
CANADA / JUDGMENT

B.L.S. v. D.J.S.

2021 BCSC 1311

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1311 B.L.S. v. D.J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.L.S. v. D.J.S.,

2021 BCSC 1311

Date: 20210706

Docket: E44629

Registry: New Westminster

Between:

B.L.S.

Claimant

And

D.J.S.

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for B.L.S.:

J.M. Richter

A.M. James

Counsel for D.J.S.:

J. D. Nelson

S.L. Specht

Place and Date of Trial:

New Westminster, B.C.

December 14-18, 2020

June 25, 2021

Place and Date of Judgment:

New Westminster, B.C.

July 6, 2021

Introduction

- [1] These are reasons following the continuation and completion of this trial. In reasons indexed at 2019 BCSC 846 ("Reasons"), I set aside the separation agreement between the parties. I directed that the parties provide further expert evidence which was required on certain financial issues, namely:
- a) the calculation of income available to D.J.S. from 2013 to present, pursuant to the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines];
 - b) the sources of the increase in the post-separation value of the companies owned by D.J.S. ("Companies");
 - c) the sources of funding for certain assets acquired by D.J.S. post-separation; and
 - d) the income taxes that would be incurred upon payment of funds from the Companies.
- [2] Mr. Mynett, who was a joint accountant and business valuation expert at the original trial, was retained again as a joint expert for the financial issues. He has provided four expert reports corresponding to the above issues.
- [3] In the Reasons, I allowed the respondent to amend his counterclaim to plead s. 95 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] on the basis of two allegations that had already been addressed in evidence. Those were that the parties' 20-year relationship began and ended prior to the FLA coming into force, and the parties lived separate financial lives.
- [4] I will use the same abbreviations as those in the Reasons, and to avoid repetition, will assume that anyone who is interested in reading this decision will have read the Reasons. Since the Reasons, two of the four Companies owned by D.J.S. have been dissolved. The assets within the two remaining Companies are now investments. When I refer to the Companies, I am referring to those Companies in existence at the relevant time.

- [5] I will review Mr. Mynett's expert evidence and determine the issues arising from that, and then address the remaining issues of property division and spousal support.

Mr. Mynett's evidence

Income available to D.J.S.

- [6] At the original trial, the parties provided expert evidence from Mr. Mynett of D.J.S.' Guidelines income, but only for the years from 2010 to 2012. Due to the complexity of the accounting, expert evidence was required to make the calculations. There was no expert accounting evidence for the six years from 2013 up to the date of trial. The first of Mr. Mynett's four new reports addresses this.
- [7] I pause here, and will do so at other places in this decision, to describe the state of the financial evidence at the original trial. It provides background as to why the four expert reports were necessary. At this juncture, I will describe the evidence concerning D.J.S.' income. As noted above, none of the expert evidence required was provided. The income statements and balance sheets of the Companies up to 2017 were in evidence, but not the corporate tax returns. D.J.S. testified regarding his line 150 income as recorded in his personal tax returns up to 2017, which were in evidence. In the Reasons at paragraph 319, I noted that D.J.S. drew moderate income and dividends: \$174,000 in 2013; \$136,000 in 2014; \$8,000 in 2015; \$43,000 in 2016; and \$64,000 in 2017. As shown on his personal tax returns, most of his income for 2016 and 2017 was from taxable dividends from one of the Companies (\$30,000 and \$45,000 respectively). D.J.S. testified regarding inter-Company dividends, but did not testify regarding any dividends paid to him except for a \$41,761 capital dividend in 2012. His two F8 financial disclosure statements sworn in 2014 and 2018 calculate Guidelines income as being approximately \$132,000 and \$165,000 respectively. They do not disclose the amounts of capital dividends he received, although his 2018 F8 referred to a one-time removal of a capital dividend (amount not identified) from one of the Companies and placed in a Coast Capital Savings account, and the F8 shows two new \$500,000 GICs held at that institution.
- [8] In Mr. Mynett's further Guidelines calculation report, he opines that subject to certain assumptions and qualifications, the income available to D.J.S. from all sources (e.g. employment income, pre-tax Companies' income, dividends, and other investment income) from 2013 to 2019 was as follows:

a)

2013

\$1,571,000

b)

2014

\$2,003,000

c)

2015

\$333,000

d)

2016

\$71,000

e)

2017

\$258,000

f)

2018

\$1,785,000

g)

2019

\$813,000

Total:

\$6,834,000

Average:

\$976,000 per year

[9] The above amounts include dividends received by D.J.S. through the Companies. Mr. Mynett's new report shows that between 2012 and March 2020, D.J.S. received \$4,539,031 in dividends from one of the Companies. Of this amount, \$41,761 was received as a capital dividend in 2012 and was included in Mr. Mynett's previous report filed at the original trial, and \$3,070,000 was received as capital dividends between 2013 and 2017. Capital dividends are not taxable when received and therefore are not reported in an individual's personal tax return. D.J.S.' 2014 F8 did not disclose a \$300,000 capital dividend paid to him nine months earlier, nor did his 2018 F8 specifically disclose a \$2 million capital dividend paid to him three months earlier, although as noted above, it referenced taking a capital dividend and investing it at Coast Capital Savings. Only a few pages of D.J.S.' bank statements were in evidence, and they did not show the flow of millions of dollars of dividends into his bank account. Except for the \$30,000 and \$45,000 taxable dividends paid to D.J.S. from one of the

Companies in 2016 and 2017, the remaining approximately \$1.35 million in dividends, which are taxable, were declared following the original trial.

- [10] I do not point to this to question what led to this state of the evidence. Both parties may have explanations for what took place. What is important is that this was the state of the evidence that led to a need for further reports. I restricted the further evidence at the continuation of the trial to the expert reports needed to make sense of the financial records and, given the length of time since the original trial, any updated financial information. With the expert assistance of Mr. Mynett, and production of further records to him, one can go back through the financial records and understand what took place. At the original trial, there was evidence of D.J.S.' financial position in 2012, and incomplete evidence of his financial position in 2018, and either none or at best opaque evidence of important financial events that took place in between. Mr. Mynett's reports now provide that evidence.
- [11] The above amounts calculated by Mr. Mynett do not include the tax-free benefit of the capital dividends. Mr. Mynett calculated that benefit, which represents the tax savings. If the capital dividends had instead been received as eligible dividends (which are taxable, but at a lower rate than employment income), the benefit between 2013 and 2017 would be \$880,000. Alternatively, if the capital dividends had instead been received as employment income, the tax-free benefit for the same time period would be \$1,407,000.
- [12] I will return to the capital dividends later in this decision. The capital dividends D.J.S. has already received, and the remaining capital dividend "pool" (also referred to as a capital dividend account) that still exists within the Companies, are important. The capital dividends received to date have affected the overall tax rate D.J.S. has paid from separation to the present, and will affect his tax rate in the future.
- [13] Mr. Mynett made the above calculations on a retroactive basis. As a result, he included income even if non-recurring or reinvested. The accuracy of Mr. Mynett's calculations is not in issue. The issue is whether the fairest determination is to include all of this calculated income as Guidelines income for the purpose of spousal support. On this point, the parties submit that the court should not do so, and I agree. The reasons are discussed below.
- [14] The relevant provisions for determining income are set out in ss. 16 to 20 of the Guidelines. Pursuant to s. 16, the calculation commences with total income from line 150 of a spouse's personal tax return and is adjusted in accordance with Schedule III: *Brown v. Brown*, 2014 BCCA 152 [Brown] at para. 16; *Vincent v. Vincent*, 2012 BCCA 186 [Vincent] at para. 35. The court must then consider if the circumstances in ss. 17 to 20 are present and whether there should be an adjustment to arrive at the fairest determination of income available for support.
- [15] In this case, the relevant Guidelines are:

- s. 17(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
 - s. 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
 - (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or .
 - s. 19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
 - (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax
- [16] The Companies are family property. Collectively, the Companies' two main assets were the book of business of the operating Company, and investments held within the Companies. The Companies had two sources of income: active business income ("ABI") from management and consulting services provided by D.J.S. until February 2014 when the book of business was sold; and investment income ("Investment Income") from market increases in the Companies' investments and income earned on those investments. I will discuss the specific amounts of these two sources of income below, but for now, it is sufficient to say that the vast majority of the income came from the Investment Income and not ABI. The Investment Income retained within the Companies has increased their value. If the current value of the Companies is included as family property, the post-separation retained Investment Income that led to the increase in that value cannot also be included as Guidelines income as that would result in double-counting of property and income.
- [17] A significant portion of the Investment Income was non-recurring. In early 2014, the book of business of the operating Company was sold, a one-time event, and D.J.S. retired. D.J.S.' share of this gain through his Companies' ownership was \$1,122,312 (App. A, Ex. 46). After the payout of that sale was completed over three years to 2017, the source of all of D.J.S.' income has been from market gains and other income from investments held within and outside the Companies. A significant portion of that income was non-recurring from a large windfall gain (over \$3.6 million - App. A, Ex. 46) from the increase in the value of Avigilon shares. All of those shares have now been sold.

- [18] Although there were large sums of Investment Income, the vast majority of these funds were not spent by the Companies or D.J.S., but were instead retained within or moved down the chain of Companies and reinvested there. Or, if the funds were paid to D.J.S. (in the form of dividends), they were reinvested by him in other investments or used to purchase property, which now form part of the claim for division of property as being derived from family property. To the extent the Investment Income was reinvested within the Companies, it was not "available" to D.J.S.: s. 18; *Kowalewich v. Kowalewich*, 2001 BCCA 450; and *Hausmann v. Klukas*, 2009 BCCA 32. To the extent this was exchanging one form of capital for another, it was a return of capital rather than a return on capital, the former of which is often excluded from Guidelines income even if the return is in the form of a dividend: s. 17(1) and s. 19(1) (h); *Brown; Dunnett v. Dunnett*, 2018 BCCA 262; and *Vincent*. The payment of capital dividends to D.J.S., which were then reinvested in property outside the Companies, was moving property from one pocket to the other. To the extent the new property was derived from family property (e.g. from capital dividends which directly decreased the value of the Companies), they are family property: s. 84(1)(b) of the FLA.
- [19] If this large amount of potentially available Investment Income had not been reinvested within the Companies or by D.J.S., and instead spent by him and a portion paid out to B.L.S. in the form of spousal support (no spousal support has been paid to date), the value of the Companies would be a fraction of their current value. B.L.S. claims a division of the current value of the Companies.
- [20] To the extent that D.J.S. received capital dividends tax-free and those funds have now been invested in property which forms the basis of the family property claim, the tax-free benefit should not be included as income. B.L.S. will share in that tax benefit (because there were more funds to invest) when that property is divided.
- [21] While both parties have proposed slightly different amounts for Guidelines income, they do share the same general approach. That is, on the facts of this case, the Investment Income which has been reinvested within the Companies and caused the fair market value ("FMV") of the Companies to increase, and the dividends arising from Investment income and paid to D.J.S. and reinvested by him in property outside the Companies, should not be included in Guidelines income, but should be divided as family property. For the reasons above, I agree. In trying to untangle 10 years of financial events, both parties have started with the current assets. Mr. Mynett has calculated the ABI in the operating Company. In addition, D.J.S. received employment income. Any remaining income is Investment Income. The parties have used the ABI and/or D.J.S.' employment income as the starting point for Guidelines income. This reflects income as a result of D.J.S.' employment efforts. The Investment Income is primarily reflected in market increases of family property which will be divided. I find that this is the approach that most fairly reflects the income available to D.J.S. for support.

- [22] While one of the starting points for Guidelines income is the ABI, the parties disagree: (a) whether there is any entitlement to spousal support; and (b) if there is entitlement, the amount of the ABI. I will address entitlement later in these reasons. The circumstances leading to the dispute regarding the amount of ABI are discussed next, in connection with the second report of Mr. Mynett.

Sources of increase in the post-separation value of the Companies

- [23] Mr. Mynett prepared a report to address how much of the Companies' post-separation value was the result of D.J.S. retaining post-separation ABI in the Companies. This is because there is double-counting between the valuation of the Companies and Guidelines income when post-separation ABI earned within the Companies is kept within the Companies. Post-separation income attributable to D.J.S.' management and consulting efforts should not be double-counted as family property: *Sanai v. Mahmoud*, 2017 BCCA 155 [Sanai] at para. 7. Alternatively, if retained ABI were included in the valuation of the Companies, then it would be necessary to consider whether it would be significantly unfair to equally divide the Companies because after the date of separation, D.J.S. caused a significant increase in the value of Companies beyond market trends by re-investing a significant portion of the post-separation ABI in the Companies: s. 95(2)(f) of the FLA. Given the amounts involved, I find it would be significantly unfair to do so.
- [24] Returning to discuss the state of the evidence at the original trial, there was no expert valuation of the four Companies as of the date of trial. The valuation that was in evidence was from 2012, six years earlier. There was neither financial evidence nor expert evidence calculating how much ABI remained within the Companies and how much was paid out, largely because there was no expert evidence regarding the income, the millions of dollars in dividends paid from 2013 to the date of the trial, or the value of the Companies at the date of trial. A summary of Mr. Mynett's conclusions is as follows.
- [25] D.J.S.' interest in the net after-tax income in the Companies from April 1, 2011 (the date of separation) to March 31, 2020 was \$8,386,689. This income was from two sources: net after-tax ABI of \$1,465,978; and net after-tax Investment Income of \$6,920,711 (a 17.5% to 82.5% split). The \$4,539,031 in dividends were paid from this after-tax income.
- [26] The FMV of D.J.S.' interests in the Companies as of March 31, 2020 was \$6,570,000. The net after-tax increase in the FMV of D.J.S.' interests in the Companies from April 1, 2011 to March 31, 2020 was \$2,462,000 after taking into account the dividends. Mr. Mynett opined that any increase in the value of the Companies arising from the management contributions of D.J.S. can reasonably be measured by the Companies' ABI, whereas increases arising from market forces can reasonably be measured by the Companies' Investment Income. On the assumption that the total dividends paid to D.J.S. were proportionally sourced from after-tax ABI and after-tax Investment Income, Mr. Mynett calculated the amounts and relative percentages of the two sources of the \$2,462,000 increase as follows.

a)

ABI:

\$672,564 (27.5%)

b)

Investment Income:

\$1,780,958 (72.5%)

c)

rounding adjustments:

\$8,478

[27] The resulting relative percentages of the sources of the increase in value are different than the relative percentages of ABI to Investment Income because of other accounting adjustments which had to be made.

[28] Mr. Mynett testified that the assumption he made regarding dividends being sourced in proportion to ABI versus Investment Income was just that - an assumption. Money is not "painted" as being from one source of funds or another, and there is no correct or incorrect assumption. Other assumptions could be made, for example, that all of the dividends were first paid from ABI, or all were paid from Investment Income, which would result in different figures. In parts of his working file which were in evidence, Mr. Mynett illustrated this. I will return to this assumption below in connection with one of the disputes regarding the amount of retained ABI.

[29] Mr. Mynett's report provides three key pieces of information. First, he provides the FMV of the Companies as of March 31, 2020 for the purpose of property division. Second, his conclusion that the after-tax ABI is \$1,465,978 provides one component of determining D.J.S.' post-separation Guidelines income. Mr. Mynett's report shows that the income tax paid by the Companies on the above ABI was \$324,474, with the result that D.J.S.' interest in the pre-tax ABI of the Companies was \$1,790,452. Third, on the assumptions Mr. Mynett has made, \$672,564 of the after-tax post-separation ABI remains in the Companies, and should not be double-counted in the value of the Companies. B.L.S. and D.J.S. dispute the \$1,465,978 and \$672,564 figures, and the valuation of the Companies, which I discuss below.

[30] B.L.S. alleges the \$1,465,978 figure should be much lower. ABI represents D.J.S.' management and consulting services in the operating Company. Mr. Mynett assumed that the operating Company's ABI as reported in its corporate tax returns was a reasonable proxy for its ABI calculated for accounting purposes. B.L.S. argues this is not a reasonable assumption because it appears that all of the funds received from 2014 to 2017 from the sale of the book of business (which were paid out over time) were recorded as business income rather than a capital gain from the sale of an asset. After a review of Schedule 7.1 of Mr.

Mynett's report, the 2017 corporate tax returns for the operating Company (now in evidence), and the income statements of the operating Company, I do not come to the same conclusion. For example, in 2017, the financial statements of the operating Company record "other" income of \$52,643, which matches with another ledger which shows this was the amount received from the purchaser of the book of business. Although the \$52,643 is recorded as ABI in Schedule 7 of the corporate tax return, there is also a deduction of \$48,612 on that return, which is stated to be investment income. The result is that Mr. Mynett has included only \$1,808 (after reduction for D.J.S.' 50% interest) in his calculation of ABI for that year, not the larger amount suggested by B.L.S. Further, App. A of Ex. 46 shows that there was a small amount of consulting income that was paid in 2017.

- [31] I have also compared the \$1,465,978 figure with the profitability of the operating Company as recorded on its financial statements from 2010 to 2013, just before the book of business was sold, and subtracted Investment Income. The profitability is consistent with this ABI figure. Moreover, extending B.L.S.' argument, she would deduct D.J.S.' share of proceeds from the sale of the book of business (\$1,122,312) from Mr. Mynett's figure of \$1,465,978, leading to the result that the total ABI for nearly three years was only \$343,666, a figure which is far from the profitability of the operating Company.
- [32] Considering all of the above, I accept Mr. Mynett's assumption that the operating Company's ABI as reported in its corporate tax returns is a reasonable proxy for the ABI calculated for accounting purposes.
- [33] D.J.S. argues his post-separation income should not be limited to \$1,465,978, but should be more because after the book of business was sold in 2014, the three other holding Companies did not "simply manage themselves". He argues he should be credited with an income for his management of the investments in the Companies. This might be a reasonable argument to make had D.J.S. raised this argument at the original trial, but he did not. In an application heard prior to the continuation of this trial, I struck out portions of an amended pleading D.J.S. had filed following the Reasons in which he alleged an unequal division of property based on his management of the investments. This argument had not been raised at the original trial, would re-open the case beyond the narrow scope of expert evidence which I had intended, and would prejudice the claimant who was denied an opportunity for discovery and examination on this issue. The argument D.J.S. makes now is essentially the same argument and I do not permit it for the same reasons. There was no evidence in the original trial that the increase in the market value of the investments was other than passive increases. Further, most of the increase has been from the windfall in the Avigilon shares.
- [34] Many of the Avigilon shares were acquired by the operating Company prior to the separation as payment for services. This was before Avigilon went public. The shares were valued at \$340,001 on the balance sheet, and ultimately were worth many millions of dollars. In addition, the Companies bought Avigilon shares after Avigilon went public and also made a large profit on these purchases. I have concluded that the windfall increase should be

included in the value of the Companies as family property. In *V.B. v. M.B.*, 2017 BCSC 1761, Madam Justice MacNaughton addressed stock options owned by a spouse through employment and in existence at separation, which had a large increase in value after separation. The spouse argued that she earned the large increase in the value by remaining a valued employee, and therefore it would be significantly unfair to equally divide the increased value under s. 95(2)(f) of the FLA. Madam Justice MacNaughton found that the spouse's contribution was nothing beyond just remaining employed, and the windfall increase was the result of market forces over which the spouse had no control. As a result, the Court found it was not significantly unfair to divide the increase equally: paras. 212-215. In my view, similar reasoning applies here. Even if the original shares in Avigilon were a form of payment for services, there is nothing D.J.S. did post-separation to cause the increase in their value.

- [35] Both parties also challenge Mr. Mynett's conclusion that \$672,564 of the after-tax post-separation ABI remains in the Companies. B.L.S. argues that the financial information shows that D.J.S. has spent all of his employment income and the ABI on ordinary living expenses and has actually encroached on Investment Income, so that no ABI remains within the Companies. D.J.S. argues that he should get "full credit" for the total ABI, so that when the court determines the value of the Companies, it should deduct the entire amount of \$1,465,978 to avoid double-counting. This position assumes that D.J.S. has lived only on his employment income. I do not agree with either of these positions.
- [36] Because Mr. Mynett stated that his calculation of \$672,564 was based on an assumption (that dividends were sourced proportionally from ABI and Investment Income), and that other reasonable assumptions could be made, I made another calculation which is based on the approach to determination of income and property described in para. 21 above. If all ABI not spent on ordinary living expenses has been invested in the Companies, the amount of ABI remaining in the Companies should approximate the total employment income plus pre-tax ABI, less the total amount of ordinary living expenses. Since separation, the total pre-tax ABI was \$1,790,452 (App. A, Ex. 46). Employment income in 2011 (pro-rated since separation) was \$97,845, and in 2012 was \$126,213 (from Sch. 2.3 of Mr. Mynett's 2018 Guidelines income report). The total employment income from 2013 to 2019 was \$303,455 (App. A, Ex. 46). The total employment income and pre-tax ABI is \$2,317,965. Based on D.J.S.' three F8 financial statements, I find that D.J.S.' ordinary living expenses have been approximately \$130,000 per year. The total ordinary living expenses have therefore been about \$1,170,000 (\$130,000 per year x 9 years (April 1, 2011 to March 31, 2020)). The difference is \$1,147,965 (\$2,317,965 less \$1,170,000). Using the same overall tax rate within the Companies for the ABI that Mr. Mynett's applied in his report (22%), I calculate the after-tax ABI remaining in the Companies to be \$895,413. This is greater than Mr. Mynett's calculation of \$672,564. To be consistent with the approach taken in para. 21, the fairest determination is to use the \$895,413 figure.

- [37] In summary, I find that the post-separation after-tax ABI earned in the Companies was \$1,465,978 and that \$895,413 in after-tax ABI remains within the Companies and should not be double-counted as family property.
- [38] The valuation date, and hence the value of the Companies is in issue. Mr. Mynett was retained in May 2020, and used the valuation date of March 31, 2020 at the instruction of counsel. This coincides with the fiscal year-end of the two remaining Companies. He said he could have requested updated information as he was preparing the reports, but this would have required interim financial statements and added to the complexity of the calculations.
- [39] The assets within the Companies are now entirely marketable securities and other investments. An updated investment summary shows that as of December 12, 2020, the investments had increased in value by about \$710,000 since March 31, 2020. Because the remaining Companies do not carry on any business and are holding Companies, this is an unrealized capital gain which directly increases the value of the Companies by this amount less the taxes which would be paid and refunded upon realization of that gain. The March 31, 2020 valuation date was just after the onset of the COVID-19 pandemic, and Mr. Mynett testified that there was a decline in the market at that time and a rise in the market since then. D.J.S. wishes to take advantage of this large temporary decline in the market.
- [40] D.J.S. argues that B.L.S. should be restricted to the March 31, 2020 date in valuing the Companies. D.J.S. argues that B.L.S. did not instruct Mr. Mynett to use a different date and she could have done so, or brought an application to have an updated valuation. B.L.S. was being provided with monthly investment account data. On August 12, 2020, Mr. Mynett offered both parties the option of using a different valuation date and neither party asked him to do so. D.J.S. argues it would be unfair to have this information provided at trial without notice. He argues that Mr. Mynett could not do a proper analysis of any change in value without determining the adjusted cost base since the last valuation and accounting for other expenses, gains or losses. D.J.S. argues it is not possible for every asset to be valued at the exact moment of trial, and there would be no purpose in an expert report deadline if reports could be updated. Experts would have to come to court with calculators in hand, and would be providing opinions they would not have time to properly consider. Finally, D.J.S. argues that the potential increase in value is not so significant as to render the reliance on the March 31, 2020 valuation as unfair.
- [41] A court may depart from the trial date as the date of valuation only if it finds significant unfairness under s. 95: *Blair v. Johnson*, 2015 BCSC 761 at paras. 69. This is because a "departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA": *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76. To justify a reapportionment of family property or family debt requires something "objectively unjust, unreasonable, or unfair in some important or substantial sense": *Singh v. Singh*, 2020 BCCA 21 [Singh] at paras. 129-134. It is not always possible to have the most up-to-date information, and in that case, a valuation that is closest to the trial date should be used:

Sanai at para. 16; Namdarpour v. Vahman, 2019 BCCA 153 at paras. 56-69.

- [42] For the following reasons, I find that D.J.S. has not established that it would be significantly unfair to use the trial date as the valuation date.
- [43] I find D.J.S. is not prejudiced by any alleged late notice. The updated value was known to D.J.S. At an earlier trial management conference, because of the uncertainty in the market following the onset of the COVID-19 pandemic, I had ordered that D.J.S. produce monthly investment statements so that up-to-date amounts could be available. Unlike almost all of the other complex accounting calculations that were required, once the Companies had been valued by Mr. Mynett, the increase in the value of the Companies as a result of further unrealized gains in the market value of the securities held by the Companies, was calculable using the formula in Mr. Mynett's report. The adjusted cost base is already included in the unrealized gains up to the March 31, 2020 valuation date, and the further unrealized capital gain after that date, adjusted for taxes, is something I find that D.J.S., who is experienced in financial matters, or his own expert Mr. Bowie, an accountant, could have calculated. Any expenses other than taxes associated with a disposition would be insignificant compared to the amount in issue.
- [44] There is no evidence that B.L.S. agreed to restrict the valuation date to March 31, 2020. It made sense to use this date and to update the valuation as required. These were already complex reports, and it was reasonable to use the most recent year-end date rather than incur further costs of interim financial statements. Mr. Mynett did offer to determine the value on a different date, however, the context of that offer is important. Both parties knew the reports would not be served by the expert report deadline. In an application ruling prior to the continuation of the trial, I found that D.J.S. had not been timely in providing comments on a draft report, which resulted in a delay in finalizing the reports. At a time when B.L.S. was having difficulty getting D.J.S. to provide his comments to Mr. Mynett, it was not practical for B.L.S. to suggest another date, resulting in further delay.
- [45] The Companies are family assets, and B.L.S. is entitled to share in any increase in their value. There is no compelling reason advanced by D.J.S. why he should be able to take advantage of a very steep and temporary decline in the market following the onset of the COVID-19 pandemic, and keep a large increase in value for himself.
- [46] In summary, I accept Mr. Mynett's FMV of the Companies as of March 31, 2020 as being \$6,570,000. As a result, I find the FMV of the Companies as of the date of trial is \$6,570,000 plus the \$710,000 in further unrealized gains since March 31, 2020, less the latent and refundable taxes payable upon realization of those gains. The specific amount of this will be addressed in connection with Mr. Mynett's fourth report.

- [47] Finally, there is one further aspect of the valuation of the Companies (and equally the marketable securities and investment held outside the Companies) which I have considered, and that is the nature and magnitude of nearly all of the family property in this case, and its volatility in value on a daily basis, particularly during the pandemic.
- [48] Orders framed as a percentage division upon a sale, or as an in specie transfer, rather than a dollar compensation figure, may effectively result in parties dividing property based on values that post-date a trial. For example, an order for the sale and equal division of a matrimonial home. In *Berg v. Berg*, 2012 BCCA 92, decided under the former Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], the Court at para. 15 affirmed that "the appropriate time for fixing a valuation date is when one spouse's interest in a family asset is taken away and a compensation order is made".
- [49] An order which is framed as a percentage of the value of the marketable securities on the date a compensating payment is made, would eliminate the risk of any increase or decrease in value and result in the most accurate division. However, in this case, it would come at a significant cost. Given the nature of the assets, there would not be finality. The parties would be engaging in further assessment of value of dozens of securities and possibly requiring further expert evidence of the value of the Companies. I have considered *Gilpin v. Gilpin* (1990), 50 B.C.L.R. (2d) 251 (C.A.), followed in *Akkor v. Roulston*, 2009 BCSC 1584, appeal dismissed, 2010 BCCA 467. In *Gilpin*, the respondent argued that the value of the matrimonial home may have fallen in value since the date of trial. Lambert, J.A. stated he was sympathetic to the submission, but: "Continuing fairness is impossible to achieve. Fairness at a particular point in time is the legislative goal." I conclude that the Companies and other family property should be valued as of the date of trial, and a compensation payment based on those values.

Assets acquired post-separation

- [50] Mr. Mynett prepared a report to address sources of funding for certain assets acquired by D.J.S. post-separation.
- [51] Returning to the evidence at the original trial, there was very little evidence on the source of funds used to purchase post-separation assets owned personally by D.J.S. In examination-in-chief, D.J.S. did not give any specific evidence as to the sources of funds used to purchase assets except for the Sechelt lot and the Sechelt cabin. D.J.S. was asked in examination-in-chief if B.L.S., "in any manner", contributed to the cost of the Sechelt cabin and he said "no", and further testified that B.L.S. did not pay for the Sechelt lot. He did not state where he obtained the funds to pay for these. In cross-examination of D.J.S., it was put to him that, with the exception of his post-separation consulting income, all of his assets came from family property. D.J.S. disagreed and said he had inheritances and continued to earn money from investments. I accepted the inheritances as excluded property, and the Companies which hold the investments are family property. In the Reasons, I identified the Sechelt lot and the Sechelt cabin as assets under dispute. D.J.S. did not challenge B.L.S.' Scott Schedule

handed up in argument, which included all of D.J.S.' assets. I note again that there was no expert evidence or evidence from D.J.S. of the millions of dollars in dividends that he had received, which would have explained the source of funds for the two Sechelt properties at a time when his line 150 income was clearly not enough to fund those expenditures.

- [52] At the request of one or both of the parties, Mr. Mynett's fourth report goes further and addresses not only the Sechelt cabin and Sechelt lot (which has now been sold) plus five other assets, being a small boat (now sold), an RRSP, a car, a TFSA, and a large boat recently purchased by D.J.S. for \$184,000. Mr. Mynett could trace the source of the funds for the Sechelt lot and the Sechelt cabin to a Coast Capital Savings account and large shareholder loans from one of the Companies. The shareholder loans were subsequently paid by the capital dividends. Thus, D.J.S.' evidence at the original trial that B.L.S. did not contribute to the cost of the Sechelt properties is not accurate because the funds came from the capital dividends D.J.S. received, which were derived from the Companies which are family property. Mr. Mynett could trace all of the other assets to the Coast Capital Savings account. Mr. Mynett was not able to identify the source of funds in the account, however, excerpts of the Coast Capital Savings account statements, which are now in evidence, show that the large dividends were deposited to that account.
- [53] Mr. Mynett also provided the parties with a letter on December 9, 2020 regarding the sources of the remaining investments listed on D.J.S.' 2020 F8 financial statement. Mr. Mynett was able to determine that, with the exception of one GIC, the source of funds used to acquire the assets were dividends from one of the Companies. For the one GIC identified, D.J.S. testified he assumed that the GIC or its predecessor was sourced from the \$2 million capital dividend in 2018.
- [54] Based on the above, I find that the financial information that has now been provided shows that, with the exception of the excluded inheritance, all of D.J.S.' current assets held outside the Companies are derived from family property.
- [55] I pause here to return to one of D.J.S.' arguments relating to income. D.J.S. argued that to the extent his post-separation employment income or the ABI purchased an asset, it is not, or is only proportionately, family property: *Sanai* at para. 7; *K.P.B. v. K.E.*, 2019 BCCA 152 at paras. 41-42. However, D.J.S. had also argued that the full amount of the ABI remained within the Companies and should be deducted from the value of the Companies. The two positions are inconsistent. If all of the ABI (not used for ordinary living expenses) remains in the Companies, then it cannot also have been used to purchase the post-separation acquired assets owned personally by D.J.S. As indicated above, the post-separation ABI remaining within the Companies will be deducted to avoid double counting of income and property.

Distributive income taxes

- [56] Corporate and distributive tax consequences of a sale of an asset must be considered when there is appropriate evidence and the taxes are not speculative: Sanai at paras. 31-33; Baryla v. Baryla, 2019 BCCA 22 at paras. 36-39. In addition, assets held within a corporation are not necessarily the same in value as assets held outside of a corporation. Some assets have inherent tax liabilities and taking taxes into account ensures assets are put on the same footing and the court is comparing apples to apples when dividing family property: Sanai at para. 28. Alternatively, if taxes are not taken into account at the stage of valuing the assets, s. 95(2)(h) provides that tax consequences of a sale or transfer may be a factor to consider in determining whether an equal division of family property would be significantly unfair. In my view, given the amounts in issue, it would be significantly unfair not to consider the inherent tax liabilities, and the tax consequences of any disposition of family property.
- [57] At the original trial, neither party filed an expert tax opinion. Both parties acknowledged the need for expert tax opinion given the lack of evidence about the accrued or potential tax implications or the mechanisms for removing the money from the Companies.
- [58] Mr. Mynett prepared a report to address the corporate and personal income taxes that would be incurred in the event that D.J.S. is required to withdraw funds from the Companies in order to make a compensation payment. These involved different types of dividend "pools". The same information is also needed to ensure that even if funds are not withdrawn immediately for a compensation payment, the difference between investments inside and outside of the Companies, as a result of the inherent tax liabilities, is recognized.
- [59] Mr. Mynett opines that using the March 31, 2020 valuation, the funds that would be available for distribution (before taxes) from the Companies if they are liquidated entirely is \$7,196,263. For two reasons, this is \$626,263 more than the \$6,570,000 FMV of the Companies. First, upon sale of the marketable securities and declaration of dividends within the Companies, refundable taxes will be created, the benefit of which is only available to D.J.S. as a shareholder. Second, one of the Companies owes D.J.S. a shareholder loan valued at \$217,695. Both the refundable taxes and the shareholder loan must be taken into account. Neither party suggested the shareholder loan is not family property, and so I have not addressed it separately as Mr. Mynett has already taken it into account.
- [60] Mr. Mynett opines that upon an immediate liquidation of the Companies, the tax that would be payable by D.J.S. is \$2,276,623. The amount available for distribution from the Companies, net of tax, would be \$4,919,640.
- [61] There are three "pools", all of which have different tax consequences. A pool is not an asset, but a notional accounting record. The existing pools are:

a)

Tax-free (capital) pool of \$2,029,720 at 0% tax rate:

\$0

b)

Eligible pool of \$2,018,623 at 36.54% tax rate:

\$737,605

c)

Other-than-eligible pool of \$3,147,920 at 48.89% tax rate:

\$1,539,018

Total eligible for distribution:

\$7,196,263

Total taxes payable:

\$2,276,623

Net available:

\$4,919,640

[62] The combined overall tax rate is 31.64%. The accuracy of Mr. Mynett's calculations is not disputed. However, his calculations are based on two key assumptions: a complete liquidation at this time which would eliminate all of the dividend pools; and D.J.S. being taxed at the highest marginal rates. Mr. Mynett opined that if D.J.S. is not required to liquidate and withdraw the entire funds within the Companies to make a compensation payment, D.J.S. will receive a financial benefit because he will not incur personal taxes until the remaining funds are actually withdrawn. This recognizes both the time value of money, and the ability to withdraw money in annual amounts that do not reach the top marginal tax rates. These assumptions and facts are the basis of the disputes concerning this report.

[63] B.L.S. argues that historically, D.J.S. has not paid a 31.64% tax rate. As D.J.S. has so far received most of his income as tax-free capital dividends, his net tax rate from all dividends received over the past nine years has been 11.5%. B.L.S. argues that the court should find a future tax rate of 11.5%. B.L.S. argues that because she is not a shareholder of the Companies, she will not enjoy the same benefits as D.J.S. Mr. Mynett investigated the possibility of the parties doing a "butterfly transaction" to enable the Companies to transfer assets into a new company owned by B.L.S. to defer taxes, but the parties have concluded this is not feasible.

[64] D.J.S. argues that B.L.S. should not have any of the benefit of the tax-free dividend pool, and that a tax rate higher than 31.64% should be found. D.J.S. proposes a tax rate of 36.54% to 48.89%, which is the tax rate for the eligible and other-than-eligible pools, again assuming D.J.S. is at the highest marginal tax rate. D.J.S. argues that the capital dividend pool is large

because D.J.S.' business partner in the former operating Company is a U.S. citizen. The business partner could not use the capital dividend account, so D.J.S. has been able to use it, increasing the tax-free pool available to him by about \$2 million. D.J.S. argues this is not family property, but a benefit conferred on him by a third party. I do not agree. D.J.S.' interest in the operating Company is family property, and that interest includes the benefit arising from the corporate structure and the partner being American. This was not a gift to D.J.S.

- [65] The fairest tax rate to use is that which likely will be incurred by D.J.S. in the future. D.J.S. has so far been able to incur a low tax rate for two reasons: use of the capital dividend account; and withdrawal of funds in amounts that do not attract the highest marginal tax rates. I find that D.J.S. will not be required to liquidate the entirety of the Companies to make a compensation payment and that, for the future, D.J.S. will continue to control distributions from the Companies so that he does not reach the highest marginal tax rates. As noted previously, D.J.S. spends about \$130,000 per year on ordinary living expenses, although since separation, he has made additional large expenditures such as building the Sechelt cabin and purchasing a large boat. Mr. Mynett did not provide tax rates for eligible and other-than-eligible dividends for lower tax brackets, but they are legislated. For income in the \$130,000 range, the tax rates are 18.88% and 34.17% respectively. Applying those figures to the calculations at paragraph 3.02 of Mr. Mynett's report results in a combined overall rate of 20%. For income in the \$200,000 range, the tax rates are 26.22% and 40.29%. Again, applying those figures to paragraph 3.02 results in a combined overall rate of 25%. Accounting for both scenarios, in my view, the fairest tax rate is in the middle, being 22.5%, which allows for the possibility of greater income in some years to make larger purchases outside of ordinary living expenses.
- [66] The \$710,000 unrealized capital gain must also be taken into account. I have calculated the resulting net increase in funds available for distribution. I am able to do this because Mr. Mynett had to take into account an already existing unrealized capital gain for his March 31, 2020 valuation, and the formula for calculating the taxes and refundable taxes is in his report. In note 9 to Sch. 3.1 of his report, Mr. Mynett helpfully explains how he calculated the latent and refundable taxes and the changes that would be made to the different pools. The notes to Sch. 3.2 provide further information. In testimony, Mr. Mynett was taken through the adjustments to Sch. 3.2 that would be necessary as a result of the \$710,000 unrealized capital gain, and it follows the same methodology as indicated in the notes. I have followed the same methodology to determine the actual amount that will be received upon disposition for the further unrealized capital gains of \$710,000. This further gain results in latent taxes of \$179,879 ($\$710,000 \times 50\% \times 50.67\%$), and refundable taxes within the Company of \$108,879 ($\$355,000 \times .3067$) for total net taxes of \$71,000 within the Company, and a net gain of proceeds available for distribution of \$639,000. The capital dividend account will increase by \$355,000 ($\$710,000 \times 50\%$) and can be paid as capital dividends to D.J.S. tax-free. I have assumed that the remaining \$284,000 ($\$639,000 - \$355,000$) will be paid as other-than-eligible dividends rather than eligible dividends. The final result is that the

total net proceeds including the \$710,000 increase in unrealized capital gains, which is available for distribution to D.J.S., increases to \$7,835,263 before taking into account the taxes D.J.S. will pay on its distribution. The \$355,000 increase in the capital dividend account also would slightly decrease the overall net tax rate that would be payable by D.J.S., but I have made the calculation and it is insignificant.

- [67] Other than the above adjustment to Mr. Mynett's figures, I accept Mr. Mynett's calculations and methodology. In summary, I find that upon liquidation of the Companies, there will be \$7,835,263 available for distribution to D.J.S. before deduction for any personal distributive taxes. This amount is the FMV of the Companies as of December 12, 2020 plus the refundable taxes and the shareholder loan which will be paid to D.J.S. From this amount, the \$895,413 in ABI remaining within the Companies must be deducted, for a net amount of \$6,939,850. The personal distributive taxes to be deducted from the \$6,939,850 is 22.5%, resulting in a net amount of \$5,378,384.

Division of Family Property

Positions of Parties

- [68] The arguments of the parties focused on two main issues: whether and to what extent the court should consider that the parties' relationship ended prior to the FLA coming into force and the parties had separation of finances; and whether there should be equal or unequal division.
- [69] Section 81 of the FLA provides that upon separation, each spouse is presumptively entitled to an undivided half-interest in all family property, "regardless of their respective use or contribution".
- [70] Pursuant to s. 95 of the FLA, the court may order unequal division if it would be "significantly unfair" to divide equally. The relevant portions of s. 95 are:
- s. 95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to
 - (a) equally divide family property or family debt, or both,
 - (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;

- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[71] I have already considered the circumstances of (f) and (h) when valuing the family property so those do not need to be considered at this stage. There are a number of previous case authorities which have considered marriage-like relationships that began or ended prior to the FLA coming into force and where the parties had a separation of finances. The courts in those cases have considered these to be relevant factors under s. 95.

[72] B.L.S. argues that: those previous case authorities are "stale" and have been "supplanted" by two Court of Appeal cases (*Newton v. Couch*, 2016 BCCA 115 [Newton] and *Matteucci v. Greenberg*, 2016 BCCA 116 [Matteucci]); two other Court of Appeal cases (*Jaszczewska v. Kostanski*, 2016 BCCA 286 [Jaszczewska] and *Singh*) narrow the scope of s. 95(2)(i) to economic characteristics of a spousal relationship; the fact that a relationship began and ended prior to the FLA is not an economic characteristic; the first two of the previous Supreme Court decisions which considered these factors (*Bressette v. Henderson*, 2013 BCSC 1661 [Bressette] and *P.N.K. v. C.L.*, 2013 BCSC 1856 [P.N.K.]) involved self-represented litigants where the Court did not receive full argument; and subsequent Supreme Court cases have followed these cases without referring to *Newton* and/or *Matteucci*, and therefore, these cases need not be followed under the principles in *Re Hansard Spruce Mills*, [1954] B.C.J. No. 136 (S.C.). B.L.S. argues that importing pre-FLA legal principles into s. 95 defeats the remedial nature of the FLA. The FLA applies to the parties, and the court cannot "half apply" the FLA when it comes to division of property.

[73] B.L.S. argues there should be equal division, and that doing so would not be significantly unfair, stressing the 20-year relationship between the parties and the presumption that the longer a relationship, the more financially intertwined the parties and the more the expectation of an equal standard of living upon dissolution of the relationship.

[74] D.J.S. argues that: the fact that the parties began and ended their relationship prior to the FLA and had separation of finances are factors that the court can and should take into account for unequal division; the previous Supreme Court case authorities should be followed and none of the Court of Appeal decisions cast doubt on those decisions; some of the Supreme Court decisions were decided after the Court of Appeal decisions; *Jaszczewska* confirms that these are factors to be considered; *Newton* and *Matteucci* consider who can claim property division, not how property is to be divided; and finally, these are economic characteristics of a spousal relationship within the scope of s. 95(2)(i) as discussed in *Singh*.

[75] D.J.S. argues that equal division would be significantly unfair, stressing the pre-FLA legal situation and the parties' separation of finances, and the expectations that flow from that, and that B.L.S. did not contribute to the Companies. D.J.S. argues the parties should be placed in the position that reflects how they lived their lives and as reflected in the claimant's initial May 11, 2012 offer letter prior to the separation agreement which has now been set aside.

Legal Principles

[76] I will review the case authorities referred to by the parties.

[77] In Bressette, the parties' relationship ended before the FLA came into force. The claimant was self-represented at trial. Griffin J. (as she then was) declined to decide whether the FLA applied as she did not have the benefit of full argument: paras. 130-131. The case was decided on unjust enrichment principles, but Griffin J. stated, if the FLA did apply, she would be required to consider s. 95. She referred to the "legitimate expectations" of the parties and found:

[134] it would be "significantly unfair" to reach a different result than that based on the unjust enrichment remedy, given that the common-law remedy is based on fairness and the legitimate expectations of the parties. Here the parties never considered or expected that there would be a new statutory regime applicable to the relationship during the course of the relationship.

[137] The fact is that neither party had the option of changing the relationship or reaching an agreement that would take into account the new statutory regime, the FLA, because their relationship had run its course before the new regime was brought into force.

[78] In P.N.K., the parties' 20-year relationship ended prior to the FLA coming into force, and again one of the parties was self-represented. At trial, the claimant applied to amend to plead the FLA. Mr. Justice Punnett dismissed that application: paras. 43-57. He then considered the unjust enrichment claim and dismissed it. He found that the parties had "an explicit agreement that they would remain financially separate", and in those circumstances, the claimant could not have "an expectation of sharing in the economic fruits of the relationship": para. 63. In the alternative, Punnett J. went on to consider the claim under the FLA. He also declined to determine whether the FLA applied (para. 84), but stated he would have come to the same conclusion and dismissed the claim. He noted the legislature intended s. 92 to permit oral agreements between the parties, and this was a factor to be considered under s. 95(2)(b) for unequal division.

[79] In Walburger v. Lindsay, 2015 BCSC 341 [Walburger], the parties' eight-year relationship ended before the FLA came into force. The parties agreed the property division issues were to be determined under the FLA. The respondent argued that a factor to be considered under s. 95(2)(i) is that the parties lived their entire relationship before the FLA was in force, when only equitable principles governed property division. Madam Justice Fitzpatrick noted

that the parties "would have anticipated that any determination of the property issues arising upon their separation would have to be determined in light of those same factors": para. 95. The parties had separate assets and debts and "organized their lives under separate property and financial regimes": para. 96. Fitzpatrick J. stated:

- [98] The fact of the matter is that the parties have now qualified to resolve their property claims under the FLA and both agree that this regime applies. However, in these unique circumstances, it remains a relevant consideration within the "significant unfairness" analysis that this relationship began and ended with this "pre-FLA" mindset, which again would have been indicative of the legitimate expectations of the parties.
- [80] In *Hamill v. Dunlop*, 2016 BCSC 1337, the parties were in marriage-like relationship that ended prior to the FLA coming into force. Madam Justice Young found the FLA applied. She reviewed the pre-FLA cases on significant unfairness. With respect to *Bressette*, she concluded that it does not stand for the proposition that the FLA requires the same analysis that the Court used in constructive trust claims:
- [134] The FLA uses the language of "unfairness", but the analysis under the FLA is quite different than constructive trust analysis. On the case before me, it is quite possible that a different result would be reached under constructive trust principles, which focus heavily on contribution. Given the presumptive language of s. 81 and the fact that the factors enumerated under s. 95 do not invite a detailed analysis of contribution, I find that direct or indirect contribution to the pension itself is not a requirement for division of a spouse's employment pension.
- [81] *Parton v. Parton*, 2016 BCSC 1528, (appeal allowed in part on other grounds, 2018 BCCA 273) the parties had a 33-year marriage, so this is not a case of unmarried spouses. However, in addressing one of the parties' arguments regarding expectations concerning the succession of a family business and how it should be divided. Butler J. (as he then was) stated:
- [68] The respondent relies on three cases in support of his argument that reasonable and legitimate expectations are relevant to a consideration as to whether equal division would be significantly unfair: *Walburger v. Lindsay*, 2015 BCSC 341; *Kuhberg v. Hall*, 2015 BCSC 2230; and *Bressette v. Henderson*, 2013 BCSC 1661. All three are distinguishable. All three involved short common law relationships. In each case, the relationship ended prior to the coming into force of the FLA. Accordingly, property division between the spouses would have been determined under constructive trust and unjust enrichment principles, but for the new legislation. In those circumstances, the courts looked at what the parties' expectations would have been with regard to property division. In *Bressette*, Griffin J. described her concern with legitimate expectations at para 134 .
- [82] In *J.C. v. A.W.*, 2016 BCSC 1012 [J.C.], the parties had a 30-year relationship with a separation of some years in the middle where they settled some property issues, and with the last separation prior to the FLA coming into force. Mr. Justice Bracken found that the facts in the case were similar to those found in *Bressette* where the parties "operated under two

property regimes" where they shared their home and certain other assets, but otherwise had separate and independent finances: paras. 101-102. He found that the parties had agreed to keep their personal financial assets separate: para. 103. He concluded:

- [130] In summary, I find that the parties have reached agreement on the family property they shared and have divided their furniture and automobiles in accordance with that agreement, and by the claimant selling his interest in the Cardiff Place property to the respondent for \$512,000. They kept the remainder of their financial assets separate by choice. The claimant made it clear at the outset of their relationship that he did not want to be married as a result of his past experiences in settling an earlier dissolution of a marriage. The respondent accepted that and throughout their relationship, they each maintained full autonomy over their own financial assets. There is no evidence of any discussion or expectation of a division of any other assets of either of the parties at the time of separation.
- [83] In Newton, the Court of Appeal defined the issues as follows:
- [2] The appeal raises the question of whether Part 5 of the FLA applies to unmarried partners who separated before the FLA came into force. Mr. Newton (the "Appellant") argues that such an interpretation results in a retroactive or retrospective application, interferes with vested rights, and that the Legislature could not have intended such a result.
- [84] After finding that the FLA does not operate retroactively, the Court stated:
- [73] the question becomes is it unfair or so unexpected, or contrary to the rule of law, to apply Part 5 of the FLA to parties who separated prior to its enactment but otherwise meet the [A]ct's requirements? In my view it is not.
- [85] The Court then addressed the appellant's argument that the FLA interfered with a vested right not to be subject to a different property regime. The Court rejected that argument, concluding:
- [79] In any event, in my view unmarried persons such as the Appellant did not have a vested right to statutory indifference. Merely because status, with respect to the prospective determination of rights is ascertained at a time preceding the passage of the enactment, is not an interference with vested rights.
- [86] Similarly, in Matteucci, the Court of Appeal defined the issues as:
- [1] This proceeding considers the application of the Family Law Act, S.B.C. 2011, c. 25 [FLA], to marriage-like relationships that ended prior to the Act coming into force. In particular, the definition of "spouse" in s. 1 and its application in s. 3, the rights conferred by s. 104 and s. 160-162, and the time limits and transitional provisions contained in s. 198 and s. 252 respectively are examined.

- [87] The Court in Matteucci found that "the FLA defining provisions are attaching new consequences for the future, as of the date of passage of the statutory provision, with respect to a state of affairs that existed in the past": para. 46. Further, that the "legislation here manifests an intention to treat all spouses, whether married or unmarried, the same (except in specified circumstances) rather than to allow the parties to choose their legal entitlement based on marital status": para. 59. As for the argument that the FLA was interfering with a vested right, the Court stated:
- [60] I also disagree with the assertion that the right to choose whether to marry, and therefore be exempt from an equal property division, is a vested right. Although the FRA provided for equal property division for married spouses, the Act was silent as to property division for unmarried parties without a separation agreement. Mr. Matteucci may have expected that by choosing not to marry he would not be subject to equal property division (although there is no evidence of that); however, no statute conferred on him such a right.
- [88] In Jaszczewska, the parties had a 10-year relationship that began and ended before the FLA came into force. At the Supreme Court (reasons indexed at 2015 BCSC 727), the trial judge stated:
- [173] The fact that the FLA came into force after the end of the parties' relationship is not, in my view, entitled to much weight in the circumstances prevailing here, if it is a factor to be taken into account at all. There is no evidence that these parties turned their minds to the differences between the property law regime that would govern the breakdown of their relationship depending on whether they lived "common law" or got married. In fact they became engaged to be married in 2006 and Mr. K urged Ms. J to marry him in 2012 when the parties were trying to reconcile. There is no evidence that they did not marry because one or both did not want family law legislation to apply in the event their relationship came to an end; or that they relied on their understanding of any differences between the different legal regimes applicable to legal marriages and common law unions when arranging their financial affairs.
- [89] On appeal, the Court considered "whether and how a court should take into account the parties' respective contributions to the value of family property" under s. 95: para. 1. The fact that the parties' relationship began and ended prior to the FLA was not an issue on appeal: para. 26. The Court stated the "Legislature intended to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions": para. 38. The statutory intent was to "constrain the exercise of judicial discretion": para. 41. The Court adopted the observations of Butler J. (as he then was) regarding the meaning of "significant" unfairness in *Remmen v. Remmen*, 2014 BCSC 1552, that to justify unequal distribution, the unfairness must be "compelling or meaningful having regard to the factors set out in s. 95(2): para. 41. Reapportionment requires "something objectively unjust, unreasonable or unfair in some important or substantial sense": para. 42.

- [90] The Court concluded that "if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so": para. 43. However, the Legislature "did not eliminate the discretion" in s. 95, and the FLA did not abolish "unequal contribution" as a factor, although "the circumstances in which it may be considered and relied on are intended to be much constrained": para. 44.
- [91] In *A.J.E.*, the parties were in a three-year relationship spanning the time when the FLA came into force. Mr. Justice Milman ordered unequal division. One of the factors identified was that the relationship began prior to the FLA. Milman J. found that the parties "had no reason to expect that by entering into a marriage-like relationship without getting married, they would later be deemed to have taken on the same obligations as if they had formally married": para. 169. One of the parties did not want to marry in part because of this, and the other party understood that. Because the relationship ended after the FLA was in force, he noted that "what ought to matter is what the parties understood about their obligations when they took them on, which is at the outset of the relationship rather than its end": para. 170.
- [92] In *Dennis v. Gill*, 2018 BCSC 1533 [Dennis], Mr. Justice Brundrett followed Walburger in the case of 17-year relationship. The Court considered that the parties' relationship began before the FLA and ended just one year after the FLA came into effect. The claimant had relied on pre-FLA law in making decisions about property investments and whether to enter into a cohabitation agreement: para. 107. The respondent made little contribution to the family property and the parties kept their financial affairs largely separate: para. 107. Brundrett J. divided the property 75/25 in favour of the claimant.
- [93] In *Doell v. Prentice*, 2018 BCSC 1115 [Doell], the parties' 23-year relationship ended two years after the FLA came into force. Mr. Justice Kelleher found that there was an oral agreement between the parties that they would keep their finances separate and that the assets of each party would remain with that party: para. 71. He noted that spouses are entitled to make agreements to divide family property and family debts under s. 92. The question of how that agreement was to be treated was to be decided under s. 95, along with the other factors listed such as the length of the parties' relationship: para. 84. In that case, the property was divided 80/20.
- [94] In *Ernst v. Carmichael*, 2019 BCSC 68, the parties had a three-and-a-half year relationship that began and ended prior to the FLA coming into force. One of the factors Mr. Justice Riley considered in deciding that equal division would be significantly unfair was the fact that the relationship began and ended prior to the enactment of the FLA "and the legitimate expectations of the parties arising therefrom": para. 96. More specifically, he later stated:

- [102] Finally, there is the fact that the relationship began and ended prior to the coming into force of the FLA. In that era, individuals in a common law relationship may not have anticipated that if their relationship later broke down, it would be governed by a property division regime which includes presumptive equal splitting of all family property. I find this to be an important consideration, under s. 95(2)(i).
- [95] In *Kondi v. Butler*, 2019 BCSC 620, the parties were married. Madam Justice Marzari referred to P.N.K., J.C. and Bressette amongst other authorities and found that none of these cases establish that simply a practice during marriage of keeping separate finances amounts to an oral agreement for the purpose of s. 92: at paras. 22 and 27.
- [96] In *Singh*, the Court reviewed the meaning of significant unfairness and the scope of s. 95(2)(i), confirming the principles in *Jaszczevska*: para. 134. The Court concluded that s. 95(2)(i) cannot include any factor that may lead to significant unfairness, but is limited to the economic characteristics of the spousal relationship. Economic characteristics is a "broad class, but one that is narrower than the general term in s. 95(2)(i)", and which could include consideration of relative contribution to family property during the relationship as set out in *Jaszczevska*: paras. 138-140.

Analysis

- [97] With that review of the case authorities, I turn now to the analysis of the parties' arguments. The first is whether the four Court of Appeal cases have rendered "stale" or cast doubt on the above Supreme Court decisions. In my view, they do not.
- [98] In *Jaszczevska*, in the Court of Appeal, the fact that the parties' relationship ended prior to the FLA was not an issue on appeal. The Court confirmed that the statutory intent of s. 95 is to limit the court's discretion to depart from equal division.
- [99] *Singh* has limited the scope of s. 95(2)(i) to economic characteristics of the spousal relationship. In my view, the parties living their entire relationship under a different legal regime with specific economic results that could affect their legitimate expectations, is an economic factor. So too is the fact that the parties kept separate finances.
- [100] I agree with D.J.S. that Newton and Matteucci address whether the FLA applies to pre-FLA marriage-like relationships, not to the considerations under s. 95 once the FLA is found to apply.
- [101] B.L.S. argues if it is not unfair to apply the property division provisions of the FLA to pre-FLA unmarried spouses, it is inconsistent to base a finding of significant unfairness upon equal division, on essentially the same grounds; and that importing the past legal effects of a relationship into the significant unfairness analysis defeats the remedial intent of the legislation and the new definition of "spouse". This is the most compelling of B.L.S.' arguments, as it is true that if and to the extent that pre-FLA legal principles are incorporated into s. 95, the remedial intent is defeated. However, in my view, the previous

case authorities do not hold that it is the past legal principles which may be considered in s. 95(2)(i), but the parties' legitimate expectations which is an economic character of their relationship, that may be considered, even if those expectations are a result of that pre-existing law. Those expectations must be assessed and may be given more or less weight, depending on other circumstances of the case.

[102] All of the Supreme Court cases (except *Jaszczevska* which did not make a determination of the issue), considered the fact that the parties lived their entire relationship or began their relationship before the FLA came into force and there was separation of finances, to be a relevant consideration under s. 95. While the comments in *Bressette* and *P.N.K.* were obiter, the reasoning in those cases has been adopted in subsequent cases. A review of the case authorities leads to the following conclusions with respect to pre-FLA marriage-like relationships where the FLA applies:

- a) an oral agreement to keep finances separate may be considered under s. 95(2)(b). There may be an agreement to share some assets and keep other assets separate;
- b) in the absence of an oral agreement, under s. 95(2)(i) the court may consider the economic characteristics of the spousal relationship, which may include legitimate economic expectations of the parties in the context of the pre-FLA legal situation. This would include assessing first the legitimacy and then the strength of those expectations. It may include evidence of how the parties actually arranged their finances, for example whether they shared property despite the existing legal regime or had separation of property and finances. It may include evidence of why the parties chose not to marry if it is related to a desire not to share property, or conversely there may be evidence indicating a plan to marry and share property. It may include evidence of why the parties made certain investment decisions, if it is related to the then existing law;
- c) the above must be considered in the context of all of the other relevant factors in s. 95, for example, the length of the parties' relationship; and
- d) the court may consider contribution to the acquisition, preservation, and maintenance of property, but the court's discretion to do so is much constrained.

[103] I turn to the facts of this case and the relevant factors in s. 95.

s. 95(2)(a)

[104] The parties had a 20-year relationship, which generally weighs in favour of equal division of property, however this is qualified by my findings below.

s. 95(2)(b)

[105] At paras. 69 and 254 of the Reasons, I found that there was no evidence of a specific agreement between the parties to keep finances separate or to share some assets and not others upon a breakdown of the relationship. As a result, I find that s. 95(2)(b) does not apply. However, I also found that there are uncontested facts that support a separation of finances, and that given the law in existence during the entirety of the parties' relationship, it may not be surprising there was not such a conversation.

s. 95(2)(c)

[106] The evidence with respect to the contribution to the career potential of each spouse is described in paras. 39-49 and 296-298 of the Reasons. In summary, both parties had successful careers and worked full-time outside their home throughout the relationship, other than the few years following their daughter's birth and her diagnosis with cancer. Shortly after this diagnosis in 1993, D.J.S. was accepted into the UBC engineering program. D.J.S. was going to quit his studies, but B.L.S. encouraged him to have faith their daughter would recover and to continue his education to advance his career so that, as she put it, when their daughter recovered he would not be working in menial jobs. While D.J.S. studied full-time, B.L.S. stayed with their daughter in the hospital and at home, liaised with health care professionals, and was the primary caregiver for at least two years. During this time, B.L.S. did contract assembly work at home to help support the family. She returned to work outside the home for another year while D.J.S. continued his full-time studies. D.J.S. also worked in the summers and took student loans to support the family. In total, D.J.S. was in full-time studies for 3.5 years during this time. The result was that in December 1996, D.J.S. earned an engineering degree from UBC which increased his earning capacity. I find the degree was a factor in him being able to work in the SRED industry and the wealth he and the Companies subsequently acquired. In my view, this is a factor that weighs in favour of equal division. In saying this, I do not discount the determination and effort of D.J.S. starting from before the parties' relationship began, in working toward higher education, and ultimately in obtaining the degree.

[107] Both parties gave evidence that early on in their relationship, B.L.S. considered a career in nursing. However, my impression is that this was not a plan that had any depth. B.L.S. was successful in her own career in quality assurance and she continued working full-time throughout the remainder of the relationship. There was no evidence that D.J.S. ever asked B.L.S. to change her career.

s. 95(2)(i)

[108] There are two arguments under this subsection: contributions to family property; and legitimate expectations of the parties because the parties lived their entire relationship under the FLA and had separation of finances.

[109] With respect to contributions to family property, B.L.S. had no knowledge of or involvement in the purchase, creation, funding, or operation of the Companies or their predecessors, and knew nothing of their corporate structures. However, B.L.S. had her own

career in which she excelled. There is no evidence D.J.S. directly contributed to her career either. Once their daughter was recovered and older, both parties equally contributed to the household and to the care of their daughter (see para. 70 of the Reasons). This is not a case where one spouse inequitably bore the burden of all work and household tasks: *Khan v. Gilbert*, 2017 BCSC 2060 at para. 32. Both parties worked hard throughout the relationship. The difference was that the Companies ended up being much more lucrative. Considering the whole of the parties' work and home arrangements and their respective contributions to the family unit, I do not find there is any unequal contribution that would rise to the level of significant unfairness, or weighs in the balance at all.

[110] With respect to the expectations of the parties and the separation of finances, the parties' relationship ended two years before the FLA came into force, and during the relationship the parties would not have had reason to expect that a different law would apply. This was not a situation where the parties could have altered their relationship to take into account new law, because the relationship had already ended. During the relationship, B.L.S. had only an unjust enrichment claim for property, which is less valuable than the presumptive one-half interest under the FLA.

[111] The way the parties arranged their financial affairs, at least for their lives outside the home, was consistent with pre-FLA law and a separation of property. The evidence of the parties' financial relationship is described at paras. 61-69 of the Reasons. In summary, both parties said they had separate finances, but what they meant by that is different. The parties have very different views towards money and it was a topic they could not happily discuss. Throughout their relationship, they each contributed to the day-to-day living expenses of their home. In summary, D.J.S. paid the mortgage and capital expenses for their home, and B.L.S. paid all other daily household expenses. However, outside the home, they kept all their personal spending, property and debts separate. They had separate bank accounts, separate investments, separate credit cards, and for the most part were responsible for their own personal debts. For example, D.J.S. paid all of his substantial student loans (about \$80,000) with no contribution from B.L.S. They knew very little of each other's investments or debts, and B.L.S. had almost no knowledge of the Companies, to the extent that she was not even sure if D.J.S. was an employee or owner; nor did she ever risk any of her assets to fund the Companies. They did not have any joint savings or investment accounts. They never created a joint financial plan for the future. As for their expectations, I stated:

[69] B.L.S. characterized the situation as family money and debt. Even though they had separate finances, and she was paying debts here and he was paying debts there, it still affected the family as a whole. She said she didn't have a focus on finances, and "I think that I thought that we were a family, the three of us, and so what's mine is his and what's his is mine." She said they had an agreement that D.J.S. would pay the mortgage and she would pay the household expenses and most of A.S.'s expenses. D.J.S. characterized the situation as an agreement to keep separate financial lives with the basic premise of "I keep mine and you keep yours" and the debts were separate. D.J.S. described it as a "two basket formula". There

was no evidence of a specific discussion between the parties where they reached an agreement to the effect that property and debts in their separate names would not be shared if they separated, or conversely that everything was family property and debts that would be shared. There was no evidence of the amount of the different expenses and whether one party was contributing more than the other.

- [112] The above quote of B.L.S.' evidence is the strongest statement she made on expectations, and she gave little evidence on the topic in comparison to other issues.
- [113] Although there was evidence from D.J.S. that he was unhappy with the relationship early on, and had decided not to leave because he did not want to get into a prolonged custody battle over their daughter, there was no evidence the parties did not marry because either of them did not want to share finances. However, given the state of the law during the relationship, this does not mean that the parties expected to share property.
- [114] In my view, the facts that the parties each had separate bank accounts and credit cards, and paid different household expenses is less significant than other evidence. While these facts are consistent with a separation of finances, they may also reflect that both parties worked and earned income, and dividing responsibility for payment of bills may have been an efficient way of ensuring family expenses were paid. The fact that there was no accounting between the parties for these expenses reinforces my view. I find the evidence supports that, for the Delta house and day-to-day joint family living expenses, there was an expectation of sharing.
- [115] However, beyond the Delta house and family expenses, the evidence supports otherwise. I find persuasive that the parties: kept their personal debts (including D.J.S.' substantial student loans) and investments separate; generally were responsible for their own debts; had none or only vague knowledge of each other's debts and investments; did not discuss finances; did not have any joint investments; had no joint plan for the future; and that B.L.S. had almost no knowledge of the Companies. I appreciate that finances were a delicate subject for them, but one would expect some substantive discussions on finances during a 20-year relationship if there were an expectation of joint sharing or economic responsibility to each other.
- [116] I find that D.J.S. did have an expectation, based on the pre-FLA law and how the parties actually arranged their financial lives, that he would not be sharing his property with B.L.S. That is consistent with him not sharing the details of his property or income with B.L.S.
- [117] B.L.S.' evidence about "paying expenses here" and "there" is consistent with an expectation to share the Delta house and joint day-to-day family expenses, but the suggestion that it extends more broadly to a presumptive half interest in all property, is not how the parties arranged their finances. Further, the parties' relationship ended two years before the FLA came into force, and I find B.L.S. could not have had, and did not have, a legitimate expectation of a presumptive equal sharing of all property given the state of the law. Despite her evidence to the contrary, I find that B.L.S. also had an expectation that they would not

share all of their own property, but that it was a less firm expectation than that of D.J.S. Part of the reason for that may have been her lack of interest in financial matters. But this does not mean that she had no legitimate expectation of some sharing. She had an unjust enrichment claim and there was sharing of family expenses surrounding the home. Further, the parties were in a family relationship, not a business relationship. For example, on B.L.S.' fiftieth birthday, D.J.S. gave her a very generous gift.

[118] Considering all of the above evidence and findings, I find that they weigh in favour of an unequal division.

[119] Finally, D.J.S. points to the May 11, 2012 initial offer letter from B.L.S., in which she proposed that each party keep their own debts and personal property, which included that D.J.S. would keep his Companies. D.J.S. argues this letter is consistent with the expectations of the parties of separate finances and how the parties lived their lives. D.J.S. also argues that upon separation, B.L.S. never indicated that D.J.S. should be responsible for B.L.S.' personal debts or she should be responsible for his. In my view, this argument is weakened by my finding that B.L.S. had no idea what D.J.S.' true financial circumstances were. In addition, there are many reasons a party may propose a compromise, and it may have little to do with their expectations arising from the relationship. Therefore, I do not rely upon this letter as supporting that the parties had an expectation of separate finances.

Conclusion on unequal division

[120] In addition to the above, I have considered the unequal division in the above case authorities, particularly in those with longer relationships, although in some of them, there was an explicit agreement for a separation of finances. For example, in Doell, there was a 23-year relationship, but an explicit agreement for separate assets, and the unequal division was ordered to be 80/20. In Dennis, there was a 13-year relationship and no agreement, but the parties kept their finances separate, and the division was ordered to be 75/25. Each case is highly dependent on its own facts.

[121] As will be discussed below, the parties' combined after-tax family property is valued at \$10,267,817. An equal division would result in a payment of \$5,133,909 to B.L.S. In weighing all of the above, I find that an equal division would be significantly unfair. However, given the length of the relationship, and the contribution by B.L.S. to D.J.S.' professional degree which contributed to the wealth in the Companies, I also find it would be significantly unfair if B.L.S. did not share in a portion of the family property. In my view, given how the parties conducted their financial affairs concerning the Delta house and day-to-day living expenses, the fairest division is 50/50 of the Delta house, and 30/70 in favour of D.J.S. for all other family property. I have considered the various family assets individually as well as globally in coming to this division, which results in a net division of \$7,107,312 to D.J.S. and \$3,160,505 to B.L.S.

Family Property

[122] I find the following are family property and their values at the date of trial. Except for the issues identified above, there is no other dispute regarding the assets and their values. I will address the debts separately below.

D.J.S.

B.L.S.

Compensation

Companies net of all taxes, shareholder loan, and retained ABI

\$5,378,384

\$1,613,515

Delta house less excl. inheritance

\$750,800

(\$445,400)

Surrey house

\$1,022,000

\$306,600

Sechelt cabin

\$707,000

\$212,100

Bank accounts and other invests.

\$1,729,053

\$18,096

\$506,049

RRSP

\$491,527

\$957

\$146,788

Vehicles and boat

\$161,000

\$9,000

\$42,000

Total

\$9,488,964

\$778,853

\$2,381,652

Net after compensation payment

\$7,107,312

3,160,505

[123] The parties provided the same values for the bank accounts, investment accounts, TFSA's and RRSP's outside of the Companies, and which were supported by bank and investment statements.

[124] The values of the real property are from the property tax assessments. While this is not optimal evidence of market value, I accept them as there is no other evidence of value and the parties agreed to these values: A.J.E. v. T.B.W., 2017 BCSC 1657 [A.J.E.] at para. 142.

[125] B.L.S. lists a large debt in her 2020 F8 financial statement allegedly owed to W.J., her partner of eight years. W.J. testified at the original trial that he does not consider that B.L.S. owes him these funds. This debt was incurred after separation and B.L.S. has not established that this is family debt within the definition of s. 86(b) of the FLA, being "incurred for the purpose of maintaining family property". B.L.S. also lists about \$15,000 in very old credit card debt incurred prior to separation, and a loan from her mother of about \$13,500 which B.L.S. used to renovate the Delta house after separation. I am not making an order dividing these debts, and have assumed they have been subsumed within the greater issues to be decided by the parties for the following reasons: the parties did not make any submissions regarding them at the continuation of the trial, likely because of their small value in relation to the other property; and, if I were to divide these, then I would also consider other factors that weigh in the balance, for example if the credit card debt has been written off or can legally be pursued given it is at least 10 years old, and whether the renovations improved the value of the Delta house when B.L.S. has not utilized or rented it out for the past eight years but let it sit vacant.

Orders

- [126] I make the following orders with explanations as required. D.J.S. shall keep the Companies in his name. The net amount after taxes available from the Companies for distribution is \$5,378,384, after taking into account the retained ABI which must be deducted to avoid double counting. D.J.S. shall make a compensation payment to B.L.S. of 30% of this value, being \$1,613,515.
- [127] For the two homes and the Sechelt cabin, D.J.S. will keep the Surrey house and Sechelt cabin in his name and B.L.S. will keep the Delta house in her name. The parties shall take steps to remove D.J.S.' name from the title of the Delta house. As I find D.J.S.' excluded \$140,000 inheritance was primarily used towards the Delta house, I deduct it here. The Delta house is valued at $\$750,800 - \$140,000 = \$610,800 \times 50\% = \$305,400 + \$140,000 = \$445,400$ owing from B.L.S. to D.J.S. The Surrey house is valued at $\$1,022,000 \times 30\% = \$306,600$ owing from D.J.S. to B.L.S. The Sechelt cabin is valued at $\$707,000 \times 30\% = \$212,100$ owing from D.J.S. to B.L.S. The net amount owing for the three properties is \$73,300 and D.J.S. shall make a compensation payment to B.L.S in this amount.
- [128] The parties shall keep the bank accounts in their own names. The bank accounts owned by D.J.S. are at Coast Capital Savings, Raymond James, Tangerine, Royal Bank, and BMO (TFSA and non-registered). The bank accounts owned by B.L.S. are at Coast Capital Savings, Tangerine, and BMO (TFSA). The total of both parties' bank accounts is \$1,747,149 resulting in D.J.S. owing B.L.S. \$506,049, calculated as follows: $\$1,747,149 \times 30\% = \$524,145$ less $\$18,096 = \$506,049$, and D.J.S. shall make a compensation payment to B.L.S. in this amount.
- [129] D.J.S. has an RRSP valued at \$491,527 and B.L.S. has an RRSP valued at \$957, for a total of \$492,484. The parties shall keep the RRSPs in their own names but D.J.S. shall complete a spousal rollover for his RRSP to B.L.S. Given the small amount of B.L.S.' RRSP, I will account for it within D.J.S.' spousal rollover. D.J.S. shall complete a spousal rollover in favour of B.L.S. in the amount of \$146,788, calculated as follows: $\$491,527 + \$957 = \$492,484 \times 30\% = \$147,745$ less $\$957 = \$146,788$.
- [130] The parties shall keep the vehicles and boat in their own names. D.J.S.' vehicles and the Seahawk boat are valued at \$161,000. B.L.S.' vehicle is valued at \$9,000, for a total of \$170,000, resulting in D.J.S. owing B.L.S. \$42,000 calculated as follows: $\$170,000 \times 30\% = \$51,000$ less $\$9,000 = \$42,000$, and D.J.S. shall make a compensation payment to B.L.S. in this amount.
- [131] The parties shall be responsible for the debts in their own names.

Spousal Support

Positions of parties

- [132] B.L.S. seeks past and future spousal support on a compensatory and non-compensatory basis. B.L.S. refers to her early contributions to the family, the care of their daughter that allowed D.J.S. to obtain an engineering degree, the long length of the relationship, and the different standards of living between the parties post-separation. B.L.S. argues she cannot meet her expenses and relies on W.J. for financial support. She has spent her RRSP and W.J. has gone into debt to meet her expenses and legal fees. B.L.S. argues she has been unsuccessful in obtaining further employment due to reluctance in her field to hire older employees and because of her depression and anxiety which limit her ability to work. As for lump-sum support, B.L.S. argues it would limit contact between the parties and would allow her to build a nest egg for her retirement and address her debt more readily than periodic support payments. She argues that future spousal support should be based on approximately \$135,000 per year for D.J.S. and \$30,000 per year for her, and paid in a lump sum. The total of this is \$946,886. Alternatively, B.L.S. seeks at least past support based on line 150 incomes. The total of this is \$395,320.
- [133] D.J.S. argues that B.L.S. has not established entitlement to support. Both bases for support are linked to a rebuttable presumption of mutual support and joint financial endeavour during the relationship, and here that is rebutted. There was no evidence that B.L.S. lost career opportunities because of the relationship. Except for maternity leave, she was employed throughout the relationship and in positions of responsibility. D.J.S. acknowledges the special role B.L.S. played for their daughter when she was ill, however, argues that his payment of the Delta house and other capital expenses over the relationship have already compensated B.L.S., including what will be an award through property division. Both parties were equally involved in raising their daughter. D.J.S. argues B.L.S. is capable of working. She worked for more than a year full-time after separation, and then was planning to move to Saskatchewan where she was confident she would find work. D.J.S. refers to B.L.S.' discovery evidence that she has no health barriers to employment. There is no medical evidence establishing that she cannot work. W.J. described B.L.S. as invaluable to his employer.
- [134] D.J.S. argues there is no evidence of need nor disparity in the parties' standards of living because they lived modestly before the separation. The claimant has been involved in a new spousal relationship with W.J. since 2013 and is supported by him. B.L.S.' F8 2020 financial statement shows modest expenses, which are less than hers and W.J.'s combined income. B.L.S. did not pursue her claims against D.J.S. with expediency nor make an application for interim spousal support. She has made no efforts to sell or rent the Delta house for income. If the court does consider a past award, D.J.S.' suggests his income could be based on line 150 or approximately \$135,000 per year, and B.L.S. should be imputed an annual income of \$80,000 as this is approximately what she was making when the parties separated.

Legal principles

[135] In determining whether there is entitlement to support, the court must consider the objectives of spousal support in s. 161 of the FLA. That section states:

- s. 161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
 - (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[136] If entitlement is established, the court must consider the factors in s. 162 of the FLA to determine the amount and duration of support. That section states:

- s. 162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:
 - (a) the length of time the spouses lived together;
 - (b) the functions performed by each spouse during the period they lived together;
 - (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[137] There are three bases upon which a spousal support award may be made: compensatory (economic advantage and/or disadvantage); non-compensatory (needs-based); and contractual: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow] at paras. 15 and 49. In determining if there is entitlement to support, the court begins with the objectives of spousal support. No objective is paramount and all must be considered: *Bracklow* at paras. 35-37; *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge] at 850-852.

[138] Compensatory support is intended to provide for an equitable sharing of the economic consequences of the relationship or its breakdown. Both economic advantage and disadvantage are considered. The longer the relationship, the greater will be the presumptive claim to an equal standard of living upon its breakdown: *Chutter v. Chutter*, 2008 BCCA 507 [Chutter] at paras. 50-52; *Bracklow* at paras. 34 and 39; *Moge* at 861-863 and 870.

- [139] Non-compensatory support is intended to provide needs-based support where compensatory principles do not apply. Its goal is to narrow the gap between the needs and means of spouses upon marital breakdown. Need is a relative concept, and goes beyond the basic necessities of life. It is informed by the circumstances of the parties, including the length of the relationship and the standards of living enjoyed during and after the relationship: Chutter at paras. 54-59; Bracklow at paras. 36 and 41. The effect of re-partnering is not relevant to compensatory-based support, but may be a relevant consideration for support on a needs basis: Morigeau v. Moorey, 2015 BCCA 160, at paras. 36-39.
- [140] While there is a rebuttable presumption of a mutual duty of support, spouses may "alter this expectation, either through explicit contracting or through the unequivocal structuring of their daily affairs, to show disavowal of financial interweaving": Bracklow at paras. 20 and 32.

Analysis

- [141] I turn first to the objectives of spousal support and whether B.L.S. has established entitlement to support.
- [142] There was no evidence that B.L.S.' career was disadvantaged other than during the time she took for maternity leave 29 years ago and when she was the primary caregiver when their daughter was very young and ill. After maternity leave, B.L.S. continued to work full-time for the next almost 20 years and was successful in doing so. With the exception of the first few years, I find that throughout the relationship, B.L.S. and D.J.S. equally contributed to childcare and household tasks. The parties' relationship was not akin to a traditional marriage where B.L.S. worked as a homemaker, nor was it a situation where B.L.S. shouldered a greater burden of childcare and domestic tasks despite working full-time. However, as discussed previously, I find that B.L.S. taking on the primary responsibility for their daughter when she was ill, returning to work, and encouraging D.J.S. to continue his education, advantaged D.J.S. because he was able to obtain an engineering degree which enhanced his career potential.
- [143] Following the breakdown of the relationship, B.L.S. continued to work full-time for more than a year until she was laid off from her job in the summer of 2012. She was planning to leave that job in any event and was moving to Saskatchewan and expected to find work there. After she decided not to move to Saskatchewan at about the end of 2012, B.L.S. did not work until 2017. I find that after separation until early 2013 when B.L.S. established a marriage-like relationship with W.J., she suffered an economic hardship as a result of the breakdown of the relationship. She no longer had the support of D.J.S. for the sharing of living expenses and for the Delta house, had lost her job, and suffered an exacerbation of depression and anxiety which prevented her from working for a period of time.

- [144] As for economic self-sufficiency, from 2017 up to the onset of the COVID-19 pandemic in March 2020, B.L.S. had been working part-time as a consultant at a lumber company and excelled at that job. Although B.L.S. said at the original trial that she could not work because she was depressed, and I accept she had an underlying depression that was exacerbated in 2012 and into 2013, there was no medical evidence that supports a current inability to work. I find that once B.L.S. re-partnered with W.J. and by early 2014, she has been capable of working but has retired from full-time work.
- [145] D.J.S. has not worked since the operating Company sold the book of business in early 2014. There was a non-competition clause in that sale agreement lasting for three years. Despite that D.J.S. has an engineering degree that enhanced his capacity to work as a SRED consultant, except for one small job when he first graduated, he has not worked as an engineer (as opposed to an engineer in a SRED consulting capacity) in over 20 years. Therefore, while I find that the degree contributed to his success in the SRED industry, I do not find it as valuable to him now. His degree is in bio-resource engineering from 25 years ago. D.J.S. gave evidence that if he wished to work, he could probably earn \$60,000-\$80,000 per year in consulting. B.L.S. was earning that much when the parties separated. I find that D.J.S. is capable of working but has also retired since early 2014.
- [146] Finally, I address D.J.S.' argument that the presumption of mutual support and joint financial endeavour during the relationship is rebutted and therefore there is no entitlement. D.J.S. relies on the same evidence he referred to regarding legitimate expectations and separation of finances concerning property division. There is no evidence of an agreement between the parties with respect to spousal support. In my view, D.J.S.' argument does not extend easily to spousal support. First, the major underlying basis of the legitimate expectations and separation of finances argument, is that the parties lived their relationship prior to the FLA coming into force, when there was no statutory claim to property division. However, B.L.S. did have a statutory claim to spousal support under the FRA (although I acknowledge that at one point it was barred), so in my view, it cannot be said that she could not reasonably have had an expectation of spousal support.
- [147] In summary, I find that B.L.S. has established: entitlement to compensatory spousal support based on the advantage she conferred on D.J.S. which enabled him to get a degree; and, some needs-based support for the first few years following the breakdown of the relationship. I will pause at this point to consider the quantum of support up to this period of time (early 2014) as my analysis of support beyond this point of time is different, and I will address it separately.
- [148] The factors for consideration of quantum (and duration) include those in s. 162 of the FLA. With respect to the compensatory-based support, I have considered how to value the advantage of a degree conferred on D.J.S. If this were a situation where there was a short marriage and young spouses near the beginning of their careers where no substantial assets had yet been amassed, one could consider support for a period of time that allowed the other spouse to become established in a career or obtain further education. But, that is

not the situation here. Nor is this a situation where B.L.S. has been a homemaker and sacrificed her career, and where equalization of the post-separation standard of living may serve as a workable substitute for the value of the advantage.

- [149] This is a long relationship where the parties are older and one party has acquired significant assets. As of early 2014, both parties have effectively retired and there is no longer an income stream (other than through earnings on investments) contributed to by the advantage acquired during the relationship. The vast majority of that income stream was reinvested in the Companies and other investments. The value of that income stream is reflected in the assets D.J.S. amassed and which have now been divided. I find that any potential advantage of the degree was exhausted as of 2014 when the book of business was sold. I have already considered the length of the marriage and the functions performed by the parties during the relationship and I must avoid any double counting of these: Chutter at para. 78.
- [150] In summary, the advantage conferred on D.J.S. was subsumed into the wealth which accumulated inside and outside the Companies and which has already been divided. Any advantage remaining, is the contribution to the ABI and employment income which continued for another nearly three years after separation until the book of business was sold. The remaining value of B.L.S.' compensatory claim is a portion of that income, at which point I find the advantage ended.
- [151] With respect to needs-based support, it is also during these same three years that D.J.S. had the means and B.L.S. had the need for support (from the loss of support from D.J.S. for household expenses, the loss of her job, and illness) until she transitioned to a new relationship with W.J.
- [152] Both parties had provided potential spousal support payments based on calculations in the range of \$135,000 or actual line 150 income. As discussed at para. 21 of these reasons, in my view, the fairest determination of D.J.S.' Guidelines income is his line 150 income, excluding Investment Income, plus the pre-tax ABI of the Companies. This is the determination that is consistent with how property has been valued and divided. I set out below parties' incomes from 2011 to 2014:

Year

D.J.S.' line 150 (excluding invest. income)

Companies' consulting income or ABI

D.J.S. total income

B.L.S. income

2011

\$840,000

\$77,611

2012

\$530,000

\$89,156

2013

\$163,946

\$870,442

\$1,034,388

\$86,660

2014

\$134,334

\$62,657

\$196,991

\$30,000

[153] For D.J.S.' income for 2013 and 2014, I have taken the amount from App. A of Ex. 46. The ABI for 2014 reflects only two months, until the book of business was sold. For 2011 and 2012, there is no similar schedule. For those years, I have used the prospective calculation of income at Schedule 7.2 of Mr. Mynett's previous report for 2010 to 2012 Guidelines income. This includes employment income and will eliminate most of the large investment gains, for example from the Avigilon shares in the autumn of 2012. I have further deducted \$130,000 each year to reflect the "other" and interest income shown in the revenues in Schedule 3.2 of the same report. Although I have not included 2015 to 2019 in the above table, for those years, D.J.S.' employment income and the ABI was less than \$15,000 in total each year.

[154] For B.L.S.' income, I have taken the figures provided to me in argument by her counsel. In one final note on the state of the evidence at the original trial, there were no tax returns of B.L.S. filed in evidence from 2013 onwards. I cannot confirm the 2013 and 2014 figures, but D.J.S. did not suggest that they were inaccurate. If there is an error, I give the parties leave to speak to the matter. Despite not working from mid-2012 to 2017, I conclude B.L.S. had income because she had a severance payment after being laid off from her job in 2012, and she withdrew the entirety of her RRSP which was about \$95,000.

- [155] Pursuant to s. 17 of the Guidelines, the court may consider a spouse's income over the last three years in determining what is fair and reasonable in light of any pattern or fluctuation of income. Since there is a substantial fluctuation in D.J.S.' income, in my view, approximating an average would be appropriate. I find the fairest determination of his available income over those three years for the purpose of spousal support to be \$800,000 per year. Likewise, I determine B.L.S.' income to be \$85,000 per year.
- [156] In Chutter at para. 121, the Court summarized a non-exhaustive list of factors that a court may consider in setting the range (and duration) of support as discussed in chapter 9 of the Spousal Support Advisory Guidelines [SSAG]. I find that the following factors indicate a support order in the low range: the significant assets the which parties have divided; B.L.S.' increased standard of living from the division of property; and D.J.S.' income from 2011 to 2013 being well above the ceiling of \$350,000 in the SSAG.
- [157] In summary, for the three year period from separation to early 2014, I find that spousal support should be awarded based on the low range of actual ABI and D.J.S.' employment income. After the above spousal support is paid, I find there will be a complete satisfaction of all compensatory-based support, and any needs-based support during that time period. The low range on the above actual income figures is \$17,875 per month x 36 months = \$643,500. For comparison, the mid-range at the ceiling of \$350,000 is \$6,625 per month x 36 months = \$238,500. In my view, the low range based on the actual income is more appropriate as it will fully compensate any advantage.
- [158] I turn next to determination of whether there is any entitlement to support beyond early 2014. In round numbers, after division of property and payment of the above past support, D.J.S. will have \$6.5 million in assets, but \$1 million of that is the Surrey house. That leaves a net amount for investment of \$5.5 million. Again in round numbers, after division of property and receipt of the above past support, B.L.S. will have \$3.8 million to invest. I have not deducted the value of the Delta house because she does not live there, and has for the past eight years lived with W.J. in his home and allowed the Delta house to sit unoccupied and not rented. If the value of the Delta house is deducted, there are net assets to invest of about 3.1 million. Both parties have chosen to retire and now could likely earn a roughly equivalent income if they chose to work full time. Their standard of living will be different solely because D.J.S. has more assets to invest than B.L.S. as a result of the unequal division of property.
- [159] As I have found that any compensatory-based support has been fully compensated, the only remaining possible basis for entitlement is needs-based, after early 2014. Need is a relative term and is informed by the length of the relationship and the standards of living enjoyed by the parties during and after the relationship.
- [160] B.L.S. refers to the comments in Moge and Chutter, that the longer the relationship, the greater the presumptive claim to an equal standard of living upon dissolution of the relationship. Moge was primarily concerned with compensatory-based support. In a long

traditional marriage, where one spouse (usually the wife) has sacrificed her career for a spouse who continues to have earning capacity, an equal standard of living is often a "workable substitute" for valuing the compensatory-based loss. This is highlighted at paras. 52 and 53 of Chutter where the Court stated:

[52] The Court in Moge discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement . As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Emphasis added, internal citations omitted.]

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in Moge:

[11] In British Columbia this comment in Moge has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

[Emphasis added.]

[161] That is not the situation here. The compensatory-based loss was quantifiable and has already been completely satisfied. The issue is whether need sufficient to ground an entitlement to support is established by the simple fact that as a result of the unequal division of property, there will be unequal investment incomes. In *Lee v. Lee*, 2014 BCCA 383, the Court addressed a not identical but similar situation where there was no compensatory basis for support, but one spouse had a greater ability to earn income than

the other spouse, and the other spouse had re-partnered. As stated in para. 1:

- [1] This appeal tests the meaning and limits of the principle of non-compensatory spousal support in a 20-year 'modern' marriage to which neither spouse was found to have sacrificed in any material way, and from which both emerged entirely self-sufficient, albeit with disparate earning abilities.
- [162] The spouse seeking support in that case made similar arguments to B.L.S. in this case: that the longer the relationship, the closer the economic union, and the greater the presumptive claim to an equal standard of living; or, that alternatively, "blurring the lines between compensatory and non-compensatory support", that the spouse suffered a disadvantage by reason of the breakdown of the marriage by being unable to share in the other spouse's higher income: at para. 1. At paras. 45-62, Madam Justice Newbury for the Court undertook a detailed analysis of appellate authority and learned commentary, noting the expansion of the concept of need in case authorities. Ultimately, she concluded:
- [65] If Mr. Lee had not formed this new relationship, the case law in British Columbia would have permitted an award of spousal support to him, given the length of the parties' marriage (which presumably creates interdependence) and the expansion of the meaning of "need" in the family law context. But whether it would have been a "material error" in law or a wrong exercise of discretion to refuse support in such circumstances is another matter. To rule as a matter of law that Mr. Lee should be compensated indefinitely for the "loss" of the ability to share in Ms. Lee's income and lifestyle would, taken to its logical conclusion, mean that support must be ordered on one model or the other in virtually every case that comes before the court. The concept of need (in the true sense) of the applicant spouse would be supplanted by the sole criterion of the respondent spouse's ability to pay. Marriage would, contrary to what was said in *Moge*, automatically entitle a spouse to the standard of living enjoyed during the marriage, or as much as the payor could afford. I respectfully agree with Professor Rogerson's suggestion, and with the Court in *Griffiths*, *supra*, that this cannot be correct. A 'clean break' is clearly possible in this case, and again as stated in *Moge*, the mere fact of marriage or its breakdown does not activate a "general tool of redistribution." As far as I am aware, this principle has not been overruled.
- [66] At the same time, the case law of this province referred to above does indicate that a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation - hence the concept of a "transitional" award, which is recognized by the SSAG. Such awards have regularly been made in favour of women, but rarely in favour of men, perhaps reflecting that, as Rogerson suggests, "Non-compensatory support is significantly structured by social norms of what is fair and just. The economic dependency of husbands on wives is not reinforced and naturalized by strong cultural norms, as is the dependency of wives on husbands ...". (At 234-5.) It seems to me that, setting aside for the moment the support already paid by Ms. Lee from August 1, 2012 to June 1, 2013, Mr. Lee could have expected some transitional award, if only on the "principle" that

what is sauce for the goose is sauce for the gander. As it is, Ms. Lee did pay a total of \$17,500 to Mr. Lee, presumably assisting him in adjusting to his new circumstances.

- [163] In my view, there are four factors that lead to the conclusion that B.L.S. has not established an ongoing entitlement to needs-based spousal support. First, at age 62, and even after having been effectively retired for the past eight years, B.L.S. will have \$3.8 million in assets. This is a substantial sum and she will not suffer a hardship. Even a modest rate of return on this amount will easily cover her expenses without encroaching on capital. Second, the parties' standard of living during the relationship was modest, and far below the income that was actually being earned. After property division, the standard of living of B.L.S. will now be greater than what she had during the relationship. This is because D.J.S. is frugal and a saver, and he invested rather than spent the vast majority of all the income he was earning throughout the relationship. All of that income, which became property, has now been divided. Third, any disparity in standards of living is a result of the unequal division of property flowing from the economic characteristics of the parties' spousal relationship which I found to exist under s. 95(2)(i) of the FLA. Fourth, for the past eight years, B.L.S. has re-partnered with W.J. who earns approximately \$85,000 to \$90,000 per year.
- [164] Prior to the separation, D.J.S. was taking approximately \$135,000 per year from the Companies as income. W.J. does not earn the same amount, but he still earns a good living. B.L.S. and W.J. began living together in a permanent relationship sometime in early 2013. I have already awarded support to early 2014 based on primarily compensatory principles and some need. B.L.S. is not entitled to indefinite support based on the difference between the income of D.J.S. and W.J., particularly after she receives the property division award. To award this would replace need with the "sole criterion of the respondent spouse's ability to pay": Lee at para. 65. The past award that has been made to early 2014 already takes into account a transitional period. I find there is no further entitlement to support on any basis beyond that time.
- [165] Finally, I have considered that this decision provides an award of past support that goes back between six and 10 years ago. Spousal support has been in issue since these proceedings were commenced in 2013, and given the misrepresentations and failure to disclose which resulted in the setting aside of the separation agreement, I find it is appropriate to make a past award of spousal support even if it does go back a significant amount of time. B.L.S. did not seek an interim award of spousal support, but that is likely because entitlement to support was in issue given the separation agreement then in existence.

Orders

[166] D.J.S. shall pay B.L.S. past spousal support of \$643,500. This award is based on \$17,875 per month from April 1, 2011 to March 31, 2014. The claim for all other past spousal support and future spousal support is dismissed.

Other claims

[167] All other claims and counterclaims of the parties are dismissed.

[168] If the parties cannot agree on costs, they may make arrangements through Supreme Court Scheduling to speak to the issue.

"Norell J."

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