by a TD Bank loan in the amount of \$25,648 as at November 17, 2023, with an estimated net value of \$6,352.
- [273] The evidence establishes that the parties jointly own the following vehicles:
- 1) A 2016 RV trailer that is valued at approximately \$30,000 as at February 2023, which is encumbered by a Scotiabank loan in the amount of \$30,674; and
 - 2) A 2018 Chase/Crestliner boat valued at approximately \$45,000 as at February 2023, which is encumbered by a Royal Bank of Canada loan in the amount of \$45,312.
- [274] Mr. A.J.S.A. wishes to retain ownership of these assets that he says he has been solely responsible for since separation. He seeks a contribution from Ms. K.L.W. for his contributions against this family debt, and for the slight difference between the estimate of the value of these assets against the debt outstanding on their loans. Ms. K.L.W. does not seek to retain these vehicles, but she opposes any contribution on her part to their costs since separation, because Mr. A.J.S.A. has had exclusive use of them since separation.
- [275] I am not satisfied that the net equity in any of these vehicles merits an order for the division of family property. Any debt that Mr. A.J.S.A. may be inheriting on the RV trailer is more than set off by his retention of the Dodge that has a net positive value. Nor am I prepared to reapportion the value of the RV or the boat based on Mr. A.J.S.A.'s contributions to paying their loans, given his continued use of them.
- [276] I therefore order that Ms. K.L.W. transfer her interest in the boat and RV trailer to Mr. A.J.S.A., and that Mr. A.J.S.A. shall ensure that she is removed from any loans associated with them. Generally, the parties shall keep the vehicles they currently drive and cooperate in removing the other from any title or loan documents with respect to those vehicles.

Bank Accounts

- [277] The parties both have their own bank accounts that they have used since separation, and neither seeks to divide those accounts. They also have a joint account that holds less than \$10,000, and they agree to divide those funds equally and close that account. I make that order.
- [278] Ms. K.L.W. also has a Tax-Free Savings Account ("TFSA") account that she held during the marriage currently valued at slightly over \$9,000. Mr. A.J.S.A. seeks half of this amount (\$4,500), and I make that order.

RRSPs and Pensions

- [279] The parties agree that \$160,000 of Mr. A.J.S.A.'s RRSPs at the time of separation was his excluded property. Those funds are therefore not subject to division. Since separation, they were rolled over to Ms. K.L.W. as part of Mr. A.J.S.A.'s purchase of her interest in the Sproat Lake Property in September 2022. These funds remain in Ms. K.L.W.'s RRSP accounts and are also not subject to further division.
- [280] The parties are agreed that Mr. A.J.S.A.'s RRSPs that constitute family property are worth slightly over \$60,000, and Ms. K.L.W.'s RRSPs that constitute family property are worth slightly over \$18,000. The parties agree, and I order, that the RRSPs shall be equalized by a spousal rollover by Mr. A.J.S.A. into Ms. K.L.W.'s RRSP account in the amount of \$21,000.
- [281] In addition, Ms. K.L.W. has a pension through her work that has not been valued. The appropriate order with respect to that pension is for it to be divided by the plan pursuant to the applicable statute on the basis of the date of the marriage commencing May 1, 2011 and ending July 18, 2021.

RESPs

- [282] The parties have approximately \$65,000 in RESPs for the children. Mr. A.J.S.A. wishes to continue managing the investments in those accounts, and Ms. K.L.W. is agreeable to that. Both parties will remain signing parties for any distribution of these funds.

FINES FOR BREACHES OF COURT ORDERS AND THE FLA

- [283] Ms. K.L.W. seeks a \$5,000 fine pursuant to ss. 213(2)(d), 228, and 230 of the FLA for Mr. A.J.S.A.'s persistent breach of disclosure requirements and conduct orders pertaining to the limitation of communications. She also seeks this order with respect to his failure to comply with the July 2022 disclosure of documents orders made by the Court, and the failure to produce the Companies' year-end financial statements to the parties and Mr. Tidball before trial in a timely manner. Finally, she argues that his breach of the August 2023 Order increasing his child support obligations, and his (lack of) cooperation in the preparation of a s. 211 report, also warrants a fine.

- [284] Under s. 213(2)(d) of the FLA, the Court may order costs and fines for a party's failure to comply with an order for disclosure.
- [285] Under s. 230 of the FLA, the Court may order costs and fines up to \$5,000 for a party's failure to abide by court orders generally.
- [286] Under s. 228 of the FLA, the Court may order costs and fines for a party's failures to abide by conduct orders. As set out in *C.A.L. v. D.E.L.*, 2018 BCSC 772:
- [43] Section 228 is a new remedy to family law proceedings and the subject of very little judicial consideration to date. The language used in s. 228 is analogous to that found in s. 213 (enforcing orders respecting disclosure). The intent and proper application of s. 213 has been canvassed by the court on several occasions, most expansively in *J.D.G. v. J.J.V.*, 2013 BCSC 1274. In *J.D.G.*, the court finds that a robust application of the FLA's enforcement provisions is necessary so that the parties can focus on resolving the true merits of their dispute and not be bogged down in repetitive and costly pre-trial applications. See also the stated purposes of a conduct order: FLA, s. 222.
- [44] Before s. 228 comes into play, however, the court must find that a party has actually breached a conduct order. Whether a breach has occurred is determined objectively. Otherwise, anyone subject to a conduct order would be free to interpret the order's terms as they like and thus never be subject to sanctions. That outcome would leave the enforcement remedies toothless and could not be what legislature intended when enacting s. 228. The respondent's subjective motive in sending the impugned communications, together with the surrounding circumstances at the time, will go to the consideration of a proper remedy under s. 228.
- [287] I find that Mr. A.J.S.A.'s breach of the series of conduct orders respecting communications in this case was flagrant and persistent. His argument that they did not apply in the case of emergencies and anything "emergent" was therefore excluded from the orders limiting his conduct is untenable, and undermines the conduct orders repeatedly made by the Court and renders them meaningless. Other than fines and costs, there is little repercussion for such persistent breaches.
- [288] Mr. A.J.S.A.'s failure to comply with the August 2023 Order regarding interim child support and the s. 211 report is also a significant breach. His failure to comply with these orders is not excused by appealing them, short of obtaining a stay. His evidence on these points indicates that his non-compliance was rooted in his disagreement with the court orders, and not a lack of means to comply.
- [289] Mr. A.J.S.A.'s slow and incomplete disclosure, requiring further applications, is also a potential ground for fines in this case. However, I consider that this is more appropriately addressed in costs.

[290] Overall, I am satisfied that Mr. A.J.S.A.'s breach of the conduct orders alone merits a fine under the FLA. I find that the higher range is appropriate.

[291] I set this fine in the amount of \$4,500. I would set off this fine against Mr. A.J.S.A.'s claim for property division of Ms. K.L.W.'s TFSA account.

SUMMARY OF ORDERS

[292] The parties agreed to a number of orders in mediation that were reflected in the April 2023 Order with respect to holidays and special occasions that I leave undisturbed.

[293] In conclusion, I order that:

Divorce

- 1) The parties are divorced from one another. The divorce will take effect on the 31st day after the date of this order, unless I receive an application for a stay of the divorce order from both parties before that date;
- 2) Ms. K.L.W.'s surname is changed to "W.";

Parenting

- 3) Mr. A.J.S.A. and Ms. K.L.W. are the guardians of the children pursuant to s. 39(1) of the FLA and may exercise the parenting responsibilities set out in s. 41 of the FLA;
- 4) During their own parenting time, the parties may exercise the parental responsibility of making day-to-day decisions affecting the children, provided that the guardian must advise the other parent of any matters of a significant nature affecting the children;
- 5) Before exercising the parental responsibilities listed in s. 41 of the FLA (other than s. 41(a)), both guardians shall consult each other about any important decisions affecting the children, and try to reach agreement concerning those important decisions. If they cannot agree after consultation, Ms. K.L.W. shall make the final determination;
- 6) If Mr. A.J.S.A. disagrees with a decision made by Ms. K.L.W. on an important parenting decision, he may apply for directions pursuant to s. 49 of the FLA;
- 7) If either parent makes a medical specialist appointment for a child, other than with their general practitioner, it shall be with 7 days' notice and on a day of the week when both parties are in Nanaimo. If the specialist does not provide any flexibility in that regard, both parties shall make themselves available on the date provided by the specialist if they wish to attend;

- 8) The parties shall have shared parenting time on the following schedule: 3-2-5-4. Ms. K.L.W. shall have parenting time with the children Monday, Tuesday, and Wednesday nights (to Thursday morning) in the first week, and Mr. A.J.S.A. shall have the children Thursday and Friday night of that week (to Saturday morning) in the first week. Ms. K.L.W. will then have the children Saturday morning to Thursday morning in the second week, and Mr. A.J.S.A. will have them Thursday through to Monday morning of the second week;
- 9) On weekday transition days, the parent who has the children in their care the night before the transition will drop the children off at school, and the other parent will pick the children up from school. On Saturdays, or if there is no school on a transition weekday, transitions will be at 9 a.m. or at an extracurricular activity scheduled for that transition morning, such as dance, skating, or gymnastics, if it starts before 10 a.m., with the party who had parenting time the evening before dropping the children off at the transition point. As the children grow older, they may also choose to walk between the two homes for their transitions;
- 10) Each year, Ms. K.L.W. shall have parenting time with the children from 9 a.m. on Mother's Day to 9 a.m. the following day, and Mr. A.J.S.A. shall have parenting time with the children from 9 a.m. on Father's Day to 9 a.m. the following day, regardless of the regular schedule;
- 11) The parenting time for school breaks in December and March shall be shared equally on a week on/week off basis, and during the summer break, each parent will be entitled to two full non-consecutive weeks with the children, which the parties may agree to make consecutive. The parenting coordinator can determine the parties' holiday schedule for 2024, after which the choice of weeks shall alternate between the parties, with Mr. A.J.S.A. having the first choice of weeks in odd years, and Ms. K.L.W. having the first choice in even years. In order to exercise this choice, the party with first choice shall notify the other party using the Our Family Wizard application of their choice of weeks no less than 4 months in advance of the start of the corresponding break;
- 12) Requests for alterations to the parenting schedule shall be communicated through Our Family Wizard. The parties shall use the Yes/No option to respond to these requests;
- 13) After May 4, 2024, the parenting coordinator's retainer shall be allowed to lapse, unless both parties agree to extend it. In the interim period, the parenting coordinator will continue to have final decision-making authority with respect to the screen time protocol currently before her and the parties' holiday parenting schedules, and general authority to assist the parties in consulting with each other on important family decisions;

Conduct and Communication Orders

- 14) For all daily, non-emergency communications, like sharing third-party documents, such as the children's test results from school exams, posting photographs, calendarizing extracurricular activities, receipts for s. 7 expenses, or sharing birthday party invitations, the parties shall exclusively use the corresponding features of Our Family Wizard. These posts shall not include questions or demands. They shall be purely informational postings;
- 15) When consultation is required with respect to a decision engaging a parenting responsibility, the parties shall use the general messaging function of Our Family Wizard. Communications shall be civil and no longer than necessary to convey each parent's position and concern;
- 16) Mr. A.J.S.A. shall be limited to initiating no more than two messages a week, and no more than one responsive message to any messages sent by Ms. K.L.W. Ms. K.L.W. shall be entitled to use the function on Our Family Wizard that gathers his communications and makes them available once per day at a time of her choosing. Unless the issue raised is an emergency, the parties shall respond to the parenting issue raised in the message within 2 days;
- 17) Except in the case of an emergency, the parties shall not communicate by telephone, email, or text messaging and shall only communicate using Our Family Wizard. This includes through carbon copy or blind copy communications with third-parties. For these purposes, emergencies are limited to matters where one or more of the children is subject to an immediate risk of harm;
- 18) In the event of an emergency, the on-duty parent will inform the other parent as soon as possible so that both parents may attend the emergency. The on-duty parent may make immediate emergency decisions if they cannot reach the off-duty parent despite making reasonable efforts;
- 19) The conduct orders made in September 2022 shall remain in force as follows:
 - a) Neither party will:
 - (1) question the children about the other parent or time spent with the other parent beyond simple conversational questions;
 - (2) discuss with the children any inappropriate adult, court, or legal matters; or
 - (3) blame, criticize, or disparage the other parent to the children.
 - b) Neither party will attend at, or enter, the place of residence of the other party without their express knowledge and consent, with parenting time exchanges made pursuant to this order to constitute express knowledge and consent to attend outside of the other party's residence;

Child Support

- 20) Mr. A.J.S.A. is imputed an income of \$707,201 in 2022 and 2023;

21) Mr. A.J.S.A. is required to pay Ms. K.L.W. \$11,494 in child support, and Ms. K.L.W. is required to pay Mr. A.J.S.A. \$2,217 in child support, for a net payment by Mr. A.J.S.A. to Ms. K.L.W. of \$9,277 per month commencing January 1, 2024, and continuing until further order of this Court for so long as any of the children are children of the marriage;

22) Ms. K.L.W. shall be entitled to receive the Canada Child Benefit and B.C. Child Benefit;

Review of Support

23) By no later than June 1 of each year, the parties will exchange copies of:

- a) Their respective income tax returns including all attachments; and
- b) Their respective Notices of Assessment for the previous tax year;

24) By no later than March 15 of every year, Mr. A.J.S.A. shall also provide the most current year-end financial statements for Saints, AJSTA, and any other corporation for which he has a controlling interest;

25) Mr. A.J.S.A.'s income for support purposes shall be calculated generally in accordance with the methodology applied by Mr. Tidball in his Guidelines income report;

26) Should either party seek a review of the child or spousal support payable under this, or a future, order on the basis of a change in income, they shall advise the other party by June 30 in that calendar year, or within 30 days of receiving all of the required financial and income information, whichever is later, by giving written notice to the other party through their counsel or through Our Family Wizard;

Spousal Support

27) Commencing January 1, 2024, Mr. A.J.S.A. shall pay Ms. K.L.W. \$2,000 per month on the first day of each month thereafter, terminating on December 31, 2026;

Section 7 Special Expenses

28) Pursuant to s. 7 of the Guidelines, the following are special or extraordinary expenses:

- a) child care or after-school care expenses, including fees for Kidz Kompany;
- b) the portion of medical and dental insurance premiums attributable to the children on their own plan;
- c) health related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist, or any other person, physiotherapy, occupation therapy, speech therapy and prescription drugs, hearing aids, glasses, and contact lenses;

- d) extraordinary expenses for primary or secondary school education or for any other education programs that meet the children's particular needs, including education requirements for the middle child as recommended by her teachers, and those already agreed to in writing between the parties, including:
 - (1) Tutoring expenses through the TLC program;
 - (2) Dance for the eldest children;
 - (3) Gymnastics for all children;
 - (4) Skating lessons for the youngest child; and
 - (5) Expenses arising in the future that the parties agree qualify as special or extraordinary expenses within the meaning of the Guidelines.
- 29) Special expenses shall be paid with Mr. A.J.S.A. paying 80% and Ms. K.L.W. 20%, and will be split at the provider level in this proportion wherever possible;
- 30) Where a special expense cannot be split by the provider, the paying party will post their receipt to Our Family Wizard within 7 days of incurring the expense, and the non-paying party will pay their proportionate share within 7 days of the receipt being posted on Our Family Wizard;
- 31) Ms. K.L.W. shall maintain the children on her extended medical and dental plans for so long as she is able to do so, and for so long as the children are eligible to receive such benefits;
- 32) Until such time as the children have finished post-secondary education, the parties shall maintain life insurance on their lives with the other party designated as a beneficiary of no less than \$1,000,000;
- 33) The parties shall transfer all life insurance policies they hold in the other party's name to that party;

Retroactive Support

- 34) Mr. A.J.S.A. shall pay Ms. K.L.W. \$13,122 in retroactive spousal support within 60 days of this order;
- 35) Mr. A.J.S.A. shall pay Ms. K.L.W. \$1,778 in retroactive special expenses within 60 days of this order;
- 36) Mr. A.J.S.A. shall pay Ms. K.L.W. \$143,286 in retroactive child support within 60 days of this order;

Property Division

- 37) Mr. A.J.S.A. shall pay Ms. K.L.W. \$114,870 to retain the Family Home within 60 days of this order;

- 38) Mr. A.J.S.A. shall retain the 2018 Dodge Ram, the 2016 RV Trailer, and the 2018 Chase/Crestliner Boat as his property, and shall be solely responsible for all costs and loans associated with them. Ms. K.L.W. shall transfer her interest in these vehicles to Mr. A.J.S.A., and Mr. A.J.S.A. shall indemnify Ms. K.L.W. for any costs associated with these vehicles;
- 39) Ms. K.L.W. shall retain her 2019 Jeep Cherokee as her property;
- 40) Within 60 days of this order, Mr. A.J.S.A. shall transfer \$21,000 in his RRSP to Ms. K.L.W.'s RRSP by way of a spousal rollover;
- 41) Within 60 days of this order, any funds remaining in the parties' joint bank account shall be divided equally, and the account closed;
- 42) Ms. K.L.W.'s pension plan shall be equalized pursuant to Part 6 of the FLA;
- 43) The parties' pensionable earnings under the Canada Pension Plan shall be equalized pursuant to the Canada Pension Plan, R.S.C. 1985, c. C-8, with either party being entitled to apply for this equalization;
- 44) The parties will continue to jointly control the children's RESP accounts for the benefit of the children;
- 45) Mr. A.J.S.A. shall provide to Ms. K.L.W. a number of items from the Family Home, including a photograph of herself with her sister and uncle, and a bowl from Bali. If there are remaining undivided family household items in storage, they shall be divided equally;
- 46) Mr. A.J.S.A. shall pay Ms. K.L.W. \$367,500 for her share in the Companies, unless the parties agree to a different way to manage distributive taxes on Ms. K.L.W.'s \$612,500 interest in Saints and the parties apply for a stay of the divorce order. Any application for a stay of the divorce order on this basis must be joint and brought with sufficient time to be scheduled before the divorce comes into effect 31 days after these Reasons are released, and no later than 21 days after the release of these Reasons in any event;
- 47) In the absence of a stay of this order or a consent order altering these terms, Mr. A.J.S.A. shall pay out Ms. K.L.W.'s interest in the Companies as follows:
 - a) \$67,500 within 60 days of this order;
 - b) \$100,000 within 6 months of this order;
 - c) \$100,000 within 12 months of this order; and
 - d) \$100,000 within 24 months of this order;
- 48) Ms. K.L.W. is required to transfer \$4,500 to Mr. A.J.S.A. to equalize her TFSA, and Mr. A.J.S.A. is required to pay Ms. K.L.W. \$4,500 in fines under the FLA for his breaches of the conduct orders to date. These amounts shall be set off against each other, such that Ms. K.L.W. shall retain her full TFSA; and

- 49) Each party shall retain as their sole property all other property, assets, and accounts in their own name.

Timing and Enforceability of Payments

- 50) Should Mr. A.J.S.A. be unable or unwilling to complete any of the above payments within the timeframes provided in this order, post-judgment interest will accrue on the outstanding amounts from the date of these Reasons. In addition, within 60 days of Ms. K.L.W. giving notice to this effect, the Family Home and/or Mr. A.J.S.A.'s interest in the Sproat Lake Property shall be listed for sale pursuant to s. 97 of the FLA, with the parties having joint conduct of sale, and the net proceeds applied against any outstanding amounts owed by Mr. A.J.S.A. pursuant to this order.

COSTS

- [294] Ms. K.L.W. has been substantially successful in this family proceeding. She was successful in relation to the valuation of family property and income, which were a significant aspect of this trial. She was also successful in relation to her position on final decision-making in parenting and the continuation of conduct orders. Ms. K.L.W. is therefore entitled to her costs in this proceeding.
- [295] Mr. A.J.S.A. has sought compensation from Ms. K.L.W. on a solicitor-client basis for his legal costs in defending the regulatory complaint against him. It is not clear whether he is seeking this as a reapportionment of family property under the FLA or as a costs order. In any event, I do not consider that he is entitled to these costs in this family proceeding.
- [296] If the parties are able to settle costs without a further court hearing, I do not wish to discourage them. However, if they are not able to do so, the parties should promptly make arrangements with the Registry to appear before me to settle costs within 2 months of the delivery of these Reasons.
- [297] Should the parties seek a stay of the divorce order on the basis of an alternate agreement on the division of property, they shall jointly make a request to appear before me no less than 21 days after the receipt of these Reasons.

"Marzari J."

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Prepared on 28 October 2026 · Esheria