

CANADA / JUDGMENT

Adama v. Adama

2019 BCSC 772

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 772 Adama v. Adama IN THE SUPREME COURT OF BRITISH COLUMBIA Citation:

Adama v. Adama, 2019 BCSC 772 Date: 20190517 Docket: ED40167 Registry: Nanaimo Between: Susan Louise Adama Claimant And: Michael Rudolph Adama M.R. Adama Enterprises Ltd. (Inc. #0577630) Westside Road Building Ltd. (Inc. # 0574997) M.J.M. Air Ltd. (Inc. #0538017)

Respondents Before: The Honourable Madam Justice Young Reasons for Judgment Counsel for the Claimant: B. R. Vining Counsel for the Respondent M. R. Adama: L. K. Taylor Place and Date of Trial/Hearing: Nanaimo, B.C. January 29 - February 1, 2019 Place and Date of Judgment: Nanaimo, B.C. May 17, 2019 Table of Contents I. INTRODUCTION. 4 II. BACKGROUND. 4 Previous Court Orders. 4 March 23, 2007 Order 4 February 22, 2010 Order 5 July 7, 2014 Order (Pronounced on September 1, 2013) 5 III. POSITIONS OF THE PARTIES. 5 IV. ISSUES. 6 A. Child Support 6 B. Spousal Support 7 C. Arrears. 7 V. CHILD SUPPORT. 7 A. Did the Respondent Provide Misleading Financial Disclosure at the 2013 Trial? 7

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- [1] The parties to this family law proceeding both seek an order pursuant to s. 17 of the Divorce Act, R.S.C. 1985, c. 3 ("Divorce Act"), retroactively and prospectively varying an order of Justice MacKenzie, pronounced on September 1, 2013 ("2013 Order"), respecting the respondent's child support and spousal support obligations. II. BACKGROUND
- [2] The parties began living together in 1979, separated in 2004, and divorced in 2006. The claimant was 45 years old at the time of separation. She is now 60 years old.
- [3] The parties have three children. The older two children are adults and independent. The youngest child, MDA, lived in the former family residence with the claimant until September 2017 when she moved to Vancouver to pursue post-secondary education.
- [4] The marriage was long and traditional. For the most part, the respondent worked as a self-employed road builder. He travelled for work and generally left the home and childcare exclusively to the claimant. The claimant was a full-time homemaker who cared for the parties' three children. She was not employed outside the home during the marriage or for most of the time since the parties' separation. Previous Court Orders
- [5] There are three previous court orders in this family law matter. March 23, 2007 Order
- [6] Justice Lander granted an order dated March 23, 2007, which divided all of the assets except for the former family residence. The order imputed a Guideline income to the respondent of \$200,000 and ordered that the respondent pay spousal support to the claimant of \$6,308 per month, commencing April 1, 2007, and child support for MDA in the amount of \$1,692 per month. February 22, 2010 Order
- [7] Justice Bracken granted an order on February 22, 2010 finding the respondent in arrears of child and spousal support in the approximate amount of \$98,000. The court ordered the transfer of the respondent's interest in the former family residence to the claimant in exchange for her forgiveness of approximately \$100,000 of spousal support and child support arrears and costs. July 7, 2014 Order (Pronounced on September 1, 2013)
- [8] Justice MacKenzie granted the 2013 Order on September 1, 2013. It was entered on July 7, 2014. The 2013 Order imputed a Guideline income to the respondent of \$130,000. It ordered the respondent to pay \$1,167 per month in child support for MDA, commencing September 1, 2013, and reduced his spousal support obligation from \$6,308 per month to \$3,388 per month, commencing September 1, 2013.

- [9] The arrears of child and spousal support were reduced from \$236,000 to \$120,000. The respondent was ordered to pay the claimant the arrears at the rate of \$1,000 per month. III. POSITIONS OF THE PARTIES
- [10] The respondent says he has earned substantially less than the income imputed to him in the 2013 Order. With respect to child support, he seeks a declaration that MDA is no longer a child of the marriage. He asks the court to terminate his child support obligations, or alternatively, to retroactively and prospectively reduce his child support obligations. He also seeks an order that child support be paid directly to MDA. With respect to spousal support, the respondent seeks to impute income to the claimant because she has made little effort to achieve self-sufficiency in the years since their separation. Finally, he applies to cancel or reduce his arrears.
- [11] The claimant cross-applies to vary the 2013 Order. She submits that the respondent provided misleading financial disclosure to the court in 2013. The claimant suggests that, in fact, the respondent's income is far higher than what was imputed to him in 2013. She seeks to impute a higher income to him for 2015, 2016, and 2017 and retroactively and prospectively increase his child support and spousal support obligations. Finally, the claimant asks the court to secure the arrears against a property owned by 0947204 B.C. Ltd., or alternatively, to order that the respondent surrender to the claimant his shares in 0947204 B.C. Ltd. to be held in escrow by the claimant's lawyer.
- [12] The parties did not address the section 7 expenses contained in the claimant's application and the parties settled an issue of accounting for insurance policies set out in the respondent's application. The respondent did not pursue an accounting of the sale proceeds of a 32-foot boat and so that issue is dismissed by consent. Both parties seek costs from the other.
- [13] The corporate defendants did not participate in this application. IV. ISSUES
- [14] The issues for determination are as follows: A. Child Support
1. Has there been a material change in circumstances since the 2013 Order that would result in a different child support order under the Federal Child Support Guidelines, SOR/97-175 ("the Guidelines")?
 - a. Did the respondent provide misleading financial disclosure in 2013?
 - b. What adjustments should be made to the respondent's corporate income for the purposes of determining his Guideline income?
 2. Did the child, MDA, cease to be a "child of the marriage" between July 7, 2014 and September 2017 when she registered in full time school?
 3. If MDA has remained a "child of the marriage", should the amount of child support be determined according to the Guidelines?
- B. Spousal Support

1. Has there been a material change in the means, needs, or other circumstances of either party since the 2013 Order that would justify a variation of spousal support?
 2. Should income be imputed to the claimant for the purposes of determining spousal support?
C. Arrears
 1. Should the respondent's arrears be reduced or cancelled?
 2. Should the respondent's arrears and ongoing support obligations be secured? V. CHILD SUPPORT
- [15] Before varying a child support order, the court must be satisfied that there has been a change in circumstances that would have resulted in a different child support order under the Guidelines: s. 17(4) of the Divorce Act; s. 14(a) of the Guidelines.
- [16] Both parties submit that the respondent's income is different from that imputed to him in the 2013 Order and both seek a variation.
- [17] I will begin by considering whether the 2013 Order is based upon misleading financial disclosure by the respondent. A. Did the Respondent Provide Misleading Financial Disclosure at the 2013 Trial?
- [18] The claimant says she has become aware of financial information that the respondent concealed from her and the court during the 2013 trial. In particular, the claimant says the respondent failed to disclose his interest in a numbered company, 0947204 B.C. Ltd., which owns two assets: a barge and an acreage in Sayward, B.C. (the "Sayward Property"). The claimant says that the respondent had at least a beneficial interest in the company at the time of the 2013 trial, which he did not disclose to the claimant or the court. She therefore questions the validity of 2013 Order and seeks a retroactive variation, effective January 1, 2015. As discussed further below, the respondent denies that he had any interest in 0947204 B.C. Ltd. at the time of the 2013 trial. He says he did not acquire his interest in 0947204 B.C. Ltd. until June 25, 2014, the date he became a shareholder and director.
- i. Respondent's Financial Disclosure in 2013
- [19] The respondent's May 23, 2013 Financial Statement was before the court in 2013. In the 2013 Financial Statement, the respondent disclosed only one business interest in Solstice Forest Services Ltd. ("Solstice Ltd.").
- [20] In the instant application, the respondent disclosed that he is a 50% shareholder in 0947204 B.C. Ltd which was incorporated on August 3, 2012. The respondent did not disclose any interest in this company at the 2013 trial before MacKenzie J.
- [21] The claimant says she did not become aware of 0947204 B.C. Ltd. until the third day of the 2013 trial.

- [22] While the court was aware of the existence of 0947204 B.C. Ltd. in 2013, the respondent said that he had no interest in the company or involvement in its business at that time. In his July 31, 2013 affidavit, the respondent deposed at para. 5 that he was involved in incorporating 0947204 B.C. Ltd. on Mr. Riley's behalf:
5. Since I know nothing about investing and wanting [sic] to put something away for my retirement, last summer I made an agreement with [Mr. Riley] to invest together. Because of my business background I suggested we start a company. Mr. Riley has never run a company so I phoned my bookkeeper, Jan at Enterprises Bookkeeping in Courtenay and asked her to have a company started up. Enterprise Bookkeeping is only open from Monday to Friday and Mr. Riley and I work Monday to Friday in the bush near Gold River, B.C. so I gave all the instructions on behalf of Mr. Riley to Enterprise Bookkeeping over the phone. I don't recall saying anything to Enterprise Bookkeeping about the address for the corporate office so I assume that they used my address which they had. Although I know where Mr. Riley lives in Campbell River I don't know his address. Mr. Riley and I each paid half of the cost of setting up the Company.
8. The Company has no business other than trading in stocks As the Court knows both I and Mr. Riley are employed full-time at Western Forest Products.
- [23] He maintained that Mr. Riley was the sole director and that the respondent had no interest in the business. He said it was his intention to become a shareholder of that company once he was cleared of his bankruptcy. He was discharged from bankruptcy in 2012.
- [24] In 2013, the respondent deposed that 0947204 B.C. Ltd. had no business other than trading in stocks. He did not disclose the company's barge venture or the Sayward Property. He deposed in his July 18, 2013 affidavit that he was sending cheques to Mr. Riley to buy gold mining stock. He initially did not disclose this in the 2013 hearing, but eventually filed a correcting affidavit, stating: I have been investing money with a friend of mine named Jim Riley who invests in gold-mining stock. For about the last year I was sending them \$900.00 per month. I have no idea of the present value of the investment because I don't even know what stocks the money has been invested in. I mentioned it to my lawyer when we did my response Affidavit on July 4th, 2013 but we were in such a rush to get it done and to Nanaimo for filing by the deadline that I didn't get it into the Affidavit. ii. Justice MacKenzie's Findings
- [25] In 2013, MacKenzie J. was satisfied that the respondent had suffered a significant and material change in circumstance since the initial 2007 order because his most significant corporate entities were in receivership in November 2007 and he declared personal bankruptcy in 2010.
- [26] Justice MacKenzie did express reservations with respect to the respondent's assessment of his earning capacity. He was not satisfied with the respondent's income projections and found that the respondent was capable of earning additional income apart from what he earned through his company, Solstice Ltd., while working for Western Forest Products.

- [27] Justice MacKenzie stated at para. 74 of his reasons, reported at 2013 BCSC 1616:
- [74] In addition, I have concerns about Mr. Adama's appreciation of his financial obligations to Mrs. Adama and [MDA]. I say this because Mr. Adama has acknowledged that since the summer of 2012, "for about the last year" he has been "investing" in gold mining stocks.
- [75] He deposes he sends \$900 a month to a long-time friend, Mr. Riley, who still works under Mr. Adama's "supervision" at Western Forest Products. Mr. Adama deposed that this was successful until the price of gold decreased dramatically. He also testified he suggested to Mr. Riley it would be a good idea to invest through a numbered company. One was incorporated August 3, 2012 for this purpose.
- [76] As a result, Mrs. Adama "wonders" if Mr. Adama is receiving money "under the table" from Mr. Riley through this numbered company, wherein Mr. Riley is the only director.
- [77] Mr. Adama says Mrs. Adama's suspicions are unfounded as he and Mr. Riley are employed full-time at Western Forest Products. Nevertheless, I agree with Mrs. Adama that this \$900 should have gone to Mrs. Adama pursuant to the outstanding order, not to speculate in gold stocks. It does illustrate to a certain extent that Mr. Adama does not fully appreciate what his financial obligations are and where his priorities should properly lie. Imputation of Income to Mr. Adama
- [78] When considering whether a higher income should be attributed to Mr. Adama, Mrs. Adama says that a review of the financial statement for Solstice Ltd. suggests Mr. Adama is actually earning income somewhere in the range of \$162,000 to \$171,000, before expenses. Even accounting for business expenses, which Mr. Adama has estimated at the present time and are subject to a final corporate tax return, Mrs. Adama says Mr. Adama's earnings capacity is greater than \$113,000, and more like \$140,000 to \$150,000.
- [79] In these circumstances, in my view it is appropriate to impute income to Mr. Adama of \$130,000 for 2013 for support purposes, as opposed to the \$113,000 net income he estimates he earns after expenses.
- [80] As a result, the ongoing spousal support Mr. Adama is to pay will be based on an imputed income to him of \$130,000, commencing September 1, 2013. iii. Subsequent Evidence about the Respondent's Financial Circumstances
- [28] The parties have now provided the court with additional evidence about the date that the respondent acquired his interest in 0947204 B.C. Ltd, the barge venture, and the Sayward Property. In the respondent's November 24, 2017 affidavit in support of this application, he refers to "my numbered company", which I know to be 0947204 B.C. Ltd. He deposed:
27. My numbered company consists of a barge and an acreage in Sayward.

28. In 2012, a friend, Mr. Wayne Fontaine who was having very serious mental health issues at the time, sold me a sinking barge that he owned on Harrison Lake, B.C. on the terms that I would only have to pay him if and when I was able to obtain work for the barge. I took out a mortgage from him in the amount of \$380,000. The only reason he extended those terms to me was because I had a long-standing and very good relationship with Mr. Fontaine.
29. I took on the challenge because I had confidence that I could repair the barge.
30. A friend of mine, Jim Riley came in with me to take this venture on. Jim and I each own ½ of the numbered company. Jim and I prepared the barge.
31. In order to finance the repair of the barge, Jim and I seized a contract with Western Forest Products who in turn lent us money to complete the repairs and then we refinanced with CIBC as a first mortgage and moved Mr. Fontaine's mortgage to a second mortgage. Western Forest Products lent us \$100,000 based on a long and excellent working relationship with them.
40. In 2012 I was offered the [Sayward] property back because the investment company that took it over could not sell it Since I had a long standing and good relationship with Tralee Investment Company they were willing to extend a mortgage to me even though I had no credit. [Emphasis added.]
- [29] This evidence brings into question the accuracy of the respondent's financial disclosure in 2013:
- 1) First, in the above 2017 affidavit, the respondent deposed that he bought the barge in 2012. The respondent swore an affidavit in October 2018 in which he maintains that he had no interest in the company until June of 2014. He does not explain the inconsistency between these two affidavits. The bill of sale for the barge was not signed until August 25, 2014. In light of the respondent's above statement that he bought the barge in 2012, I find he had a beneficial interest in the venture before the bill of sale was signed. The barge was not disclosed at the 2013 trial. As noted above, the respondent told the court in 2013 that he was sending money to Mr. Riley to invest in "gold mining stocks". The claimant suggests that the cheques purportedly sent to Mr. Riley to buy gold stock were in fact sent to the numbered company to pay for the undisclosed barge venture. I note that the "gold stocks" are not disclosed in the respondent's 2013 or 2017 financial statements. I find it highly likely that the respondent was paying money to Mr. Riley for the barge venture and was trying to hide that venture from the court and from the claimant.
 - 2) Second, in 2013 the respondent did not disclose to MacKenzie J. that he had bought back the 56-acre Sayward Property, which he had owned prior to bankruptcy. He was offered the property back in 2012 by his trustee. His previous mortgage company, Tralee Investment Company, was willing to extend a mortgage to him even though he did not qualify for credit.

- 3) Third, the above affidavit undermines the accuracy of the information given to the court in 2013 about the respondent's ability to obtain credit. In this regard, he deposed in his July 5, 2013 affidavit at para. 48: The obvious reason why I do not going to business by myself is that I am bankrupt and family maintenance enforcement is pursuing me. I absolutely cannot borrow money from any financial institution. That is why I have from time to time asked the claimant for loans. Without capital it is impossible for me to go into business by myself. In fact, at the time the respondent swore that statement, he had borrowed money to purchase the Sayward Property, had at least a beneficial, if not a legal interest, in the barge, and had obtained financing from Tralee Investment Company.
- [30] I conclude that the respondent provided misleading financial disclosure in 2013. While the respondent did not become a shareholder and director of 0947204 B.C. Ltd. until June 25, 2014, he had at least a beneficial interest in the company and was involved in its business at the time of the 2013 trial. The respondent provided misleading financial disclosure by failing to disclose this business interest in his financial statement.
- [31] I note further that at the time of the 2013 hearing, the respondent stated that 0947204 B.C. Ltd.'s only business was in trading stocks. In 2013, he deposed that he and Mr. Riley worked full-time at Western Forest Products. The respondent's November 2017 affidavit establishes that, in fact, he and Mr. Riley bought the barge in 2012 and were undertaking significant work to repair it. The affidavit states that the barge is being rented to Western Forest Products Ltd., but is producing no profit because the rental income is put back into the barge and used to pay off loans and expenses related to it. The respondent lists several major repairs left to do in order to finish the "complete overhaul of the barge". In the respondent's opinion, most of the work will be completed within four or five years, but expenses will be ongoing.
- [32] The respondent did not file any affidavit evidence from Mr. Riley.
- [33] In summary, the respondent provided misleading financial disclosure to the Court in 2013 by concealing his interest in 0947204 B.C. Ltd., the barge, and the Sayward Property, and by giving inaccurate evidence regarding his ability to obtain financing. This constitutes a change of circumstance which might have resulted in a different child support and spousal support order.
- [34] Accordingly, I will conduct a new assessment of the respondent's income from January 1, 2015 onward to determine if a different support order should be made. B. Calculating the Respondent's Income
- [35] Both parties tendered expert reports to assist the court in assessing the respondent's Guideline income. The claimant has relied on three reports by Travis Bryson of MNP LLP, dated December 4, 2018, January 11, 2019, and January 29, 2019. The respondent provided two reports by Jerrod Cross of Cross and Company, dated December 14, 2018 and January 28, 2019.

- [36] The two accountants relied on the same source documents but came to different conclusions regarding the respondent's income. I will consider the areas on which there are diverging opinions and then provide my findings as to the respondent's Guideline income for 2015, 2016 and 2017.
- i. Methodology: Three or Four-Year Average?
- [37] The accountants disagree on whether the respondent's prospective Guideline income should be calculated using a three-year or four-year average.
- [38] Section 17(1) of the Guidelines sets out that the court may determine a spouse's income by averaging his or her income in the three years prior.
- [39] Mr. Bryson favoured using a four-year average instead of the three-year average referenced in s. 17(1) because the respondent's companies and his personal income do not have coterminous year-ends. Solstice Ltd. has a year-end of January 31 and 0947204 B.C. Ltd. has a year-end of July 31. Personal income has to be reported on a calendar year. Mr. Bryson opines that using a four-year average reduces the variability caused by the different year-ends. With the four-year average, he calculated the respondent's income at approximately \$199,162. On a three-year average, he calculated the respondent's income to be \$209,328.
- [40] Mr. Cross's calculation of the respondent's Guideline income averaged over three years is \$101,544. He also provided a four-year average for comparison purposes, which he calculated to be \$132,102.
- [41] Mr. Cross addressed the different fiscal year-ends by incorporating personal and corporate income streams into a calendar year using a pro rata analysis. Mr. Bryson critiques this approach because there is insufficient information to determine if the pro rata distribution of income over the calendar months is reasonable.
- [42] I accept Mr. Cross's explanation that Guideline income is to be based on a calendar tax year and so it makes more sense to adjust pro rata to determine what income the respondent earned from all sources in each personal tax year. Finally, s. 17 of the Guidelines refers to a three-year average, not a four-year average. I find that a three-year average of the adjusted pro rata income is the appropriate method for calculating the respondent's Guideline income for prospective support.
- [43] I note that while the Court is using a three-year average (2015, 2016, 2017), the 2014 incomes of the corporations will also have to be calculated because the corporations' 2014 fiscal years overlap with the respondent's 2015 personal income year. ii. Should Mr. Riley's Income be Separated in 0947204 B.C. Ltd. Before Calculating the Respondent's Guideline Income?
- [44] Mr. Bryson's first report comments on a previous report prepared for the respondent by Ashcroft and Associates, which the parties did not rely on in the hearing before me and I will not address in any detail. A proposition had been made that the respondent did not receive dividends from 0947204 B.C. Ltd. because Mr. Riley continued to record his personal

income in the company. Mr. Bryson says that as of 2014, the respondent was listed as a 50% shareholder and as such, absent a formal agreement otherwise, he is presumed to receive a 50% share of the corporation's income for the purposes of calculating his Guideline income.

[45] There appears to be no dispute to that conclusion. Mr. Cross did not adjust the Guideline income by taking out Mr. Riley's income stream. There is no written shareholder agreement and therefore, the respondent must declare 50% of the income from 0947204 B.C. Ltd. iii. Adjustments to Corporate Expenses

[46] Section 19(1)(d) of the Guidelines permits the court to impute income if a parent unreasonably deducts expenses from his or her income. The reasonableness of an expense is not solely governed by whether the deduction is permitted under the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.): s. 19 (2) of the Guidelines. I will review the reasonableness of the disputed corporate expenses.

[47] I note that the parties did not file the 2014 financial statement for Solstice Ltd. Both accountants reviewed the Solstice Ltd. 2014 financial statement and commented on the income and expenses reported in it. Thus, in considering Solstice Ltd.'s 2014 income and expenses, I have relied on the 2014 figures reported in Schedule "A" to Mr. Bryson's December 4, 2018 report and Appendix 4 to Mr. Cross's January 28, 2019 report.

a) Amortization

[48] As identified in Mr. Bryson's January 11, 2019 report, the key source of the discrepancy between the accountants' respective income calculations is their differing conclusions on whether amortization should be deducted as a corporate expense for 0947204 B.C. Ltd. The company deducts significant amortization from its income. In some years, this deduction is as high as \$68,000.

[49] In calculating the respondent's Guideline income, Mr. Bryson added back 100% of the amortization of the barge into the corporate income of 0947204 B.C. Ltd. Mr. Bryson opines that while amortization may be a deductible expense for tax purposes, it is a non-cash expense and does not affect the funds available to the respondent for paying support. He says this is especially true when the company deducts amounts for repairs and maintenance to the underlying asset that may actually be capital in nature.

[50] In his second report, Mr. Bryson points out that s. 11 of Schedule III of the Guidelines provides a specific requirement to add back a spouse's deduction for an allowable Capital Cost Allowance ("CCA") with respect to real property. He opines that the barge is analogous to real property and may therefore be subject to a 100% adjustment. He states further that there is "sufficient case law" to establish that amortization for non-real property can also be added back into a spouse's income if the amortization is not reflective of the real decline in value of the subject asset. I note that he does not refer to any of the "sufficient case law". In any event, I find that this amounts to legal argument, which is outside the proper scope of Mr. Bryson's expert opinion.

- [51] Mr. Cross argues that the barge could easily be considered non-real property because it is not fixed to land and is movable on water. He did not add back any of the amortization expense into the income of 0947204 B.C. Ltd.
- [52] Both accountants attempted to provide evidence of the barge's current value. The relevance of this evidence would be to establish the extent to which the barge has actually depreciated since being purchased by the company. Mr. Bryson provided two listing prices for float camps. Mr. Cross provided a sale listing for a float camp. Mr. Bryson also provided the following opinion, which I find amounts to advocacy in breach of his duty as an expert to assist the court: Additionally, per Ms. Adama's affidavit of December 4, 2018 (paragraph 57) it was noted that Mr. Adama stated that he had the camp appraised at \$1,300,000. As that claim has not been rebutted by Mr. Adama we conclude that he feels the camp as a value well in excess of its cost. Thus, an adjustment for 100% of the amortization 100% is reasonable.
- [53] Neither party provided an appraisal of the barge. I do not accept list prices as proof of the value of the barge. Moreover, the fact that the respondent did not object to the claimant's statement that he told her the float camp was worth \$1,300,000 is not evidence of its value. It is possible that the respondent did say that, however, it does not prove to me that the contents of the statement are true or what the value of the property is.
- [54] The respondent says in his November 24, 2017 financial statement where he discloses his 50% interest in 0947204 B.C. Ltd.: This company owns 56 acres of land in Sayward for which we paid \$350,000 and took out a \$296,000 loan. The property was recently appraised at \$300,000. This company also owns a float camp which is leased out to Western Forest products. We are not allowed to draw any money from this company pursuant to the CIBC loan although permitted to pay the loan and business expenses. We also have a second mortgage owed to Fontaine family trust. The float camp is worth \$538,403.30.
- [55] I do not know how the respondent arrived at the valuation of the float camp. On the evidence before me, I cannot make a finding about the barge's current value. Legal Principles Regarding Amortization
- [56] In *Egan v. Egan*, 2002 BCCA 275, the court held that CCA on personal property may be deducted from income, but does not necessarily have to be deducted. The court should look at the nature and extent of the deduction to determine whether it is reasonable from a Guidelines perspective as opposed to an Income Tax Act perspective.
- [57] In *Egan*, the Court of Appeal cited a list of factors set out in *Andres v. Andres* (1999), 170 D.L.R. (4th) 254 (M.B.C.A.) that the court may consider in assessing the reasonableness of the expense. I do not have sufficient evidence before me to address most of those factors.
- [58] *Egan* also cites the comments of Justice Wakeling in *Rudachyk v. Rudachyk*, [1999] 10 W.W.R. 321 (Sask. C.A.), which I find to be more helpful for the case at bar. In *Rudachyk*, counsel had not examined the reasonableness of the expense but instead insisted that it would be too arduous to have to evaluate every amortization claim with expensive appraisals. Justice

Wakeling stated at para. 22: In my opinion, a useful challenge to any item of CCA does not involve an appraisal, it involves a determination of the likelihood of a piece of equipment being replaced, the cost of that replacement, and perhaps the continued need for such equipment for the production of income. The object of this inquiry is to see whether the CCA claimed is real and required or is more in the nature of a book entry and a consequent artificial reduction in income.

- [59] After reviewing Wakeling J.A.'s comments, Justice Newbury added in Egan at para. 49: The factors referred to by Wakeling J.A., like the factors referred by Monnin J.A. for the Manitoba Court of Appeal in *Andres v. Andres* [1999] M.J. No. 103, are undoubtedly relevant to an inquiry into the propriety of a claimed CCA deduction, but I would not want to be taken as endorsing the notion that at every family law trial or hearing of an application for child maintenance, CCA properly taken under the Income Tax Act is entirely 'at large' and that payor spouses may be routinely called upon to justify the purchase of every piece of equipment, the price paid, and the rate of depreciation claimed (the latter being, of course, a matter of regulation in the Income Tax Act) without counsel's having provided the court with some reason to question what the Income Tax Act permits. In others words, unless the CCA schedule attached to the payor spouse's tax return or the answers to questions in discovery about claimed CCA, give rise to some concern that the equipment is not needed or used in the business, or that an inflated cost amount has been used, a judge sitting in a family law trial should not be expected to fulfill the role of a Revenue Canada tax auditor. Although a "pragmatic approach" must be taken to the question at trial, counsel for the payee spouse should ensure that before the court is asked to make a determination with regard to CCA that differs from the amount of CCA deductible for income tax purposes, the matter has already been investigated to the extent permissible under the court rules and the Guidelines, and that there exists at least some prima facie basis for embarking on any wholesale re-examination of CCA deductions. Conclusion on Amortization Expense
- [60] The accountants have taken an all or nothing approach -- they have chosen to either add back 100% of the amortization or 0% of the amortization. I do not accept either adjustment.
- [61] I am satisfied that Mr. Bryson has used an inflated rate of depreciation. I do not accept Mr. Bryson's analogy between the barge and the land. Whereas land appreciates in value, I am quite certain that this barge floating on salt water exposed to the elements will not. The reason that it has appreciated from the date of purchase is because extensive capital expenditures were made to refurbish it.
- [62] I do, however, accept the assertion that the barge likely will not rapidly depreciate if it is well-maintained. It is unlikely to be replaced in the next 10 to 20 years and so I consider it to be a quasi-permanent asset.

- [63] It appears that the barge has been characterized as falling under Class 8 of Schedule II of the Income Tax Regulations and thus a depreciation rate of 20% has been used to calculate the deduction for amortization. Given its semi-permanent nature, this depreciation rate is more generous than the actual rate of depreciation of this asset. Thus, for the purpose of calculating the respondent's Guideline income, some portion of this deduction should be added back as income available for paying support.
- [64] I conclude the appropriate approach is to allow a reduced rate of depreciation, which recognizes that the asset may be replaced at some point in the far future. For the purpose of assessing Guideline income only, I will use Class 7 as being analogous to a vessel. Schedule II of the Income Tax Regulations sets the applicable CCA rate for this class of property at 15%.
- [65] A 15% depreciation rate is 75 percent of a 20% depreciation rate. I will therefore add 25% of the amortization deduction back into the corporate income of 0947204 B.C. Ltd. for the purpose of imputing Guideline income to the respondent. There is no need for a similar adjustment to Solstice Ltd.
- [66] Thus, the following amortization amounts are added back to 0947204 B.C. Ltd.'s corporate income: Reported Amortization Add-back (25%) 2014 \$24,564 \$ 6,141 2015 \$66,684 \$16,671 2016 \$78,068 \$19,517 2017 \$68,468 \$17,117 2018 \$60,035 \$15,009
- b) Professional Fees
- [67] The respondent's companies deduct the following expenses for professional fees: Solstice Forest Service Ltd. 0947204 B.C. Ltd. 2014 \$ 6,310 \$ 3,467 2015 \$20,660 \$13,991 2016 \$ 4,094 \$ 9,022 2017 \$ 6,270 \$ 8,891 2018 \$21,930 \$ 5,168
- [68] Mr. Bryson opines that \$2,500 per year per company for professional fees would be reasonable. He estimates \$1,000 for bookkeeping, \$1,000 for tax filings and financial statement preparation, and \$500 for annual legal filings. He submits that these are market rates for purchasing these services from a local one-office non-CPA bookkeeping company. He says any amounts in excess of \$2,500 are unreasonable and should be adjusted.
- [69] In response, Mr. Cross notes that while the respondent deposed that approximately 20% of the accounting fees were personal, the respondent's corporate taxes have grown in complexity whereas his personal taxes have not. Mr. Cross applies only a minor adjustment to professional fees at the rate of inflation and not 20% of the total accounting fees. Mr. Cross opines that in his experience, it is not unusual for complex or unorganized file records to exceed annual billings of \$2,500. He added back 100% of the legal expenses for 2018 for Solstice Ltd. because they appear to be personal in nature. In his opinion, the expenses remaining as business expenses are legitimate and reasonable. He applies no add-back to the professional fees in 0947204 B.C. Ltd.

[70] The deductions for professional fees appear to be excessive. I agree with Mr. Bryson that a base rate of \$2,500 per company is reasonable and anything in excess of that would require substantiating evidence. I do not have any evidence to substantiate the large professional fees. I will therefore add back the portion of professional fees exceeding \$2,500 per year for both Solstice Ltd. and 0947204 B.C. Ltd.

c) Telephone Charges

[71] The respondent's companies deduct the following expenses for telephone charges and utilities: Solstice Forest Service Ltd. 0947204 B.C. Ltd. 2014 Financial statement not available \$1,200 2015 \$4,661 \$1,319 2016 \$1,716 \$3,486 2017 \$4,322 \$5,451 2018 \$5,141 \$3,388

[72] Mr. Bryson opines that the deductions for telephone charges for both companies are excessive and should be adjusted. In his opinion, \$300 per month for telephone expenses is reasonable. He adjusted the surplus back into the corporate incomes.

[73] Mr. Cross says that 25% of the telephone expenses for Solstice Ltd. appear to be personal in nature. Accordingly, he adds back 25% of the telephone expenses for Solstice each year. He finds that the remainder of the telephone expenses are reasonable due to the remote location where Solstice Ltd. and the respondent operate, which requires additional long-distance, data, and other devices to remain connected. He applies no add-back for the telephone expenses in 0947204 B.C. Ltd.

[74] I accept the respondent's explanation for the increased telephone charges and will adopt Mr. Cross's calculations on this point. I will add back 25% of the telephone charges for Solstice Ltd. No adjustments will be made for telephone charges in 0947204 B.C. Ltd.

d) Meals & Entertainment

[75] The respondent's companies deducted the following expenses for meals and entertainment: Solstice Forest Service Ltd. 0947204 B.C. Ltd. 2014 \$3,008 \$ 474 2015 \$3,955 \$1,469 2016 \$3,199 \$3,609 2017 \$5,543 \$3,656 2018 \$5,492 \$ 978

[76] Mr. Bryson explains that there is a personal component to all meals and entertainment. Absent detailed accounting, he opines that these expenses should be adjusted by a 50% add-back. This is the add-back that the CRA applies to such expenses.

[77] Mr. Cross does not add back any portion of the expenses for meals and entertainment.

[78] I do not find any of these meals and entertainment claims to be excessive. I will not add any of them back into the corporate incomes.

e) Vehicle Expenses

[79] The respondent's companies deduct the following vehicle expenses: Solstice Forest Service Ltd. 0947204 B.C. Ltd. 2014 \$13,180 \$ 3,216 2015 \$20,341 \$ 5,372 2016 \$ 7,922 \$ 6,334 2017 \$ 6,252 \$10,470 2018 \$ 5,694 \$ 366

[80] Mr. Bryson and Mr. Cross make similar adjustments to vehicle expenses in Solstice and no adjustments in 0947204 BC. Ltd. I accept Mr. Bryson's adjustment for vehicle expenses, which he sets out in Schedule "A" to his December 4, 2018 report. The vehicle expenses for Solstice Ltd. are adjusted as follows:

- (a) 2014: add-back \$ 8,380
- (b) 2015: add-back \$15,541
- (c) 2016: add-back \$ 3,122
- (d) 2017: add-back \$ 5,452
- (e) 2018: add-back \$ 894
- f) Other Add-Backs

[81] I adopt the following additional add-backs for Solstice Ltd. from Mr. Cross's January 28, 2019 report, which were uncontested: 2014 2015 2016 2017 2018 Wages paid to non-arm's length employees 64,819 84,283 11,717 - Hydro add-back 396 450 - 927 785 Insurance add-back 1,212 1,939 1,082 1,084 2,659 iv. Conclusion on the Respondent's Income

[82] In light of the add-backs set out above, I adjust the incomes of 0947204 B.C. Ltd. and Solstice Ltd. as follows: 0947204 B.C. Ltd. Adjusted Corporate Income (July 31 Year End) 2014 2015 2016 2017 2018 Net income for accounting purposes before taxes (per financial statements) 33,190 (34,961) 5,991 143,814 60,845 Amortization add-back 6,141 16,671 19,517 17,117 15,009 Professional fee add-back 967 11,491 6,522 6,391 2,668 Adjusted net income before taxes 40,298 (6,799) 32,030 167,322 78,522 50% ownership 20,149 (3,399.50) 16,015 83,661 39,261 Solstice Ltd. Adjusted Corporate Income (January 31 Year End) 2014 2015 2016 2017 2018 Net income before taxes (per financial statements) 48,140 121,287 68,087 47,368 71,592 Wages paid to non-arm's length employees add-back 64,819 84,283 11,717 - Professional fee add-back 3,810 18,160 1,594 3,770 19,430 Meals and entertainment add-back 1,504 1,977 1,600 2,772 2,746 Vehicle add-back 8,380 15,541 3,122 5,452 894 Insurance add-back 1,212 1,939 1,082 1,084 2,659 Telephone add-back 1,042 1,009 419 750 638 Hydro add-back 396 450 - 927 785 Adjusted corporate income 129,303 244,646 87,621 62,123 98,744 Three-Year Average Guideline Calculation 12/31/2014 12/31/2015 12/31/2016 12/31/2017 1 month of Solstice Ltd. fiscal 2014 income 10,775.25 11 months of Solstice Ltd. fiscal 2015 income 224,258.83 1 month of Solstice Ltd. 2015 fiscal income 20,387.17 11 months of Solstice Ltd. 2016 fiscal income 80,319.25 1 month of Solstice Ltd. 2016 fiscal income 7,301.75 11 months of Solstice Ltd. 2017 fiscal income 56,946.08 1 month of Solstice Ltd. 2017 fiscal income 5,176.92 11 months of Solstice Ltd. 2018 fiscal income 90,515.33 7 months of 0947204 fiscal 2014 income 11,753.58 5 months of 0947204 fiscal 2015 income (1,416.46) 7 months of 0947204 fiscal 2015 income (1,983.04) 5 months of 0947204 fiscal 2016 income 6,672.92 7 months of 0947204 fiscal 2016 income 9,342.08 5 months of 0947204 fiscal 2017 income 34,858.75 7 months of 0947204 fiscal 2017 income 48,802.25 5 months of 0947204 fiscal 2018 income 16,358.75 Adjusted total income from corporations 245,371.20 105,396.30 108,448.66 160,853.25 Line 150 income

54,288 48,993 23,400 64,350 Less dividends from Solstice Ltd. - - (23,400) (64,350) Adjusted total income from all sources 299,659.20 154,389.30 108,448.66 160,853.25

[83] I impute income to the respondent for 2015, 2016, and 2017 as follows: 2015: \$154,389.30 2016: \$108,448.66 2017: \$160,853.25

[84] Thus, the three-year average is calculated as $(154,398.30 + 108,448.66 + 160,853.25) \div 3 = \$141,230.40$.

[85] Based on the three-year average, I impute income of \$141,230.40 to the respondent for prospective child support. As discussed further below, I also find that this imputed income should be used to calculate retroactive child and spousal support as the three-year average indicates that the respondent has been underpaying support. Calculating support using the actual income for each of these years makes a negligible difference.

[86] Having calculated the respondent's Guideline income, I will consider the respondent's submissions regarding MDA's entitlement to child support. He challenges MDA's entitlement to child support in 2015, 2016 and for half of 2017. In particular, the respondent submits that MDA has ceased to be a child of the marriage by virtue of the passage of time. Alternatively, if the court finds that MDA is still a child of the marriage, the respondent submits that the Guidelines amount is inappropriate and the Court should exercise its discretion to reduce the amount pursuant to s. 3(2)(b) of the Guidelines. He says that MDA's income over the past five years and her move out of the claimant's home are material changes in circumstances since the 2013 Order. C. MDA's Circumstances

[87] MDA is 26 years old. She graduated from high school in 2011. She then worked two part-time jobs at a pub and hardware store while she upgraded her high school courses. She is currently attending college in Vancouver to complete a two-year radiography program.

[88] The claimant deposed that MDA upgraded eight courses after graduating high school before she was accepted into the college of her choice. During that time, she worked part-time and did volunteer work at a local hospital as a requirement for admission.

[89] MDA also swore an affidavit in these proceedings. She deposed that she took multiple courses after graduating from high school. She had to take Mathematics Principles 12 twice. After the second time taking the course and not achieving the grade necessary for her college's high standards, she took an optional Mathematics Foundations 12 course through distance education. She took a physics course three times in order to achieve a grade that her college would accept.

[90] MDA explained that there was some delay in finishing these courses because they were only offered once a year on Vancouver Island. She considered going to Vancouver to upgrade faster, but knew it would be more expensive to do so.

[91] Between 2014 and the present, MDA earned the following income: 2014 \$12,477 2015 \$16,412 2016 \$15,197 2017 \$ 8,331.20

- [92] Between 2014 and 2017, she lived at home with the claimant. Prior to commencing college, MDA had saved \$4,780.
- [93] MDA is now registered as a full-time student in an accelerated program. It is not possible for her to work while she is attending this program. MDA currently rents an apartment in Vancouver. She requires a car to drive to her college campus and to the hospitals where she will be working. Her monthly living expenses are \$2,583 per month, which includes \$853.86 per month for tuition, textbooks, scrubs, and work shoes. D. The 2013 Child Support Variation
- [94] Given that MacKenzie J. considered an application to vary child support in 2013, my assessment should start there. In 2013, the respondent initially applied to terminate child support and then changed his position and agreed to continue to pay Guideline support based on his reduced income.
- [95] Justice MacKenzie ordered the respondent to pay child support for MDA in the full amount as long as MDA remained a child of the marriage.
- [96] At the time of the 2013 hearing, MDA was living at home with the claimant. She was taking high school upgrading courses on a part-time basis and working part-time.
- [97] Justice MacKenzie was aware that MDA intended to complete her upgrading courses and then attend a radiography program (para. 98). He ordered child support in the full Guideline amount while MDA continued to pursue her radiography degree (para. 100). E. Has There Been a Material Change in MDA's Circumstances Since the 2013 Order?
- [98] Since the 2013 Order, MDA continued to work part time and study part-time with the intention of attending postsecondary school. She is now completing the radiography program as contemplated by the reasons of MacKenzie J.
- [99] However, the respondent says that the six years it took MDA to upgrade her high school courses and begin post-secondary education was unreasonably long and he should be relieved of his obligation to support her.
- [100] As discussed further below, I find that MDA has provided a reasonable explanation for the delay in upgrading her high school courses. Nonetheless, I conclude that the extended period of time in which MDA completed these upgrades is a material change in circumstances. During that time, she took only one or two courses at a time, with intervals in which she was not in school at all. She lived with the claimant and in 2015 and 2016 was earning an income in excess of \$15,000. As such, I will consider (1) whether MDA ceased being a child of the marriage in the years between the 2014 decision and her registration in full-time school in September 2017, and (2) if MDA remained a child of the marriage, whether the full Guideline amount is appropriate. F. Child of the Marriage
- [101] Section 2(1) of the Divorce Act defines a "child of the Marriage" as follows: child of the marriage means a child of two spouses or former spouses who, at the material time,

- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

[102] In determining whether an adult child attending school is still a "child of the marriage", the court may consider some or all of the factors set out by Master Joyce, as he then was, in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.) at 64 - 65:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full time or part time course of studies;
- (2) whether or not the child has applied for, or is eligible for, student loans or other financial assistance;
- (3) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[103] It is not necessary that all factors be present: *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 (B.C.C.A.) at para. 14.

[104] It is possible for a child to lose the status of "child of the marriage" for a period of time, perhaps while taking time off from school to travel or work. The child may subsequently regain the status once he or she returns to school: *S.A.H. v. I.B.L.*, 2018 BCSC 544 at para. 25.

[105] The first relevant factor is whether the course of study is part-time or full-time. In this case, MDA took one or two upgrading courses at a time. Her progress was very slow. However, this case is not similar to *Y.H.B. v. J.P.B.*, 2014 BCSC 618 where Justice Savage found at para. 18 that "[t]here seem[ed] to be a considerable amount of prevarication on [the child's] part concerning his academic career". There are valid reasons for MDA's slow progress.

- [106] The next relevant factor is MDA's past academic performance. MDA must have struggled in high school in order to require eight high school upgrade courses to be admitted to college. She appears to have taken her career seriously and has worked hard to achieve excellent grades, a requirement of the radiography program. It took two or three attempts in some courses for her to obtain those grades. She should be commended for her efforts. It would be inappropriate to discourage her because she had some academic challenges.
- [107] Further, I accept MDA's explanation for the delay in completing her upgrading courses. Some of the courses were not offered on Vancouver Island more than once a year. Staying in the claimant's home was far more affordable than if she had moved to a larger city to accelerate her studies.
- [108] Another factor to consider is whether MDA's career plans are reasonable and appropriate. I find that they are. She worked hard to get accepted into this intensive course of study. Graduating as a radiology technician should afford her stable remunerative employment in the future.
- [109] The age of the child is also a factor. MDA is 26 years old and is enrolled in a two-year course of study, which means she will graduate when she is 28. This is certainly pushing the age limit for child support.
- [110] As noted above, a child may cease being a "child of the marriage" for a period of time and then regain that status upon returning to school. During 2015 and 2016, MDA was earning in excess of \$15,000 a year, living at home, and only taking one or possibly two courses. However, as a student preparing for college and hoping to save money for school, I find that it would be unreasonable to expect her to completely withdraw from parental support.
- [111] Had she completely withdrawn from parental support, she hypothetically would have had to contribute money for room and board, which I conservatively estimate at \$500 a month. I estimate she would have spent \$750 a month covering her basic expenses which would have covered vehicle insurance and maintenance, clothing, cellular telephone costs, entertainment, haircare, and toiletries. That would have left her with little or no savings for college.
- [112] I find that MDA has remained a child of the marriage throughout and is entitled to some child support. G. Should the Respondent Pay the Full Guideline Amount?
- [113] Section 3(2) of the Guidelines deals with children over the age of majority and provides that the court may depart from the Guideline amount of child support if applying the Guidelines would be inappropriate: Child the age of majority or over
- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [114] In *Wesemann v. Wesemann*, [1999] 49 R.F.L. (4th) 435 (B.C.S.C.), Justice Martinson directed a four step analysis for determining child support under s. 3(2) of the Guidelines. The test was clarified in *Neufeld v. Neufeld*, 2005 BCCA 7 where the Court of Appeal stated at para. 42:
- [42] In my opinion, in principle, support for an adult child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b). The "table amount", as noted by Martinson J. in *Wesemann*, contemplates a contribution by the non-custodial parent to the expenses borne by the custodial parent in providing a home for the child. The fact that the "table amount" increases incrementally and not absolutely for additional children supports that interpretation of the intention of the Guidelines. The "table amount" does not contemplate a child's contribution, which is an important factor in considering the amount of support a student requires.
- [115] I find the Guidelines amount is inappropriate for determining the respondent's child support obligations between January 1, 2015 and August 2017. I find it appropriate for the respondent to contribute \$500 a month to MDA's room and board. This would leave MDA free to pay for the basic expenses that I have listed above and notionally save \$500 per month toward her education.
- [116] This is a retroactive reduction of child support. Before making an order to retroactively reduce child support, the court must consider the factors in *D.B.S. v. S.R.G.*, 2006 SCC 37. The Court of Appeal reviewed these factors in the context of an application to retroactively reduce child support in *G.M.W. v. D.P.W.*, 2014 BCCA 282 at para. 43:
- [43] A finding of unreasonable delay will militate against a retroactive child support award (para. 104). Similarly, a payor parent's blameworthy conduct, defined as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support" will also militate against a retroactive order (paras. 106-109). The circumstances of the children are also relevant in order to ensure that they receive the benefit of a support order to which they are entitled, in a timely manner (paras. 110-113). Lastly, consideration of the hardship that may be occasioned by a retroactive order is not limited to the payor parent (paras. 114-116).

- [117] The respondent is delayed in bringing this application. He has also engaged in blameworthy conduct. While he objects to paying child support for six years post high school, he has, in fact, not paid child support consistently. After 2015, his payments dropped substantially and he has fallen into arrears. This was at a time when his income increased. This likely contributed to MDA's reduced savings over the past three years. Arrears of child and spousal support were approximately \$153,000 by December 2018.
- [118] That said, taking into account MDA's income and living expenses during 2015 and 2016, I find it is appropriate to retroactively reduce child support from January 1, 2015 to August 31, 2017. Commencing January 1, 2015 and continuing until August 31, 2017, child support payable to the claimant for the support of MDA is varied to \$500 per month.
- [119] When MDA returned to school in September 2017, I find she was wise to focus exclusively on her accelerated degree program. It would be unreasonable to expect her to work during this 24-month period. Accordingly, she requires full child support while completing the radiography program.
- [120] Once MDA graduates from her college program, she will cease to be a child of the marriage and child support can terminate.
- [121] Given the substantial arrears in child support, I do not think that it is reasonable for the respondent to be critical of MDA's meagre savings. Had he paid the court ordered child support, MDA might have been able to save more money for college. Because the respondent fell into arrears, I suspect that much of MDA's money was spent on her living expenses which is why she only had \$4,000 to contribute to her post-secondary education expenses and has incurred the substantial student loan.
- [122] Commencing September 1, 2017, the respondent is ordered to pay to the claimant for the support of MDA full Guideline child support based on the imputed Guideline income of \$141,230. For September to November 2017, the respondent is ordered to pay \$1,255 per month. The Guideline tables were amended on November 22, 2017 and so, based on the new table, the respondent is ordered to pay \$1,288 per month from December 1, 2017.
- [123] Finally, given the respondent's poor track record of arrears, I will not order that he pay MDA directly. The payments should continue to be paid to the claimant for the support of MDA so that she can enforce the order through FMEP. VI. SPOUSAL SUPPORT
- [124] On an application to vary spousal support, the court must be satisfied that there has been a change in the condition, means, needs or other circumstances of either former spouse since the most recent variation order: s. 17(4.1) of the Divorce Act.

- [125] The applicant must satisfy the court that there is something that would likely have resulted in different terms if known at the time the original order was made: *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.); *L.M.P. v. L.S.*, 2011 SCC 64. The test may be met where the change was reasonably foreseeable, but not actually contemplated by the court when making the initial order: *Hausmann v. Klukas*, 2016 BCSC 853.
- [126] I have found that the respondent's Guideline income is \$141,230 from January 1, 2015 to the present. That constitutes a material change in his circumstances, which gives rise to a variation of the quantum of prospective spousal support. As discussed further below, I also find that a retroactive variation of spousal support is warranted because of this increase in Guideline income and because of the respondent's blameworthy conduct. A. Claimant's Efforts to Achieve Self-Sufficiency
- [127] The respondent submits that the claimant's lack of effort towards becoming self-sufficient is a material change in her circumstances that justifies imputing income to her.
- [128] Promoting economic self-sufficiency as far as practicable is one of the objectives of a spousal support order under s. 15.2(6) of the Divorce Act. It is also one of the objectives of a variation order respecting spousal support under s. 17(7) of the Divorce Act. However, the Divorce Act does not impose a duty on spouses to become self-sufficient: *Leskun v. Leskun*, 2006 SCC 25; *L.M.P.* at para. 59.
- [129] The court may impute income to a spouse for the purposes of determining child and spousal support: s. 19(1) of the Guidelines; *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 34. Section 19(1) of the Guidelines sets out a number of circumstances that may justify imputing income, including where:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
 - (e) the spouse's property is not reasonably utilized to generate income;
- [130] The burden of proof is on the spouse seeking to impute income: *MacCarthy* at para. 35. On a variation application, the Court should not engage in a de novo assessment of the payee's ability to work without first finding a material change in circumstances: *L.M.P.* at para. 56.
- [131] The respondent raised the issue of self-sufficiency in his 2013 application for variation. Justice MacKenzie noted that the claimant's efforts towards becoming self-sufficient were lacking. However, he was uncertain whether the parties made submissions regarding the claimant's income-earning potential at the time of the original order for spousal support and therefore could not determine whether her failure to make reasonable efforts towards self-sufficiency was a material change in circumstance. For this reason, the court declined to impute income to the claimant and instead addressed the issue by ordering spousal support at the low end of the range.

- [132] The respondent submits that the claimant is capable of earning an income. He says that she can work as a bookkeeper because she has experience in bookkeeping prior to separation and took a bookkeeping course about three years after the parties separated. I agree with the claimant that these submissions were already considered by MacKenzie J. in 2013. They do not establish a material change in circumstances since the previous order.
- [133] Furthermore, I accept the claimant's evidence in response to this submission. First, it is unreasonable to expect the claimant to work as a bookkeeper. She did manual bookkeeping for the family company prior to separation and completed a one-month bookkeeping course on the computer after separation. However, she explains that she never felt confident doing bookkeeping on the computer. Based on the claimant's evidence, I find it unreasonable to expect her to obtain a bookkeeping job without extensive computer training. Even if the claimant completed computer training it may not result in a job given her age and lack of experience.
- [134] The respondent also says the claimant's property is suitable for boarding horses. He provided information that full board per horse at a nearby stable in Courtenay costs between \$550 and \$600 a month. He submits further that the claimant is capable of providing horse instruction at a rate of \$40 per hour. Finally, the respondent says the claimant could earn income by renting out the basement of the former family residence for approximately \$1,000 a month.
- [135] In response, the claimant deposed that her basement suite has an illegally low ceiling and is not proper to rent. It does not pass the building code. There is one room that is finished and has a pool table, sink, and counter in it. There is no bathroom. The respondent had the old toilet and shower torn out over 20 years ago and everything is cemented in. The house is on a septic system and the basement is below ground level. There is no wiring for an oven or fridge. The claimant submits that it would cost tens of thousands of dollars to turn the space into a legal suite. I accept the claimant's evidence. She should not be expected to rent out her basement.
- [136] I accept the claimant's evidence that it is unreasonable to expect her to board horses given the work that would be required on the barns and the physically demanding labour she would have to do herself in order to make boarding profitable.
- [137] The claimant has not taught riding for over 30 years. Moreover, she says that a rate of \$40 an hour for horse instruction would only apply if the instructor supplied the school horse. She does not own a horse.
- [138] The respondent raises one additional issue with respect to self-sufficiency that was not before the court in 2013. He says the claimant sold a few acres of her property for \$250,000 and recently put the property on the market for \$1,895,000. He says investment income should be imputed to her in light of the value of her assets.

- [139] The claimant believes that due to her age, physical condition, and lack of job experience, the best plan is to sell the property and use the proceeds to purchase a smaller property that she can more easily manage such as a two bedroom city lot home. Since January 2016, she has been working on getting the home ready to sell. She did list the property for sale, but received no offers and so it has been delisted.
- [140] I agree with the claimant that the best use of the property at this point is to sell it and downsize so that she can buy a property that is more physically manageable and invest any surplus sale proceeds for her later years.
- [141] I do not find that the claimant's decision to sell a portion of her property and eventually downsize is a material change in circumstances that justifies imputing income to her. The claimant was awarded the entire interest in the matrimonial home in exchange for forgiving an earlier set of the respondent's support arrears. If she has any surplus sale proceeds after the purchase of a new home and those proceeds earn interest that will become income attributed to her. At this stage, it is not known if she will. She should not be expected to deplete this asset in order to support herself.
- [142] In summary, there has been no material change in circumstances with respect to the claimant's income-earning ability since 2013. The claimant has made very little effort to earn any income. However, I find she has a limited capacity to do so. Accordingly, I will not impute income to the claimant. I agree with MacKenzie J. that setting spousal support at the low end of the range is an appropriate compromise in these circumstances. B. Retroactive Variation of Spousal Support
- [143] The D.B.S. factors respecting retroactive child support are also relevant for an application for retroactive spousal support although they may be weighed differently: *Ducharme v. Rempel*, 2016 BCCA 198 at para. 17; *Petrie v. Lindsay*, 2019 BCSC 371 at para. 108. As noted above, the D.B.S. factors include whether there is a reasonable excuse for the delay in bringing the application, the payor's conduct, the circumstances of the recipient spouse, and whether any hardship will result from the retroactive award.
- [144] In this case, both parties seek a retroactive variation of spousal support. Thus, I will assume they both waive the requirement of proving a reason for the delay in bringing this application.
- [145] I have no hesitation in finding that the respondent is guilty of blameworthy conduct. He repeatedly misled the Court in his 2013 application by failing to disclose ongoing business ventures and claiming an inability to raise financing to engage in business ventures. Moreover, he has not consistently complied with his spousal support obligations. I have not been provided with evidence that a retroactive award would cause material hardship to the respondent. Thus, I conclude that it is appropriate to rely on the increased imputed income of \$141,230.40 to calculate the respondent's spousal support obligations retroactively from January 1, 2015.

- [146] Based on the respondent's increase in income, my decision not to impute income to the claimant, and my finding that a retroactive variation of support is warranted because of the respondent's blameworthy conduct, I order that spousal support be varied from January 1, 2015 to August 31, 2017 in the amount of \$4,089 per month. This calculation takes into account the reduced child support of \$500 per month during this time period. From September 1, 2017 to the present, when the respondent will be paying full child support, he shall pay spousal support of \$3,702 per month. As noted above, I have retained MacKenzie J.'s approach of ordering spousal support at the low end of the range because the claimant has taken no steps toward her self-sufficiency. VII. REDUCTION OR CANCELLATION OF ARREARS
- [147] The respondent has a history of accumulating arrears of support. In January 2010, his arrears of \$100,000 were cancelled in exchange for the claimant receiving his one-half interest in the family home. The claimant was overcompensated, but this was addressed by MacKenzie J. in 2014 and therefore, the respondent is not entitled to a further consideration of this overpayment. By July 2014, the respondent had accumulated another set of arrears in the amount of \$236,000. Justice MacKenzie reduced the arrears by \$120,000, taking into consideration the overpayment that resulted from the prior transfer of the home.
- [148] As of December 31, 2018, the respondent owes \$153,752 in arrears of child support, spousal support, interest, and penalties. He seeks a reduction or cancellation of his current arrears of support.
- [149] The Court of Appeal set out the test for a reduction or cancellation of arrears in MacCarthy at para. 54:
- [54] The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".
- [150] In *Earle v. Earle*, 1999 BCSC 283 at para. 46, Martinson J. made clear that it is not enough for a payor to simply say that he earned less during the relevant period. Justice Martinson's comments were adopted by the Court of Appeal in MacCarthy at para. 58: People making this argument have a heavy onus. It is not good enough just to say that they could not pay because they earned less. They can only get a reduction or a cancellation of arrears if they present detailed and full financial disclosure, under oath (usually in the form of an affidavit) that:

- i. the change was significant and long lasting and ii. the change was real and not one of choice and iii. every effort was made to earn money (or more money) during the time in question, and those efforts were not successful.
- [151] Given that I have found that the respondent's average income is higher than what was imputed to him in the last order, it would be grossly unfair to the claimant if the arrears were reduced or cancelled. The application to reduce arrears is dismissed. VIII. SECURITY FOR ARREARS
- [152] The claimant seeks an order that a charge be registered against the Sayward Property to secure the arrears and future payment of child support and spousal support.
- [153] The claimant also seeks an order that the respondent surrender his shares in 0947204 B.C. Ltd. to be held in escrow by the claimant's solicitor pending further court order or agreement.
- [154] The court has authority to secure a payor's arrears under s. 15.2(1) of the Divorce Act, s. 170(d) of the Family Law Act, S.B.C. 2011, c. 25, and s. 12 of the Guidelines.
- [155] Given the respondent's history of accumulating arrears and refusing to pay them, I find that an order for security is appropriate in this case. However, the orders sought by the claimant are not workable.
- [156] The Sayward Property is owned by 0947204 B.C. Ltd. As noted above, the respondent owns 50% of the shares in 0947204 B.C. Ltd. Mr. Riley owns the other 50%. The company has not been made a party to these proceedings. In these circumstances, the court cannot pierce the corporate veil to secure the arrears against the company's property: Rohani v. Rohani, 2002 BCCA 253 at paras. 92-93.
- [157] The alternative order sought by the claimant to hold the shares in escrow would not prevent a director from consenting to the sale of corporate assets and I believe would be ineffective in achieving her goal, that is, securing the arrears. I therefore decline to make that order. IX. CONCLUSION
- [158] The Court will make the following orders:
- 1) The respondent's Guideline income is imputed as \$141,230.40.
 - 2) The respondent's child support obligation is varied retroactive to January 1, 2015. The respondent is ordered to pay to the claimant for the support of MDA, \$500 per month from January 1, 2015 to August 31, 2017.
 - 3) The respondent is ordered to pay to the claimant for the support of MDA the full Guideline amount of child support of \$1,255 per month from September 1, 2017 to and including November 1, 2017 and \$1,288 from December 1, 2017 to the date that MDA completes the radiography program. Once MDA completes the radiography program, she will cease to be a child of the marriage and child support will terminate.

- 4) The respondent's spousal support obligation is varied retroactive to January 1, 2015. The respondent is ordered to pay spousal support to the claimant, in the amount of \$4,089 per month from January 1, 2015 to August 31, 2017 and \$3,702 per month thereafter. X. COSTS

[159] At the hearing of this matter, counsel requested an opportunity to make submissions as to costs once this decision has been released. I will direct them to contact Supreme Court scheduling within 30 days to book a hearing date. "B. M. Young, J." The Honourable Madam Justice Young

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