
CANADA / JUDGMENT

B.A. v. L.S.

2017 BCSC 1796

COURT

Supreme Court of British Columbia

DECIDED

10 October 2017

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2017 BCSC 1796 B.A. v. L.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.A. v. L.S.,

2017 BCSC 1796

Date: 20171010

Docket: E151434

Registry: Victoria

Between:

B.A.

Claimant

And

L.S., T.R., 0774925 BC Ltd.,

and 1025927 BC Ltd.

Respondent

Corrected Judgment: The text of the judgment was corrected
at paras. 172 and 222 on November 16, 2017.

Before: The Honourable Madam Justice H. Holmes

Reasons for Judgment

Counsel for the Claimant:

K. Hauer

The Respondent, L.S.:

In Person

The Respondent, T.R.:

L.S., appearing as agent

The Respondent, 0774925 BC Ltd.

L.S., appearing as agent

Place and Date of Trial:

Victoria, B.C.

January 30, 31, February 1 - 3,

April 18 - 21, 2017

Place and Date of Judgment:

Victoria, B.C.

October 10, 2017

INTRODUCTION

- [1] B.A. alleges that, after an event that led to the breakdown of the marriage to L.S., L.S. fraudulently conveyed the proceeds of sale of the family home to his mother, the defendant T.R. Ms. A. alleges that subsequent transfers of funds to Ms. R. were also fraudulent conveyances of family property, and she seeks damages under the Fraudulent Conveyances Act or compensation under the Family Law Act in respect of all of the transfers. She also seeks compensation for the interest she claims in another property, which she submits is family property, and which is held by a numbered company which Ms. A. submits is an alter ego for Mr. S.
- [2] Mr. S. and Ms. R. deny any fraud in these transfers, saying that they were to repay loans Ms. R. made to Mr. S. before and during the marriage. Mr. S. submits that the family property will, effectively, be equally divided if he and Ms. A. each keep the property currently under their control.
- [3] Also in issue are the parents' incomes for child support purposes, each parent claiming to be unable to find suitable employment, while also claiming that the other parent has significant unrealized earning potential. Ms. A. seeks spousal support as well, and asks for a lump sum award for reasons I will outline later. Mr. S. submits that neither child nor spousal support should be paid by either parent.

- [4] Ms. A. and Mr. S. have two children, E., aged 7, and S., aged 5. The children's time is divided equally between the two homes in Victoria, B.C. An interim consent order made on February 4, 2016, provides for a three and four night parenting schedule, alternating week by week. Both parents wish to continue this general arrangement, and they support the children's relationship with the other parent. However, issues have arisen about which parent should make the key decisions in the children's lives, more particularly whether the children should participate in as many extra-curricular activities as Mr. S. would like them to, and whether the children should change to a school closer to Ms. A.'s home, to make transportation and travel easier for her.

THE ISSUES

- [5] The parties' positions and the evidence give rise to the following issues:
1. whether certain transfers of funds to Ms. R. were fraudulent conveyances; designed to deprive Ms. A;
 2. whether the property on Otter Place in Nanaimo, owned by 0774925 BC Ltd., is family property for which Mr. S. should compensate Ms. A.;
 3. if either or both of issues 1 and 2 lead to an affirmative conclusion, what remedy should follow;
 4. what incomes should be imputed to Ms. A. and Mr. S. for the purposes of child support;
 5. whether Ms. A. is entitled to spousal support; and, if she is, how much and in what form (periodic payments or lump sum);
 6. whether Ms. A. should have sole decision-making authority about the children's extra-curricular activities, and the school they will attend; and
 7. whether the parenting schedule should be modified to allow the parties longer periods with the children during the summer and other school holidays.
- [6] Before discussing these issues, I will give a broad outline of the background, signalling my findings about facts that are in dispute.

BACKGROUND

- [7] These are the facts as I find them to be.
- [8] Mr. S. is 43 years of age. He was born in Hungary, and moved to Canada in 1998. He currently lives with his mother, the respondent Ms. R., on McKenzie Avenue in Victoria, B.C. His father lives in a neighbouring unit.

- [9] Ms. A. is 38 years of age. She was born in Yugoslavia and has lived in several different countries as well as Canada. During the two-and-a-half years before the trial, she lived with her parents in Saanichton, near Victoria, B.C., until, two weeks before the trial, she moved into a basement suite in the Royal Oak area, closer to the centre of Victoria.
- [10] Ms. A. and Mr. S. met in approximately 1999. This was around the time when Mr. S. was studying information technology at the University of Victoria. They had begun to live together in a romantic relationship by 2002, and, I find, likely earlier than that, in 2001. Mr. S. acknowledged the earlier date as possibly being accurate, but was unwilling to confirm it.
- [11] In 2002, Mr. S. worked for KPMG as an IT analyst. He left that position in 2003, and, after some months, began employment as an IT analyst with the City of Maple Ridge. He remained in that employment until September 2004, when he and Ms. A. moved to Houston, Texas, as I will discuss later.
- [12] According to Ms. A., she and Mr. S. married on August 12, 2002. At the time, Mr. S. worked for KPMG, and they were living together in New Westminster. Ms. A. testified that she and Mr. S. married secretly, over the objection of Ms. R., who, when they announced their engagement, said that they should wait until Mr. S. had repaid the money he owed her, which Ms. A. understood to be around \$20,000.
- [13] Mr. S. denies a marriage in 2002, and says that the marriage was two years later, on July 10, 2004 in Victoria, as invitations and wedding photographs make clear. Ms. A. does not disagree that a July 10, 2004 wedding ceremony and celebration took place, but says that the event was a second, public celebration, in the presence of family and friends.
- [14] The dispute on this point makes little difference to the main issues in the trial, but I will address it briefly later. The date of the marriage is relevant because it must be stated in the order for divorce, which both parties seek, and because the dispute bears somewhat, in my view, on issues of credibility.
- [15] Ms. A. travelled to Abu Dhabi in September 2002. She testified, and I accept, that she and Mr. S. intended for him to join her, and for them to remain there for some time. However, within a month she discovered she did not like living in Abu Dhabi, and she returned to B.C. in October 2002.
- [16] Shortly after Ms. A.'s return to B.C., she began work as a multicultural advisor for the Surrey school board.
- [17] At or around the time of Ms. A.'s return from Abu Dhabi, Mr. S. purchased the property on Shaw Avenue in Coquitlam, B.C., which became the family home. The purchase closed in November 2002, at a price of \$198,000. As I will discuss later, the home was then sold on June 12, 2014, for \$418,000, and Mr. S. transferred the net proceeds to Ms. R. in one of what Ms. A. alleges were several fraudulent conveyances.

- [18] In June 2004, Ms. A. purchased a property on Glen Drive in Coquitlam, B.C. for \$140,000. She purchased the property as an investment, and it has been rented out since the purchase. As of December 2016, the appraised value of the Glen Drive property was \$290,000. The property is subject to a mortgage debt of approximately \$28,585, as of the time of the trial.
- [19] In October 2004, the couple moved to Houston, Texas - Mr. S. slightly ahead of Ms. A. - so that Mr. S. could take up employment with a petrochemical company as an IT consultant. Ms. A. accordingly left her work as a multicultural advisor with the Surrey school board. She had no work visa in the U.S.A., and she therefore worked only minimal amounts over the several years that the couple remained there.
- [20] The couple lived in Houston until March 2007, when a change of employment for Mr. S. took them to the San Francisco area for approximately a year. After that, they returned to Canada.
- [21] It was in 2006 or 2007, while the couple was living in the U.S.A., that Mr. S. purchased the two lots in Nanaimo B.C., one for \$50,000 and one for \$80,000. Title to both properties was registered in the name of 0774925 BC Ltd., which was incorporated in November 2006 for this purpose. As I will discuss later, Ms. A. and Mr. S. take different positions about whether these properties were family property in which Ms. A. has or had an interest. Mr. S.'s employment in San Francisco came to an end approximately a year later, in March 2008, and he and Ms. A. returned to B.C. At first, they lived with Ms. A.'s parents in Saanichton, near Victoria, and Mr. S. worked there for IBM for about seven months.
- [22] Mr. S. then took up work with ICBC in the Lower Mainland, and the couple moved, in November 2008, to the family home on Shaw Avenue in Coquitlam.
- [23] Mr. S.'s employment changed again. Ultimately, he did short-term contract work through a recruiting company, Tech Systems, for various large clients. The couple continued to live in the Shaw Avenue property, and Mr. S. worked mostly from home.
- [24] The children were born during this period, E. in March 2009, and S. in October 2011. Ms. A. did not work outside the home.
- [25] In June 2014, the couple moved back to Victoria in order to be closer to both sets of parents. The plan was for Mr. S. to continue working through Tech Systems from Victoria.
- [26] The couple sold the Shaw Avenue property for \$420,000, with net proceeds of \$401,435. As I have mentioned, and will discuss in more detail later, Mr. S. acknowledges that he transferred these net proceeds to Ms. R., but he says that he did so to repay loans she had made to him at various times.

- [27] Immediately after the move, the family stayed with Mr. S.'s parents on McKenzie Avenue in Victoria. The move was a challenging one, and it led to conflict and an incident with police involvement on June 21, 2014. As a result of that incident, Ms. A. moved with the children to her parents' home, in circumstances I will describe in more detail later when I discuss whether Mr. S.'s transfer to Ms. R. of the proceeds of sale of the family home was a fraudulent conveyance.
- [28] Ms. A. continued to live with her parents, until, as I mentioned, she moved into a basement suite in the Royal Oak area shortly before the trial. Mr. S. has continued to live with Ms. R. in the home on McKenzie Avenue.
- [29] By a consent order of February 4, 2016, Ms. A. and Mr. S. agreed to a shared parenting arrangement in which the children spend equal time with each parent.
- [30] I will turn now to Ms. A.'s allegations that Mr. S. fraudulently conveyed family property to Ms. R., intending to deprive her of her interest in it.
1. DID MR. S. FRAUDULENTLY CONVEY FUNDS TO MS. R.?

Introduction

- [31] Ms. A. alleges three fraudulent conveyances made to deprive her of her share in family property:

i the transfer by Mr. S. to Ms. R. on June 23, 2014 of the proceeds of sale of the Shaw Avenue family home;

ii the transfer by the respondent 0774925 BC Ltd. to Ms. R. in February and June, 2015 of the proceeds of sale of the property on Woodhaven Drive in Nanaimo;

iii the transfer by Mr. S. to Ms. R. in December 2014 of his 10% share of the home on McKenzie Avenue in Victoria.

- [32] There is no dispute that these transfers took place. The issues are:

- (a) whether Ms. A. had an interest in the property transferred;
- (b) whether Ms. A. is entitled to claim under the Fraudulent Conveyance Act; and
- (c) whether the transfers were fraudulent conveyances intended to deprive Ms. A. of her interest.

- [33] I will discuss those issues in turn.

- (a) Did Ms. A. Have an Interest in the Transferred Properties?

The Applicable Law

- [34] Subject to certain exceptions that do not apply in this case, spouses are each entitled to an undivided half interest in all family property at the time of separation: see s. 81, FLA.
- [35] Family property means all real and personal property owned by a spouse at the time of separation, unless it is excluded property under s. 85: see s. 84, FLA.
- [36] The types of excluded property that may be relevant in this case are those described in ss. 85(1)(a) and (g):
- (a) property acquired by a spouse before the relationship between the spouses began
 - ...
 - (g) property derived from property or the disposition of property referred to in . . . paragraph . . . (a)
- [37] The FLA takes an analogous approach to family debt: see s. 86.
- [38] Mr. S. contends that Ms. A. had no interest in any of the properties in issue. He submits that, throughout their relationship and their marriage, he and Ms. A. kept separate finances and agreed that each would have and keep the property in his or her name. He submits that, on that basis, the Glen Drive property is entirely Ms. A.'s. However, he submits that Ms. A. has no interest in any of the three properties now in issue.
- [39] The difficulty for Mr. S. is that his position, in this area, does not accord with the approach of the FLA or with the evidence in this case.
- [40] I will address each of the three properties in turn.

The Proceeds of the Shaw Avenue Family Home

- [41] When the Shaw Avenue property was purchased, in November 2002, Ms. A. and Mr. S. were spouses, within the meaning of s. 3 of the FLA. According to Ms. A.'s evidence, which I accept, they had married in August 2002. But even by Mr. S.'s evidence, by which they did not marry until July 2004, they had lived together since approximately November 2001, in a "marriage-like relationship".
- [42] Ms. A. acknowledges that Mr. S. alone paid the \$31,000 down-payment for the Shaw Avenue property, and that this amount is therefore excluded property under s. 85. However, she submits that there is no reason to view any other portion of the Shaw Avenue property (and later, its proceeds of sale) as anything other than family property. I agree.

- [43] Mr. S. led evidence in an attempt to show that Ms. A. had little, if anything, to do with the property except during the time (which he says was between November 2008 and June 2014) when the family lived in it (Ms. A. testified that they lived there for longer). He testified that she had nothing to do with the purchase - indeed, that the agreement for purchase and sale was made before she returned from Abu Dhabi. Ms. R. testified similarly.
- [44] I do not accept Mr. S.'s and Ms. R.'s evidence on this matter. Ms. A.'s evidence indicated that she had a much closer association with the property, and her evidence was more specific. For example, she described viewing the property before the agreement was made, and expressing her views, which were largely negative. She also described hoping to rent out the property when the couple moved to the U.S.A., but being prevented by strata bylaws (except for during one year when the strata council allowed a rental on a hardship basis). The restriction under the strata bylaws was printed on the written agreement by which Mr. S. made the original purchase.
- [45] But even on Mr. S.'s and Ms. R.'s evidence concerning the property, Mr. S.'s position that the home was not family property cannot prevail. A spouse's use of property or contribution to it (or lack thereof) have no bearing on whether the property is family property: see s. 81(a) of the FLA.
- [46] That considerable time was spent in the trial attempting to distance Ms. A. from association with the Shaw Avenue home reflects badly on Mr. S.'s and Ms. R.'s credibility generally, in the circumstances.
- [47] I make similar observations about Mr. S.'s position, and his and Ms. R.'s evidence, that no marriage took place until July 2004. Powerful evidence of an earlier marriage is provided by a certificate of marriage, issued by the B.C. Vital Statistics Agency, which records a marriage in August 2002. It is true that, when Ms. A. described the way in which the marriage took place, she testified that only she, Mr. S., and the marriage commissioner were present. Of course, a marriage requires the presence, also, of two witnesses, and a marriage commissioner would inevitably know this and decline to officiate in their absence. However, I am satisfied that either Ms. A. has forgotten that witnesses were present, or that, when she testified that no one else was present, she was referring, only, to members of the family or close friends, and the witnesses were not from either of those groups.
- [48] Mr. S. submits further that any interest Ms. A. may have had in the Shaw Avenue family home must be limited to be proportionate to the period during which he says the family lived in that home, namely between November 2008 and June 2014. As I have said, I do not accept Mr. S.'s evidence that the family lived there only during that period. But also this submission does not accord with the approach of the FLA. Each spouse has an undivided interest in the property because the home was purchased during the relationship, whether it was a family home or not, and no matter the length of time during which the family lived in it.

- [49] The Shaw Avenue home was family property, apart from the \$31,000 down-payment which is Mr. S.'s excluded property. Accordingly, when the home was sold in June 2014, the net proceeds of sale (less the \$31,000 excluded down-payment) would also have been family property upon separation: see s. 81, FLA.
- [50] I will discuss later Ms. A.'s position that the transfer of the proceeds of sale was a fraudulent conveyance. Suffice it to say at this point that I am satisfied that, had it not been for the transfer to Ms. R., the proceeds of sale would have existed as such at the time of the separation, or, alternatively, would have been invested in a further property. In either event, Ms. A. would have had an undivided half interest in either one or the other.

The Property on Woodhaven Drive, Nanaimo

- [51] The property on Woodhaven Drive was one of two properties in Nanaimo that Mr. S. purchased while the couple lived in the U.S.A. As I mentioned earlier, 0774925 BC Ltd. was incorporated to hold the two properties.
- [52] Mr. S. takes the position, once again, that the properties were always intended as his alone. He would own and keep (through 0774925 BC Ltd.) the two Nanaimo properties, while Ms. A. would buy and keep her own property, which she did by buying the Glen Drive property.
- [53] I prefer Ms. A.'s evidence on this point. Her evidence was more detailed - for example, she described other potential investments the couple considered and rejected before making the Nanaimo purchases - and was more consistent with the evidence as a whole. She testified that the intention, in these purchases, was for the couple to invest the money Mr. S. was earning in the U.S.A., and that they lived relatively frugally to that end.
- [54] But, whether on Mr. S.'s evidence or Ms. A.'s, Mr. S. faces the same difficulty that, under the FLA, the Nanaimo properties - as well as the Glen Drive property, as Ms. A. acknowledges - were all family property.
- [55] The intervention of 0774925 BC Ltd. does not change this situation, in my view. As I mentioned, that company was incorporated for the single purpose of holding title to the two Nanaimo properties, and it did nothing else. Although Mr. S. was less than forthcoming about that company and the other companies through which he dealt, I have no doubt at all that 0774925 BC Ltd. was his alter ego.
- [56] In February 6, 2015, after the breakdown of the marriage, 0774925 BC Ltd. sold the Woodhaven Drive property for net proceeds of \$99,629 to another numbered company associated with a long-time friend of Mr. S.'s. Ms. A. no longer takes issue with the sale. However, she contends that what then followed was a fraudulent conveyance, when 0774925 BC Ltd. transferred the proceeds of sale to Ms. R.

- [57] I will deal later with the question of whether that transfer was a fraudulent conveyance. Suffice it to say at this point that the proceeds of sale of the Woodhaven Drive property were family property, as the property was purchased during the marriage, and Ms. A. had an undivided half interest upon separation. There is no evidence that any portion of the proceeds of sale is excluded property.

The McKenzie Avenue Property

- [58] The ownership of the home on McKenzie Avenue has a complicated history, beginning with the purchase, in Mr. S.'s name, in December 2001, for \$168,500. This was shortly after the beginning of the marriage-like relationship that preceded the marriage. It is common ground that Ms. R. has lived there throughout.
- [59] Mr. S. and Ms. R. testified that Mr. S. held title in trust for Ms. R. to protect her against potential liability arising from her employment as a housecleaner and babysitter. This evidence did not convince, largely because it was inconsistent with Mr. S. then granting Ms. R. a mortgage on the property as security for what he said was a debt. It is also inconsistent with Mr. S.'s strong emotional reaction, which I will describe below, to the size of his interest then being reduced.
- [60] Sometime before April 2005, while Mr. S. and Ms. A. were living in the U.S.A., Ms. R. transferred 90% of the interest in the property to Mr. S.'s sister, using Mr. S.'s power of attorney to do so. Ms. A. testified that Mr. S. became upset to the point that he was ill when he learned that Ms. R. had done so.
- [61] In July 2006, the sister transferred a 1% interest to Ms. R., retaining 89% herself. However, Mr. S.'s 10% interest remained unchanged, and has done so since.
- [62] Ms. A. acknowledges that Ms. R. contributed the down-payment of \$10,000 for the initial purchase, and that this amount should be treated as Mr. S.'s excluded property.
- [63] With the exception of that excluded property, Mr. S.'s 10% interest in the home on McKenzie Avenue is family property.
- [64] The next question is whether Ms. A. is entitled to claim under the FCA.
- (b) Is Ms. A. Entitled to Claim under the FCA?
- [65] I am satisfied that she is.
- [66] The FCA permits a person to seek a declaration that a transfer of property is fraudulent, and therefore of no force or effect, if it was made to delay, hinder or defraud creditors:

Fraudulent conveyance to avoid debt or duty of others

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

(a) a disposition of property, by writing or otherwise,

- (b) a bond,
- (c) a proceeding, or
- (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

[67] This section was discussed by Madam Justice Gray in a family law context in *AWD v. CCDD and SJD*, 2005 BCSC 1142:

146 The phrase "creditors and others" in the Fraudulent Conveyance Act includes an estranged spouse. See *Jack v. Parkinson* (1994), 91 B.C.L.R. (2d) 96 (B.C. C.A.).

147 For a conveyance to be set aside under the Fraudulent Conveyance Act, the intent to delay, hinder or defraud a creditor, or someone having an interest in the property, must be held by both the transferor and the transferee: See *Mulcahy v. Archibald* (1898), 28 S.C.R. 523 (S.C.C.) and *Soo Chan v. Soo Chan*, [1993] B.C.J. No. 442 (B.C. S.C.).

[68] The issue of determining fraudulent intent under the FCA is "essentially a matter of fact to be proved in the circumstances of each particular case": see *Chan v. Stanwood*, 2002 BCCA 474 at para. 15.

[69] The first transfer took place on June 23, 2014, when Mr. S. transferred to Ms. R. the proceeds of sale of the Shaw Avenue family home. At this time, and at the times of the other transfers, which are alleged to be fraudulent conveyances, Mr. S. did not have formal notice that Ms. A. would be making a claim for her interest in the family property. However, a real risk to the family relationship was obvious, given Ms. A.'s allegation of domestic violence on June 21, the police coming to the home that day or the next, and her departure shortly afterwards with the children. Those events all took place before the June 23 transfer.

[70] Mr. S. denies that the events of June 21 involved domestic violence. I do not need to decide whether they did or did not. Even if they did not, the events were inherently high-conflict and emotionally-fraught. They were also followed by various interventions that must have been obvious and traumatic for the entire family.

[71] Ms. R. gave testimony that suggested she was unaware at the time of what was going on, but I cannot accept that evidence. It is inconsistent with other evidence about the circumstances at the time, including the living arrangement and the close relationship between Mr. S. and Ms. R. Also, Ms. R. showed signs of still being affected by the marriage breakdown, when she cried, during her testimony in the trial about Ms. A.'s departure from the home and the family. I cannot accept that the significance of the events that led to the marriage breakdown passed her by at the time.

- [72] Mr. S. takes the position that he and Ms. A. did not separate until March or April 2015, when Ms. A. or her counsel wrote to advise that she wished to formally separate. He and Ms. R. both intimated, in their evidence, that until then the reasonable expectation was that the marriage would survive the trouble and continue.
- [73] I agree with Ms. A. that the separation was in early July 2014, when she left the home for the final time. However, even if Mr. S. and Ms. R. saw things in a different way at that time, they can have had no doubt that the marriage was in serious jeopardy or worse, and that Ms. A. could well decide to make a claim to the property now in issue.
- [74] There is no doubt that, by the time of the transfer of the proceeds of sale of the Shaw Avenue family home - and therefore also by the time of the later transfers alleged to be fraudulent conveyances - it was clear that the marriage had either broken down or was at high risk of doing so.
- [75] Ms. A. is entitled to claim under the FCA.
- (c) Were the Properties Fraudulently Conveyed?
- [76] The next question is whether the transfers were intended to deprive Ms. A. of her interest in the property.
- [77] Generally, where a person transfers assets to close relatives in suspicious circumstances, a rebuttable presumption arises that they did so to defeat a creditor or other person with an interest in the property. The parties to the transfer have a burden of explaining it. See *Koop v. Smith* (1915), 51 S.C.R. 554.
- [78] I will discuss the explanations for the various transfers separately, beginning with the transfer of the proceeds of sale of the Shaw Avenue family home.

Transfer to Ms. R. of Net Proceeds of Shaw Avenue Family Home

- [79] Mr. S. and Ms. R. testified that the transfer of the proceeds of sale of the Shaw Avenue property had nothing to do with the Ms. A.'s departure with the children. They testified that the transfer was to repay very large loans Ms. R. had made to Mr. S. over the course of many years.
- [80] Mr. S. testified that he transferred the funds on June 23 because that was the first day the funds were available to him. The closing date for the sale was June 12, 2014, and Mr. S. received on that date the net proceeds of \$401,435. Since the bank placed a hold on the funds for five business days after the deposit, and the bank operated on Eastern Standard Time so that the deposit, made during the afternoon of Thursday June 12, 2014, was not processed until Friday June 13, the funds came available to him on the Monday (June 23) a week later, Mr. S. testified.

- [81] Even if Mr. S.'s explanation about this timing is correct, the explanation is not sufficient to account for the transfer.
- [82] First, and as I have discussed, both Mr. S. and Ms. R. must have known, by Monday June 23, that the marriage was in jeopardy. However, in explaining the transfer, they claim that they did not. Their evidence on that point is not credible, and indicates an effort to present an inaccurate picture of the situation at the time.
- [83] Second, on his own account of the transfer, Mr. S. acted with haste in making it at the earliest possible time. Yet most or all of the loans that he claims to have been repaying had been outstanding for more than a decade, without, on the evidence in the trial, any earlier repayment at all.
- [84] Third, Mr. S. transferred not only the proceeds of sale of the family home but also the remaining balance in his account, for a total of approximately \$409,000. If there had been urgency in repaying the loans, he could have transferred the existing balance much earlier. Also, neither Mr. S. nor Ms. R. explained how the \$409,000 amount more closely reflected the outstanding loan amount, or whether, after that payment, any portion of the loans remained outstanding.
- [85] Fourth, Mr. S. acted with secrecy at the time, failing to either consult or tell Ms. A. about the transfer, and he and Ms. R. continue to withhold information from Ms. A. and the Court. Ms. R. refused, in her evidence, to disclose where the transferred funds were or are, even though she was asked several times and was directed by the Court to answer. Her attitude toward her financial transactions with Mr. S., and Mr. S.'s attitude which reflects it, do not suggest legitimate or defensible dealings.
- [86] Fifth, I am not persuaded that the loans Ms. R. and Mr. S. claim were, in fact, made.
- [87] I give little weight, on this point, to Ms. A.'s submission that Ms. R. cannot possibly have had the necessary funds for the loans she claims to have made. Ms. A. submits that, as a housecleaner and babysitter - albeit a very hard working person, by all accounts - Ms. R. cannot have earned and saved the very significant amounts involved.
- [88] In my view, the submission invites speculation. Because of her deficient disclosure and her uncooperative and evasive attitude, little is known about Ms. R.'s earnings except that they were "the minimum to the medium wage". She did not provide tax returns or even indicate whether she filed them. She did intimate that her husband paid the family expenses from his own earnings - one infers that, if such were the case, she may have been able to save most of her earnings. There was also some suggestion in the evidence that Ms. R. benefitted at some point from a property sale or sales. In all the circumstances, including Ms. R.'s lengthy working career, it is not obvious that she could not have amassed the amount she claims to have loaned to Mr. S.
- [89] It is for other reasons that I conclude that loans of the magnitude claimed were not made.

- [90] There is but scant evidence of any loans, despite their significance to the issues in the trial and, one assumes, their important role in the financial history of the parties.
- [91] In her examination for discovery, which was read into evidence in the trial, Ms. R. was almost completely unhelpful about the dates, amounts, and reasons for the loans she claims Mr. S. repaid through the proceeds of sale of the family home. Asked why she made the loans, Ms. R. responded that she did so because Mr. S. requested them. As to what he needed the money for, she said she did not ask.
- [92] In the trial, the dates and amounts of the loans were never entirely clear in the evidence. For some of the alleged loans, the evidence varied about why they were made.
- [93] The one amount which both Mr. S. and Ms. R. testified about, and provided some documentary evidence to support, was a total of \$130,000, said to have been advanced in 2002 in several (between three and five) instalments. Mr. S. testified that those funds were applied to the purchase of the Shaw Avenue property, to stock investments, which then were lost, and to his and Ms. A.'s expenses, such as for a renovation, cars, and education.
- [94] The documents tendered to provide circumstantial evidence of these advances are not persuasive, given the extensive intermingling of Mr. S.'s and Ms. R.'s finances, through joint bank accounts, shared ownership, trust relationships, and other mechanisms. For example, despite the large repayment Mr. S. claims to have made in June 2014, by transferring the proceeds of sale of the Shaw Avenue family home, he also claims (when confronted with receipts showing that Ms. R. transferred to him between \$3,000 and \$4,000 per month between July 2014 and June 2015) that these were further loans Ms. R. made to him.
- [95] Ms. A. testified that she did not know about any large loans from Ms. R. By itself, this evidence does not mean that no such loans were made, because it is clear that Mr. S. kept his financial arrangements with his mother away from Ms. A. Ms. A. testified that through the marriage Mr. S. would never discuss his mother or his bank accounts. She was surprised to learn, through this litigation, how many bank accounts Mr. S. and his mother had together.
- [96] However, the evidence Ms. A. gave concerning whether, to her knowledge, Ms. R. had made loans to Mr. S., must be considered in the light of her evidence about why she and Mr. S. married privately or secretly in August 2002, two years before the celebration to which family and friends were invited. Ms. A. testified that they married secretly in 2002 because, when they had previously announced their engagement, Ms. R. told them that they could not marry until Mr. S. repaid the loans she had made to him. Ms. A. testified that she understood that these loans amounted to approximately \$20,000, and that they were made mostly to support Mr. S.'s studies. I therefore accept that, before the start of the marriage, Mr. S. owed Ms. R. approximately \$20,000.

[97] It is unclear, on the evidence, whether those loans also pre-dated the marriage-like relationship, or if those loans had been repaid by the time of separation. It is Mr. S.'s obligation to establish that the loans were incurred during the relationship, and that they remained outstanding at the time of the separation. See, for example, *Asselin v. Roy*, 2013 BCSC 1681, where Mr. Justice Harvey said the following:

247 Absent proof of debt existing at the time of separation coupled with proof, in the broad sense of the word, as to how debt was incurred (so as to assess whether it would be significantly unfair to divide such debt equally), the respondent is responsible for whatever debt he now has in his name alone.

See also *Wong v. Rooney*, 2016 BCSC 1166, at paras. 124-6, and *J.S.R. v. P.K.R.*, 2017 BCSC 928, at paras. 127-8.

[98] The \$20,000 debt was Mr. S.'s alone. Mr. S. has not established that it was a family debt for which Ms. A. was also responsible. If Mr. S. wished to repay it from the proceeds of sale of the Shaw Avenue property, he could use only his one-half share to do so, not Ms. A.'s.

[99] Mr. S. submits that Ms. A. impliedly acknowledged further loans from Ms. R. He notes that Ms. A. agreed that an entry in her journal at the time of the Shaw Avenue purchase said that Ms. R. "put a lot down . . . [w]hich she loaned" for the purchase of the Shaw Avenue property in November 2002. Ms. A. agreed that the entry was true. Mr. S. points to the entry as evidence of a large loan with no evidence of a corresponding repayment.

[100] However, the journal entry, and Ms. A.'s evidence about it, made no mention of how much or in what way Ms. R. put money down for the Shaw Avenue purchase. Nor did it mention whether that amount was repaid in any way before or in the course of the sale of the property in 2014. A personal journal is not an accounting record or a ledger; the absence of an entry documenting a repayment does not mean that no such repayment was made. Moreover, as Ms. A. testified, Mr. S. was generally loath to tell her about his financial arrangements with his mother.

[101] Mr. S. relies also on an email Ms. A. wrote to Ms. R. in 2005 or 2006, after, Ms. A. testified, Mr. S. became upset on learning that Ms. R. had used his power of attorney to transfer almost all of his interest in the McKenzie property to his sister. In the email, Ms. A. told Ms. R. about the state Mr. S. was in, and added, "I understand that you want to get back what you put in to secure your future".

[102] In my view, while this evidence about the McKenzie property shows an acknowledgement of financial arrangements with Ms. R. which could include loans, it also shows Ms. R. taking steps to ensure that her contribution was returned to her. The evidence, like other evidence, also shows that, in the wider context of Mr. S.'s family, ownership of the property was viewed as fluid and not necessarily consistent with the face of the title and mortgage documents.

[103] I conclude that the transfer of the net proceeds of sale of the Shaw Avenue property in the amount of \$401,435 was intended by Mr. S. and Ms. R. to remove those funds from Ms. A.'s reach. It was a fraudulent conveyance.

Transfer of Proceeds of Sale of Woodhaven Property, Nanaimo

[104] I mentioned earlier that on February 6, 2015, 0774925 BC Ltd. sold the Woodhaven Drive property in Nanaimo for net proceeds of \$99,629 to another numbered company associated with a long-time friend of Mr. S.'s. Then, on February 12, 2015, 0774925 BC Ltd. transferred \$76,000 to Ms. R., and a further \$22,590 to her on June 4, 2015.

[105] Ms. A. alleges that the two transfers, totalling \$98,590, were a fraudulent conveyance. I agree that they were.

[106] Mr. S. and Ms. R testified that the transfers were to repay Ms. R. for having provided the purchase funds and the mortgage payments for the Woodhaven property. However, there is no satisfactory evidence to support this assertion, especially given the long history of intermingled finances.

[107] Moreover, Ms. A. testified, and I accept, that the two Nanaimo properties were purchased while the couple lived in the U.S.A. as a way to invest the substantial amounts of money Mr. S. was earning. She testified that they lived frugally, relative to Mr. S.'s earnings, in order to maximize their ability to invest. She gave compelling detail about other investments they considered before they settled on the Nanaimo properties.

[108] In addition, Mr. S.'s other conduct around the time of the transfers shows an intent to deprive Ms. A.

[109] On April 26, 2015, Mr. S. resigned as director of 0774925 BC Ltd., and made a gift of his shares to the two children and his godmother.

[110] On the same date, he also made a gift of all the shares in a different numbered company (0885370 BC Ltd.) through which he worked in B.C. He gave 48% of the shares of that company to each of the two children, and the remaining 4% to his godmother, who lives in Hungary.

[111] These actions were but three days before Master Bouck made an order (on April 29, 2015) that included a term prohibiting the disposition of any property.

[112] Mr. S. claims that he was unaware that such an order was likely, and, in any event, that the shares in each of the companies had no value. Asked why, if the shares had no value, he troubled to make the gifts, his only answer was that it seemed like a good thing to do.

- [113] Neither response was convincing. In the circumstances, it was highly unlikely that Mr. S. did not expect an order prohibiting the disposition of property. Also, his claim that none of the shares had any value is inconsistent with his letter to Mr. Hauer, on November 29, 2016, in which he expressed his intent to defend against any claims that might be made against, among other things, the children's property. There is no suggestion that the children had or have any property other than the shares Mr. S. transferred to them.
- [114] As between Mr. S., Ms. R, and Ms. A., the transfers of the proceeds of sale of the Woodhaven property, totalling \$98,590, were a fraudulent conveyance.
- [115] However, I will say something later about the fact that the second transfer took place after Mr. S. had transferred the shares in 0774925 BC Ltd. to the children and his godmother, and that they were not parties in this action.

Transfer of Mr. S.'s 10% Interest in the Home on McKenzie Avenue

- [116] In December 2014, Mr. S. transferred his 10% interest in the McKenzie Avenue home to Ms. R. for consideration of \$1.
- [117] This was well after Ms. A. had left the home with the children. It followed the transfer of the proceeds of sale of the Shaw Avenue family home, which I have found to be a fraudulent conveyance.
- [118] Asked, in his evidence, why he made the transfer, Mr. S. said, again, that it seemed a good thing to do.
- [119] The only reasonable conclusion is that this, too, was a transfer intended to deprive Ms. A.
- [120] Except for the initial \$10,000 down-payment, which Ms. A. acknowledges Ms. R. paid and is Mr. S.'s excluded property, Mr. S.'s transfer of his 10% interest was a fraudulent conveyance.

Closing Comments on this Issue

- [121] It is entirely possible that the conclusions I have reached may fail to take account of funds that may have passed from Ms. R. to Mr. S. at some point, and, although loosely intended as loans, have not been repaid (except through the fraudulent conveyances).
- [122] Responsibility for any such result lies squarely with Mr. S. and Ms. R. They deliberately withheld information from Ms. A. and from the Court. They evaded questions, in their evidence, about key points - Ms. R. to the point of contempt.
- [123] It is not the Court's responsibility to try to conduct a forensic accounting on an insufficient body of evidence to correct any misleading results of a strategic and self-serving approach to the trial process.

2. IS THE OTTER PLACE PROPERTY FAMILY PROPERTY?

- [124] The next question is whether the property on Otter Place in Nanaimo, which is still owned by 0774925 BC Ltd., is family property for which Mr. S. should compensate Ms. A.
- [125] For the reasons that I concluded that the property on Woodhaven Drive was family property, this property too is family property.
- [126] The intervention (between Mr. S. and the property) of 0774925 BC Ltd. is of no significance. Until Mr. S. transferred his shares in that company to the children and his godmother, the company was nothing more than an alter ego for him, holding this and the other Nanaimo lot as family investments.
- [127] The effect of Mr. S.'s transfer of the shares in 0774925 BC Ltd. out of his direct control will be addressed below, in the discussion of the appropriate remedy. To that matter I now will turn.
3. WHAT REMEDY WILL GIVE MS. A. HER EQUAL SHARE IN THE FRAUDULENTLY CONVEYED AND OTHER FAMILY PROPERTY?
- [128] As discussed above, Mr. S. made fraudulent conveyances to Ms. R. of family property, namely the proceeds of sale of the Shaw Avenue family home, the proceeds of sale of the Woodhaven Drive property in Nanaimo (subject to a qualifier I will discuss shortly), and Mr. S.'s 10% interest in the McKenzie Avenue home in Victoria.
- [129] The Court could set aside those transfers as invalid. However, to do so would offer no meaningful remedy for Ms. A., because Ms. R. steadfastly refuses to disclose where the transferred funds are held.
- [130] Instead, Ms. A. seeks damages against Mr. S. and Ms. R. under the FCA, on the basis that the assets that were fraudulently conveyed are no longer available: *Sale v. Roper Construction Ltd.*, [1989] B.C.J. No. 2017 (Co. Ct.); *Gooseaire Humidification Ltd. v. Knowles Brothers Ltd.* (1979), 27 N.B.R. (2d) 541 (NBQB) (both cited in obiter in *Chan v. Stanwood*, 2002 BCCA 474 at para. 38).
- [131] With the one qualifier I will discuss shortly, Ms. A. will have an order for damages for her one-half interest in the fraudulently conveyed assets, based on the values set out in the chart Mr. Hauer prepared to accompany his closing submissions.
- [132] The qualifier is this. The second transfer by 0774925 BC Ltd. of the proceeds of sale of the Woodhaven property post-dated Mr. S.'s transfer of the shares in that company to the children and his godmother. Those transferees are not parties in this action. It therefore appears - absent further submissions on this matter - that the transfer by that company to Ms. R. cannot be declared invalid as a fraudulent conveyance in this action without those parties having an opportunity to participate. See *Rohani v. Rohani*, 2002 BCCA 253 at paras. 92-3, and *Michie v. Michie*, 2009 BCSC 1172 at para. 35.

- [133] The damages awarded in respect of the fraudulent conveyances should therefore be adjusted to remove that second transfer in the amount of \$22,590. That amount will, however, be included in the property in respect of which an order for compensation is made, as will be discussed shortly.
- [134] The amount of the award of damages against Mr. S. and Ms. R. should also (in reflecting her half interest in family property) take account of the excluded property Ms. A. acknowledges, namely the \$31,000 down-payment on the Shaw Avenue home, and the \$10,000 down-payment (adjusted to proportionately reflect Mr. S.'s 10% interest) in the McKenzie Avenue home.
- [135] Ms. A. applies also, under s. 97(2)(c) of the FLA, for an order for compensation for her interest in family property that has been disposed of, transferred, converted, or exchanged into another form.
- [136] This includes the fraudulently conveyed property, for which Ms. A. also has an order for damages, as discussed immediately above.
- [137] However, it also includes some other property, namely:
- the Otter Place property in Nanaimo, currently owned by 0774925 BC Ltd., which was Mr. S.'s alter ego and completely under his control until he transferred the shares to the children and his godmother; and
 - the second transfer (in the amount of \$22,590) by 0774925 BC Ltd. to Ms. R. of proceeds of sale of the Woodhaven Drive property in Nanaimo.
- [138] Ms. A. will have an order against Mr. S. for compensation for her half share in the fraudulently conveyed property as well as the two properties listed immediately above.
- [139] Mr. S. is entitled to a half interest in the Glen Drive property owned by Ms. A. That property had a value of \$290,000 as of December 2016, and was subject to debt of approximately \$28,600.
- [140] Mr. Hauer calculates that, taking into consideration the fraudulent conveyances of family property as well as the family property currently held by Mr. S. or Ms. A. (or 0774925 BC Ltd. until Mr. S. transferred its shares away from his direct control), an equal division of family property would be achieved with the parties keeping the assets in their names and Mr. S. paying \$185,999 to Ms. A.
- [141] That calculation needs to be adjusted to take account of the excluded property Ms. A. acknowledges, namely the \$31,000 down-payment for the Shaw Avenue home, and a proportionate share (based on Mr. S.'s 10% interest) of the \$10,000 down-payment for the McKenzie Avenue home. Mr. Hauer should make the adjustment before submitting a draft order.

[142] Ms. A. may enforce the damage award, granted in response to the fraudulent conveyances, against either or both of Mr. S. and Ms. R. She may also enforce the compensation order against Mr. S. However, she must not recover in total more than the amount found to be owing to her to reflect the value of her equal share of the family property.

[143] To be clear, Ms. A. will also keep the Glen Drive property as her own as part of the equal division of property, subject to compensation to Mr. S. for his half-share, as I have indicated.

4. WHAT ARE THE PARTIES' INCOMES?

[144] As I mentioned at the outset, at the time of the trial neither party had been in the paid work force for quite some time. Each submits that the other is capable of substantial earnings and has made insufficient effort to realize their earning potential.

[145] They do not disagree that each should be imputed some income, for the purposes of child support. However, they disagree about the amount.

Mr. S.'s Income

[146] Mr. S. submits that the income he could reasonably earn is between \$40,000 and \$50,000 per year. Ms. A. submits that the amount should be \$150,000 per year.

[147] For the reasons I will give, I conclude that the income imputed to Mr. S. should be \$90,000 per year.

[148] Mr. S. has a good academic background in a reasonably wide field of application. He studied statistics, finance, and accounting. He has a Bachelor's degree from Hungary. He studied Information Technology at the University of Victoria, and he has an MBA from the University of Phoenix.

[149] He also has an impressive earnings history in his field of expertise. Mr. S.'s income changed slightly with his several changes of employment over the years, but I find that it was generally between about \$50 or \$60 USD per hour (between October 2004 and March 2007), and that it was almost \$100 per hour (through contract work for Microsoft in 2010 or 2011).

[150] Sometimes Mr. S. was able to work on two contracts at the same time, and to earn the full hourly rate twice; at one such time, he told Ms. A. that he earned \$50,000 in one month, and that he wanted to keep doing so. When contracts came or were brought to an end, Mr. S. was never out of work for long.

[151] I accept Ms. A.'s evidence concerning Mr. S.'s approximate income from his various jobs in the U.S.A. and, then, back in B.C. Her evidence was credible and reasonably detailed, and Mr. S. offered no other evidence on that topic.

- [152] Indeed, Mr. S. was less than forthcoming about his previous earnings. In his examination for discovery, as read into evidence in the trial, Mr. S. gave as little information as possible about the closely-held company through which he worked in the U.S.A. and possibly later, maintaining sometimes that the information was private, and sometimes that only the company could answer. When Mr. S. was pressed on that last point, it became clear that he knew that he himself was the only individual who could give information about that company. He agreed that it was a one person company of which he was shareholder and director. He added that there may have been another shareholder or director, but, when pressed, agreed that any such additional shareholder or director could only have been Ms. A. It is clear from all the evidence that if Ms. A. was a shareholder or director, she had no real role.
- [153] Mr. S. gave similar evidence about the numbered company through which he carried on the same type of work in the same manner when the family lived in Victoria. However, for that company, he testified that Ms. A. may have had some shares.
- [154] On Ms. A.'s evidence, which I accept, Mr. S.'s closely-held companies billed out at significantly more than Mr. S. was paid. For example, Ms. A. testified that when Mr. S. began work for Microsoft, toward the end of 2010, his income was between \$80 and \$100 per hour, but he charged out his time at \$250 per hour (an amount equivalent, I note, to what Mr. S. described, in a fee dispute with his former counsel, as his "opportunity cost" of preparing for a court hearing). The evidence did not indicate what overhead expenses Mr. S. or his closely-held company may have incurred - and I note, as I will explain later, that almost no disclosure has been made of the closely-held companies' financial situations - but it seems unlikely that any such expenses were high, as Mr. S. worked mostly from home without staff. Also, cross-examination of Mr. S. established (despite his uncooperative attitude) that no one other than Mr. S. and, possibly, Ms. A., held any shares in those companies (before Mr. S. transferred his interests away). The reasonable inference is that Mr. S. had access to revenue which did not form part of his income.
- [155] Ms. A. testified, and I accept, that during the time in the U.S.A. (between 2004 and 2008) Mr. S. spoke of retiring at age 40 with \$1.5 million in savings. While they were there, they lived frugally, relative to Mr. S.'s earnings, and, when they returned to B.C., they lived with Ms. A.'s parents for some time in order to save money, even though Mr. S. was continuing his well-paying contract work at that time. An intention to save, by accumulating assets, is also consistent with the parties' purchases of various properties (the Glen Drive property in Ms. A.'s name, and the two lots in Nanaimo in Mr. S.'s name).
- [156] Mr. S. claims that he can no longer continue in this kind of work, but I cannot accept the reasons he gives.

- [157] First, I do not accept Mr. S.'s evidence that the criminal charge against him that followed Ms. A.'s departure from the marriage has prevented any further employment for him. The charge did not proceed, and Google agreed to the request to remove the link to the Ministry of Justice criminal list. Moreover, Mr. S. appears to have had no difficulty at all taking up numerous volunteer positions with the children's swim club and other activities, and at their school.
- [158] Nor can I find that Mr. S. is impeded by effects of the motor vehicle accident he suffered in late April 2015. On the evidence, he was likely unable to work for a time. However, by the time of the examination for discovery in November 2016, the injury no longer limited him. In my view, the injury should play little or no role in the assessment of Mr. S.'s ability to earn income in the future.
- [159] Finally, Mr. S. refers to his heavy involvement in the children's school and extra-curricular activities, both as a parent volunteer and, for some activities, a coach or leader.
- [160] Involvement of that kind, while valuable to the community and, to an extent, the children, does not displace the obligation to provide appropriate financial support.
- [161] Taking into account Mr. S.'s absence from the work force in an industry that changes quickly, I conclude that Mr. S. is reasonably capable of earning \$90,000 per year. He will be imputed that income for the purposes of child support.

Ms. A.'s Income

- [162] At the time of the trial, Ms. A. had no income from employment. She received income of \$1,350 per month from renting the Glen Drive property.
- [163] When the marriage came to an end, Ms. A. had been out of the paid work force for ten years. However, she was still relatively young and had some good qualifications, including a degree in linguistics, a language teaching certificate, some training, though incomplete, as a professional appraiser, and one accounting course she took in the U.S.A. She speaks three languages fluently, and is competent in several others. She presents herself well.
- [164] Ms. A. testified that she has been looking for work in and around Victoria in a variety of positions at salary levels at or above that of the job she had in 2002 - 2004 with the Surrey school board, in which she earned \$21 per hour for approximately 32 hours per week. She estimates a total of 20 applications since the separation, resulting in one or two interviews, but no offers. It was not clear in the evidence when her job search began.

- [165] There was no evidence of any factors such as illness or disabling emotional distress after the breakdown of the marriage that may have limited Ms. A. in her search for employment. I have to conclude that her search has not been as intense or as wide as necessary in the circumstances. I am confident that, with a suitably directed search, she could have found employment at close to the salary she earned with the Surrey school board within 18 months of the marriage breakdown.
- [166] Ms. A. will be imputed an employment income of \$35,000, as of January 1, 2017.
- [167] In addition, Ms. A. receives rental income from the Glen Drive property of \$1,350 per month (or \$16,200 gross per year), or, according to her financial statement, \$8,012 per year net, after the deduction of expenses.
- [168] Ms. A's income for child support purposes is set at \$43,012, based on the imputed employment income and her net rental income.

The Child Support to be Paid

- [169] On the basis of imputed incomes of \$90,000 for Mr. S. and \$43,012 for Ms. A., Mr. S. will pay Ms. A. \$1,345 per month, and Ms. A. will pay Mr. S. \$655 per month. With a set-off of these amounts under s. 9 of the Child Support Guidelines, Mr. S. will pay Ms. A. \$690 per month.

Section 7 Expenses

- [170] Mr. S. seeks an order requiring Ms. A. to contribute a proportionate share of certain expenses he has incurred for the children's activities during the separation.
- [171] In my view, such an order is not appropriate in the circumstances, which include the fraudulent conveyances. Also, Mr. S. consulted Ms. A. only occasionally and minimally before registering the children in many of the programs or activities for which he seeks a contribution. The number of activities is, on its face, excessive (at approximately 40 over the several years), and the evidence does not permit an examination of which ones were reasonable s. 7 expenses in all the circumstances.
- [172] In the future, medical and dental expenses and expenses for extra-curricular activities approved, in each case, by Ms. A., will be shared proportionately to the parties' incomes. Other expenses will be shared similarly if agreed by Ms. A. and Mr. S. in writing in advance, except for the following.
- [173] I agree with Mr. S. that for the children's school supplies, the parents should alternate taking responsibility for the purchases and the costs. In school years beginning in odd years, Mr. S. will provide the children with the necessary school supplies. In school years beginning in even years, Ms. A. will do so.

5. SHOULD MR. S. PAY SPOUSAL SUPPORT TO MS. A.?

- [174] Ms. A. seeks an order for lump sum spousal support payable from the family property she says Mr. S. fraudulently conveyed to others.
- [175] Ms. A. did not explain in any detail the basis for her claim, whether compensation for earning capacity she gave up during the marriage, her present needs, or a combination or those or some other basis.
- [176] Nor did she explain the basis for her request that the lump sum be ordered to be paid from a particular source, or how such an order, if made, would coexist with the orders for damages and for compensation she sought and obtained.
- [177] However, the evidence clearly established that Ms. A. is entitled to spousal support on the basis of, at least, compensation. She gave up her working career to enable Mr. S. to develop his career in the U.S.A., where, as both parties knew, she was not entitled to work. Instead, Ms. A. supported Mr. S.'s career through some work, such as editing, for his closely-held company. She took some post-secondary courses, but any educational goals she may have had were clearly secondary to Mr. S.'s career, because the couple always moved where Mr. S.'s employment took them. When the couple returned to B.C., she remained out of the paid work force to look after the children.
- [178] On the imputed incomes discussed above, in relation to child support, the Spousal Support Advisory Guidelines suggest spousal support for an indefinite duration, subject to variation and possible review, with a minimum duration of 6.5 years and a maximum duration of 16 years at monthly amounts ranging from \$97 (low) to \$446 (mid-range) to \$798 (high).
- [179] The factors to be considered in determining whether lump sum spousal support should be ordered were summarized in *Brandl v. Rolston*, 2012 BCSC 902, appeal dismissed 2013 BCCA 235:
- [84] Ms. Brandl seeks periodic and/or lump sum spousal support. In *Robinson*, Madam Justice Watchuk reviewed the Ontario Court of Appeal decision of *Davis v. Crawford*, 2011 ONCA 294 (CanLII), which set out the factors that should be taken into consideration in determining whether lump sum spousal support should be ordered. These are summarized in Ms. Brandl's submissions at paragraph 129:
- a. The court's ability to award lump sum spousal support is not restricted to "very unusual circumstances".
 - b. Although a lump sum award should not be made in the guise of support for the purpose of redistributing assets, a lump sum order can be made to relieve against financial hardship, if this has not been done in the division of assets.
 - c. Any lump sum award that is made will have the effect of transferring assets from one spouse to the other. The real question in any particular case is the underlying purpose of the order.

- d. A court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any perceived disadvantages of making such an order.
- e. The advantages of making a lump sum award can include the following:
 - i. Ensuring adequate support will be paid in the circumstances where there is a real risk of non-payment of periodic support
 - ii A lack of proper financial disclosure
 - iii Where the payor has the ability to pay lump sum but not periodic support
 - iv Satisfying immediately an award of retroactive spousal support.

[180] I agree with Ms. A. that, in light of the fraudulent conveyances, and Mr. S.'s unwillingness to rejoin the work force, a lump sum award is appropriate in the circumstances.

[181] Generally, orders that spousal support be paid by way of a lump sum are made only when there are assets or resources available to make the lump sum payment. For example, in *Plattig v. Robillard*, 1995 CanLII 326 (BCCA), the Court of Appeal held a lump sum is not appropriate when the payor has a large debt load.

[182] In this case, Mr. S. appears not to have any assets from which to pay a lump sum order. According to his financial statement, he also has a large debt load.

[183] However, I am not persuaded that this is the true picture of his financial situation. I refer to the fraudulent conveyances themselves, and the clear intent to deprive Ms. A. and insulate as many assets as possible from her, as well as to the evidence about the long-time intermingling of Mr. S.'s financial interests with those of Ms. R. and other family members.

[184] The Spousal Support Advisory Guidelines suggest lump sum spousal support at the mid-point of \$9,253 (low) to \$42,065 (mid-range) to \$74,548 (high). These calculations are made on a net present value assumption based on a spousal support duration of 11 years and 3 months.

[185] Mr. S. will pay lump sum spousal support of \$42,065.

6. HOW SHOULD THE MAJOR DECISIONS BE MADE FOR THE CHILDREN?

The Parties' Positions

[186] Ms. A. asks that she have sole authority to make decisions about the children's extra-curricular activities and the school they will attend.

[187] The children are in the French immersion program at the school the parties chose when they moved from the Lower Mainland in 2014. However, Ms. A. testified that they chose the school because it is close (about 800 metres) to the McKenzie Avenue home where the family lived after the move, and that the location of the school is no longer convenient for

her. When Ms. A. lived with her parents in Saanichton, the distance was about 25 km, and her new home is about 10 km from the school; Ms. A. testified that without her share of the family assets she lacks the financial means to live closer.

[188] Also, Ms. A. would prefer a school with a building in better condition than she understands the present school to be in. She strongly favours French immersion education for the children, who already speak two languages well and understand a third, in addition to French, and she has in mind two French immersion elementary schools in North Saanich or closer to her present home. Ms. A. testified that she has been unable to discuss a change of schools with Mr. S. because he is not open to any discussion at all.

[189] As to the children's extra-curricular activities, Ms. A. agrees that the children generally enjoy the extra-curricular activities Mr. S. arranges for them, but says that he pushes them to participate too often and too intensely, sometimes exhausting them to the point that they struggle with or even miss school because of illness. Instead of the schedule of activities Mr. S. arranges, on five or six days per week, often for two or three hours per day, Ms. A. would arrange activities on two or three days per week, and for shorter periods. Ms. A. testified that she has had no success in asking Mr. S. to schedule fewer activities, or to avoid scheduling them on the days the children spend with her.

[190] Mr. S. submits that the parents should share all parental responsibilities, as in the interim order of February 4, 2016 but with some minor variations he sets out. The interim order provides for both parents to be guardians of the children and to share parenting responsibilities:

- i. In the event of the death of a parent, the surviving parent will be the only guardian of the children,
- ii. Each parent will have the obligation to advise the other parent of any matters relating to their exercise of any of the s. 41 Family Law Act parenting responsibilities,
- iii. Each parent will have the obligation to discuss with the other parent any significant decisions relating to the parental responsibilities set out in s. 41 of the Family Law Act, and will have an obligation to try and reach agreement on those decisions,
- iv. In the event the parties cannot reach agreement on a significant decision despite their best efforts, they will engage a mutually agreed upon trusted third party to assist them in making the decision,
- v. In the event the parties are unsuccessful in reaching a decision with the aid of the third party, then either party [may] apply to Court for a judicial determination of the issue.

[191] Mr. S. submits that if the parents cannot agree on a decision despite their best efforts and despite mediation through a "trusted third party", then Mr. S. should have the authority to make the decision, except for decisions concerning the children's school. For the school, he submits that the children should remain at their current school where they are thriving.

Discussion

School

- [192] In my view, the time is not right for a change of school or for a change in the allocation of responsibility to make decisions about the children's school. I am not persuaded that the age of the building at the present school requires a change. Nor does the 10 km distance from Ms. A.'s home require a change, so long as the arrangements for driving the children are clear, as I will discuss below. Further, the evidence was incomplete and uncertain about the schools Ms. A. proposes, or about whether she would, in fact, live closer to the present school if the financial orders from the trial enable her to.
- [193] Ms. A. and Mr. S. will therefore continue to share the responsibility for making decisions about the children's schooling. Each party will have the obligation to advise the other parent of any matters relating to the children's schooling and have an obligation to discuss any significant decisions relating to the children's schooling and try to reach an agreement. If an agreement cannot be reached, the parties will engage a mutually agreed upon trusted third party to assist them in making the decision. If they are not successful in reaching a decision with the aid of the third party, then either party may apply to Court for a judicial determination of the issue.
- [194] Each party gave incomplete evidence faulting the other for failing to drive the children between Ms. A.'s home and their school. I accept Ms. A.'s evidence that Mr. S. agreed to do much or all of the driving if the children were to remain at the present school. It was not entirely clear whether Mr. S. disputed this evidence, but, if he did, I conclude that he has forgotten the arrangement, or may have mistakenly assumed that the arrangement would change over time.
- [195] In all the circumstances, it is appropriate for Mr. S. to be responsible for driving the children to and from school when they are with Ms. A.
- [196] Mr. S. will be responsible for driving the children to and from school when they are with Ms. A. However, Mr. S. may ask someone suitable (such as one of his parents) to assist. Although the evidence was undeveloped about whether and how such a driving responsibility might negatively affect his or Ms. A.'s ability to take up paid employment, it seems likely that Mr. S. would be the least affected because he worked mainly from his home during his working years.
- [197] I agree with Mr. S. that an order should require the parent who receives a child's report card to promptly make and send a copy to the other parent.

Extra-Curricular Activities

- [198] Experience has shown that shared decision-making about the children's extra-curricular activities has not worked.

- [199] For the reasons I will give, I find that Ms. A. is the parent best able to make decisions about extra-curricular activities in light of the children's best interests overall.
- [200] For Mr. S., the children's sports and other activities appear to have become a mission and a purpose of his own and a primary focus of his life. In the circumstances, this affects the children's best interests in two main ways.
- [201] First, I am not convinced that Mr. S.'s very high expectations of the children are realistic, or that he would allow the children to develop according to their own interests and age-appropriate preferences. For example, Mr. S. has already researched potential university tennis scholarships for E. Already, at very young ages, the children are over-scheduled in strenuous organized activities with insufficient regard for the other aspects of their development, including their parenting time with Ms. A. It is not enough to say that the children enjoy the activities, and that Ms. A. is free to go to swimming and other events to watch the children.
- [202] Second, Mr. S.'s extensive involvement in the children's many activities, both as a parent and as a volunteer, and, for some activities, a leader, appears to be interfering with his ability or willingness to undertake paid employment that would allow him to contribute more appropriately to the children's financial support.
- [203] I have no concern that Ms. A. will overlook the pleasure and satisfaction that the children evidently gain from many of their current activities. Nor am I concerned that Ms. A. will fail to recognize and encourage particular talent, where appropriate. In cross-examination, she readily agreed, for example, that E. is a talented swimmer.
- [204] I do not view Ms. A. as unsupportive of the children's activities merely because she does not often attend them with the children. It is important for children to know that their parents support them in their activities and take a strong interest. However, the children's best interests do not require that the parents bear constant witness to the children carrying out the activities. Indeed, children may benefit from the sense of independence that comes with taking part in activities outside the family. The children also benefit from knowing that their parents also have a contributing role in society, outside the family.
- [205] Ms. A. will determine which extra-curricular activities the children will participate in, and when. She will consult Mr. S. well in advance of registering them - generally at least four weeks in advance if possible. Mr. S. is also entitled to make recommendations to Ms. A., and to bring activities or concerns to her attention.

Health-Related Matters

- [206] Ms. A. will have responsibility for making decisions about the children's medical, dental, and other health-related treatments, and giving or refusing the necessary consent.

- [207] Neither parent is unfit to have this responsibility, but the children will benefit from the parties having a clear understanding that one of them has the lead concerning the matter.
- [208] In my view, the balance tips toward Ms. A. on this matter. I am not persuaded that she holds an "anti-vaccination" attitude: her query about the children being vaccinated did not question the value of vaccination, but rather showed her concern to know which vaccinations were being administered. On the other hand, Mr. S. appears to sometimes overemphasize medical or related issues requiring treatment (such as for speech difficulties) when it is not necessary.
- [209] Ms. A. is to consult Mr. S. about these matters, but will have the final authority to make decisions if she and he cannot agree. Ms. A. is in any event to inform Mr. S. promptly about decisions made and steps taken.
- [210] In making medical or other appointments for the children, Ms. A. will not be limited to days when the children are with her. If an appointment is scheduled during time when the children are with Mr. S., Ms. A. will notify Mr. S. forthwith. If, despite reasonable efforts, it is not possible for Mr. S. to take the child or children to the appointment, he will notify Ms. A. of this within one week of being notified of the appointment. Ms. A. may then reschedule the appointment or opt to take the children to it herself.
7. LONGER TIMES WITH THE CHILDREN DURING SCHOOL HOLIDAYS?
- [211] I agree with Mr. S. that the parenting schedule should allow for longer periods with each parent during the summers and other school holidays.
- [212] The usual parenting arrangement will be suspended during summer and other school holidays, and will resume after the holiday period as though the holiday period had not taken place.
- [213] School holiday periods will be divided into two equal and unbroken periods. For holiday periods falling in odd years, Mr. S. will notify Ms. A. which of the two periods he chooses, and is to do so in writing at least six months in advance, and is to confirm that Ms. A. has received the notification. For holiday periods falling in even years, Ms. A. is to do likewise.
- [214] During holiday periods, the parent with the children is to make arrangements for the children to speak with reasonable frequency with the other parent by telephone, Skype, or other suitable means.
- [215] Each parent is authorized to travel with the children outside the Province or the country without the consent of the other parent. However, at least two weeks before any such travel, the travelling parent is to give the other parent a written itinerary for the travel, with reasonable detail about the travel arrangements, including accommodation, and contact information, where it is available.

SUMMARY OF ORDERS

- [216] Mr. S. and Ms. R. are to pay Ms. A. damages under the FCA equivalent to the value of her one-half interest in the family property I have found was fraudulently conveyed (namely (i) the net proceeds of sale of the Shaw Avenue home; (ii) the net proceeds of sale of the Woodhaven Drive property, excluding the second transfer of \$22,590; and (iii) Mr. S.'s 10% interest in the McKenzie Avenue home), based on the values set out in the Mr. Hauer's chart, as adjusted for the excluded property Ms. A. acknowledges, namely the \$31,000 down-payment for the Shaw Avenue home, and a proportionate share (based on Mr. S.'s 10% interest) of the \$10,000 down-payment for the McKenzie Avenue home.
- [217] Mr. S. is also to pay Ms. A. compensation under s. 97(2)(c) of the FLA for her half-interest in family property that has been disposed of, transferred, converted, or exchanged into another form. This includes the fraudulently conveyed property, described immediately above, as well as the second transfer (in the amount of \$22,590) of the proceeds of sale of the Woodhaven Drive property, and the Otter Place property. Compensation will be based on the values in Mr. Hauer's chart as adjusted for the excluded property Ms. A. acknowledges.
- [218] Ms. A. will keep the Glen Drive property as her own as part of the equal division of property. Mr. S. is entitled to off-set, from the damages or compensation payable to Ms. A., the value of his half interest in that property, based on the values in Mr. Hauer's chart.
- [219] Ms. A. may enforce the damage award, granted in response to the fraudulent conveyances, against either or both of Mr. S. and Ms. R. She may also enforce the compensation order against Mr. S. However, she must not recover in total more than the amount found to be owing to her to reflect the value of her equal share of the family property.
- [220] On the basis of imputed incomes of \$90,000 for Mr. S. and \$43,012 for Ms. A., Mr. S. will pay Ms. A. \$1,345 per month, and Ms. A. will pay Mr. S. \$655 per month. With a set-off of these amounts under s. 9 of the Child Support Guidelines, Mr. S. will pay Ms. A. \$690 per month.
- [221] Mr. S.'s application for the payment of s. 7 expenses since the separation is dismissed.
- [222] The children's future medical and dental expenses and their expenses for extra-curricular activities as approved, in each case, by Ms. A., will be shared proportionately to the parties' incomes.
- [223] Other expenses will be shared similarly if agreed by Ms. A. and Mr. S. in writing in advance, except that Ms. A. and Mr. S. will alternate in having responsibility for the children's school supplies, Mr. S. in school years beginning in odd years, and Ms. A. in school years beginning in even years.
- [224] Mr. S. will pay lump sum spousal support of \$42,065.

- [225] Ms. A. and Mr. S. will continue to share the responsibility for making decisions about the children's schooling. Each party will have the obligation to advise the other parent of any matters relating to the children's schooling and have an obligation to discuss any significant decisions relating to the children's schooling and try to reach an agreement. If an agreement cannot be reached, the parties will engage a mutually agreed upon trusted third party to assist them in making the decision. If they are not successful in reaching a decision with the aid of the third party, then either party may apply to Court for a judicial determination of the issue.
- [226] Ms. A. will determine which extra-curricular activities the children will participate in, and when. She will consult Mr. S. well in advance of registering them - generally at least four weeks in advance if possible. Mr. S. is also entitled to make recommendations to Ms. A., and to bring activities or concerns to her attention.
- [227] Ms. A. will have responsibility for making decisions about the children's medical, dental, and other health-related treatments, and giving or refusing the necessary consent.
- [228] Ms. A. is to consult Mr. S. about these matters, but will have the final authority to make decisions if she and he cannot agree. Ms. A. is in any event to inform Mr. S. promptly about decisions made and steps taken.
- [229] In making medical or other appointments for the children, Ms. A. will not be limited to days when the children are with her. If an appointment is scheduled during time when the children are with Mr. S., Ms. A. will notify Mr. S. forthwith. If, despite reasonable efforts, it is not possible for Mr. S. to take the child or children to the appointment, he will notify Ms. A. of this within one week of being notified of the appointment. Ms. A. may then reschedule the appointment or opt to take the children to it herself.
- [230] The usual parenting arrangement will be suspended during summer and other school holidays, and will resume after the holiday period as though the holiday period had not taken place.
- [231] School holiday periods will be divided into two equal and unbroken periods. For holiday periods falling in odd years, Mr. S. will notify Ms. A. which of the two periods he chooses, and is to do so in writing at least six months in advance, and is to confirm that Ms. A. has received the notification. For holiday periods falling in even years, Ms. A. is to do likewise.
- [232] During holiday periods, the parent with the children is to make arrangements for the children to speak with reasonable frequency with the other parent by telephone, Skype, or other suitable means.

[233] Each parent is authorized to travel with the children outside the Province or the country without the consent of the other parent. However, at least two weeks before any such travel, the travelling parent is to give the other parent a written itinerary for the travel, with reasonable detail about the travel arrangements, including accommodation, and contact information, where it is available.

[234] A divorce is granted on the usual terms. The order will refer to the date of the marriage as August 12, 2002.

"The Honourable Madam Justice H. Holmes"

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