

CANADA / JUDGMENT

## A.L.A. v. C.F.W.

2023 BCSC 1888

### COURT

Supreme Court of British Columbia

### DECIDED

28 July 2023

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2023 BCSC 1888 A.L.A. v. C.F.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.L.A. v. C.F.W.,

2023 BCSC 1888

Date: 20230728

Docket: E47364

Registry: Penticton

Between:

A.L.A.

Claimant

And

C.F.W.

Respondent

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for the Claimant:

C.F. King

Counsel for the Respondent:

B. Hankins

M. Santano

Place and Dates of Trial:

Kelowna, B.C.

February 21-24, 28

and March 1-2, 2023

Place and Date of Judgment:

Penticton, B.C.

July 28, 2023

Table of Contents

I. OVERVIEW.. 4

II. FACTUAL BACKGROUND.. 4

A. The Parties' Relationship. 4

B. The Parties' Assets. 5

C. The Parties' Expenses. 9

D. The Agreement 9

III. ISSUES. 18

IV. CREDIBILITY AND RELIABILITY OF EVIDENCE. 19

A. The Parties. 19

B. Other Witnesses. 20

V. ANALYSIS AND CONCLUSIONS. 21

A. Setting Aside the Agreement re: Property Division. 21

1. Legal Framework. 21

2. The Agreement 24

3. Is the Agreement procedurally unfair?. 27

a) Financial Non-Disclosure (s. 93(3)(a)) 27

b) Exploitation of Vulnerabilities (s. 93(3)(b)) 36

c) Nature and Effect of the Agreement (s. 93(3)(c)) 42

d) Other Circumstances (s. 93(3)(d)) 45

4. Does the saving provision in s. 93(4) of the FLA apply?. 45
5. Is the Agreement significantly unfair? (s. 93(5)) 46
  - a) Length of Relationship (s. 93(5)(a)) 47
  - b) Spouses' Intentions (s. 93(5)(b)) 48
  - c) Degree of Reliance (s. 93(5)(c)) 49
  - d) Conclusion. 50

## B. Setting Aside the Agreement re: Spousal Support 51

1. Legal Framework. 51
2. The Agreement 52
3. Is the Agreement procedurally unfair? (s. 164(3)) 52
4. Is the Agreement significantly unfair? (s. 164(5)) 53

## C. Application of Part 5 of the FLA. 56

## D. Parenting Arrangements. 57

## E. Parties' Guidelines Incomes. 59

1. Claimant 62
2. Respondent 63

## F. Child Support 67

## G. Section 7 Expenses. 68

## VI. DISPOSITION.. 68

## I. OVERVIEW

- [1] The central issue in this family law action is whether the cohabitation agreement the parties signed in March 2021 (the "Agreement") is legally binding. The claimant, A.L.A., seeks to set it aside; the respondent, C.F.W., relies on it as a valid waiver of the parties' entitlement to spousal support and an equal division of family property.
- [2] The claimant submits that the process which preceded the parties' execution of the Agreement was flawed. She says that the respondent's financial non-disclosure prevented her from obtaining effective independent legal advice and that when considered in the context of her own alleged vulnerability and pressure from the respondent to sign it, the Agreement is significantly unfair. She argues that the Agreement ought to be set aside and family property and debt divided equally in accordance with the provisions of the Family Law Act, S.B.C. 2011, c. 25, [FLA]. She seeks mid-range spousal support retroactive to the

date of separation and prospective spousal support for an additional 10.5 years. If the Agreement is set aside, the respondent submits that an equal division of family property would be significantly unfair.

- [3] The parties have two children together, B.C., who is currently four years old, and N.R., who is now approximately 15 months old (collectively, the "Children"). Parenting arrangements for the Children and determination of the parties' incomes for the purposes of the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines] are also at issue.
- [4] For the reasons that follow, I conclude that the Agreement is neither procedurally nor operationally unfair. Accordingly, I decline to set it aside.

## II. FACTUAL BACKGROUND

### A. The Parties' Relationship

- [5] The parties met on January 8, 2018 when the respondent installed a sign at a property the claimant had listed for sale. The claimant was then 37 years old and an established realtor. The respondent was 29 years old and a trained journeyman electrician. He was then working temporarily as a business developer with a software company. He also co-owned two businesses: MCS, a two-person partnership that was in the business of renting posts and installing signs, and PI Ltd. a telecommunications company.
- [6] PI Ltd. provides electrical work, including installation and repair services for television, telephone, internet and security systems at predominantly residential locations. It supplies trained technicians to do this work. Traditionally, contractors have subcontracted these services to PI Ltd.
- [7] The parties' relationship progressed quickly. They started dating in February 2018. The claimant learned that she was pregnant with their first child in April 2018. By mid-July 2018, they had signed a contract to purchase a house together in Okanagan Falls; this property became their former family residence (the "FFR"). The parties moved into the FFR on November 1, 2018. Their first child was born in December 2018.
- [8] The parties separated on February 11, 2022, after a relationship of about four years. The claimant gave birth to their second child in April 2022.

### B. The Parties' Assets

- [9] Both parties owned real property when they met. The claimant had a condominium in Edmonton, Alberta and a house in Summerland, BC (the "Summerland Property"). The respondent owned a house on Burns Street in Penticton, BC (the "Burns Street Property").

- [10] By late April or early May 2018, the parties were living together at the Summerland Property. In early July 2018, the claimant listed the Summerland Property for sale. The parties initially planned to use the net proceeds from the sale of the Summerland Property towards their purchase of the FFR. This plan changed when it took more than one year to sell the Summerland Property and the parties were unable to qualify for a mortgage without the Summerland Property sale proceeds.
- [11] On July 13, 2018, the parties signed a contract of purchase and sale for the FFR (the "FFR Contract"). Despite the Summerland Property not having sold, they waived all the conditions on the FFR Contract. On the respondent's evidence, the parties had about two weeks to come up with the required down payment to purchase the FFR.
- [12] The parties drew on their respective lines of credit for the required deposit: the respondent borrowed \$19,000 and the claimant borrowed \$1,000. They borrowed the additional \$55,000 that they required to finalize their purchase of the FFR: the respondent borrowed \$40,000 from his parents and the claimant borrowed \$15,000 from her mother. The parties represented to their lending institution that these funds were a gift; in fact, they were loans that both parties then expected to have to repay. The claimant drafted the "Gift Letter".
- [13] In October 2018, the claimant's name was removed from the FFR Contract; her debt to income ratio was too high to allow the parties to obtain financing. According to the respondent, this was initially planned as a temporary change, pending sale of the Summerland Property.
- [14] On November 1, 2018, the parties moved into the FFR. The claimant was then eight-and-a-half months pregnant with their first child. She continued to market the Summerland Property for sale, periodically renting it out and retaining all of this rental income.
- [15] After the parties moved into the FFR, the respondent rented out the Burns Street Property until it sold on June 28, 2019. He retained all of this rental income plus the net proceeds of \$104,559.15 when it sold. He spent \$9,000.00 of these sale proceeds to purchase an ATV, transferred \$30,000.00 into a TFSA account, and used \$44,021.89 to repay a debt that was unrelated to the parties' purchase of the FFR, evidence he corroborated with documentation.
- [16] On September 9, 2019, the claimant had her first meeting with Kathryn Robinson, a family law lawyer. Ms. K. Robinson recorded in her contemporaneous notes that the parties had started living together officially in July 2018 and that the claimant was the primary caregiver for B.C. and was still working from home. She wrote that the parties had one joint account for the FFR bills and mortgage and that growth of the parties' businesses was to be "excluded". Based on Ms. K. Robinson's notes from her September 9, 2019 with the claimant, the claimant provided her with the following information:

· Biggest thing is that [the claimant's] name is going to get added to title of the house they're currently living in - she is going to put a bunch of money into it - wants to make sure she gets that back

[17] In late 2019, the Summerland Property sold. The claimant retained the net sale proceeds of \$93,337.25. She said that these funds were quickly depleted and used to pay down debts and for B.C.'s needs, evidence that was not corroborated with any documentation. When confronted about this matter in cross-examination, the claimant replied that she did not think she had been asked to produce any of this documentation, a statement that overlooks her disclosure obligations. She said that she used these funds to repay about \$37,000 that she had borrowed from her mother to fund her living expenses while the Summerland Property was listed for sale, evidence that was also not corroborated with any documentation. The claimant testified that she was not working much after B.C.'s birth.

[18] According to the respondent, once the Summerland Property sold, the claimant wanted a cohabitation agreement to protect her money. On his evidence, she was no longer happy with the FFR and had decided that it was not worth as much as she had previously thought. In the circumstances, he testified that he told her he would:

- a) Refinance the FFR on his own;
- b) Repay her parents the funds she had borrowed from them for the FFR down payment;
- c) Be the sole owner of the FFR if they separated; and
- d) Prepare a cohabitation agreement to this effect.

[19] The claimant conceded in cross-examination that this conversation took place; she did not admit that the parties reached this agreement.

[20] On December 9, 2019, the parties approached their mortgage broker, Tracey Robinson, about title to the FFR being placed in the respondent's name alone and their plan to prepare a cohabitation agreement. The respondent sent the following email that day to Ms. T. Robinson, copied to the claimant:

Hey Tracey,

[A.L.A.]. and myself have talked over the options and with [A.L.A.]. having to [sic] high of a debt ratio we think it's best that we go with the plan of myself locking in for the five years. We will be doing a Co-habitant agreement prior to this and feel it will relieve a lot of extra stress we both carry and some money in the bank for [A.L.A.].

[21] On December 16, 2019, the claimant had a second meeting with lawyer, Ms. K. Robinson. According to Ms. K. Robinson, they discussed possible terms for inclusion in a cohabitation agreement. She noted that this was the claimant's second appointment, that the Summerland Property had sold, and that the claimant was ready to proceed with a cohabitation agreement. Under the heading "New Plan", she recorded the following information:

They were going to re-mortgage and she would put money in, both names added to title, both moms paid back; but [A.L.A.]. can't get on title b/c of debt to income ratio so instead:

[C.F.W.] will re-mortgage and [pay] his mom back the \$40,000 but can't pay her mom back the \$15,000..

\$15,000 was actually a gift, she doesn't have to pay her mom back. . . borrowed \$22,000 for living expenses. . .

[22] On February 3, 2020, the respondent repaid his parents the \$40,000.00 he had borrowed from them to purchase the FFR, evidence his mother corroborated. He did so with funds that he had deposited in his TFSA account following sale of the Burns Street Property, evidence he corroborated with bank statements. He paid the remainder owing by e-transfer, as corroborated by bank statements. On June 11, 2020, he repaid the claimant's mother, C.T., the \$15,000 that she had loaned the claimant towards the purchase of the FFR, as corroborated by a copy of the bank draft in evidence.

### C. The Parties' Expenses

[23] After the parties began living together at the FFR, they maintained separate finances. They opened one joint account for the sole purpose of paying their shared living expenses (including the mortgage, electricity, gas, utilities, insurance, and other household costs) equally. They split the cost of groceries equally. The claimant maintained a detailed written monthly reconciliation of these expenses. According to the claimant, she paid most of the costs for toys, clothing, and accessories for B.C., evidence that she did not corroborate with any documentation. At some point, the parties acquired a tenant at the FFR. Thereafter, the parties agree that they shared the FFR expenses equally with their tenant, with each of them paying one-third.

### D. The Agreement

[24] On the respondent's unchallenged evidence, he had just ended a two-year engagement with someone who had left him with significant debt when he met the claimant. He wanted to ensure that he did not find himself in a similar position again. He testified that the parties agreed before moving in together that they would divide all expenses equally and that each would retain the assets they had brought into the relationship if they separated. The claimant did not deny that this conversation occurred; she conceded in cross-examination that it is possible it did.

- [25] The respondent recalled that it was the claimant who initiated a cohabitation agreement. He said that, once she received an offer to purchase the Summerland Property, she wanted to protect her net sale proceeds. On his evidence, he initially thought that a written agreement was unnecessary but he ultimately agreed to one. This evidence is consistent with the contemporaneous note of family law lawyer, Noemi Argueta, made at her first meeting with the claimant in April 2020, that the claimant "started the process with getting a cohab agreement".
- [26] The respondent's evidence on this point is also consistent with the claimant's evidence given on discovery, at which time she testified that she suggested to the respondent in the fall of 2019 that they should look into getting a cohabitation agreement. At trial, the claimant admitted that she gave this answer on discovery; she agreed that the respondent might have told her they already had a verbal agreement but she denied any recollection of him saying that he thought a written cohabitation agreement was unnecessary.
- [27] The claimant met with Ms. K. Robinson three times: on September 9, 2019, December 16, 2019, and February 19, 2020.
- [28] According to the claimant, she and Ms. K. Robinson discussed general family law information at their first meeting. However, based on Ms. K. Robinson's contemporaneous notes and her trial testimony, the claimant was then considering a cohabitation agreement. The claimant denied telling Ms. K. Robinson at their first meeting that: 1) she wanted a cohabitation agreement; and 2) the purpose of such an agreement was, in part, to protect the Summerland Property net sale proceeds. She denied any recollection of telling Ms. Robinson that the parties intended to retain the growth in their respective companies.
- [29] Ms. K. Robinson testified at trial. Her complete file is in evidence. She reviewed her notes in detail. She confirmed that the claimant was considering a cohabitation agreement in September 2019, and that she wanted it to be in effect if the parties married. Ms. K. Robinson understood that the parties had opened an account for the payment of bills, including the FFR mortgage, and that any growth in their businesses was to be excluded. Title to the FFR was then in the respondent's name; Ms. K. Robinson understood that the parties were then contemplating that this be changed. She noted that the claimant estimated the respondent's net take home pay to be about \$5,000 per month. Ms. K. Robinson understood that the claimant would contact her again when she was ready to proceed.
- [30] The claimant agreed that she and Ms. K. Robinson continued their discussions at a second meeting on December 19, 2019; she did not ask Ms. K. Robinson to take any steps on her behalf at that time. Ms. K. Robinson noted that the parties had planned to remortgage the FFR but that the claimant's name could not be added to title as her debt to income ratio was too high. She recorded the various questions that she then had and what she says she would have told the claimant about the need for more fulsome financial disclosure and instructions regarding the parties' intentions concerning the growth in their assets.

- [31] At their final meeting in February 2020, Ms. K. Robinson noted that the claimant had instructed her not to draft a cohabitation agreement as the respondent had told her that he did not know if he wanted to remain in the relationship. She wrote that the claimant's entitlement to spousal support was uncertain and that she was to await instructions. The claimant admitted in cross-examination that she and Ms. K. Robinson had some discussion about the applicable law if the parties separated. Ultimately, the claimant did not provide the requested retainer and she and Ms. K. Robinson had no further contact.
- [32] On April 29, 2020, the claimant consulted with Ms. Argueta, her second family law lawyer. She informed Ms. Argueta that she was considering leaving the respondent. Under the heading "Reason for her call", Ms. Argueta noted that, if the claimant were to leave the respondent, the "biggest thing is child custody". The claimant accepted the accuracy of this note. Ms. Argueta provided the claimant with information about her legal rights and entitlements in the event of a separation.
- [33] On October 8, 2020, the claimant sent Ms. Argueta the following email:
- Hi Noemi,
- I chatted with you over the phone a couple of months ago about separation and child custody.
- I am needing to get out of my relationship but want to know if I leave, if my rights are no longer valid? Like house/equity/child custody etc.
- [34] The respondent testified that he asked his own lawyer to draft a cohabitation agreement when the claimant did not produce one. In October 2020, he retained lawyer, Ian McAndrews, for this purpose.
- [35] The parties agree that the claimant wanted to have a second child; the respondent said that it was important to both of them for B.C. to have a sibling. The claimant turned 40 in December 2020; both parties were aware of her advancing maternal age.
- [36] According to the claimant, the respondent sent her the first draft of a cohabitation agreement in December 2020. Ultimately, they exchanged four drafts. On the claimant's evidence, she perused the first draft quickly and set it aside, saying she did not want to deal with it. She described it as very one-sided in favour of the respondent. She admitted in cross-examination that the parties had a civil conversation about this draft and that she corrected some mistakes in it. On her disputed evidence, the respondent subsequently pressured and bullied her by threatening to leave their relationship if she did not sign it.
- [37] On January 3, 2021, the respondent emailed the claimant a second draft cohabitation agreement. The claimant was not certain what, if any, changes had been made to it. On her evidence, the only revisions that she suggested involved correcting her age and clarifying that she was a broker and not an employee.

- [38] On January 18, 2021, the respondent sent the claimant a third draft cohabitation agreement. On January 27, 2021, the claimant had a second meeting by telephone with Ms. Argueta. Based on Ms. Argueta's notes, the claimant requested independent legal advice about a cohabitation agreement. Ms. Argueta understood that the claimant's primary concern related to parenting arrangements for B.C. On her evidence, she and the claimant discussed a wide variety of issues related to the draft cohabitation agreement, including its purpose, the division of property, the importance of financial disclosure, an appraisal of the respondent's company, and spousal and child support. Ms. Argueta advised the claimant that it was impossible for her to provide more specific advice without seeing the draft agreement.
- [39] According to the claimant, the respondent continued to badger her daily about signing this draft agreement; her evidence on this point evolved at trial. In cross-examination, she said that this occurred almost daily. In her evidence given on discovery, she testified that the respondent harassed her about signing the Agreement about once a week between December 20, 2020 and March 4, 2021, a period of approximately two and a half months. At trial, she conceded that he might have told her he was frustrated because she kept changing her mind about it.
- [40] On February 18, 2021, the claimant had a third, in-person, meeting with Ms. Argueta. Ms. Argueta reviewed the draft cohabitation agreement that the respondent had provided to the claimant and gave her some legal advice. An annotated copy of this draft agreement is in evidence. Ms. Argueta reiterated the need for financial disclosure and told the claimant that it would be prudent for her to obtain a valuation of the respondent's company and documentation confirming the value of his assets.
- [41] Based on her discussions with Ms. Argueta, the claimant understood that Ms. Argueta considered the draft Agreement to be one-sided and unfair and recommended against her signing it without more fulsome financial disclosure, evidence Ms. Argueta corroborated. It was Ms. Argueta's view that the claimant would be in a better position if she did not sign the Agreement and chose instead to be governed by the FLA. She recommended that the claimant speak to the respondent about amending the Agreement to make it more equitable.
- [42] The parties had an argument on February 18, 2021. They disagree about what was said but agree that it concerned the draft Agreement.
- [43] According to the claimant, she told the respondent that she had reviewed the draft Agreement with a lawyer and been advised that it was one-sided and unfair. On her evidence, he reacted in anger, describing the Agreement as "his", declining to change any part of it, and threatening to leave the relationship and to not have a second child together if she did not sign it. The claimant testified that the prospect of being denied a second child and having her idea of the perfect family "ripped from her over a stupid cohabitation agreement" was devastating, saying this was all that she wanted.

[44] That night, the claimant sent Ms. Argueta the following email:

A very brief conversation happened this evening with [C.F.W.] with regards to the cohab and our appt today. and I had informed him that I was not going to be signing it but would like to talk.

He's losing he mind-saying I'm only after him for his money and he needs to protect that!

Said he'll either now have to serve me papers. or sell the house.. and then I would have to sue him for the money..

Also.. he can't invest \$300-\$400,000 into more company's until I sign this paper..

I don't care about his company. how much he makes.. what he spends his money on.. I care about our family. and that's what I'll fight my rights on with this co-Hab.

Please advise if I should make another appt with you. Sounds like he doesn't want to be an adult and talk.. so I may have to go this route.

[45] The respondent conceded that he told the claimant during their argument on February 18, 2021 that he was "done". On his evidence, he was frustrated by the claimant's ongoing requests for minor changes to the draft agreements that his lawyer had prepared, all of which he said was costing him substantial legal fees.

[46] The next day the parties exchanged the following text messages:

Claimant:

When you are calm and can talk like adults not screaming and yelling and talking over each other.

Respondent:

There is nothing to talk about

I'm done livid

Everybody wants a free handout

I get it

Claimant:

I think you need to take some time.. you have no idea what I even wanted to talk about. you're getting mad over something that hasn't even happen

You need to please stop thinking I'm MEG!

This is why I want to go to counselling

Respondent:

You are the same when it's money

No it easy protect my assets and m happy why is that an issue

I told you we can buy a place together

Claimant:

Buying a place together isn't the issue..

Respondent:

I'm done If you want money you can have it but we will go separate ways than. I worked to hard to loose my companys and investments

You agreed to this all prior and you never are a person who holds there word

Claimant:

As mentioned, I wanted to talk about things . and told you we need to make a time for this.. you got angry., it's escalated.. you don't even know what I want to talk about.. And that's not fair.. I thought we were a family, in this together good or bad, and building a happy life together - for our child.

Please stop threatening me with legal/your lawyer. we can talk like adults and come to a win win!

Respondent:

I told you I'm angry I can't help it

It's the hcg or hormones or whatever the fuck it is but I'm overly stressed and not

### **Be putting in a situation where I can lose everything I struggled for**

- [47] The parties agree that the above-noted texts are a comprehensive summary of the messages they exchanged about a cohabitation agreement. Both said that they were then on a severely restricted low-calorie diet; according to the respondent, it made him testy and the claimant moody.
- [48] On March 2, 2021, the respondent emailed the fourth and final version of the Agreement to the claimant. She signed it on March 4, 2021 before Ms. Argueta; the respondent signed it on March 8, 2021 before Mr. McAndrews. Both parties' lawyers signed certificates of independent legal advice. The Agreement expressly waives the parties' entitlement to spousal support and to an equal division of family property.
- [49] According to the claimant, she made an appointment with Ms. Argueta on March 4, 2021 because she wanted to save her family and she was tired of being bullied by the respondent. She described her March 4, 2021 meeting with Ms. Argueta as "very quick" and lasting no more than 30-45 minutes. In fact, Ms. Argueta billed the claimant for a visit lasting 0.8 of one hour, evidence the claimant did not dispute. The claimant conceded in cross-examination that, before she signed the Agreement, Ms. Argueta reviewed it with her "point by point" and "page by page". She agreed that Ms. Argueta had advised her at their first meeting that she

was a spouse under the FLA and that the FLA would apply if the parties separated without an agreement. The claimant admitted that she read the Agreement before she signed it.

- [50] Ms. Argueta confirmed that the claimant came to their meeting on March 4, 2021 with an amended cohabitation agreement. She noted that three non-substantive changes had been made to it. The claimant had not yet received the kind of fulsome financial disclosure that Ms. Argueta had recommended. Ms. Argueta's notes from her March 4, 2021 meeting with the claimant have been lost. However, Ms. Argueta gave detailed evidence about her comprehensive standard practice when providing independent legal advice. Notably, it included a discussion about the importance of obtaining full financial disclosure and a Guidelines income report.
- [51] In accordance with her standard practice, Ms. Argueta testified that she would have satisfied herself that the claimant was not being coerced and was signing the Agreement voluntarily. She would have explained that, once signed, the Agreement would be final and would have the same force and effect as a court order. She recalled that the claimant was calm at their March 4, 2021 meeting and that there were no cues that anything was out of the ordinary. Ms. Argueta confirmed that she could have assisted the claimant by negotiating changes to the Agreement and that the claimant was content to sign it without amendment. Based on her discussions with the claimant, Ms. Argueta was satisfied that she was in a position to sign the certificate of independent legal advice and she did so.
- [52] Ms. Argueta's observations of the claimant on March 4, 2021 are consistent with those of C.W., the respondent's mother. C.W. recalled speaking to the claimant after she had been to see Ms. Argueta that day; she described their conversation as normal, calm, and relaxed. On the claimant's evidence, the parties did not discuss the Agreement again after she signed it.
- [53] On April 1, 2021, the parties purchased a travel trailer together; they later sold it. On June 15, 2021, the respondent bought out his business partner, T.M., thereafter becoming the sole director and shareholder of PI Ltd. The claimant witnessed the respondent's signature on this share purchase agreement. Mr. M. received \$500.00 in remuneration for the sale of his shares in PI Ltd., plus \$500 per month in gas cards for two years. Mr. M. agreed that he also recouped his initial investment. On his evidence, there was no money in PI Ltd. to pay him any additional compensation; however, he conceded that he did not have PI Ltd. valued before he sold his shares to the respondent.
- [54] On July 9, 2021, the parties purchased another travel trailer together. It remains in the respondent's possession. On July 29, 2021, they entered into a contract of purchase and sale for a rental property on Chase Avenue in Penticton, BC (the "Chase Avenue Property"). Because the respondent was not approved for financing, his name was removed from the contract. In order to qualify for a 5% down payment (instead of 20%), the claimant represented to the lending institution that the Chase Avenue Property would be her primary residence. She described this as a technicality and strategic move; it was actually a material misrepresentation. The claimant admitted in cross-examination that the Chase Avenue

Property was being purchased secretly as an investment property. She never resided at the Chase Avenue Property and never intended to do so.

- [55] On August 11, 2021, the claimant learned that she was pregnant with the parties' second child.
- [56] On November 29, 2021, the respondent entered into a verbal agreement to sell MCS for \$35,000.00. The March 21, 2022 sale agreement contemplated that the respondent would receive payment over time, rather than in a single lump sum.
- [57] On January 28, 2022, the Chase Avenue Property was sold. The claimant retained all of the net sale proceeds of \$73,983. On February 11, 2022, she left the respondent. The respondent said that he was blindsided by her departure. The claimant was then six months pregnant; B.C. was three years old.
- [58] On February 15, 2022, four days after the parties separated, the claimant commenced these family law proceedings. On March 17, 2022, the respondent filed his response to family claim and counterclaim.
- [59] On April 11, 2022, the parties' second child was born.
- [60] On April 21, 2022, both parties signed a document agreeing to end this litigation. The claimant describes it as another example of the respondent's ongoing attempts to pressure her; on her evidence, he told her that he would drain her financially and that she would have to go bankrupt if she did not sign this document. She said that she ultimately signed this document in order to end his harassment. The respondent disputes this characterisation of events, underscoring that he has never taken the position that this document is a binding agreement.

### III. ISSUES

[61] The following issues arise in this case:

- a) Is the Agreement binding on the parties?
- b) What are the parties' 2022 and 2023 Guidelines incomes?
- c) What retroactive and prospective child support is payable?
- d) How are parental responsibilities for the Children to be shared?
- e) How is parenting time for the Children to be allocated?

### IV. CREDIBILITY AND RELIABILITY OF EVIDENCE

[62] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in the frequently cited passages of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.) and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186. I have applied those principles here.

## A. The Parties

- [63] The claimant gave many qualified answers in cross-examination. She often avoided making direct admissions and frequently claimed to have no recollection about various matters, including those that she might reasonably be expected to recall. Some of her answers were surprising. For example, despite a clear reference in the contemporaneous notes of Ms. K. Robinson that the parties intended any cohabitation agreement they prepared to exclude the growth in their respective businesses, the claimant refused to admit that she gave Ms. K. Robinson this information. There were inconsistencies in the claimant's evidence. While Ms. K. Robinson recorded in her file notes and testified that the claimant initially consulted her in 2019 about a cohabitation agreement, the claimant maintained that she was instead seeking general information only. She denied that she was then concerned about protecting her Summerland Property net sale proceeds, contrary to what Ms. K. Robinson specifically recorded in her notes, and to the claimant's own evidence given on discovery (at which time she agreed that she then wanted to protect her own funds in the event of a separation).
- [64] It appeared that the claimant overstated some of her evidence in an attempt to bolster her position. For example, she initially testified that the respondent was away three to four days per week after B.C. was born because of his work; she later conceded that, in fact, he was actually away only three to four days per month. She did the same thing regarding her evidence about the respondent's alleged exertion of pressure on her to sign the Agreement. She initially said that he pestered her about this matter daily before adjusting her answer and saying instead that this occurred almost daily. By contrast, she testified on discovery that he pressured her about signing the Agreement about once a week before she signed it. The claimant minimized some evidence that undermined her claim. For example, she understated the amount of time that she and Ms. Argueta spent together the day both signed the Agreement and Ms. Argueta provided her certificate of independent legal advice.
- [65] Some of the claimant's evidence seemed improbable. For example, she testified that she was devastated when the respondent threatened to leave their relationship in February 2021. However, by then, she had already consulted Ms. K. Robinson twice about the possibility of leaving the respondent and advancing a claim for "custody" of B.C. Ultimately, the qualifications, inconsistencies, and evolution in some of the claimant's trial evidence undermined her credibility.
- [66] There were also some inconsistencies between the respondent's evidence given on discovery and his trial evidence. However, it was my general impression that he was a more forthright witness who more consistently provided unqualified admissions in cross-examination and corroborated his evidence with documentation.
- [67] Ultimately, I have approached the uncorroborated evidence of both parties with caution. While I conclude that both parties may have shaded some of the evidence to suit their convenience, I generally prefer the respondent's evidence to that of the claimant when there are conflicts.

## B. Other Witnesses

- [68] I have no concerns about the credibility of any other witness. The parties' joint business valuator, Derek Sanders, and joint realtor, Paul Doucet, confined their evidence to their respective areas of expertise and made reasonable concessions.
- [69] Lawyers, Ms. K. Robinson and Ms. Argueta, were careful, candid, and forthright witnesses whose evidence was corroborated with their contemporaneous file notes. I prefer the independent evidence of Ms. K. Robinson and Ms. N. Argueta to that of the claimant where there are conflicts.
- [70] I accept that the parties' mothers, C.T. and C.W., did their best to provide responsive answers to the questions they were asked. While I found them both to be generally credible, it is clear that they have close bonds with their children and that neither is an independent or disinterested witness.
- [71] I found Mr. M. to be a straightforward witness whose evidence I accept without difficulty. The credibility of Andrew Dimma, the respondent's accountant, was not seriously challenged and his evidence raised no concerns.

## V. ANALYSIS AND CONCLUSIONS

### A. Setting Aside the Agreement re: Property Division

#### 1. Legal Framework

- [72] Section 93 of the FLA governs when parties seek to set aside written agreements regarding property division. It provides a two-pronged approach for assessing the enforceability of such agreements. This approach requires courts to consider both the formation and substantive fairness of the impugned agreement: *Hudema v. Moore*, 2021 BCCA 482 at para. 17.

- [73] Section 93(3) of the FLA provides as follows:

On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- (c) a spouse did not understand the nature or consequences of the agreement;
- (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

- [74] Section 93(3)(a) of the FLA codifies the principles expressed in *Rick v. Brandsema*, 2009 SCC 10 regarding the importance of financial disclosure in the family context:
- [47] [ ] [A] duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.
- [48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.
- [75] As noted by Justice Johnston in *Donnelly v. Weekley*, 2017 BCSC 529:
- [108] In a perfect world, disclosure would be immediate and complete. In the real world, for a court to set aside all or part of an agreement for failure to disclose under s. 93(3)(a) of the FLA, a party to an agreement must demonstrate that a significant asset, debt, or other information relevant to the negotiation of the agreement was not disclosed.
- [76] In *Y.L. v. G.L.*, 2020 BCSC 808 [YL], Justice Matthews provided a helpful summary of the principles which emerge from a review of the relevant authorities:
- [285] With regard to the s. 93(3) considerations, on review of *Miglin*; *Rick v. Brandsema*, 2009 SCC 10; *Asselin*; *Bartch*; *De Medeiros*; *B.L.S. v. D.J.S.*, 2019 BCSC 846; and *Bradshaw v. Bradshaw*, 2011 BCSC 1103, the following principles emerge:
- a) the court should consider the s. 93(3) considerations holistically, and not in isolation to each other as the combination of certain factors may lead to setting aside the agreement where each of the factors alone would not, or where the presence of a factor in favour of setting aside the agreement may be ameliorated by the absence of another factor;
  - b) the fact-specific nature of the inquiry, particularly the relative vulnerabilities of the parties and/or the relative amount of information they have about each other's financial affairs is such that the cases are not necessarily readily comparable;
  - c) with regard to failing to disclose significant property, debts or other relevant information:
    - i. failure to disclose financial information or incomplete disclosure impacts the integrity of the bargain made. The extent and nature of the failure determines whether the court will intervene;

- ii. a party's assertion that he or she did not believe the other party had a claim to the assets and so did not disclose is not an answer if the party has a claim or an arguable claim. Disclosure is mandatory separate from any argument or negotiation around whether there is a legal interest in the property;
  - iii. failing to disclose any value for property cannot be defended on the basis that there is no misrepresentation because no value is given;
  - iv. where an asset's value is uncertain, the party with the duty to make disclosure should disclose the facts that will allow the other party to make a decision as to the value or as to whether further investigation is required;
  - v. if a party waives the right to financial disclosure in making a separation agreement but does so in the context of having been misled about the existence of assets and/or their value, the waiver may not be informed and therefore not determinative, especially if it is paired with a representation that the facts disclosed are true, accurate and complete;
  - vi. failure of a party to act in good faith and to act in accordance with an agreement made is not an answer to the other party's failure to disclose financial information;
  - vii. failing to disclose includes incomplete financial disclosure such as not providing the values of assets that both parties know to be in existence, not advising of the true income stream of a business, and providing estimates of the values of an RRSP;
  - viii. failing to ask for greater financial disclosure does not prevent the party who did not receive it from relying on s. 93(3)(a);
  - ix. where the party complaining of non-disclosure has general knowledge of the other party's assets and their value, non-disclosure of the exact value may not result in an agreement being set aside where the non-disclosure is not a deliberate attempt to avoid addressing the division of those assets or to deprive the other party of information he or she should have in making the agreement;
  - x. the non-disclosure must be significant and material;
- d) with regard to one spouse taking advantage of the other's vulnerability, including the other's ignorance, need or distress:
    - i. the parties' relative abilities to understand financial matters is relevant to the assessment of whether one party took advantage of the other's vulnerabilities;
    - ii. vulnerability of a less powerful party should not be presumed, there must be evidence to support a finding of vulnerability;
    - iii. whether the party who asserts vulnerability had input into the content of the agreement is relevant to assessing this factor;

- iv. legal advice may negate vulnerability but does not necessarily do so and the absence of legal advice does not lead to a presumption that a vulnerability has not been exploited;
- v. the parties' respective bargaining power is relevant to vulnerability and includes whether one of the parties was at an immediate economic disadvantage because the other party controlled the cash or had better access to cash;
- vi. physical and/or emotional abuse is relevant;
- vii. the timing of emotional or physical abuse in relation to the time at which the agreement was made is relevant in the sense that if a party is living in active fear and makes the agreement to get away from an abuser, that is different than a situation where there was an incident of abuse a significant length of time prior to when the agreement was made, especially if the parties were living in different locations when the agreement was made;
- e) with regard to whether one of the spouses did not understand the nature or consequences of the agreement:
  - i. whether the party received independent legal advice is relevant, but not determinative;
  - ii. persons who do not take advantage of the ability to receive legal advice may not be held to unfair agreements despite their own failures especially where the party seeking to enforce it withheld information or the person is vulnerable;
  - iii. if a party received legal advice but it was affected by incomplete financial disclosure, it may be not fair to hold the party to the agreement;
  - iv. similarly, failure to read an agreement when there was an opportunity to do so will be taken into account in assessing whether failure to understand the agreement is a basis on which to set it aside;
- f) with regard to other circumstances that would, under the common law, cause all or part of a contract to be voidable:
  - i. unconscionability can be based on information asymmetry; and
  - ii. unconscionability does not have to result in the same type of power imbalance that would void a commercial contract but can arise out of any circumstances of oppression, pressure or other vulnerabilities.

[77] I have applied these principles when considering whether the Agreement is procedurally or substantively unfair.

## 2. The Agreement

[78] The following provisions in the Agreement address property division:

3.2 With respect to property, [C.F.W.] and [A.L.A.], intend by this Agreement:

- (a) to waive any and all rights and obligations relating to property that have arisen or that may arise under the Family Law Act, and any other applicable legislation or law, now or in the future, at law or in equity, from their marriage and/or in the event of a breakdown of the relationship;
- (b) except as specifically provided by this Agreement, to elect and affirm that none of the property of either of them will be divided between them, except according to ownership.

[ ]

6.3 Except as otherwise provided in this Agreement, [C.F.W.] and [A.L.A.] agree that the division of all property during the marriage and in the event of a breakdown of the relationship will be determined by rights of ownership. Specifically:

- (a) title to any property in the name of one of the parties will be conclusive proof of the separate and exclusive ownership of the property by that party, unless the party having title has expressly acknowledged by written declaration of trust or other written document, the ownership rights of the other party;
- (b) where title to any particular property cannot be established, proof of the purchase or of the receipt by gift or inheritance of the property will be conclusive proof of the separate and exclusive ownership of the property by the party who purchased it or received it by gift or inheritance;
- (c) property transferred from one party to the other by an appropriate written instrument will be deemed to be owned by the party to whom the property is transferred;
- (d) property held in the name of one party will be deemed to be owned by that party;
- (e) property held in the name of both parties as joint tenants will be deemed to be owned by both parties as joint tenants, in equal shares, with rights of survivorship;
- (f) property held in the name of both parties together will, unless the title document states otherwise, be owned by the parties equally as tenants in common as to an undivided one-half interest and not as joint tenants, or if a ratio is specified, will be owned by the parties in proportion to the specified ratio as tenants in common;
- (g) money on deposit in the name of both parties as joint tenants will be deemed to be in the names of both parties as joint tenants with rights of survivorship;
- (h) money on deposit in the name of one party will be deemed to be owned by that party;
- (i) household contents and personal effects will be distributed between the parties according to ownership, whether that ownership arises by way of purchase, inheritance or gift, including gifts from the other party;

- (j) household contents and personal effects purchased during the marriage out of joint funds for the parties' joint use and enjoyment, or gifted to the parties jointly will be divided equally in kind;

[ ]

#### 7.1

- (a) [C.F.W.] and [A.L.A.]. acknowledge that as of the date of marriage, the property at [address redacted] in Okanagan Falls [C.F.W.]'s Residence is owned solely by [C.F.W.] and that the parties already occupied and intend to ordinarily occupy [C.F.W.]'s Residence as their family residence once they are married.
- (b) [C.F.W.] and [A.L.A.]. acknowledge and agree that the fair market value of [C.F.W.]'s Residence on the effective date of this Agreement is \$889,000. [C.F.W.] and [A.L.A.]. further acknowledge that [C.F.W.]'s Residence is subject to an outstanding mortgage in the amount of \$583,644 in favour of First National Bank as of the date of this Agreement, and that [C.F.W.] is the mortgagor. Monies [A.L.A.]. contributed towards [C.F.W.]'s Residence were repaid to her.
- (c) [C.F.W.] and [A.L.A.]. acknowledge and agree that the value of [C.F.W.]'s interest in [C.F.W.]'s Residence on the effective date of this Agreement is the difference, on the date that this Agreement takes effect, between the fair market value and the mortgage registered against [C.F.W.]'s Residence.

7.2 Unless [A.L.A.]. acquires an interest in [C.F.W.]'s Residence and that interest is the subject of an agreement detailing the nature of the interest and the extent of that interest:

- (a) [C.F.W.] and [A.L.A.]. agree that [C.F.W.]'s Residence, any income generated from [C.F.W.]'s Residence, any increase in the value of [C.F.W.]'s Residence, and any assets into which the proceeds from the sale of [C.F.W.]'s Residence can be traced (other than a subsequent family residence specifically addressed in the section entitled "Family Residence" below) (collectively referred to in this paragraph as [C.F.W.]'s Residence property), will at all times remain the exclusive property of [C.F.W.] throughout the marriage and upon a breakdown of the relationship.
- (b) [C.F.W.]'s Residence property will at all times be excluded from family property and will not be subject to division under Part 5 of the Family Law Act or any other applicable legislation or law, now or in the future, in law or in equity. [A.L.A.]. will not claim nor be entitled to a division of [C.F.W.]'s Residence property upon a breakdown of the relationship.
- (c) [A.L.A.]. waives all rights under Part 5 of the Family Law Act and all other rights that she has or may acquire under any other applicable legislation or law, now or in the future, in law or in equity, to [C.F.W.]'s Residence property.

- (d) No contributions by [A.L.A.] to [C.F.W.]'s Residence property, including any contribution towards the mortgage instalments, utility bills, taxes or similar carrying costs of [C.F.W.]'s Residence or otherwise, will entitle [A.L.A.] to any interest in [C.F.W.]'s Residence property, including any interest by way of resulting, constructive or implied trust, or any claims for monetary or proprietary remedies for unjust enrichment, or by way of any other doctrine in equity or at law.
- (e) This paragraph may be pleaded and is a complete defence to any claim, application or other court proceeding by [A.L.A.] for a division of [C.F.W.]'s Residence property or its value.

3. Is the Agreement procedurally unfair?

[74] The claimant submits that the process leading up to the parties' execution of the Agreement was flawed. She argues that the Agreement should be set aside given the combined prejudicial effect of: 1) the respondent's material non-disclosure; 2) her resulting inability to obtain informed independent legal advice; and 3) her inherent vulnerability, in the context of the respondent's exertion of undue pressure on her to sign the Agreement, despite her not understanding what specific rights she was giving up by doing so. She submits that family property and debt ought to be divided equally pursuant to the FLA.

[79] The claimant emphasizes the importance of considering the s. 93(3) factors holistically. She argues that their combined effect can result in an agreement being set aside when individual factors, considered in isolation, might be insufficient to do so.

a) Financial Non-Disclosure (s. 93(3)(a))

[80] Paragraph 13.13 of the Agreement addresses financial disclosure:

13.31 Although neither [C.F.W.] nor [A.L.A.] has requested nor received financial disclosure from the other, they are satisfied with the financial information each has about the other and each waives further financial disclosure. [C.F.W.] and [A.L.A.] agree that lack of financial disclosure shall not constitute a ground for avoiding the provisions of this Agreement. [C.F.W.] and [A.L.A.] deem financial disclosure irrelevant to the negotiation of the terms of this Agreement.

[81] The claimant alleges that the respondent's financial disclosure was deficient in two respects: 1) he failed to provide her with values for any of his assets; and 2) he knew but did not tell her that PI Ltd. was about to experience a significant surge in income. I address each allegation in turn.

[82] Except for the FFR, the Agreement says nothing about the value of the parties' assets. The claimant submits that this was an intentional omission by the respondent so that he could avoid providing her with this kind of information. She argues that, at best, she had fragmented information from the parties' discussions about the respondent's income and the value of PI Ltd. She submits that this non-disclosure is fatal to the integrity of the Agreement; she denies that it is defensible on the basis that she did not request this information.

[83] The claimant relies on the respondent's admissions given on discovery that:

- a) He did not think he disclosed to the claimant the value of any of his assets when he prepared the Agreement;
- b) The Agreement does not reference the value of any of his assets; and
- c) He provided none of the following documents to the claimant before she signed the Agreement:
  - i. A Form F8 financial statement;
  - ii. His three most recent personal income tax returns;
  - iii. His personal bank or credit card statements;
  - iv. His three most recent notices of assessment;
  - v. PI Ltd.'s three most recent financial statements;
  - vi. PI Ltd.'s three most recent T2 corporate income tax returns;
  - vii. PI Ltd.'s general ledger;
  - viii. Documentation regarding his PI Ltd. shares; and
  - ix. PI Ltd.'s bank statements.

[84] Apart from her January 2021 email to the respondent, setting out a list of her assets with estimated values, the claimant similarly did not provide this kind of information or documentation to the respondent before he signed the Agreement.

[85] The claimant admitted that Ms. T. Robinson would have requested some financial information from the parties in the spring of 2018, when they were considering purchasing the FFR together. She agreed that the parties would have discussed their available funds for the purpose of making a down payment on the FFR; she assumes that they likely also discussed the size of mortgage that they could potentially afford. According to the respondent, the parties then disclosed to each other their incomes, assets, and debts and discussed the amount required for a down payment on the FFR and the mortgage amount for which they could qualify.

[86] The claimant submits that, by October 2020, the respondent knew about an approaching surge in PI Ltd.'s income and that he would enjoy a profitable 2021. She says that his non-disclosure of this information before she signed the Agreement was significant and material. However, she also conceded in cross-examination that neither party knew what their 2021 incomes would be in March 2021.

- [87] The parties considered purchasing another property together in early January 2021. Ultimately, they did not do so. However, the claimant was copied with an email dated January 6, 2021 from Ms. T. Robinson, disclosing some information about the parties' respective incomes, assets, and debts.
- [88] The claimant denies that the respondent copied her on any of his other emails providing financial information and documentation to Ms. T. Robinson in connection with their various attempts to secure mortgage financing. While the respondent identified Ms. T. Robinson on his witness list, he did not call her at trial. The claimant urges me to draw an adverse inference from Ms. T. Robinson's failure to testify and to conclude that her evidence would not have favoured the respondent. I decline to do so. It was open to either party to call Ms. T. Robinson as a witness at trial, as necessary. Adverse inferences may be drawn when a party chooses not to call a witness over whom they have exclusive control: *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at para. 1.
- [89] The claimant submits that the respondent knew before March 2021 that PI Ltd.'s revenue was about to increase substantially. She highlights the significant disparity between his 2020 income of \$80,000 (as set out in the Agreement) and the calculation of his 2021 income by Derek Sanders, the parties' joint business valuator, in the amount of \$572,000. She argues that the respondent's non-disclosure ought to result in the Agreement being set aside, citing *YL; B.L.S. v. D.J.S.*, 2019 BCSC 846; *McAdie v. McAdie*, 2019 BCSC 578; *Bartch v. Bartch*, 2019 BCSC 1643. She relies on the respondent's trial evidence that:
- a) PI Ltd. receives contracts to carry out "man hours" on electrical or telecommunication projects in British Columbia and Canada;
  - b) Contracts are offered to PI Ltd. based on past performance and its ability to upscale (i.e., sourcing, coordinating, and training technicians);
  - c) The respondent has learned how to upscale PI Ltd.;
  - d) Depending on a contract's size and location, and labour availability, upscaling can require time and planning;
  - e) Contracts are based on forecasts so they can be planned and fulfilled; and
  - f) There is a "lag time" between when PI Ltd. carries out work and when it is paid.
- [90] Based on the respondent's February 11, 2020 email to Mr. Dimma, PI Ltd. was then "gearing up to hire 40 techs in Toronto and another 15 throughout Canada". Mr. Dimma conceded that the lag time between PI Ltd. carrying out work and receiving payment for its services can be up to three or four months.

[91] The claimant highlights the significant increase in PI Ltd.'s monthly revenue by October 2020, as compared to the previous year. She denies that this information was disclosed to her before she signed the Agreement. PI Ltd.'s total monthly income between late 2020 and November 2022 is set out below.

Date

PI Ltd.'s Total Monthly Income

PI Ltd.'s Net Monthly Profit

May 2020

\$7,982.43

-\$13,253.84

June 2020

\$1,831.74

-\$30,854.73

July 2020

\$27,701.93

-\$24,316.29

August 2020

\$50,735.41

-\$26,742.09

September 2020

\$50,517.01

-\$69,986.84

October 2020

\$137,300.60

\$32,387.82

November 2020

\$121,596.88

\$50,058.24

December 2020

\$134,511.19

\$10,148.02

January 2021

\$108,410.34

\$23,644.94

February 2021

\$143,722.92

\$47,574.65

March 2021

\$134,180.87

\$700.64

April 2021

\$143,795.53

\$30,668.80

May 2021

\$118,913.97

\$26,183.54

June 2021

\$123,348.19

\$10,611.36

July 2021

\$146,249.37

\$28,922.43

August 2021

\$134,620.28

-\$106,133.87

September 2021

\$178,819.47

\$65,043.17

October 2021

\$261,079.69

\$39,060.38

November 2021

\$377,511.17

\$244,898.45

December 2021

\$219,068.43

\$70,757.08

Total for 2021

\$2,089,720.23

\$481,931.57

January 2022

\$144,433.09

-\$13,422.87

February 2022

\$222,198.13

\$11,511.29

March 2022:

\$200,045.85

\$4,417.77

April 2022

\$226,723.30

\$110,139.45

May 2022

\$165,962.96

-\$56,051.46

June 2022

\$171,098.08

\$52,095.47

July 2022

\$168,745.90

\$40,438.01

August 2022

\$193,381.08

\$3,538.01

September 2022

\$120,869.30

-\$7,569.89

October 2022

\$159,737.34

\$23,493.31

November 2022

\$160,862.72

-\$66,891.97

December 2022

\$169,676.20

-\$3,060.84

Total for 2022

\$2,103,733.95

\$98,636.28

[92] The claimant calculates the respondent's average total monthly income from PI Ltd. between May 2022 and November 2022 to be \$162,950, or "multiples" of what PI Ltd. generated in revenue in the months preceding October 2020.

- [93] A Compilation Engagement Report dated January 13, 2023 and prepared by OKV Chartered Professional Accountants, contains information about PI Ltd.'s revenues in 2021 and 2022. It indicates that PI Ltd.'s total 2021 revenues were \$2,005,163. The corresponding figure for 2022 is \$2,152,909. It is unclear why these figures are slightly different from those contained in PI Ltd.'s summarise of profits and losses, as set out above. However, both documents demonstrate that 2021 was an anomalous and exceptionally profitable year for PI Ltd.
- [94] On the respondent's unchallenged evidence, PI Ltd. was closed for about three months during the COVID-19 pandemic. Thereafter, PI Ltd. was deemed to be an essential service and received substantial short-term top-ups from one of its contractors between October 2021 and April 2022, thereby increasing PI Ltd.'s monthly income. Mr. Dimma and the respondent both testified that these top-ups, together with forgivable government loans, increased PI Ltd.'s profitability in 2021. The respondent said that, when they ended, PI Ltd. had insufficient work to keep all of its technicians busy and that many of them were let go.
- [95] Mr. Sanders admitted that PI Ltd. had a negative net income in 2020. He agreed that, without the BDC economic recovery and working capital loans that PI Ltd. secured, its shareholders would have been required to inject money into PI Ltd. in its 2020 fiscal year. He admitted that, without the benefit of the government funds that PI Ltd. received in 2020, its 2020 shareholder losses would have been higher.
- [96] The respondent notes that the monthly profit and loss statements in evidence show no substantial increase in PI Ltd.'s monthly revenue until the summer of 2021. He denies that the significant top-ups PI Ltd. received after it was deemed to be an essential service could have been anticipated in late 2020 or early 2021.
- [97] In June 2021, the respondent purchased Mr. M.'s shares in PI Ltd. for the nominal consideration of \$500, plus \$500 per month in gas cards for two years and repayment of his original \$40,000 investment. According to the respondent, there was then nothing in PI Ltd., evidence Mr. M. corroborated. Mr. M. testified that running PI Ltd. was always a struggle, that he did not have much faith in the business, and that it was easy for him to walk away from it. On his evidence, there was no indication in June 2021 that PI Ltd. revenues would increase substantially. He said that PI Ltd.'s biggest risk was losing contracts which, on his evidence, could happen "in a day". He never received any salary or dividends from PI Ltd. but he did have the benefit of a company truck. Mr. M. conceded in cross-examination that he did not know the value of his PI Ltd. shares when he sold them and that he did not have them professionally valued.
- [98] On the respondent's evidence, the value of PI Ltd. has declined significantly since September 2022 due to economic and market conditions. He said that he paid himself a salary of \$96,000 in 2022. He deposed in his F8 financial statement sworn in May 2022 that his income that year was \$99,763. He denied knowing that this was an underestimate, saying he had not yet received Mr. Sanders' Guidelines income report. He described PI Ltd.'s 2021 year as an aberration. He denied knowing that PI Ltd. would experience a surge in income

when he consulted a lawyer about preparing the Agreement in 2020.

- [99] In January or February of 2023, Telus offered PI Ltd. a three-year direct service contract in Vancouver. According to the respondent, he has been working towards securing this kind of a contract since 2012. He intends to sign this contract but said that fulfilling it will require PI Ltd. to make substantial capital expenditures.
- [100] Having regard to the trial evidence as a whole, I am not persuaded that the respondent knew in March 2021 that PI Ltd. was on track to have an exceptional year. PI Ltd. ended 2020 with a net deficit. PI Ltd.'s revenue increased substantially in 2021 once it was deemed an essential service (after the onset of the COVID-19 pandemic) and it became eligible to receive about \$400,000 in top-ups. These non-recurring sources of income, together with the \$33,000 in government subsidies that PI Ltd. received in 2021, have all been discontinued. Based on the financial statements that Mr. Dimma prepared, PI Ltd.'s 2022 year-end net income was \$174,698 (as compared to \$421,323 in 2021). PI Ltd. had year-end long-term debts of \$373,963 in 2022, as compared to \$216,655 in 2021. Mr. Sanders admitted that his valuation of PI Ltd. could be impacted if PI Ltd.'s overall revenue was less after September 2022 than it had been in 2021.
- [101] The claimant was an experienced realtor when the parties signed the Agreement. She provided Ms. T. Robinson with information about comparable properties for financing purposes before the parties' planned purchase of the FFR. The FFR was valued in the Agreement at \$889,000. On the evidence of Paul Doucet, the parties' joint real estate appraiser, it had an assessed value of \$841,000 as of March 4, 2021, and \$925,000 as of November 16, 2022.
- [102] On Mr. Doucet's trial evidence, the real estate market in the South Okanagan has softened since 2022. If he were to re-assess the FFR, he agreed that it would be necessary to recognise this change in the market and that he would adjust his value downward by 1-2%. Depending on the market, he said that reductions could be as high as 4% for luxury homes and that an appropriate reduction would be in the range of 1-3%. A two percent reduction on \$925,000 is \$18,500, thereby reducing Mr. Doucet's most recent estimate of the value of the FFR to \$906,500.
- [103] The claimant understood that the respondent was trying to sell MCS in or about April 2020; based on their discussions, she had a general idea of the value of this business. She admitted in cross-examination that she understood the respondent had received an offer to sell MCS for \$80,000. She estimated the value of MCS to be about \$100,000 when she met with Ms. K. Robinson in September 2019. The respondent bought out his former partner in MCS in 2019 for \$15,000. They agreed on this price and did not have MCS valued. Although the respondent has sold his interest in this business, he is still receiving proceeds from the sale based on the agreed sale structure. Going forward, he anticipates declaring no income from MCS.

- [104] The claimant estimated the value of PI Ltd. to be in the range of \$1,000,000 - \$2,000,000 when she met with Ms. K. Robinson in September 2019. Based on Ms. Argueta's notes from her initial consultation with the claimant, the claimant estimated the value of PI Ltd. to be over one million dollars. In his December 22, 2022 report, Mr. Sanders estimated the value of PI Ltd. to be in the range of \$30,000-\$60,000 as of March 4, 2021. As at December 22, 2022, Mr. Sanders estimated the value of PI Ltd. to be in the range of \$670,000 - \$770,000.
- [105] Based on the January 6, 2021 email of Ms. T. Robinson, both parties then had about \$30,000 in savings. There was no suggestion at trial that this figure was inaccurate. Ms. K. Robinson wrote in her notes dated September 9, 2019 that the claimant estimated the respondent's net take-home pay to be about \$5,000 per month (for a net annual income of about \$60,000). Mr. Sanders estimated the respondent's pre-tax 2020 Guidelines income to be \$84,000.
- [106] The claimant conceded at trial that she was aware of the kind of "toys" that the respondent owned; he kept them at the FFR. They included a snowmobile, an ATV, and a truck. The respondent has retained possession of the second trailer that the parties purchased together during their relationship; he concedes that it is a joint asset and must be equalised with the claimant.
- [107] It was suggested to the claimant in cross-examination that the disclosure of more precise values for the respondent's assets would not have changed her decision to sign the Agreement. She gave an equivocal response, denying that she knew the answer to this question and saying that she could not speak to the matter. In my view, if the claimant had known in March 2021 that the actual values of the respondent's assets were substantially lower than the estimates she had provided to her lawyers, she would still have signed the Agreement. I conclude that the facts before me are analogous to those in *S.B.F. v D.G.F.*, 2022 BCSC 2231 [SBF].
- [108] In *SBF*, Justice Murray held that misstating income or omitting assets in a cohabitation agreement is not detrimental if the party attempting to set aside the agreement would still have signed it:
- [49] I do not agree that Mr. F. understated his income in the agreement. I accept Mr. F.'s explanation that the figures supplied to Ms. F. by his former counsel as his income represent his business income and that his personal income was significantly lower. His personal income tax returns support this conclusion. In any event I do not accept that the amount of income on the agreement made any difference in Ms. F.'s decision to sign. Her decision rested solely on the upcoming wedding.
- [50] I further accept that Mr. F. did not intentionally omit listing two timeshares in South Africa from his list of assets. I find that this was an oversight. In any event, the value of the timeshares is nominal. I do not accept that the listing of the two timeshares was material or made a difference to Ms. F.'s decision.

- [109] Based on the expert evidence of Mr. Doucet, the parties overvalued the FFR in the Agreement. While not formally disclosed, the claimant was generally aware of the value of the respondent's personal and recreational vehicles. She substantially overestimated the value of both MCS and PI Ltd. in her discussions with her lawyers. In my view, if she had known that PI Ltd. was actually worth substantially less than her estimate of its value in March 2021, she would nonetheless have signed the Agreement. On the claimant's own evidence, her primary focus was on her family including, in particular, having a second child with the respondent and the closing window of opportunity within which to do so given her advancing age.
- [110] I conclude on all the evidence that the claimant was generally aware of the respondent's income and assets when the parties signed the Agreement. I find that she made a conscious decision, informed by her discussions with two capable family law lawyers, to sign the Agreement, despite not having followed their advice to first obtain more fulsome financial disclosure. I conclude that the claimant would have signed the Agreement in any event, even if she had received the kind of financial disclosure that her lawyers had recommended. I am not persuaded that the respondent intentionally withheld material financial information from the claimant before the parties signed the Agreement.
- b) Exploitation of Vulnerabilities (s. 93(3)(b))
- [111] The claimant alleges that the respondent exploited her position of vulnerability when she signed the Agreement. She testified that he threatened to end their relationship if she did not sign the Agreement, thereby depriving her of the opportunity to have a second child.
- [112] The respondent denies that he bullied or badgered the claimant into signing the Agreement. He said that they had civil discussions and only one disagreement about it during the four months while it was being drafted. He denied that he is a confrontational person and said that the claimant chose to sign the Agreement.
- [113] The claimant denied that she was in a strong financial position in March 2021. Her Summerland home sold in November 2019; she retained the net sale proceeds of \$93,337. On her uncorroborated evidence, these funds were quickly depleted to pay debts and family expenses. She said that she chose to take a break from real estate and to work less after B.C. was born, working mostly from home with existing clients and occasionally taking B.C. with her to showings.
- [114] The claimant testified that the Agreement was first presented to her in late November 2020 or early December 2020. The parties had been cohabiting since the spring of 2018, had one child together, and were contemplating having a second child. Both were aware of the claimant's advancing age and her wish to have a second child. The respondent said that this was important to both of them.

[115] In support of her assertion that the respondent pressured her to sign the Agreement, the claimant called her mother, C.T., who testified that the claimant told her about this pressure. The claimant produced the following text message that she sent to C.T. on February 11, 2021:

Oh and [C.F.W.] is starting to pressure me to get the cohab done cause he can't buy anything until then and he wants to buy a business with his buddy. Then he was like if you don't sign my lawyer will serve you and it will be forced.

[116] This February 11, 2021 text message, indicating that the respondent was then "starting to pressure her", is inconsistent with the claimant's trial evidence that he had been bullying her non-stop to sign the Agreement until she consulted with a lawyer in January 2021.

[117] On February 18, 2021, the claimant emailed Ms. Argueta the message referenced at para. 44 of these reasons, stating that she had informed the respondent she would not be signing the Agreement and that he was "losing [his] mind". On February 19, 2021, the claimant sent another text message to her mother stating as follows:

Morning! So [C.F.W.] is raging at me cause I told him I'm not signing the cohab but let's talk . . . losing it!

Refusing to go to counselling . . and won't even let me talk. . .

[118] While the claimant asserted that she provided no meaningful or substantive input regarding the Agreement, she had the opportunity to do so. She retained two competent family law lawyers and received advice from both of them before she signed the Agreement. She knew what information was not included in the Agreement and that she had been advised to obtain additional financial disclosure before the Agreement was finalised. She chose not to follow this advice. It was open to her to engage one of the lawyers with whom she consulted to negotiate changes to the Agreement on her behalf, or to do so herself. She had experience advocating on behalf of her own clients and negotiating contracts in her work as a realtor. The claimant chose not to take any of those steps, knowing that the consequence of her failure to do so would be a binding agreement that she had been advised was less fair to her than what the FLA would provide.

[119] According to the claimant, she said "whatever she needed to say" to Ms. Argueta on March 4, 2021 in order to finalise the Agreement. In my view, her decision to sign the Agreement was heavily influenced by her strong desire to expand her family and to have a second child. This legitimate wish does not vitiate her consent to the Agreement.

- [120] The claimant maintains that the respondent continued to exert pressure on her to abandon this court proceeding after she signed the Agreement. On her evidence, she signed a document agreeing to end this litigation because she was tired of the respondent's emotional abuse and wanted to end his harassment. He disputed this evidence, saying that it was an emotional time for both parties after N.R.'s birth in April 2022, and that they discussed the possibility of reconciliation.
- [121] On April 7, 2020, at her first meeting with Ms. Argueta, the claimant completed a Client Intake Sheet and responded to detailed questions that were intended to screen for family violence. The claimant consistently answered them all in the negative. Specifically, she confirmed that she:
- a) Was comfortable meeting with the respondent in the same room;
  - b) Was not afraid of him;
  - c) Had no concerns regarding his alcohol or drug use;
  - d) Had no concerns regarding his mental health; and
  - e) Had no concerns for the safety of the Children.
- [122] The claimant admitted in cross-examination that the respondent visited N.R. almost daily after her birth. She conceded that the parties discussed a possible reconciliation. She acknowledged in retrospect that her decision to leave the respondent without notice had likely not been the best decision. She agreed that he had prepared the document they both signed agreeing to end this litigation and suggested that she give it to her lawyer. She denied knowing whether he has ever taken the position that it is binding. The respondent did not take that position at trial.
- [123] In *Miglin v. Miglin*, 2003 SCC 24 at para. 83 [Miglin], the Supreme Court of Canada confirmed that the mere presence of vulnerabilities alone will not justify the court's intervention:

Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

- [124] In *C.W.C. v. L.A.W.*, 2021 BCSC 1774, rev'd on other grounds 2022 BCCA 400 [CWC], the claimant (who was then eight months pregnant, on maternity leave, and dependent on the respondent for food and shelter) was presented with a cohabitation agreement and told to sign it or leave:

- [120] Here, Mr. C. and Ms. W. have indicated to the outside world their intention to be bound by their agreement, the terms of which are clear. Mr. C. and Ms. W. were not acting at arm's length in arriving at their agreement, but rather were in a special relationship which imposed on both a duty to negotiate in good faith. The special relationship arose out of their cohabitation, the fact that Ms. W. was eight months pregnant with Mr. C.'s child, that Ms. W. was without an income, having left work on maternity leave, and was dependent upon Mr. C. for food and shelter. In those circumstances, Mr. C. was not bargaining in good faith by handing Ms. W. a cohabitation agreement and telling her to sign it or get out, when what he wanted was to end the relationship.
- [125] In CWC, Johnston J. found that the claimant was in a vulnerable state when presented with the cohabitation agreement but concluded that those facts were insufficient to render the parties' cohabitation agreement voidable:
- [124] Ms. W. was in a vulnerable state when Mr. C. presented her with the draft agreement on December 21. She had left her work in order to give birth to their second child and was without an income. That does not mean she was without resources, as she did have some money available to her, and she could rely on her parents for support if necessary. Ms. W. is an intelligent and well-educated woman who has demonstrated an ability to take care of herself. During the relationship, the parties have described instances where, in the heat of an argument, Ms. W. was capable of giving as good as she got.
- [ ]
- [127] On December 21 and 22, 2016, Ms. W. was somewhat vulnerable, but not so much that the agreement or any part of it should be set aside. Her need was more emotional than financial. She was in emotional distress. While Mr. C. may have had some advantage from these conditions, Ms. W.'s intelligence, education, and strong-willed nature leads me to conclude that Mr. C. did not take improper advantage of Ms. W.'s circumstances (s.93 (3)(b)).
- [128] Although Ms. W. was somewhat ambivalent in her evidence about whether she had read the new draft cohabitation agreement, I conclude that she did read it before she signed it and that she understood its nature and consequences (s. 93 (3)(c)).
- [129] I find no other circumstances that would, at common law, cause all or any part of the cohabitation agreement to be voidable (s. 93 (3)(d)).
- [126] Similarly, in C.C. v. S.P.R., 2022 BCSC 1817 at para. 47 [CC], Justice Gibb-Carsley noted that the parties' agreement included several clauses expressly stating that they had entered into the agreement voluntarily, freely, and under no duress or undue influence by the other party. Section 13.14 of the Agreement contains comparable clauses. I find that the claimant chose to sign the Agreement, knowing that she had been advised against doing so and that she could have decided not to sign it.

- [127] In *C.M.M. v. D.R.M.*, 2014 BCSC 2123 at para. 73 [CMM], Justice Schultes found that C. was motivated to sign the parties' prenuptial agreement due to a concern that her imminent wedding would otherwise not proceed. He found that the pressure C felt was insufficient to establish duress or undue influence, that she ultimately chose to sign the agreement in order to avoid what she perceived to be undesirable consequences, and that she was not "deprived of the ability to choose by D's actions": CMM at para. 75. A similar finding was made in SBF where the respondent threatened to cancel a destination wedding if the claimant refused to sign a cohabitation agreement.
- [128] In my view, the facts in CWC, CMM, and SBF are analogous. I conclude that the evidence before me is insufficient to establish that the claimant was deprived of the choice not to sign the Agreement. Ultimately, considering the evidence as a whole, I am not persuaded that the claimant was in a position of vulnerability when she signed the Agreement. She had an established career, her own business, and she continued to work during the parties' relationship. She had been a successful realtor in Alberta for many years before she relocated to BC in July 2016. As a realtor, she had some familiarity with contracts. She admitted that her work often involved engaging in negotiations and advocating on behalf of her clients to secure the best outcome.
- [129] On the claimant's own evidence, she is a note-taker and a detail-oriented person. She prepared itemized monthly reconciliations of the parties' expenses when they cohabited at the FFR. She kept her own file regarding their purchase of the Chase Avenue Property and prepared a corresponding addendum to the Agreement following this purchase. She took steps to obtain independent legal advice when she was considering investing her own funds in the FFR and it was in her interests to do so.
- [130] Both parties were financially self-sufficient. They lived together and shared parenting responsibilities but they did not have a traditional relationship. They shared their living expenses but otherwise maintained separate finances.
- [131] By early 2021, B.C. was three years old and in full-time daycare. On the parties' uncontroverted trial evidence, as corroborated by C.W. and C.T., they had the benefit of generous, readily available, childcare from their parents. C.W. and C.T. both testified that they were willing and able to provide as much childcare assistance as the parties required. The claimant agreed that the parties shared responsibility for taking B.C. to and from daycare. Her career allows for flexibility in her hours and location of work. On the evidence before me, I am not persuaded that the claimant suffered a significant decline in her income as a result of her relationship with the respondent or their decision to have a family.
- c) Nature and Effect of the Agreement (s. 93(3)(c))

- [132] The claimant consulted two family law lawyers before she signed the Agreement. Both testified at trial. The claimant denies that she received specific advice about what she was actually giving up, or what she might be entitled to at law, before she signed the Agreement. She submits that the legal advice she received was instead confined to generalities about entitlements under the FLA and that the respondent's financial non-disclosure effectively deprived her of meaningful legal advice before she signed the Agreement.
- [133] However, on the evidence of Ms. K. Robinson and Ms. Argueta, the claimant was clearly advised about the importance of obtaining fulsome financial disclosure before signing any cohabitation agreement and the Agreement in particular. The claimant signed the Agreement knowing that she had not followed this advice.
- [134] I find that the claimant initiated the process of obtaining a cohabitation agreement in September 2019, and that she did so because she wanted to protect her net proceeds from the sale of the Summerland Property before she invested them in the FFR. I find that such an agreement became less important to the claimant once her name was not going to be placed on title to the FFR and she was no longer planning to invest any of her personal funds in the FFR.
- [135] Ms. Argueta gave detailed evidence at trial about her discussions with the claimant on March 4, 2021, before the claimant signed the Agreement. I accept Ms. Argueta's evidence, as corroborated by her account, that she spent almost one hour with the claimant that day. While she thought that it would be prudent for the claimant to obtain full financial disclosure, she noted that the claimant had not yet received it. It was her general impression that the claimant just wanted to sign the Agreement and move on with her life, an impression that is consistent with the claimant's own trial evidence.
- [136] On Ms. Argueta's evidence, she was certain that the claimant:
- a) Understood the Agreement;
  - b) Was signing the Agreement voluntarily;
  - c) Knew that it was different from what she would be entitled to under the FLA;
  - d) Knew that Ms. Argueta thought it was unfair to the claimant and that she ought not to sign it;
  - e) Knew that she had not obtained full financial disclosure, despite Ms. Argueta's advice that she do so; and
  - f) Knew that, once signed, the Agreement would be binding and would have the same force and effect as a court order.
- [137] Ms. Argueta's certificate of legal advice forms part of the Agreement and provides as follows:

I, N. NOEMI ARGUETA, of the City of KELOWNA, in the Province of British Columbia, Barrister and Solicitor, certify that I was consulted by [A.L.A.], one of the parties to the attached cohabitation agreement with respect to her rights and obligations under this Agreement.

I acted only for [A.L.A.] and fully explained to her the nature and effect of the Agreement. [A.L.A.] acknowledged that she completely understood the nature and effect of the Agreement. [A.L.A.] executed the Agreement in front of me and confirmed that she was entering into the Agreement of her own volition without any fear, threats, compulsion or influence by [C.F.W.] or any other person.

**Dated at KELOWNA, BC this March 4, 2021**

- [138] In my view, the claimant clearly understood the nature and effect of the Agreement before she signed it. She was aware of the deficiencies in the financial disclosure that the respondent had provided. I conclude that, while she may not have known precisely how much she was giving up by signing the Agreement, she was generally aware of the kind of benefits to which she might otherwise be entitled, including an interest in the growth of the respondent's businesses, an increase in the value of the FFR, and spousal support. I find that the claimant nonetheless made a conscious choice to sign the Agreement.
- [139] In *Azanchi v. Mobrhan-Shafiee*, 2021 BCCA 55 [Azanchi], Justice Groberman upheld the trial judge's conclusion that the claimant understood the nature and consequences of the parties' agreement:
- [32] The judge noted that Mr. Azanchi is a university-educated professional, who has considerable familiarity with contracts through his work. This was not his first marital breakdown, so he had some familiarity with family law processes as well. The judge observed that the agreement, as drafted, is fairly easy to understand.
- [140] Those comments are analogous here. In March 2021, the claimant was an accomplished realtor with many years' experience dealing with contracts in the context of her own business. As in *Azanchi*, the nature and effect of the Agreement is clear on a plain reading of the document.
- [141] In *SBF*, Murray J. found that the claimant had thoroughly reviewed the parties' cohabitation agreement with her counsel and received legal advice not to sign it. After considering that advice, the claimant had the option not to sign the agreement but chose to do so. In those circumstances, Murray J. found that the claimant fully understood the agreement and its implications. I reach the same conclusions on comparable facts.
- [142] I accept that the claimant did not have precise values for the respondent's assets when she signed the Agreement. However, as noted above, she signed the Agreement on the understanding that the value of those assets was substantially higher than the historical valuations of the parties' own joint business valuator. The respondent's modest savings were roughly equal to her own. Two capable family law lawyers had clearly advised her on

multiple occasions that she would be well advised to obtain more fulsome financial disclosure before she signed the Agreement. In my view, the claimant was provided with good legal advice; she simply chose not to follow it. She admitted in cross-examination that she read the Agreement before signing it and that she knew it was a legally binding document.

[143] I find that the claimant understood what she was signing and that she knew the legal implications of doing so without first obtaining full financial disclosure. I find that she made a conscious choice to sign the Agreement for predominantly personal reasons including, in particular, her wish to have a second child.

d) Other Circumstances (s. 93(3)(d))

[144] The claimant does not allege duress. The evidence does not support a finding that there were any other circumstances that would render the Agreement voidable.

4. Does the saving provision in s. 93(4) of the FLA apply?

[145] Section 93(4) of the FLA provides as follows:

The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.

[146] In reaching my conclusion that the Agreement is not procedurally unfair, I have weighed the factors in s. 93(3) of the FLA holistically. Given this finding, I need not consider the saving provision in s. 93(4).

5. Is the Agreement significantly unfair? (s. 93(5))

[147] Section 93(5) of the FLA provides as follows:

Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

- (a) the length of time that has passed since the agreement was made;
- (b) the intention of the spouses, in making the agreement, to achieve certainty;
- (c) the degree to which the spouses relied on the terms of the agreement.

[148] Section 93(5) of the FLA applies if none of the circumstances in s. 93(3) existed when the parties entered into the agreement: *Blom v. Blom*, 2021 BCSC 181 at para. 78. It requires significant unfairness before an agreement can be set aside or replaced.

[149] The Court of Appeal explained the meaning of "significant unfairness" in *Jaszczewska v. Kostanski*, 2016 BCCA 286:

- [41] [ ] The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.
- [150] In *Azanchi*, the Court of Appeal clarified that s. 93(5)(a)-(c) of the FLA are simply factors that must be considered before setting aside an agreement for significant unfairness: *Azanchi* at paras. 51-52. The Court confirmed that there may be situations where those factors impinge on the fairness of the agreement, but more often they are factors to consider in deciding whether an otherwise significantly unfair agreement should be left in place or set aside: *Azanchi* at para. 52.
- [151] Because s. 93 is essentially a codification of the common law relating to marriage agreements as set out in *Miglin*, whether an agreement is significantly unfair on a substantive basis pursuant to s. 93(5) must be determined by the degree of non-compliance with the objectives of the FLA: *Reiner v. Reiner*, 2021 BCSC 1514 at para. 15 [*Reiner*], citing *Miglin* at para. 85.
- [152] As noted by Murray J. in *SBF* at para. 97, apart from an application of the factors in s. 93(5), it is not open to a court to find that an agreement is substantially unfair because it deviates significantly from what a party is entitled to under the FLA.
- [153] In *Asselin v. Roy*, 2013 BCSC 1681 at para. 124, Justice Harvey observed that the tenor of the FLA favours a less interventionist approach than previous legislation. Notably, s. 92 of the FLA specifically permits parties to structure their division of property unequally: *SBF* at para. 97.
- [154] I consider below the factors enumerated in s. 93(5).
- a) Length of Relationship (s. 93(5)(a))
- [155] The parties' relationship was relatively short in duration. It lasted less than four years from the time they began cohabiting in April or May 2018 and their separation on February 11, 2022. The parties signed the Agreement in early March 2021; they separated about 11 months later. Throughout their relationship, they maintained separate finances and shared only one joint account for the sole purpose of paying their household expenses. Apart from the birth of B.C., their circumstances did not change significantly during their cohabitation.
- [156] In *CC*, on analogous facts, *Gibb-Carsley J.* concluded that no change had occurred in the parties' relationship which warranted a finding of significant unfairness:

- [69] In my view, the following factors support a conclusion that the Prenuptial Agreement is not significantly unfair to the respondent. The parties were married for a relatively short time and during that time there was no significant change in their circumstances, other than the birth of S.R. The respondent has not provided compelling evidence to support his claim that he contributed in any significant way to the Cassiar Townhome to increase its value. The claimant brought the Cassiar Townhome with her into the marriage. In respect of non-monetary contributions, on the evidence before me, I accept that both parties contributed towards S.R.'s caregiving during the marriage, but given the claimant was on maternity leave with S.R. during his first year and the respondent was working, I accept that the claimant provided significantly more caregiving to S.R. than did the respondent.
- [157] Given the relative brevity of the parties' relationship and the separation of their businesses and finances throughout their relationship, I conclude that this factor weighs in favour of finding that the Agreement is not significantly unfair.
- b) Spouses' Intentions (s. 93(5)(b))
- [158] Justice Murray addressed the parties' intention to achieve certainty in SBF. Her comments are instructive:
- [87] I turn now to the second factor, which addresses the intention of the spouses to achieve certainty. Ms. F. argues that the agreement was created as a result of Mr. F.'s intention to achieve financial certainty, and that she did not share that intention. She merely signed the agreement because she did not want to suffer the humiliation of a cancelled wedding.
- [88] There are two problems with this argument. First, it overlooks the clauses in the agreement that protect Ms. F.'s interests. Considering the intention to achieve certainty is not a backward-looking exercise. Life is uncertain. Circumstances change. Things rarely go as expected. The fact that the parties did not buy a house or have a child together does not invalidate or change Ms. F.'s intention at the time she entered into the agreement. Second, Ms. F.'s argument suggests that in order for a prenuptial agreement to be upheld, the parties must both need it to achieve certainty. That cannot be true. Rarely do people of equal means and financial holdings come together in a marriage. Most prenuptial agreements are entered into to protect the spouse with the most assets.
- [89] Here, Mr. F. sought to protect the assets he was bringing into the marriage for his children and his retirement. I do not accept the argument that because Ms. F. did not have assets to protect that she did not share the intention to achieve certainty through the agreement. As stated above, I am satisfied that Ms. F. knew from at least the beginning of their engagement that Mr. F. wanted an agreement to protect his assets. The agreement protected Ms. F. as well. It protected her pension. It provided certainty to her if she acquired assets during the course of their relationship or if she and Mr. F. had a child or purchased a house. In fact, Ms. F. negotiated a longer period of spousal support if they had a child. I have found that Ms. F. freely entered into the agreement. By signing the agreement, Ms. F. indicated her own desire to achieve certainty. As stated by the Supreme Court of Canada in *Miglin v. Miglin*,

2003 SCC 24 [Miglin]:

- [83] Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.
- [90] Although Miglin precedes the enactment of the FLA, its principles have been upheld repeatedly by the courts in this province. For instance, in *Reiner v. Reiner*, 2021 BCSC 1514 [Reiner] at para. 17, Baird J. quoted the above passage from Miglin in support of the principle that courts ought "to be reluctant to interfere with agreements that conform to the parties' substantive intentions."
- [91] Following Miglin and bearing in mind all of the circumstances, I am satisfied that the parties intended to achieve certainty through the agreement.
- [159] In my view, the trial evidence supports the same conclusion in this case. After signing the Agreement, the parties continued their relationship on exactly the same terms as they had previously. They continued to maintain separate finances. They continued to maintain one joint account for the sole purpose of sharing their living expenses.
- [160] As in SBF, the Agreement includes clauses which protect the claimant's interests. Neither party was required to share any growth in their respective businesses with the other. Ultimately, I am satisfied that the parties intended to achieve certainty by signing the Agreement. In my view, this factor weighs against a finding of significant unfairness.
- c) Degree of Reliance (s. 93(5)(c))
- [161] I conclude that both parties relied on the certainty the Agreement provided after they signed it. They purchased two travel trailers and the Chase Avenue Property as a joint investment. They moved forward with their relationship. The claimant conceived a second child with the respondent.
- [162] The comments of Murray J. in SBF are applicable:
- [92] Considering the final factor -- the degree to which the spouses relied on the agreement -- Ms. F. argues that Mr. F. did not rely on the agreement as he acted contrary to the separate property regime by requesting financial contributions from her toward family property and allowing the mixing of funds. For the reasons above, I do not accept this submission. Again, I am satisfied that Mr. F. sought Ms. F.'s contribution toward living expenses and their holidays, not family property. In the circumstances of this case, I do not accept that the "mixing" of funds in one bank account reflected a change in Mr. F.'s intention. Mr. F. was consistently clear that Ms. F. would not share in the properties. Ms. F. further argues that

Mr. F. had assured her that the West 16th Property, once redeveloped, would be their family home. Even if Mr. F. said that, I find that the phrase "family home" was not meant as a legal term indicating a change of intention. Further, I find that it was not truly a "mixing of funds." Ms. F. testified that aside from the \$500 she gave to Mr. F. every two weeks, the rest of her income was hers to do with as she pleased. She kept it in a separate bank account that she alone could access. As a result of this separation of finances, she was able to pay off her debt during the marriage.

[ ]

[95] Mr. F. clearly relied on the agreement. He married Ms. F., something he would not have done, regardless of his love for her, had they not had the agreement in place. He allowed her to move into the West 16th Property, the house he described in his evidence as his primary asset and his "retirement plan", as he does not have a pension. Again, his evidence is unequivocal that this is something he would not have done if it was not protected by the agreement. I am further satisfied that Ms. F. relied on the agreement. Throughout the marriage, she was able to pay off her debt knowing that she was financially independent and was not responsible for Mr. F.'s substantial debt load. Having regard to all of the evidence, I am satisfied that both of the parties relied on the agreement.

[163] As in SBF, I conclude that both parties relied on the Agreement. It provided some protections to both, including their agreement not to share in the growth of the other's business if their relationship ended. The claimant was able to use the net proceeds from the sale of the Summerland Property to retire her personal debts. She was not required to invest in the purchase of the FFR. She assumed none of the risks of being a mortgagor or of the value of the FFR declining due to market forces (as it has in recent years). In my view, consideration of this factor weighs in favour of a finding that the Agreement is not significantly unfair.

d) Conclusion

[164] Having regard to the factors outlined in s. 93(5), viewed holistically, I conclude that the Agreement is not significantly unfair. In my view, the claimant effectively asks me rewrite the Agreement, having decided retrospectively that she struck an improvident bargain. I decline to do so.

B. Setting Aside the Agreement re: Spousal Support

1. Legal Framework

[165] Section 164 of the FLA provides as follows:

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

(2) For the purposes of subsection (1), the same person may witness each signature.

- (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
  - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
  - (c) a spouse did not understand the nature or consequences of the agreement;
  - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
  - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
  - (c) the intention of the spouses, in making the agreement, to achieve certainty;
  - (d) the degree to which the spouses relied on the terms of the agreement;
  - (e) the degree to which the agreement meets the objectives set out in section 161[objectives of spousal support].
- (6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

[166] The claimant seeks retroactive spousal support to the date of separation in the amount of \$131,234 and mid-range prospective spousal support in the amount of \$9,740 per month until July 1, 2033 (for a total of 11 years and six months or roughly three times the length of the parties' relationship). The respondent denies that the claimant is entitled to spousal support in any amount. None has been paid to date.

## 2. The Agreement

[167] The Agreement addresses spousal support in para. 3.1 as follows:

With respect to spousal support, [C.F.W.] and [A.L.A.], intend by this Agreement to waive any and all spousal support rights and obligations that have arisen or that may arise under the Family Law Act, the Divorce Act, and any other applicable legislation or law, now or in the future, at law or in equity, from their marriage and/or in the event of a breakdown of the relationship.

[168] The parties expressly acknowledge in para. 4.1 of the Agreement their wish to remain "completely financially independent of each other" and that both are self-sufficient and responsible for their own support. Each expressly releases the other from any claim that they might have to support. Both expressly acknowledge that their financial circumstances might change and that no such change will alter their intentions, as set out in the Agreement, or entitle either one to support from the other. For greater certainty, the Agreement expressly provides that it may be pleaded as a complete defence to any claim by either party for spousal support.

3. Is the Agreement procedurally unfair? (s. 164(3))

[169] The analysis under s. 164(3) of the FLA mirrors the one that is contemplated by s. 93(3). I reach the same conclusions for the same essential reasons in my analysis of ss.164(3) and 93(3). I conclude on all the evidence that the claimant would have signed the Agreement, even if she had been provided with more precise valuations of the respondent's assets indicating that they were actually worth substantially less than her estimates. I have found that the respondent did not intentionally withhold information from the claimant and that he could not reasonably have predicted that PI Ltd. would have an exceptional 2021 year in March of 2021.

[170] For the above-noted reasons, I am not persuaded that the claimant was in a position of vulnerability in March 2021, or that the respondent unduly pressured her to sign the Agreement. The claimant had the benefit of good legal advice from two family law lawyers before she signed the Agreement.

[171] In *Reiner*, Justice Baird declined to set aside the spousal support provisions of a separation agreement. While the respondent alleged that the claimant took improper advantage of her mental and emotional vulnerability, Baird J. found that there was no persuasive evidence to support those arguments. Both parties were represented by experienced counsel and the respondent signed a certificate of independent legal advice. Those facts are comparable to the ones before me.

[172] I conclude that the Agreement regarding spousal support is not procedurally unfair.

4. Is the Agreement significantly unfair? (s. 164(5))

[173] If none of the procedural defects apply under s. 164(3), the analysis moves to section 164(5) of the FLA.

[174] The claimant submits that, in determining whether an agreement regarding spousal support is significantly unfair in its application pursuant to s. 164(5), the court must consider any changes in the condition, means, needs, or other circumstances of a spouse. She argues that the respondent's means increased exponentially in a way that could not have been foreseen after the parties signed the Agreement. Specifically, she notes that:

- a) PI Ltd. was worth 12 times its March 2021 value in September 2022 (\$770,000 vs. \$60,000); and
- b) The respondent's Guidelines income increased from \$84,000 in 2020 to \$572,000 in 2021.

[175] By contrast, the claimant underscores that the Agreement provides that the parties' incomes were approximately equal. She submits that the Agreement ceased to be fair once the respondent's income so far exceeded her own. She argues that her own needs changed after the parties signed the Agreement with the birth of N.R.

[176] I am not persuaded that the provisions in the Agreement regarding spousal support should be set aside on the basis of significant unfairness. The respondent's income was accurately set out in the Agreement when the parties signed it. I have found that he was not in a position to predict the extent to which PI Ltd.'s income would increase in 2021 when he signed the Agreement in early March of that year. The trial evidence supports the conclusion that PI Ltd.'s 2021 revenue increased substantially as a result of COVID-related government subsidies and top-ups after being declared an essential service.

[177] On the evidence of the respondent, as corroborated by Mr. M. and Mr. Dimma, the service contracts on which PI Ltd. relied to generate revenue could be cancelled on short notice. According to Mr. M., the business was always a struggle. The claimant focuses heavily on PI Ltd.'s gross revenue in 2021 but overlooks its substantially lower net profits. PI Ltd. sustained a net loss in 2020; additionally, its 2022 monthly incomes are substantially lower than those in 2021.

[178] In *Ashak v. Ashak*, 2016 BCSC 941 at para. 50 [Ashak], Justice Brown summarized the purpose of compensatory spousal support as follows:

Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the receipt of an economic advantage upon the other spouse: *Chutter v. Chutter*, 2008 BCCA 507 at para. 50. As stated in *Moge v. Moge*, [1992] 3 S.C.R. 813 at 867-68, the most significant economic consequence of marriage or marriage breakdown usually arises from having children, where a wife is generally required to leave or cut back her participation in the workforce in order to care for the children.

[179] Entitlement to compensatory support may arise due to a reduction in work hours to perform childcare, where that reduction allowed the other spouse to grow their business: Ashak at para. 51; K.D.R. v. J.N.D., 2018 BCCA 232 at para. 27. Spousal support may be awarded to compensate a spouse for the time it takes to rebuild their clientele after reducing their commitment to business to undertake childcare: Pellerin v. Ostermann, 2012 BCSC 1307 at para. 36.

[180] Income disparity alone does not entitle a spouse to non-compensatory support: Lee v. Lee, 2014 BCCA 383 at para. 60. The court must consider the degree to which the parties' agreement meets the objectives of spousal support: SBF at para. 103. The objectives of spousal support are set out in s. 161 of the FLA:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[181] The claimant had an established and successful career before she met the respondent. She worked throughout the parties' relationship and continues to do so. She was never financially dependent on the respondent. The parties consistently maintained separate finances and split their living expenses throughout their relationship. They shared parenting responsibilities. In my view, the evidence falls short of establishing that the claimant lost opportunities or was economically disadvantaged as a result of the parties' relationship.

[182] On the respondent's uncontroverted evidence, the claimant has never had any involvement in MCS or PI Ltd. The claimant submits that she allowed the respondent to focus his time and attention on PI Ltd. by providing care to B.C. during the parties' relationship. Her evidence on this point evolved somewhat at trial. She initially said that the respondent was away for work 3-4 days/week when they were together; when challenged on this point in cross-examination, she conceded that he was actually away only 3-4 days per month.

- [183] The claimant admitted that it was very easy to sell real estate in the Okanagan in 2021. She described 2021 as her best year of sales to date. She agreed that she did "fairly well" selling real estate until the birth of N.R. in 2022; thereafter, she said that the real estate market slowed. On her own evidence, her decreased volume of sales after the parties' separation was largely due to market forces and not her childcare responsibilities. She agreed that market forces constitute one of many reasons why a realtor's income can fluctuate.
- [184] The parties share childcare responsibilities and have the benefit of generous and readily available childcare support from their parents. By 2021, B.C. was in full-time daycare, the cost of which the parties shared equally. N. R. recently had her first birthday and has now passed the age when B.C. started attending daycare.
- [185] The claimant was self-supporting when she signed the Agreement and she remains so. Mr. Sanders' estimate of the respondent's 2021 Guidelines income includes significant, discontinued, non-recurring sources of income that are no longer available to either the respondent or to PI Ltd. On the trial evidence, 2021 was an outlier year for PI Ltd. Accordingly, I conclude that the gap in the parties' incomes has narrowed substantially since 2021.
- [186] I find that the claimant has not established an entitlement to spousal support on either a compensatory or non-compensatory basis.

### C. Application of Part 5 of the FLA

- [187] If I find that any procedural defects necessitate replacing some or all of the Agreement, the respondent submits that it would be significantly unfair to divide family property equally. Given my finding that the Agreement is not procedurally unfair, I need not consider whether it would be significantly unfair to divide family property equally pursuant to Part 5 of the FLA.
- [188] I turn next to the claims in relation to the Children, including parenting arrangements and the parties' financial obligations.

### D. Parenting Arrangements

- [189] To their credit, the parties have largely resolved matters related to their shared parental responsibilities. The parenting orders that I make by consent are set out in my final disposition at the end of these reasons. The contentious parenting issues relate primarily to the parenting schedule for the Children going forward.
- [190] The parties agree that parenting issues are to be determined based solely on what is in the Children's best interests in accordance with s. 37 of the FLA. Both support a continued shared parenting arrangement for B.C.; they disagree about what this entails. The claimant prefers a 2-2-5-5 schedule; the respondent seeks a 7/7 schedule.

- [191] The parties agree that N.R. should continue to reside primarily with the claimant for now, with frequent parenting time by the respondent. They disagree about the number of overnight visits per week that the respondent should have with N.R. after her first birthday. The claimant proposes one overnight visit and that this matter be reviewed thereafter; she proposes a more defined parenting schedule for N.R. once she is two years old. The respondent proposes two overnight visits per week with N.R. once she is one year old, with the option of having them scheduled consecutively.
- [192] Both parties admit that the other is a capable parent. I credit them both for acknowledging that the Children's needs are appropriately prioritized over their own.
- [193] B.C. is now four years old. The claimant submits that it would be in B.C.'s best interests to transition to a 2-2-5-5 shared parenting schedule, which would provide the parties with a balance of both structured and unstructured time with B.C., while ensuring that B.C. is not away from either parent for a full week. In her view, the respondent's proposed 7/7 schedule is not child-focused but instead structured to suit his convenience. Given the Children's young ages, she denies that it is in the interest of either one to be away from either their sibling or one parent for a whole week. I agree.
- [194] The claimant proposes the following parenting schedule for N.R. (who is currently about 15 months old):
- a) When N.R. reaches the age of one year, she should spend a minimum of one overnight night with the respondent during his parenting time with B.C.;
  - b) When N.R. is 1.5 years old, she should spend a minimum of two overnights with the respondent; and
  - c) When N.R. is two years old, her parenting schedule may be reviewed.
- [195] I accept that both parties are capable parents and that a shared parenting schedule for the Children going forward is appropriate. The essential questions before me include whether:
- a) A 2-2-5-5 or 7/7 schedule is best for B.C.; and
  - b) How much overnight parenting time the respondent should have with N.R. now that she has reached the age of one year.
- [196] I conclude that a 2-2-5-5 schedule for B.C. is currently in her best interests. B.C. is still very young and, in my view, a more gradual transition to a 7/7 parenting schedule is in her best interests. In reaching this conclusion, I have focused on what is in B.C.'s best interests and not what is most convenient to the respondent. However, I anticipate that the parties will gradually transition to a 7/7 parenting schedule for B.C. over time. Given their history of success, I am optimistic that they will be able to resolve this issue, with the assistance of their counsel or parenting coordinator, as necessary.

- [197] I also conclude that one overnight per week of parenting time by the respondent with N.R. is appropriate now that she has reached the age of one year. Thereafter, I anticipate the respondent transitioning to two overnights of parenting time per week with N.R. over the next six months. I am also optimistic that the parties will be able to resolve this issue, with assistance, as necessary.
- [198] N.R. will continue to reside primarily with the claimant until she is two years old. Thereafter, I agree that it would be appropriate for the parties to have a more formal parenting schedule for N.R. In the interim, the respondent will have generous and regular parenting time with N.R., to be agreed between the parties. Either party will be at liberty to apply to the court for specified parenting time for N.R. if they are unable to reach agreement on this matter.
- [199] The claimant proposes that when B.C. is with one party, she be permitted Facetime with the other party at least once every 24 hours; the respondent suggests that this be every 72 hours. In my view, Facetime contact at least once every 48 hours, between B.C. and the party who does not then have parenting time with B.C., is reasonable.

## **E. Parties' Guidelines Incomes**

- [200] The parties separated in February 2022. Accordingly, I am required to determine the parties' Guidelines incomes for the years 2022 and 2023.
- [201] Section 16 of the Guidelines provides as follows:

### **Calculation of annual income**

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

- [202] Section 18(1) of the Guidelines authorizes the court to include as income for support purposes all or part of the pre-tax income of a corporation of which a spouse is a shareholder, director or officer:

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

[203] In *Hausmann v. Klukas*, 2009 BCCA 32 [Hausmann], the Court of Appeal discussed the analysis contemplated pursuant to s. 18 of the Guidelines:

[32] In *Kowalewich*, Madam Justice Huddart comprehensively analyzed s. 18 and the related sections of the Guidelines. In particular she commented on the purpose and application of s. 18:

[43] In this regard, I find helpful the view Justice Martinson expressed in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.) at para. 28:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No. 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) (B.C.S.C.) and *McCrea v. McCrea*.

[204] The onus is on the payor to establish that a business' pre-tax income is not available for child support: *Richardson v. Richardson*, 2013 BCCA 378 at para. 34 citing *Hausmann* at paras. 51-52.

[205] In *Kargl-Fluckiger v. Fluckiger*, 2022 BCSC 1609 [Kargl-Fluckiger] Justice Elwood discussed the inclusion of pre-tax corporate earnings for the purpose of determining child support:

[53] While the Guidelines allow a court to include all of the pre-tax income of a corporation in the payor's income, they no [sic] not require it. Put another way, the Guidelines do not make the inclusion of all pre-tax income a default rule: *Kowalewich v. Kowalewich*, 2001 BCCA 450, at para. 54 [Kowalewich].

[54] Whether to use any, part or all of a corporation's pre-tax earnings depends on the circumstances of each case. The case law provides the following principles to guide the assessment:

- a) It is not necessary for the claimant to show bad faith or an intent by the payor spouse to defeat the Guidelines to demonstrate that all or part of the corporation's pre-tax income is available for distribution: *Kowalewich*, at para. 40;
- b) The onus is on the payor spouse to "present clear evidence showing that part of the pre-tax income is not available": *Namdarpour*, para. 124; *Quinton v. Kehler*, 2020 BCCA 254, at para. 83-84;
- c) However, there is no requirement for the payor spouse to demonstrate "that the business could not be run in a fashion that generates more available income": *McKenzie v. McKenzie*, 2014 BCCA 381, at para. 102 [McKenzie];

- d) In assessing whether to include corporate income in Guideline income, the court is not required to "second guess business decisions"; nor is it required to "place the largest available shovel in the company store": Kowalewich, at para. 44;
  - e) Instead, the court must assess "a spouse's allocation of pre-tax income between business and family purposes for fairness on priorities as [parents] would in an intact family": Kowalewich, at para. 44.
  - f) In doing so, the court "must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income": Kowalewich, at para. 58-59;
- [55] In the end, the quantification of a payor's income for support purposes is a question of common sense in which "a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business .. having regard to the objectives of [the Guidelines and] the underlying parental obligation to support children": McKenzie, at para. 102, quoting Kowalewich, at para. 45.
- [206] In *Evanow v. Lannon*, 2018 BCCA 208 [Evanow] not all of the capital reserve in the payor parent's company was available as income for the purpose of child support. The Court of Appeal in *Evanow* confirmed that it is appropriate to analyze what a company requires to continue as a viable enterprise:
- [61] This test was succinctly restated by the Court in *McKenzie v. McKenzie*, 2014 BCCA 381. In that case, the contested corporate income involved principal payments on mortgages, and the s. 18 question was phrased as "whether [the payor] has provided clear evidence that the amounts paid in respect of the mortgage principal were "necessary to sustain the company as a viable enterprise" and were "not available" to him to pay spousal support" (para. 99). As tailored to the facts of the present appeal, this inquiry becomes whether the contested capital reserve was necessary to maintain Mr. Evanow's companies as viable enterprises and whether the amount in question was unavailable to him for the purposes of child support.
- [62] Mr. Evanow's business provides maintenance services for medical imaging technologies used by healthcare professionals. I agree with Mr. Evanow that based on the nature of his business, the comments made by this Court in *Teja v. Dhanda*, 2009 BCCA 198, are relevant. In that decision, the Court indicated that the s. 18 analysis must "allow the payor to maintain value in the company and permit the company to continue as a viable enterprise and, at the same time, also permit a reasonable amount of income to be available for child support" (para. 12). *Teja* also acknowledges that corporate income is used to "take advantage of business opportunities, for expansion, to protect against the possibility of business downturns and the like" (para. 13).

[63] There was evidence before the Court that it was necessary to accumulate a capital reserve in the circumstances of Mr. Evanow's business, which was accepted by the judge. Mr. Evanow deposed to the developments within the medical imaging field, including the creation of the Health Authorities, that changed the interface with clientele, the need to transition from analog to digital equipment, the special requirements for housing and displaying such equipment, as well as increased competition from equipment suppliers.

[64] Mr. Evanow submitted that the combination of these factors necessitated the acquisition of a building in the Lower Mainland. His companies could only continue to be viable if they were able to sell digital equipment, and in order to sell digital equipment the manufacturers and providers of such equipment demand a location in the Lower Mainland from which to conduct sales.

[65] In his reasons, the judge below correctly turned his mind to the s. 18 framework. He accepted the evidence of Mr. Evanow that "a building is required to enable the Companies to be competitive in the marketplace" (OD, para. 178).

[207] Section 19(1) of the Guidelines states:

The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

[ ]

(f) the spouse has failed to provide income information when under a legal obligation to do so;

[ ]

1. Claimant

[208] Mr. Sanders, the parties' joint expert, calculates the claimant's 2020 and 2021 Guidelines incomes in his report dated December 22, 2022, as set out below.

Year

Claimant's Guidelines Income

2020

\$62,000

2021

\$100,000

[209] These figures are not controversial and I accept them. While the claimant gave some evidence about a decreased volume of real estate sales in the Okanagan in 2022, as compared to 2021, her actual income in 2022 and 2023 is unclear. By order dated February 9, 2023, Master Schwartz dismissed the respondent's application for a 2022 Guidelines income report.

[210] Both parties proposed an income of \$100,000 for the claimant in 2022. I adopt this figure and impute an income of \$100,000 to the claimant for the year 2022. I accept the claimant's uncontroverted evidence that real estate sales in the Okanagan have slowed since 2021. Based on her updated F8 financial statement sworn January 26, 2023, her anticipated 2023 Guidelines income for the purpose of child support is \$71,100. Doing my best on the available evidence, I impute an income of \$80,000 to the claimant for the year 2023, as proposed by the respondent.

## 2. Respondent

[211] Mr. Sanders calculates the respondent's 2020 and 2021 Guidelines incomes as set out below.

Year

Guidelines Income

2020

\$84,000

2021

\$572,000

[212] I do not rely on Mr. Sanders' calculation of the respondent's 2021 Guidelines income for the years 2022 and 2023. On the uncontroverted evidence of the respondent, Mr. Dimma, and Mr. Sanders, neither the respondent nor PI Ltd. has ongoing access to COVID-19 government subsidies or top-ups. In my view, it is not appropriate to include non-recurring sources of income in calculating the respondent's personal and pre-tax corporate income after 2021.

[213] Based on the respondent's updated F8 financial statement sworn January 31, 2023, his total income for child support purposes was then \$126,049, comprised of:

- a) \$96,000 - employment income
- b) \$30,049 - dividends and net rental income

**TOTAL: \$126,049**

- [214] Based on the statement of income and retained earnings for the year ended November 30, 2022, PI Ltd.'s pre-tax income in that fiscal year was \$181,196. This figure represents a significant decline from 2021, when PI Ltd. received substantial non-recurring sources of income.
- [215] I accept that not all of PI Ltd.'s 2022 pre-tax income of \$181,196 would have been available for the purpose of paying child support. On Mr. Sanders' evidence, there can be legitimate reasons why a company might be unable to access all of its pre-tax revenue including:
- a) The need to fund its ongoing operations;
  - b) The repayment of debt; and
  - c) The need to purchase additional equipment or capital assets.
- [216] On the respondent's evidence, PI Ltd. faces all of those obligations in its fiscal year ended November 30, 2022. He argues that I must guard against "killing the goose that lays the golden eggs" by stripping out all of this pre-tax income to fund support payments. PI Ltd. was required to make a balloon payment on a BDC loan effective April 30, 2023 in the amount of \$123,295. It is unclear on the trial evidence whether the respondent intended to repay or to refinance this debt. He testified that PI Ltd. must pay its employees every two weeks, despite not receiving payment for PI Ltd.'s services for up to 90 days. Based on PI Ltd.'s financial statements for the fiscal year-ends of November 30, 2021 and 2022, the average annual expenses for salaries and wages over three years (2020 - 2022) was \$88,778 (\$7,398 per month or \$22,194 for three months).
- [217] The respondent confirmed at trial that he intends to sign the Telus direct services contract for a three-year term. On his evidence, doing so will attract significant, but unquantified, capital expenditures, including upgrading its fleet of service vehicles. In cross-examination, he conceded that PI Ltd. is not required to purchase these vehicles and could lease them, if available.
- [218] The claimant points to evidence that the respondent was considering purchasing another business in August 2022 for \$1.35 million as some evidence of his financial wealth. However, on the trial evidence as a whole, the respondent has a history of incurring substantial debt, financing purchases, and assuming monetary risk. Ultimately, he did not purchase this business. In my view, the fact that he was considering doing so in 2022 is of limited assistance in determining his Guidelines income.
- [219] I conclude, as in *Evanow* and in accordance with s. 18 of the Guidelines, that it is appropriate to include some, but not all, of PI Ltd.'s pre-tax income in calculating the respondent's Guidelines income. In doing so, I have considered PI Ltd.'s ongoing financial obligations, including its requirement to pay PI Ltd. employees before PI Ltd. is paid for the services that they provide. Doing my best on the available evidence, I conclude that

including \$100,000 of PI Ltd.'s pre-tax income in the respondent's 2022 Guidelines income is reasonable. I assess his 2022 Guidelines income as follows:

- a) \$96,000 - employment income
- b) \$28,750 - dividend income
- c) \$1,299.40 - net rental income
- d) \$(1,935.87) - net loss from MCS

Sub-Total: \$124,113.53

- e) Plus \$100,000 - net pre-tax income from PI Ltd.

TOTAL: \$224,113.53

[220] For the year 2023, I assess the respondent's Guidelines income, before accounting for pre-tax income from PI Ltd., as follows:

- a) \$96,000 - employment income
- b) \$1,299 - net rental income
- c) \$25,000 - estimated dividend income

**Sub-total - \$122,299**

[221] In my view, some pre-tax corporate income from PI Ltd. must be added to this amount. I acknowledge that PI Ltd.'s revenue might increase once the respondent signs a direct service contract with Telus. However, I also accept that PI Ltd.'s corresponding expenses are likely to increase. Doing my best on the available evidence and having regard to PI Ltd.'s financial obligations in 2023, I impute an additional \$100,000 in pre-tax income to the respondent for the year 2023.

[222] In the result, the respondent's 2023 Guidelines income for the purpose of assessing the parties' child support obligations is virtually identical to the income I have imputed to him for 2022. Accordingly, I use the same Guidelines income figure for the respondent for the years 2022 and 2023, namely \$224,113.53.

[223] The parties' 2023 Guidelines incomes, as set out in these reasons, are subject to variation once they have prepared their 2023 personal and corporate income tax returns and exchanged more detailed financial disclosure, in accordance with these reasons.

## F. Child Support

[224] The parties have agreed to a shared parenting regime for B.C. Section 9 of the Guidelines therefore applies and an off-set of child support is appropriate. Until N.R. transitions to a shared parenting schedule, the full table amount of child support is payable by the respondent to the claimant. Applying the parties' Guidelines incomes, as set out in these reasons, I calculate their retroactive and prospective child support obligations as set out below.

Year

Guidelines Incomes

Claimant

Pays

Respondent

Pays

Set-Off Amount

Payable by the Respondent

2022 (February and March)

One Child

Claimant: \$100,000

Respondent: \$224,113

\$946

\$1,934

\$988

2022

(April - December)

Two Children

Claimant: \$100,000

Respondent: \$224,113

\$946

\$3,034

\$2,088

2023

(January - July)

Claimant: \$80,000

Respondent: \$224,113

\$765

\$3,034

\$2,269

[225] These figures result in retroactive support payable by the respondent to the claimant, subject to a credit for support paid to date, as follows:

- a) 2022 - \$20,768 (i.e., \$988 x 2 + \$2,088 x 9); and
- b) 2023 - \$15,883 (i.e., \$2,269 x 7)

TOTAL: \$36,651

[226] Commencing June 1, 2024, and on June 1st of each year thereafter, the parties shall exchange:

- a) Their personal and corporate income tax returns for the previous year, including all attachments and corporate financial statements; and
- b) Copies of any notices of assessment or reassessment provided to them by the Canada Revenue Agency, immediately on receipt.

[227] Subject to changes in income based on the above disclosure, the respondent will pay ongoing child support to the claimant in the amount of \$2,269 on the first of each month.

## G. Section 7 Expenses

[228] The claimant is not seeking compensation for retroactive s. 7 expenses. Those expenses currently include childcare costs, gymnastic classes, and dance lessons.

[229] The parties will share s. 7 expenses for the Children proportionately based on their incomes. In other words, based on my findings, that currently means that the claimant will pay 26% and the respondent will pay 74% prospectively.

## VI. DISPOSITION

[230] I make the following orders:

- a) BY CONSENT, the parties are joint guardians of the Children pursuant to s. 39 of the FLA.
- b) BY CONSENT, the parties will share equally all parental responsibilities for the Children, as outlined in s. 41 of the FLA, pursuant to s. 40(2) of the FLA.

- c) BY CONSENT, the parties' parental responsibilities under s. 40(2) of the FLA, to be exercised in the best interests of the Children, are as follows:
  - i. Making day-to-day decisions affecting the Children and having day-to-day care, control, and supervision of the Children;
  - ii. Making decisions respecting where the Children will reside;
  - iii. Making decisions respecting with whom the Children will reside and associate;
  - iv. Making decisions respecting the Children's education and participation in extracurricular activities, including the nature, extent, and location;
  - v. Making decisions respecting the Children's cultural, linguistic, religious, and spiritual upbringing and heritage;
  - vi. Subject to s. 17 of the Infants Act, R.S.B.C. 1996, c. 223, giving, refusing, or withdrawing consent to medical, dental, and other health-related treatments for the Children;
  - vii. Applying for a passport, license, permit, benefit, privilege, or other thing for the Children;
  - viii. Giving, refusing, or withdrawing consent for the Children, if consent is required;
  - ix. Receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
  - x. Requesting and receiving from third parties health, education, or other information respecting the Children;
  - xi. Subject to any applicable provincial legislation:
    - (1) starting, defending, compromising, or settling any proceeding relating to the Children; and
    - (2) identifying, advancing, and protecting the Children's legal and financial interests; and
  - xii. Exercising any other responsibilities reasonably necessary to nurture the Children's development.
- d) BY CONSENT, a party becoming aware of important information relating to the Children not known to the other party must immediately notify the other party about that information.
- e) BY CONSENT, both parties must consult about any important decisions that must be made and try to reach agreement concerning the best interests of the Children in these important decisions but, if they disagree, the issue will be resolved:
  - i. Through mediation; or
  - ii. With the assistance of their parenting coordinator.

- f) BY CONSENT, during parenting time, a party may exercise the parental responsibility of making day-to-day decisions affecting the Children provided that the party must advise the other party of any matters of a significant nature affecting the Children.
- g) BY CONSENT, if either party dies, the surviving party will be the guardian of the Children and will have all the parental responsibilities. The surviving party will make all reasonable efforts for the Children to maintain relationships with immediate family members of the deceased party.
- h) BY CONSENT, either party may, under s. 49 of the FLA, seek a review of any decision made by the other on the basis that it is contrary to the best interests of the Children.

## Travel

- i) BY CONSENT, the parties will jointly apply for a passport for the Children and shall share the cost of obtaining the passports, and any renewals, equally.
- j) BY CONSENT, the claimant will retain possession of the Children's important documents, including their passports.
- k) BY CONSENT, neither party will unilaterally apply for a passport on behalf of either child.
- l) BY CONSENT, neither party shall be permitted to remove the Children from Canada without the written consent of the other party, such consent not to be unreasonably withheld, or a court order permitting the travel.
- m) BY CONSENT, the parties may travel with the Children outside Canada only if:
  - i. At least sixty days prior to the intended travel, the traveling party provides the other party with the following information:
    - (1) The location, including the address and contact telephone number, of the traveling party, and the telephone contact for the Children to enable the non-travelling party to communicate with the Children;
    - (2) The duration of the travel;
    - (3) Flight numbers and airline itinerary, with proof of return ticket, if applicable; and
    - (4) A phone number of a contact person in case of an emergency;
  - ii. Each party will cooperate to provide the necessary authorization to permit the Children to travel with the other party;
  - iii. The traveling party will provide the other party with a travel authorization for their signature at least 21 days before the travel dates, which travel authorization shall not be unreasonably withheld. The other party will sign and have the travel authorization notarized, and return it to the traveling party within 7 days after receiving it; and

- iv. In the event that the parties do not agree regarding any proposed travel outside of the country, their parenting coordinator will make the decision about travel outside of the country, with either party having the right to apply under s. 49 of the FLA for a court order permitting the travel.
- n) BY CONSENT, the Children may travel within British Columbia for vacation purposes with either party. This travel will not require the consent of the other party, but the other party must be notified of the travel. The travelling party will provide the non-travelling party with a travel itinerary and contact information.

## Communication

- o) BY CONSENT, unless otherwise agreed, all communications between the parties will be in writing using email, text message, or other family communication software.
- p) BY CONSENT, for any urgent communications, the parties shall call or text and the other party will respond as soon as possible.
- q) BY CONSENT, the parties shall check for correspondence from the other party at least once per day, unless not possible, in which case the other party will be notified in advance. The parties will respond to written communications within 24 hours. If further time is needed for response, the party will advise the other party of the expected response time.
- r) B.C. will be permitted Facetime with the party who does not then have parenting time with B.C. at least once every 48 hours;
- s) BY CONSENT, the parties will review any telephone and/or Facetime parenting time access on a regular basis to evolve with the Children's advancing age.
- t) BY CONSENT, each party shall designate a contact person of their choice in the event that the other party cannot be reached in the event of an emergency.
- u) BY CONSENT, the parties will provide each other with copies of all child-related documents, including health cards, social insurance cards, birth certificates, and immunization records. The parties will share equally in the cost of obtaining these documents.
- v) BY CONSENT, the parties will notify each other of any change in their employment status, change of residence, change of persons living in their homes, or relationship status for any person having contact with the Children.
- w) BY CONSENT, pursuant to s. 222 of the FLA, the parties shall not:
- i. Question the Children about the other party or time spent with the other party beyond simple conversational questions;
  - ii. Discuss with the Children any inappropriate adult, court, or legal matters; or
  - iii. Blame, criticize or disparage the other party to the Children.
- B.C.

- x) The parties will share parenting time equally for B.C. on a 2-2-5-5 shared parenting schedule, to be agreed on between them (the "Regular Parenting Schedule").
- y) BY CONSENT, the parties agree that either party has the option of keeping B.C. home from daycare during their parenting time on their regular parenting days, which means a day where that party is to collect B.C. from daycare, provided that they notify the other party in advance of their intention to keep B.C. out of daycare.
- z) BY CONSENT, if the respondent has to travel out of town for work, he will provide notice as soon as possible to the claimant of his travel and give her the option of keeping B.C. for additional parenting time. If the claimant is unable to accommodate the additional parenting time, the respondent will be responsible to make alternate care arrangements for the care of B.C.

aa) BY CONSENT, the Regular Parenting Schedule for B.C. will prevail, subject to the holiday sharing set out below.

Christmas:

bb) BY CONSENT, B.C.'s Christmas holiday period will consist of the period from December 23 to December 26 ("B.C.'s Holiday Period").

cc) BY CONSENT, the parties will rotate B.C.'s Holiday Period as follows:

- i. The claimant shall have B.C. from 9:00 a.m. on December 23 to 9:00 a.m. on December 25 in even years and the respondent shall have B.C. from 9:00 a.m. on December 23 to 9:00 a.m. on December 25 in odd years; and
- ii. The respondent shall have B.C. from 9:00 a.m. on December 25 every year until December 26 at 5:00 p.m. in even years and the claimant shall have B.C. from 9:00 a.m. on December 25 until December 26 at 5:00 p.m. in odd years.

New Years:

dd) BY CONSENT, there will be no change to the Regular Parenting Schedule for B.C.

Spring Break:

ee) BY CONSENT, there will be no change to the Regular Parenting Schedule for B.C.

Easter:

ff) BY CONSENT, the parties will rotate Easter Sunday and Easter Monday as follows:

- i. In even years, the claimant will have B.C. on Easter Sunday commencing at 9:00 a.m. and the respondent will have B.C. on Easter Monday commencing at 9:00 a.m.; and
- ii. In odd years, the respondent will have B.C. on Easter Sunday commencing at 9:00 a.m. and the claimant will have B.C. on Easter Monday commencing at 9:00 a.m.

### Thanksgiving:

gg) BY CONSENT, the parties will rotate Thanksgiving Sunday and Thanksgiving Monday as follows:

- i. In even years, the respondent will have B.C. on Thanksgiving Sunday and the claimant will have B.C. on Thanksgiving Monday; and
- ii. In odd years, the claimant will have B.C. on Thanksgiving Sunday and the respondent will have B.C. on Thanksgiving Monday.

### B.C.'s Birthday:

hh) BY CONSENT, until B.C. starts school full time, each party will host a birthday party for her on their parenting days, inviting their friends and relatives on their side of the family.

ii) BY CONSENT, once B.C. starts school, the parties will alternate planning a birthday party for school friends. Each party will be able to attend the birthday party.

### Parties' Birthdays:

jj) BY CONSENT, if B.C. is not with a party on their birthday, that party will have parenting time for two hours if the birthday lands on a school day or overnight until the next morning on a weekend day.

### Mother's Day and Father's Day:

kk) BY CONSENT, B.C. will be with the claimant on Mother's Day every year, from 9:00 a.m. until the following Monday at 9:00 a.m. when the Regular Parenting Schedule for B.C. resumes.

ll) BY CONSENT, B.C. will be with the respondent on Father's Day every year, from 9:00 a.m. until the following Monday at 9:00 a.m. when the Regular Parenting Schedule for B.C. resumes.

### Other Statutory Holidays and Long Weekends:

mm) BY CONSENT, there will be no change to the Regular Parenting Schedule.

### Summer Months:

nn) BY CONSENT, each party may have parenting time with B.C. if they wish for a block of five nights and six days during the summer months. One block will be in July and one block will be in August, not to be consecutive with any other parenting days, and not back-to-back. Pick up and drop off times will be between 9:00 a.m. and 9:30 a.m.

oo) BY CONSENT, if a party who is scheduled to have B.C. in their care is unable to care for her for a period of 24 hours or more, the other party will be given an opportunity to care for B.C. If the notified party cannot provide care, the notifying party will make appropriate childcare arrangements at their own expense (the "Right of First Refusal").

pp) BY CONSENT, B.C. may have occasional overnight stays with the parents of the party who has current care of B.C. The other party will be notified before the overnight stays.

qq) BY CONSENT, neither party will make plans for B.C. when she is scheduled to be with the other party.

rr) BY CONSENT, the parties shall canvass any proposed changes to the Regular Parenting Time Schedule for B.C. before speaking to B.C. about the change or proposed social activity.

ss) BY CONSENT, there will be no make-up parenting time for missed parenting time (regular or holiday) unless both parties have agreed to this in writing in advance.

tt) BY CONSENT, each party may attend any extracurricular activities open to the public, including, but not limited to, sports practices, competitions, concerts (including school concerts), performances, and recitals. The party who normally has care and control of B.C. under the Regular Parenting Schedule for B.C. shall assume responsibility for B.C. at the event. The other party may greet and/or encourage B.C. but shall otherwise observe at a respectful and reasonable distance.

uu) BY CONSENT, while attending any activities, both parties will be cordial to each other and shall not discuss child related issues while in attendance.

vv) BY CONSENT, if either party seeks a change in the Regular Parenting Schedule for B.C. or the Holiday Schedule, for a special event, celebration or unforeseen circumstance, a written request shall be made to the other party to permit that party to make a reasonable effort to accommodate this request. A response to the request shall be given within 48 hours of receipt of the request.

ww) BY CONSENT, B.C. will be provided sufficient clothing at each party's house.

xx) BY CONSENT, both parties will make best efforts to ensure that B.C. attends her extracurricular activities.

N.R.

yy) BY CONSENT, N.R. will continue to reside primarily with the claimant until she is two years old, at which time the parties will review the parenting schedule for N.R.

zz) BY CONSENT, the respondent will be provided regular and generous parenting time with N.R., at times and locations to be agreed between the parties, regardless of whether it is the respondent's week with B.C.

aaa) Now that N.R. has had her first birthday, the respondent will have a minimum of one overnight per week with N.R. during his week of parenting time with B.C.

bbb) BY CONSENT, either party will be at liberty to apply to the Court for a specified parenting time schedule for N.R. in the event of a disagreement.

ccc) The claimant's 2022 Guidelines income is \$100,000.

ddd) The claimant's 2023 Guidelines income is \$80,000.

eee) The respondent's 2022 and 2023 Guidelines income is \$224,113.

fff) The respondent shall pay ongoing child support to the claimant in the amount of \$2,088 on the first day of each month.

ggg) BY CONSENT, commencing June 1, 2024, and on June 1st of each year thereafter, the parties shall exchange:

- i. Their personal and corporate income tax returns for the previous year, including all attachments and corporate financial statements; and
- ii. Copies of any notices of assessment or reassessment provided to them by the Canada Revenue Agency, immediately on receipt.

hhh) BY CONSENT, if either party is seeking to have an expense qualify as a s. 7 expense, then (except for an urgent expense) that party will consult with the other party and obtain his or her agreement in writing prior to incurring the expense. If a party fails to seek the other party's consent prior to incurring an expense that party will be responsible for payment of the full amount of the expense.

iii) BY CONSENT, the party who incurred a s. 7 expense and is seeking reimbursement for the same will provide the other party with a copy of all receipts for the expense at the time that the expense is incurred.

jjj) BY CONSENT, the parties will readjust the child support and s. 7 expenses commencing July 1, 2024, and continuing each July 1 thereafter.

kkk) BY CONSENT, in addition to the annual review, either party, at any time, may request a variation of child support by delivering a written notice to the other if:

- i. There is a material change of circumstances, such as a change to the Children's primary residence or a substantial change in the income of one or both of the parties;
- ii. There is a change leading to undue hardship for either party as defined by the Guidelines;
- iii. The Children cease to be eligible for support; or
- iv. The Children's need for support changes by reason of, for example, reaching the age of majority.

lll) Where a s. 7 expense is incurred, the parties shall each contribute to that expense in proportion with their respective share of the total income of the parties. Based on their current Guidelines incomes, as set out in these reasons, the claimant will pay 26% of these expenses and the respondent will pay 74% of them, prospectively.

mmm) BY CONSENT, the parties will share the child tax benefits or any eligible child related financial assistance.

nnn) The claimant shall pay to the respondent the amount of \$36,991.50, representing the respondent's 50% share of the Chase Avenue Property net sale proceeds.

ooo) The respondent shall pay to the claimant the amount of \$21,000, representing the claimant's 50% interest in the 2018 XLR Toy Hauler trailer.

ppp) The respondent shall pay \$36,651 to the claimant for retroactive child support from February 2022 to July 2023, subject to a credit for child support paid to date.

qqq) Subject to variation based on financial disclosure, as set out in these reasons, the respondent will pay ongoing child support to the claimant in the amount of \$2,269 on the first of each month.

[231] The net effect of the above-noted orders is a lump sum payment in the amount of \$20,659.50, from the respondent to the claimant, subject to a credit for any child support payments that he has made to date.

[232] Absent information of which I am unaware that might alter this view, the respondent is entitled to costs on the ordinary scale.

"Douglas J."

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