

CANADA / JUDGMENT

Betts v. Betts

2023 BCSC 1508

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1508 Betts v. Betts

THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Betts v. Betts,

2023 BCSC 1508

Date: 20230829

Docket: E202108

Registry: Vancouver

Between:

Courtney Ann Betts

also known as Courtney Ann Nichols

Claimant

And

Steven Douglas Betts,

Douglas Cooper Land Holdings Ltd.,

672111 B.C. Ltd.

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraphs 84, 92, 93, and 198 on January 23, 2024.

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Claimant:

B.J. Ingram

M. Combow (A/S)

Counsel for the Respondent:

J. Desilets

N. Bernardi

Place and Date of Trial:

Vancouver, B.C.

February 13-17 & 21, 23 & 24, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2023

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I. INTRODUCTION

- [1] This is a family law case. Courtney Ann Betts and Steven Douglas Betts began living together in April 2005 and married in November 2005. They separated in November 2019, after a 14-year marriage. They have two children together, now 14 and 16 years old.
- [2] Mr. Betts is the co-founder of a business that specializes in hydroponic equipment and nutrients used primarily for cannabis cultivation. Mr. Betts started the business in 1993 with one store in Surrey called Pacific Northwest Indoor Gardner. Over time, the business expanded to include additional retail locations, a wholesale distribution company, a nutrient production company and an online retailer. I will refer to the combined business as "PNW".
- [3] The most significant family asset in this case is the shares of Steven Douglas Betts Corporation ("Betts Co."), a holding company through which Mr. Betts owns shares in the various companies that make up PNW.
- [4] The primary issues to be resolved by this decision are:

- a) how to give effect to a division of the family property in Betts Co.: Ms. Betts seeks an equalization payment based on a fair market valuation of the shares, whereas Mr. Betts proposes an order that the shares be divided;
 - b) whether to account for Mr. Betts' excluded property claim in the division of the net sale proceeds from the former family home: Ms. Betts argues that the exclusion was lost when Mr. Betts registered the property in their joint names;
 - c) how to account for Mr. Betts' interests in two homes that he helped his family members acquire: Ms. Betts seeks an order that Mr. Betts holds those interests in trust, whereas Mr. Betts proposes a set-off against his excluded property claim;
 - d) how to determine Mr. Betts' income for child and spousal support purposes: Ms. Betts seeks to include the pre-tax income of some of the PNW companies; Mr. Betts argues that it should be limited to his actual employment income in 2022; and
 - e) how much income to impute to Ms. Betts, if any, for child and spousal support purposes.
- [5] Mr. Betts acknowledges that Ms. Betts is entitled to spousal support. He disputes her entitlement to retroactive support. He proposes a review clause, which she opposes.
- [6] The parties have agreed on a split parenting schedule for the children. They agree that they will remain joint guardians of the children. They agree that they will continue to share joint decision-making responsibilities for the children. They agree that their application for a divorce should be adjourned pending a resolution of the property division issues. They have helpfully provided draft final orders based on their positions.
- [7] For the reasons that follow, I have largely agreed with Mr. Betts' position, with some important modifications.

II. FAMILY PROPERTY

A. Steven Douglas Betts Corporation

i. Background

- [8] Mr. Betts incorporated Betts Co. in 1996 to hold his interests in PNW. Mr. Betts owns 50% of the common shares and all of the preferred shares of Betts Co. The remaining common shares are owned by the Steven Betts Family Trust (the "Trust"). Mr. Betts created the Trust as part of a tax-driven reorganization of his holdings in 2015.
- [9] Through Betts Co. and the Trust, Mr. Betts is a shareholder in each of the companies that make up PNW; however, he is not a majority shareholder of any of the companies.
- [10] Justin Chorbajian is Mr. Betts' business partner. Mr. Chorbajian has worked with Mr. Betts since the early days of PNW. Mr. Betts and Mr. Chorbajian do not have a shareholders agreement or other written agreement to govern their partnership. They rely on trust and compromise, and make business decisions by consensus.

[11] Through Betts Co., Mr. Betts currently holds a 50% interest in the following active companies:

- a wholesale distribution company called Green Planet Wholesale Limited ("Green Planet");
- the company that owns and operates the Pacific Northwest Indoor Gardner store in Surrey (the "Surrey Company");
- the company that owns and operates a retail location in Maple Ridge; and
- Douglas Cooper Land Holdings Ltd. ("DCLH"), a company that owned the property on which a retail store in Squamish, now closed, was located.

[12] The remaining 50% interest in these companies is held by Mr. Chorbajian through his own holding company, Evergreen Holding Company ("Evergreen").

[13] Through Betts Co., Mr. Betts holds a 33% interest in the following active companies:

- a nutrient production company called HIT Manufacturing ("HIT");
- companies that own and operate retail stores in Kelowna, Nelson and Mission.

[14] Mr. Chorbajian holds a 33% interest in these companies through Evergreen. The remaining 33% is held by independent owner-operators.

[15] Green Planet is the most valuable company in terms of earnings. Green Planet sells hydroponic products to retailers, not individual growers. It does not own any assets of significance other than inventory. Its value to its shareholders is in its ability to sell inventory.

[16] PNW grew significantly in scale and value over the course of Mr. Betts' relationship with Ms. Betts. The bulk of its business is tied to cannabis cultivation, which is an extremely unpredictable industry. Sales fluctuate based on the market for hydroponic products such as fertilizers and indoor growing equipment. The legalization of cannabis in Canada in 2018 created uncertainty in the demand for these products. Once the market for legal cannabis stabilized, however, demand and revenues rose. They increased significantly during the COVID-19 pandemic, and PNW recorded its highest profits in 2020 and early 2021. By mid 2021, however, the market had become oversaturated and the demand for fertilizers and equipment shrank.

[17] PNW has suffered financially since mid-2021. It has closed retail locations in Vancouver, Prince George and Squamish, reduced its inventory and amalgamated its wholesale operations.

[18] The Squamish property owned by DCLH was sold in early 2023. Mr. and Ms. Betts have agreed in a consent order that they will share 50% of the net sale proceeds equally after distributive taxes.

ii. Expert Evidence

- [19] The parties jointly retained Patti Daum in November 2020 to prepare a fair market valuation of Mr. Betts' interest in the shares of Betts Co., inclusive of his direct and indirect interests in the PNW companies.
- [20] Mr. Betts provided Ms. Daum with financial information to April 30, 2022. With some assumptions, Ms. Daum extrapolated this financial information to a valuation date of June 30, 2022. She delivered a draft report to counsel in July 2022. Following input from the parties, Ms. Daum finalized her report in early December 2022.
- [21] Ms. Daum provided a midrange valuation of Mr. Betts' interest in the shares of Betts Co. of \$10,104,000 as of June 30, 2022.
- [22] Ms. Daum prepared a second report in which she calculated a fair market value of Mr. Betts' interests as of April 1, 2005, representing the value of his holdings when the relationship with Ms. Betts began. Ms. Daum provided a midrange valuation of \$2,008,000 as of April 1, 2005.
- [23] In this second report, Ms. Daum also calculated the distributive taxes that would be incurred by Mr. Betts on the sale of his corporate interests. She estimated that Mr. Betts would incur taxes in a range of \$2,574,000 to \$2,819,000 if he sold his corporate interests.
- [24] Ms. Daum's evidence confirms that the most significant assets of Betts Co. are the shares of the active PNW companies. Ms. Daum valued those shares using a capitalized cash flow approach based on projections of estimated earnings before interest, taxes, depreciation and amortization ("EBITDA"), a widely used measure of a company's financial health and ability to generate cash.
- [25] Under cross-examination by counsel for Mr. Betts, Ms. Daum was shown more current financial information, specifically the comparative income statement for Green Planet for May to October, 2022. After reviewing these documents, Ms. Daum acknowledged that her calculations as of June 30, 2022 may not reflect fair market value on the date of trial. She testified that she would need to do further investigations to determine why the financial results had changed, but she agreed that her valuation may be dated.

iii. Positions of the Parties

- [26] Ms. Betts seeks a compensation payment based on Ms. Daum's calculations of the fair market value of Mr. Betts' interests in the shares of Betts Co.
- [27] Ms. Betts acknowledges that it makes sense to deduct the DCLH component of Ms. Daum's valuation, \$152,000, because DCLH's only asset, the Squamish property, has been sold and Mr. Betts' share of the net sale proceeds is being divided between the parties.

- [28] Ms. Betts accepts Mr. Betts' excluded property claim in the amount of \$2,060,000. Accordingly, she submits, the family property component of Mr. Betts' interests in the shares of Betts Co. is \$7,892,000.
- [29] Ms. Betts acknowledges that it is necessary to consider the taxes that may be incurred by Mr. Betts or the Trust if shares are sold to pay Ms. Betts. She argues that it is reasonable to allocate the tax burden between the family component and the excluded component of the asset. This allocation yields a multiplier of 0.7291. Applying the 0.7291 figure to the adjusted family property component of Betts Co. yields a net family property value of \$5,754,057.
- [30] Accordingly, Ms. Betts seeks a compensation payment of \$2,877,028 (one half of \$5,754,057). Recognizing that this is a significant sum, Ms. Betts proposes that the compensation be paid over four years, with fixed installments and a balloon payment at the end.
- [31] Mr. Betts seeks an order that the shares of Betts Co. and the Trust be divided between the parties, with Mr. Betts to retain a certain number of preferred shares of Betts Co. to reflect his excluded property interest.
- [32] Mr. Betts proposes to transfer one-half of the common and voting shares held by Betts Co. and the Trust to Ms. Betts, such that, going forward, Ms. Betts will receive half of any dividends paid to Betts Co. from the underlying companies.
- [33] Mr. Betts further proposes that, at any point after March 1, 2028, either party may compel a sale of the shares of Betts Co.

iv. Analysis

- [34] In general terms, the Family Law Act, S.B.C. 2011, c. 25 [FLA], requires that family property be divided equally, based on its value on the date of trial, less the value of any excluded component on the date the relationship began.
- [35] Section 97(2)(c) of the FLA authorizes the court to order a compensation payment for the purpose of dividing family property. Whether to order a compensation payment is a fact-specific analysis which is tied to the nature of the property in question, the ability of the payor to make the payment, and providing for a fair division of the family property.
- [36] The courts strive to: (a) ensure that the total family assets are maximized, which will generally involve maintaining a business as a going concern; and (b) ensure that the division of family property is not merely equal in a legal sense but that the actual benefit received by each spouse is also equal: *Weintz v. Weintz*, 2014 BCCA 118 at para. 38.
- [37] As discussed by the Court in *Tratch v. Tratch* (1981), 30 B.C.L.R. 98 at 112-13, 1981 CanLII 774 (S.C.), the goal should be to divide the family property with as little disruption, including commercial disruption, as is compatible with securing to each party their rightful interest. Private companies present unique difficulties in this regard, particularly where the family property constitutes a minority shareholder interest. It may be difficult to find a buyer for these kinds of interests at a fair value. The payor spouse may also be actively employed by

the company. On the other hand, it would be unfair to put the recipient spouse in the position of a "minority and alien shareholder" in a company controlled by an ex-spouse and their business associates (Tratch at 113).

- [38] As a general principle, wherever possible the parties' financial affairs should be separated, and it is preferable not to leave one ex-spouse as a minority shareholder in a company controlled by the other: *Smith v. Smith*, 2008 BCCA 245 at para. 26.
- [39] This is an important consideration when the shares are of a personal services company, leaving the recipient spouse dependent on the services of an ex-spouse: *Smith* at para. 26. It is less compelling when the company is an operating business with other shareholders who have a stake in its profitability, and in the absence of evidence the majority shareholder spouse would run the business in a manner that disrespects the rights of the minority shareholder spouse: *Mahannah v. Mahannah*, 2012 BCSC 403 at paras. 101-102.
- [40] While a compensation payment furthers the objective of a clean break between former spouses, it may not always be fair or practical. This was the case in *Seabrook v. Seabrook*, 2012 BCSC 606. The family property in that case included two real estate properties, some relatively minor transferable assets and shares in several valuable private companies. The wife argued that the appropriate way to divide the property was to leave the shares in the husband's name and order a compensation payment of about \$450,000 for her interest in the shares.
- [41] Justice Adair found that the wife's proposal was not practical. The other assets the husband would receive would not be sufficient to assist with the compensation payment for the shares. Since he was only a 50% shareholder, the husband could not borrow money against the shares to make the payment. Every withdrawal from the companies would require the agreement of the other 50% shareholder, who would be entitled to an equal withdrawal. In addition, there was some uncertainty in the business, and the wife's proposal would place all of that risk on the husband: *Seabrook* at paras. 77-78.
- [42] In *Ortynski v. Ortynski*, 2014 BCSC 73, the proposed compensation payment was much less than in *Seabrook*. Nonetheless, Justice Barrow found that neither the payor husband nor the company had any realistic prospect of paying or borrowing the funds necessary to make the proposed compensation payment (at para. 78). While recognizing that leaving the wife as a shareholder was not the preferred solution, Justice Barrow ordered that the parties retain their shares and that so long the wife was a shareholder, she be entitled to access any and all financial records of the company (at para. 79).
- [43] In my view, a compensation payment would be neither a fair nor a practical means of dividing the family property component of Mr. Betts' interests in the shares of Betts Co.

- [44] First, the proposed compensation payment vastly exceeds the value of all other family property remaining to be divided in this case. The former family home has been sold, and the parties have already received and spent most of their shares of the net sale proceeds. There are no other assets that can be allocated to Ms. Betts to provide compensation for her interest in Betts Co. Mr. Betts will not receive other assets he could use to make the compensation payment.
- [45] Second, Mr. Betts does not have sufficient income, after paying child and spousal support, to make meaningful installment payments against the proposed compensation payment. He would require Mr. Chorbajian's agreement to take any additional funds by way of dividends out of the PNW companies for that purpose.
- [46] Mr. Betts is not without other resources: he will receive approximately \$100,000 from the sale of the Squamish property; he has \$200,000 cash in a safe; and there are more than \$300,000 in the Betts Co. bank account. These funds could be used to pay some installment payments, but they fall well short of what would be required to satisfy the compensation amount.
- [47] Third, there is no reasonable means for Mr. Betts to borrow funds with which to make the compensation payment. The evidence is that banks will not lend to the PNW companies (apparently because of concerns around the grey market for cannabis products and federal criminal law in the United States). It is therefore unlikely Mr. Betts could use conventional financing to raise funds with which to pay compensation.
- [48] In these circumstances, a compensation payment requiring installment payments would inevitably result in a sale of Mr. Betts' shares when he exhausts his immediate resources and misses an installment payment.
- [49] Rather, I adopt Mr. Betts' proposal for the division of the family property in Betts Co. Mr. Betts' proposal would allow either party to require a sale of the shares after five years. In my view, this is preferable to a forced sale under Ms. Betts' proposal when Mr. Betts inevitably misses an installment payment. I agree with Mr. Betts that a delay will allow the parties to maximize the value of the asset before it is sold.
- [50] Further, if the shares are sold prematurely, Mr. Betts would lose his only source of income. It is unclear whether he would be kept on as an employee of PNW if he were no longer an owner. It is unlikely, at age 54 with a high school level of education, he could find alternate employment that would pay an equivalent income with which to pay support to Ms. Betts and the children. Mr. Betts' proposal will ensure that the parties and their children continue to enjoy, at minimum, the benefit of his salary for the next five years. In the event the business becomes more profitable and dividends are paid, the parties will share in that return on an equal basis.

- [51] Finally, there is evidence that the valuation by Ms. Daum as of June 30, 2022, is not the fair market value of the shares on the date of trial as required by s. 87 of the FLA. The date of trial is not an absolute rule for the valuation date; s. 87 allows the court to order otherwise. An expert report prepared and delivered in advance of a trial will rarely value an asset precisely on the date of trial. However, in this case, the value has declined by a material amount and the expert analysis is dated.
- [52] Ms. Betts submits that the Court ought to adopt the valuation date in Ms. Daum's report, because, while the report may not reflect current value, the Court ought not allow Mr. Betts to undermine Ms. Daum's valuation without providing an alternate valuation. Ms. Betts notes that Mr. Betts did not provide Ms. Daum with additional financial information after April 30, 2022; nor did he ask her to prepare an updated report. He now attacks the joint valuation report.
- [53] These are valid points; however, the fact remains the valuation is not a fair value for the shares. Based on the evidence before the Court, a compensation payment using the June 30, 2022 valuation date would result in unfairness to Mr. Betts. He simply could not sell the shares for that value. In my view, Ms. Betts' concerns around the handling of Ms. Daum's expert report are better addressed in submissions on costs.
- [54] If it was otherwise the appropriate order, a compensation payment would require an updated valuation report. A further expert report would add to the expense of these proceedings and delay their resolution. However, as I have sought to explain, there are other reasons to prefer a division of the shares over a compensation payment.
- [55] In my view, Mr. Betts' proposal allows for a division of shares that ensures that the value of the family property is maximized, enables the business to continue as a going concern, and ensures that the division of Betts Co. is not only equal in a legal sense but also provides actual benefit to both spouses.
- [56] It is true Ms. Betts will be a minority shareholder and a silent partner in a business controlled by her ex-husband and Mr. Chorbajian. However, every indication is that Mr. Betts is a reliable business partner. Ms. Betts acknowledges that she trusts Mr. Betts to operate the business and that he has done so fairly since the separation. There is evidence that Mr. Chorbajian harbours personal animosity toward Ms. Betts. However, PNW is Mr. Chorbajian's life work and his passion. I see no risk he would jeopardize the business to spite Ms. Betts.
- [57] For these reasons, I adopt Mr. Betts' proposal for the division of the family property in Betts Co. I would add a term along the lines of the order in *Ortynski* at para. 79, that so long as Ms. Betts is a shareholder, she be entitled to access any and all financial records of the company.

B. The Former Family Home

i. Background

- [58] Mr. Betts owned a home on Yeomans Crescent in Langley, BC, when the relationship began (the "Yeomans Property"). Mr. Betts purchased the property in 2001.
- [59] On May 31, 2012, the parties sold the Yeomans Property and purchased a home on 217A Street in Langley, in which they lived as a family until they separated in November 2019 (the "Former Family Home").
- [60] Mr. Betts handled the purchase and sale transactions. He caused the title to the Former Family Home to be registered jointly in his name and Ms. Betts' name.
- [61] The parties sold the Former Family Home on February 25, 2021. The net sale proceeds were \$2,002,964.97. From these net sale proceeds, the parties have already each received approximately \$835,000 pursuant to a series of agreements and interim orders.

ii. Positions of the Parties

- [62] Mr. Betts claims an exclusion in the amount of \$605,000, representing the value of the Yeomans Property when the relationship began, which he argues can be traced to the purchase of the Former Family Home.
- [63] Ms. Betts argues that the exclusion was lost when the parties purchased the Former Family Home and Mr. Betts registered its title in their joint names.
- [64] In the event the exclusion is lost, Mr. Betts seeks an unequal division of the family property in the Former Family Home. He proposes a resolution of this issue that also addresses the family property in two other real estate properties discussed below.

iii. Analysis

- [65] Section 85 of the FLA provides:

(1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

(2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

- [66] To establish the exclusion he claims, Mr. Betts must prove on a balance of probabilities the value of the Yeomans Property when the relationship began and that the Former Family Home was derived from the disposition of the Yeomans Property. This exercise is not meant to be overly complicated or burdensome. If documentary evidence is not available, Mr. Betts may rely on his recollection of the transactions. While that evidence must be scrutinized for credibility, as trial judge, I am entitled to draw reasonable inferences from evidence that is less than certain or precise: *Shih v. Shih*, 2017 BCCA 37 at paras. 42-45.

- [67] According to an appraisal by Dean Doolan of Johnston, Ross & Cheng Ltd. Real Estate Evaluators, the Yeomans Property was valued at \$605,000 as at April 1, 2005, the date the parties began living together.
- [68] There was a mortgage and a line of credit secured against title to the Yeomans Property. Mr. Betts testified that he paid off the line of credit in 2004 and that he paid off the mortgage in 2005, shortly after the parties began living together but before they married. There may have been a balance owing on the mortgage when the relationship began, but it was negligible.
- [69] Mr. Betts further testified that he used the net sale proceeds from the Yeomans Property for the down payment on the Former Family Home. The purchaser's trust reconciliation confirms that the down payment was \$759,000.
- [70] This evidence is sufficient to establish an exclusion in the amount of \$605,000 when the parties purchased the Former Family Home. The issue is whether the exclusion was lost when Mr. Betts registered its title in their joint names.
- [71] Ms. Betts testified that Mr. Betts told her he was going to put her name on title to the new home and she was happy about that. She could not recall any specifics of the conversation; nor could she recall any reason for the decision other than that she and Mr. Betts were happily married at the time and building a life together.
- [72] Mr. Betts testified that he put the title in their joint names at the request of Ms. Betts. He testified that he did not consider or factor into his thinking at the time the possibility they might separate.
- [73] There is conflict in this evidence; but nothing much turns in my view on whether Ms. Betts asked to be on title or Mr. Betts made the decision and told Ms. Betts about it after the fact.
- [74] The critical question is whether the parties intended to own the Former Family Home in combination, as a pooled asset of their marriage. That is, by using the proceeds from his previously-owned property to purchase a new property, did Mr. Betts intend to "gift" the proceeds to the marriage: *World v. World*, 2021 BCSC 1177 at paras. 18-21; *Salman v. Astifan*, 2021 BCSC 1395 at para. 72.
- [75] It can be inferred from the surrounding circumstances that the parties intended the Former Family Home to be a place to raise their two young children. They lived in the Former Family Home as a family for more than seven years. In my view, they treated the home as a pooled asset of their marriage. I infer that Mr. Betts "gifted" the proceeds from the sale of the Yeomans Property to the marriage, meaning that the exclusion was lost.

- [76] I turn to Mr. Betts' reappportionment argument. Section 95(1) of the FLA authorizes an unequal division of family property if it would be "significantly unfair" to divide the property equally. Section 95(2) lists a number of considerations, none of which specifically mention a loss of excluded property; however, s. 95(2)(i) includes "any other factor that may lead to significant unfairness".
- [77] Mr. Betts relies on *Venables v. Venables*, 2018 BCSC 1736 [Venables BCSC]. In that case, the husband owned a home before the marriage. He also received an inheritance during the marriage. The wife brought no assets into the relationship. The parties were married for about eight years. During the marriage, the husband transferred the home and part of his inheritance into their joint names.
- [78] In *Venables BCSC*, similar to this case, there was little discussion about the transfers at the time, and the parties could not agree on the details of any discussions. There was no express talk of a gift. There was no expressed intention to gift. There was some suggestion that the transfers were done for tax-related purposes.
- [79] Justice Marchand (then a judge of this Court) found that the husband gifted the property to the marriage, meaning the exclusion was lost: *Venables BCSC* at para. 74. However, the Court found that, considering the significant amount of excluded property contributed by the husband, dividing the family property equally would be significantly unfair: *Venables BCSC* at para. 122-131. Accordingly, Justice Marchand reappportioned the property in favour of the husband: *Venables BCSC* at para. 132.
- [80] On appeal, the Court of Appeal upheld the decision to reappportion the property based on the loss of excluded property: *Venables v. Venables*, 2019 BCCA 281 [Venables BCCA]. The Court of Appeal held that, while a consideration of relative contributions is discouraged by the FLA, the FLA does not require a court to ignore the origins of formerly-excluded property when considering reappportionment (at paras. 100-101). The Court of Appeal concluded:
- 112 In not expressly dealing with the question of what happens when excluded property becomes family property, but by providing for reappportionment if equal division of family property would be significantly unfair, the FLA left it open to the court to consider, as a factor justifying reappportionment, the origins of family property as formerly-excluded property contributed by one spouse. The degree of attention paid to this factor will, as in all property division matters, depend on all the circumstances.
- [81] In this case, the formerly-excluded property contributed by Mr. Betts (\$605,000) allowed the parties to acquire the Former Family Home with a large down payment. His contribution is directly reflected in the equity that was available to the parties following their separation.

- [82] At the time Mr. Betts made this contribution, the concept of excluded property was not part of the law in British Columbia. That changed with the implementation of the FLA in 2013. The legislative purpose of moving to an excluded property regime in the FLA was, in part, to better fit with people's expectations about what is fair: they now "keep what is theirs" (such as pre-relationship property), but share the property that accrued during their relationship: *P.G. v. D.G.*, 2015 BCSC 1454, at para. 76; *Shih* at para. 45.
- [83] Some recognition of the source of the down payment for the Former Family Home would therefore bring the final distribution of the property more in line with the current concept of what is fair.
- [84] I conclude that an equal division of the Former Family Home would be substantially unfair. In my view, the appropriate reapportionment is to increase Mr. Betts' share of the proceeds of sale of the Former Family Home by \$201,500.

C. Other Real Estate Properties

i. Background

- [85] In 2003, before the relationship began, Mr. Betts helped his sister to purchase a home on 205A Street in Langley (the "205A Property"). Mr. Betts contributed 50% toward the purchase price. He raised the funds by drawing down on a line of credit on the Yeomans Property. He repaid the draw on the line of credit in 2004. Mr. Betts' sister and her husband continue to live in the 205A Property. Mr. Betts has not contributed to its maintenance or upkeep.
- [86] The appraised value of the 205A Property as of April 1, 2005, was \$320,000, meaning that the 50% interest of Mr. Betts was worth \$160,000 when the relationship with Ms. Betts began.
- [87] The appraisal value as of January 30, 2023, is \$1,050,000, meaning the half-interest of Mr. Betts is worth \$525,000. After deducting the exclusion of \$160,000, the family property component of Mr. Betts' interest is \$365,000. An equal distribution to Ms. Betts would be \$182,500.
- [88] In 2006, after the relationship began, Mr. Betts helped his parents to purchase a home on 197 Street in Langley (the "197 Street Property"). Mr. Betts contributed 90% toward the purchase price of this property. His parents continue to reside in the 197 Street Property. Mr. Betts has not contributed to its maintenance or upkeep, apart from recently purchasing a chairlift for the home.
- [89] The appraised value of the 197 Street property is \$490,000, meaning that Mr. Betts' 90% share is worth \$441,000, all of which is family property. An equal distribution to Ms. Betts would be \$220,500.

ii. Positions of the Parties

- [90] Ms. Betts acknowledges that Mr. Betts' family members should not be displaced by this divorce case. She submits that a reasonable solution is for her interests to be secured by imposing a trust obligation on Mr. Betts combined with 'due on sale' provision and a caveat or similar notice of interest being registered on title to the 205A Property and the 197 Street Property.
- [91] Mr. Betts proposes to give effect to Ms. Betts' interests in these two properties with a credit to be applied against the reapportionment of the value of the Former Family Home.

iii. Analysis

- [92] Ms. Betts' interest in the properties owned by Mr. Betts' family members is \$403,000.
- [93] It is not clear whether a final resolution of the real estate aspect of the family property division can be achieved using the funds available to the parties. If not, the parties may seek further directions from the Court.

D. Other Family Property and Debt

- [94] During the relationship, the parties established two ScotiaMcLeod investment accounts in Mr. Betts' name which they agree are for the benefit of the children as follows:
- an account for the first-born child with a balance of \$65,319.00 as at January 23, 2023; and
 - an account for the younger child with a balance of \$28,839 as at January 23, 2023.
- [95] These accounts are family property, but appear to be akin to RESP savings accounts. Each should be formalized for the benefit of the child for whom it was established. Mr. Betts may continue to hold the accounts, but he should do so in trust for the children. He should take steps to add Ms. Betts as a joint trustee, if that is possible.
- [96] Ms. Betts seeks a compensation payment of \$14,250 for one-half the value of Mr. Betts' Breitling Navitimer watch, less the value of her own watch and engagement ring. Mr. Betts seeks an off-setting compensation payment of \$13,000 for one-half of the value of a vehicle he provided to Ms. Betts following the separation, which she later traded in for a trade-in value of \$26,000.
- [97] As such, the parties should retain their own vehicles, watches and jewelry, with no compensation payment owing from either of them.
- [98] Finally, in January 2020, Ms. Betts withdrew \$100,000 from a joint Scotiabank Line of Credit without Mr. Betts' knowledge or consent. Mr. Betts seeks a repayment from Ms. Betts of \$50,000 (he did not seek the full amount of the debt). This adjustment should be made against the remaining proceeds from the sale of the Former Family Home.

III. GUIDELINE INCOMES

A. Mr. Betts' Income

i. Background

- [99] Mr. Betts receives employment income by way of paychecks from Green Planet. Mr. Chorbajian receives an equal salary from Green Planet. The salaries of Mr. Betts and Mr. Chorbajian are funded by management fees paid by the PNW companies. The amount of the management fees reflects the revenues of the retail locations. Essentially, each independent owner/operator takes a base salary and then shares anything left over with the two co-founders through Green Planet.
- [100] Mr. Betts also receives dividends that are paid by the PNW companies into Betts Co. and then paid out to Mr. Betts. Mr. Chorbajian receives equal dividends through Evergreen.
- [101] All of this is done by consensus. There are no written agreements between the PNW companies or between their shareholders. Mr. Betts does not have an employment agreement.
- [102] In the most recent income tax return for Mr. Betts in evidence, 2021, his Line 15000 total income was \$360,788, of which \$340,326 was employment income and \$18,219 was taxable dividends. In the most recent pay stub in evidence, January 16-31, 2023, his gross pay was \$7,093.75, which equates to approximately \$170,000 annually if it continues at that level to the end of 2023.
- [103] On October 31, 2022, Mr. Betts and Mr. Chorbajian agreed to reduce their salaries to \$170,000 and to stop taking dividends. Mr. Betts and Mr. Chorbajian testified that they agreed to this reduction in their compensation because of the poor financial performance of the PNW companies and the present uncertainty in the industry. They further testified that their salaries remained at \$170,000 as of the date of trial.
- [104] Mr. Chorbajian testified that he had been reluctant even to agree to \$170,000, stating that, if he had had his way, he would have set their salaries even lower to ensure that the companies had adequate reserves.
- [105] The Chief Operating Officer, Mark Walman, gave evidence that there is currently no ability to pull additional funds out of the underlying companies to pay additional compensation to Mr. Betts and Mr. Chorbajian. Mr. Walman testified that he does not anticipate the ability to pull additional funds from the companies for that purpose for at least the next 12 to 18 months.
- [106] Mr. Betts did receive dividends from Betts Co. in 2022, but these were non-reoccurring withdrawals for the purpose of an agreement to pay interim support on an income of \$341,000 (discussed below), not dividends from the PNW companies paid through Betts Co. as in years past.

ii. Expert Evidence

[107] The parties jointly retained Ms. Daum to prepare a calculation of Mr. Betts' income in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. Ms. Daum prepared three scenarios:

- Scenario 1 representing income that Mr. Betts actually received as taxable income with adjustments under Schedule III of the Guidelines and the funds that were actually available to him in Betts Co. from dividends distributed by the PNW companies.
- Scenario 2 which included the pre-tax income available to the companies in which Betts Co. has a 50% interest, which Ms. Daum reduced for what she assumed to be appropriate working capital requirements of the underlying companies.
- Scenario 3 which included the pre-tax income of all of the PNW companies, with adjustments for assumed working capital needs.

[108] Ms. Daum summarized her calculations as follows:

2017

2018

2019

2020

2021

Scenario 1

\$541,000

\$515,000

\$447,000

\$ 866,000

\$ 513,000

Scenario 2

\$ 789,000

\$874,000

\$538,000

\$1,640,000

\$1,269,000

Scenario 3

\$ 975,000

\$1,021,000

\$ 798,000

\$1,939,000

\$1,161,000

[109] Ms. Daum did not prepare income calculations for 2022, so the Court did not have the benefit of her analysis for that year.

iii. Positions of the Parties

[110] Ms. Betts submits that Mr. Betts' Guidelines income should be set using an average over four years of Scenario 1 income plus a portion of a four-year average of Scenario 2 income. Recognizing that Ms. Betts is only a 50% shareholder in the companies from which the Scenario 2 income would be obtained, Ms. Betts proposes that 33% of the Scenario 2 income be included. Ms. Betts' counsel acknowledges that this method of calculating income is somewhat "arbitrary"; however, he submits it would achieve fairness.

[111] Based on the foregoing, Ms. Betts submits that Guidelines income for Mr. Betts should be set at \$634,083:

- Scenario 1 income, averaged over four years (2019-2022) = \$499,000; and
- Scenario 2 income, averaged over four years (2019-2022) at 33.3% = \$135,083.

[112] Mr. Betts did not challenge Ms. Daum's calculations. However, he submits that his Guidelines income should be set at \$170,000. He argues that the evidence establishes the PNW companies have no ability to provide any additional compensation at this time and that, in any event, he has no control over his income because any additional compensation would require Mr. Chorbajian's agreement.

iv. Analysis

[113] Section 15 of the Guidelines requires that a spouse's annual income be determined in accordance with ss. 16-20. The starting point is s. 16 and the spouse's Line 15000 total income:

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

[114] Section 17(1) authorizes the court to adjust income based on the preceding three years, in the event that annual income under s. 16 does not represent the fairest determination of income:

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.

[115] Where annual income under s. 16 does not fairly reflect all the money available to the spouse, s. 18(1)(a) authorizes the court to include as income all or part of the pre-tax income of a corporation of which a spouse is a shareholder, director or officer. Alternatively, s. 18(1)(b) authorizes the court to set an income commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income:

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

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

[116] Finally, s. 19(1) confers a broad discretion on the court to impute an income to the spouse that it considers appropriate in the circumstances, including but not limited to where the spouse is intentionally under-employed (s. 19(1)(a)); the spouse's property is not reasonably utilized to generate income (s. 19(1)(e)); and 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 (s. 19(1)(h)).

[117] Ms. Betts relies first on an averaging over four years.

[118] In *Harras v. Lhotka*, 2016 BCCA 246 at para. 35, the Court of Appeal reviewed the case law under s. 17 and set out the following general principles:

- a) the averaging approach to income determination under s. 17 is very fact specific;
- b) generally speaking, averaging will be applied where income fluctuates, or where the payor has not demonstrated a lasting decline in earnings;
- c) depending on the reasons for a pattern of fluctuating income, averaging may be more or less appropriate; and
- d) ultimately, it depends on fairly calculating the amount of income reasonably available to pay child support.

- [119] In rarer cases, income may be averaged over a longer period of time where it would more accurately reflect the income available to the payor spouse than a three-year average; however, this is done under s. 19(1), not s. 17: Harras at paras. 36-37.
- [120] In my view, the determination of Mr. Betts' income under s. 16 of the Guidelines would not be the fairest determination of that income. As stated, Mr. Betts' 2022 tax return is not in evidence; however, in his most recent F8 Financial Statement, Mr. Betts deposed that his Line 15000 total income is \$341,000, of which \$170,250 is employment income and \$170,750 is the non-reoccurring dividends discussed above. Neither \$341,000 nor \$170,250 would be a fair determination of Mr. Betts' income.
- [121] Mr. Betts' income fluctuates dramatically over time. His Scenario 1 income went from \$515,000 in 2018, down to \$447,000 in 2019, up to \$866,000 in 2020, and back down to \$513,000 in 2021 (roughly the same as in 2018). Following the agreement with Mr. Chorbajian in October 2022, it declined precipitously to \$170,000.
- [122] These fluctuations are generally, but not directly, reflections of the revenues of the PNW companies. The pre-tax income of Green Planet went from \$1,222,598 in 2018, down to a loss of \$464,735 in 2019, back to income of \$1,294,134 in 2020, and down to \$196,728 in 2021. According to its comparative income statement, Green Planet had a loss of \$177,618 in the first six months of its 2022 fiscal year, which would suggest an estimated loss in 2022 of \$355,236 if the same pattern continued in the second half of the year.
- [123] Notably, in my view, Mr. Betts received Scenario 1 income of \$447,000 in 2019 when Green Planet recorded a loss of \$464,735.
- [124] While the business of PNW has suffered financially since mid-2021, Mr. Betts has not demonstrated a lasting decline in its revenues. It is apparent that PNW operates in a dynamic industry, with dramatic highs and lows. The witnesses described legalization, the pandemic and the current market downturn as unique events, rather than as long-term trends. While revenues may have "fallen off a cliff" recently, there is no evidence that the downturn is permanent.
- [125] Considerable evidence was given at trial on behalf of Mr. Betts about the steps PNW is taking to manage the current decline in revenues, including sourcing new products, formulating new fertilizers and reorganizing their packaging and online sales to reduce costs and increase revenues. These steps may take time to improve the bottom line. PNW does not expect a significant change in revenues for 12 to 18 months; however, the witnesses all expressed confidence in the future of the business.
- [126] Indeed, a central premise of Mr. Betts' proposal for the division of the family property in Betts Co. was that the value of the shares is likely to increase over the next five years, meaning that the revenues from the underlying PNW companies are expected to increase.

- [127] In the circumstances, setting Mr. Betts' income at what is essentially the nadir of PNW's profitability is not a fair determination of that income.
- [128] Moreover, regardless of current profitability, \$170,000 is not a fair salary for Mr. Betts' contribution to the company as its co-founder. Ms. Daum included a notional salary of \$200,000 for Mr. Betts' position in her business valuation, which strikes me as a bare minimum for his services. During the past downturn following legalization in 2018, Mr. Betts' base salary was in the range of \$250,000, not \$170,000.
- [129] Nor is it fair to use his full Line 15000 income in 2022 of \$341,000 because that amount includes non-reoccurring dividends to pay interim support on a without prejudice basis.
- [130] Averaging Mr. Betts' income over three years pursuant to s. 17, or even over four or five years pursuant to s. 19(1), would not produce a fairer result. This is because the high income he received in 2020 and 2021, when PNW enjoyed record profits, skews the average upward. No length of averaging would fairly represent Mr. Betts' current ability to pay support.
- [131] Accordingly, I decline to use averaging to set his Guidelines income.
- [132] Ms. Betts also relies on s. 18(1)(a) of the Guidelines and seeks to include in Mr. Betts' income a share of the pre-tax income of the PNW companies in which Mr. Betts has a 50% interest (Scenario 2 from Ms. Daum's report).
- [133] The Court of Appeal explained the reason for considering corporate income, when it is available, in *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 121:

Where a person owns or controls a corporation, the income actually paid by the corporation may not represent the total income available to be paid. By underpaying him or herself, an owner could artificially reduce the income available to pay support unnecessarily or arbitrarily--i.e., reduce income by choice. A corporation could be used as a vehicle to accumulate savings, which would depress support payments. Section 18 allows the court to "lift the corporate veil" to ensure that money received as income by the payor spouse fairly reflects all the money available for payment of support [citations omitted].

- [134] Reliance on s. 18 presumes that the company, or companies, had pre-tax income in the most recent tax year. In this case, there is very little objective financial information about the 2022 tax year. Ms. Daum's calculations end with the 2021 tax year. The only financial statements in evidence for 2022 are the interim statements of Green Planet and HIT.
- [135] The interim statements of Green Planet show net income of \$987,790 from May 2021 to April 2022, followed by a loss of \$177,618 from May to October 2022. The interim statements of HIT show a loss of \$172,726 from May 2021 to April 2022, and a loss of \$177,618 from May to October 2022.

- [136] These financial statements confirm that PNW was struggling financially in 2022; however, they do not establish that there was no after-tax income in the PNW companies in 2022.
- [137] A further requirement for s. 18 to apply is that the Court must be "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" (emphasis added).
- [138] Whether any, part or all of a company's pre-tax earnings is "available" for distribution to a payor spouse depends on the circumstances of each case. The case law provides the following general principles:
- a) it is not necessary for the claimant to show bad faith or an intent by the payor spouse to defeat the Guidelines to demonstrate that all or part of the corporation's pre-tax income is available for distribution: *Kowalewich v. Kowalewich*, 2001 BCCA 450, at para. 40;
 - b) the onus is on the payor spouse to "present clear evidence showing that part of the pre-tax income is not available" (emphasis added): *Namdarpour* at para. 124; *Quinton v. Kehler*, 2020 BCCA 254 at paras. 83-84;
 - c) however, there is no requirement for the payor spouse to demonstrate "that the business could not be run in a fashion that generates more available income": *McKenzie v. McKenzie*, 2014 BCCA 381 at para. 102;
 - d) in assessing whether to include corporate income in Guidelines income, the court is not required to "second-guess business decisions"; nor is it required to "place the largest available shovel in the company store": *Kowalewich* at para. 44;
 - e) instead, the court must assess "a spouse's allocation of pre-tax corporate income between business and family purposes for fairness on priorities as [parents] would in an intact family": *Kowalewich* at para. 44; and
 - f) in doing so, the court "must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income": *Kowalewich* at paras. 58-59.
- [139] The nature of a spouse's ownership interest is also an important consideration. In *Kowalewich* the Court of Appeal stated:
- [48] In some cases, the nature of the spouse's relationship with the corporation will be decisive. Section 18 applies to a spouse who wholly controls a corporation, but it also applies to one who shares ownership and control with others. In the former case, the corporate income method is likely to be the fairer method of determining income. This is because it allows a court to include not only reasonable payment for personal services but also a reasonable return on the owner's entrepreneurial capacity and investment. These are sources of income available for child support an intact family would utilize.

[Emphasis added.]

- [140] In some cases involving corporations with more than one shareholder, the courts have focused on the spouse's ability to control the company's decisions when determining what money is "available" to them. In *Isacson v. Isacson*, 2014 BCSC 2351, for example, the Court held:
- [108] I find that the Respondent has demonstrated on a balance of probabilities that Allterra's pre-tax earnings are not available to him. He is not the sole shareholder and does not control the decisions that are made by the company. Rather, they are based upon a consensus among the Respondent, Mr. Lam and Mr. Mizuik.
- [141] In *Ross v. Ross*, 2017 BCSC 371, the Court recognized that the payor spouse did not control the business and could not unilaterally increase his compensation:
- [75] Contrary to Ms. Ross' assertions, I am not convinced that Mr. Ross "controls" RGY to the extent suggested by Ms. Ross and in particular, in terms of controlling RGY's income. He is a 50% shareholder, as is Ms. Mahoney. Ms. Mahoney is the person who controls the financial matters of RGY. In that circumstance, both must agree before Mr. Ross could take any corporate steps, obtain information and documentation or even declare dividends or take draws from RGY's account.
- [142] More recently, in *Jensen v. Jensen*, 2018 BCSC 283, Justice MacNaughton held at para. 77, that "[e]ven where the payor parent is a minority shareholder, it is fair to attribute a portion of the corporate pre-tax income to that payor", citing *Chapman v. Summer*, 2010 BCCA 237 at para. 33. In *Jensen*, the husband was a shareholder in several corporations; for some he was a majority shareholder and for others he was a minority shareholder. In determining what income was available to Mr. Jensen for child support purposes, the Court looked to what cash was required to maintain the profitability of the operating companies rather than whether he controlled company decisions.
- [143] In *Chapman*, the husband was a minority shareholder in a family business with his brothers. At para. 33, the Court of Appeal concluded that his income "must recognize the money that is available to him from the companies' income". The Court had found money was "available" to him because (a) significant funds were held by the company that were not required to be retained for corporate needs and (b) the husband was in a position to influence the amounts paid out by the company.
- [144] In this case, there is evidence that the PNW companies have retained earnings, but very little net income (although, as stated, current financial information is sparse). There is also evidence that the companies require working capital for inventory, research, development and the steps underway to return the business to profitability. This is largely because PNW does not have access to conventional bank financing.

- [145] The dividends Mr. Betts received historically reflect times when the companies' earnings exceeded their working capital needs. Currently, the companies do not have excess working capital with which to pay dividends.
- [146] Mr. Walman testified, generally, that there is currently no ability to pull additional funds out of the companies to pay additional compensation to Mr. Betts.
- [147] However, I am not persuaded on the limited objective financial evidence that there are no funds with which to pay Mr. Betts an income commensurate with the services that he provides to the PNW companies.
- [148] Mr. Betts is not the sole shareholder and does not control decisions by the PNW companies, even those in which he is a 50% shareholder. A decision to increase the management fees paid to Green Planet requires a consensus among the various owner/operators. A decision to pay out dividends requires a consensus between Mr. Betts and Mr. Chorbajian.
- [149] As the co-founder of the business, however, Mr. Betts is, in my view, in a position to influence what amounts are paid out of the companies. Here, I distinguish between Mr. Betts' base salary and additional compensation by way of dividends. While Mr. Betts may not be able to take additional dividends out of the companies without the agreement of Mr. Chorbajian, he is entitled in my view to demand to be paid a fair salary.
- [150] In my view, an income of between \$200,000 and \$250,000 is commensurate with the services that Mr. Betts provides to PNW. I am not persuaded that this amount exceeds the pre-tax income of the PNW companies. I would therefore set Mr. Betts' income at the mid-point of \$225,000 pursuant to s. 18(1)(b) of the Guidelines.
- [151] In my view, this is fairer, and more consistent with the language of the section, than relying on s. 18(1)(a) to include an arbitrary amount of the companies' pre-tax income from years past, as proposed by Ms. Betts.
- [152] If I am wrong in reaching this conclusion under s. 18(1)(b), I would alternatively impute an income of \$225,000 to Mr. Betts under s. 19(1) of the Guidelines. Section 19(1) provides wide discretion to impute income to a spouse as the court considers appropriate. This provision is not subject to the restrictions set out in ss. 16, 17 and 18: *Ouelette v. Ouelette*, 2012 BCCA 145 at para. 66.
- [153] For these reasons, I set Mr. Betts' Guidelines income at \$225,000.

B. Ms. Betts' Income

- [154] Ms. Betts was in her mid-30s when she met Mr. Betts. She was working as a hairdresser and makeup artist. She had completed some post-secondary education in interior design and completed certificate programs for hairdressing and makeup. She had worked in the film industry for a while; however, her income had always been modest.

- [155] Ms. Betts moved in with Mr. Betts in April 2005. Following the birth of their first child, G., in November 2006, Ms. Betts was mostly a stay-at-home mother. A second child, B., was born in June 2009. For the first four years of the marriage, the parties employed live-in nannies to care for the children, clean the home and prepare meals. Nonetheless, Ms. Betts ran the home and she was primarily responsible for the two young children when they were not in the care of the nannies. Mr. Betts was also involved in raising the children, notably acting as their hockey coach. However, Ms. Betts was the primary caregiver, while Mr. Betts continued to build a successful business.
- [156] From 2012 to 2014, Ms. Betts operated a small business that sold furniture, clothing and home decor. The business never turned a profit. After two years, she and Mr. Betts made a joint decision it should be shut down.
- [157] Ms. Betts also wrote a blog, but her blogging did not generate any income.
- [158] Ms. Betts was not working outside the home when the parties separated. She reported income from PNW on her tax returns, but this was for income splitting purposes. She was not involved in the business and did not provide any services to PNW.
- [159] Initially, when the parties separated in November 2019, they continued to live in the Former Family Home, albeit separate and apart. When they sold the property in February 2021, Ms. Betts moved to a townhouse in Langley.
- [160] In January 2022, Ms. Betts moved to North Vancouver. The parties agreed on a split parenting schedule in which B. lives with Ms. Betts during the week, and G. lives with Mr. Betts in Langley during the week.
- [161] Ms. Betts drives B. to school at Fraser Academy in Vancouver. The private school has programs which are well-suited to his needs, which include dyslexia. He is doing well, and wants to continue attending Fraser Academy.
- [162] Ms. Betts' plan has been to find work as a medical aesthetician. She estimates that she could earn between \$21 and \$25 per hour, working 35 to 40 hours per week. In 2020, she attended a course from home to become a medical aesthetician. She did not complete the course because it interfered with her parenting time. She enrolled in a further course in February 2023, but cancelled it because of this trial. She recently completed a reiki course, which I understand to be a wellness practice.
- [163] Ms. Betts is a capable and intelligent woman. It is understandable that she would need some time following the separation to support her children and find separate living accommodations. However, any reasonable transition period has passed. It is now almost four years since the separation. While she understandably has put her children first, I am not persuaded that her parenting responsibilities prevent Ms. Betts from working full-time. Driving B. to and from Fraser Academy is not a barrier to her working. If necessary, B. could take a bus, which he did when the parties still both lived in Langley.

[164] In my view, Ms. Betts is capable of full-time employment. However, it must be recognized that she has been out of the regular workforce for almost 17 years. Her education and training are limited and dated. On the other hand, her efforts to date at retraining and finding employment have been sporadic, at best. In part, this has been because of the family law proceedings. By the time these reasons are issued, it will have been several months since she had any court commitments. She has had time to complete the necessary training. I think it is reasonable to find that Ms. Betts is now capable of working as a medical aesthetician, or in a similar line of employment, and earning between \$21 and \$25 per hour.

[165] For these reasons, I would impute an income to Ms. Betts of \$37,000 per year commencing September 1, 2023.

IV. SUPPORT

A. Retroactive Support

i. Background

[166] Initially following the separation, Mr. Betts did not pay child or spousal support per se; however, he continued to cover family expenses. While the parties lived under the same roof, Mr. Betts continued to pay the expenses related to the home. He ensured that Ms. Betts continued to receive payments of \$1,376 twice monthly from PNW that were allocated to her for income splitting purposes.

[167] In addition, Mr. Betts paid the following expenses for the children:

- tuition at Fraser Academy for B. (at that time, \$34,500 and currently \$44,585 per year);
- bus to school for B. (\$3,250 per year);
- field trips and technology at school for B. (\$500 per year); and
- hockey registration, equipment and travel for G. (approximately \$12,000 per year)

for a total of \$60,345 per year.

[168] Whatever was left over from each pay cheque from Green Planet, Mr. Betts paid half to Ms. Betts by way of e-transfer or cheque. In addition, Mr. Betts provided Ms. Betts with the following payments after taxes:

- a \$30,000 dividend from the Surrey Company and a \$10,000 dividend from the company that operated the now-closed location in Vancouver in 2020; and
- a \$20,000 e-transfer, representing one-half of what remained from a \$55,558.96 bonus he received from the companies, after paying \$15,850 to Ms. Daum to satisfy her joint retainer.

[169] Ms. Betts filed the notice of family claim on September 22, 2020, giving formal notice of a claim for child support and spousal support.

- [170] In February 2021, Ms. Betts moved to the townhouse in Langley and began to incur some of her own expenses. She also began to receive advances out of the net sale proceeds of the Former Family Home.
- [171] On March 15, 2021, Mr. Betts began paying support to Ms. Betts, without a court order, based on a Guidelines income of \$340,000, in the amount of \$4,401 per month for child support and \$2,242 per month for spousal support.
- [172] On October 22, 2021, Ms. Betts applied for interim child and spousal support based on her calculation of Mr. Bett's proper Guidelines income, which was substantially more than \$340,000.
- [173] On December 16, 2021, Master Muir adjourned Ms. Betts' application and made an interim order by consent that Mr. Betts pay \$4,413 per month in child support and \$2,230 per month in spousal support based on a Guidelines income of \$341,000.
- [174] On October 31, 2022, Mr. Betts' income was reduced to \$170,000. Through an agreement between counsel, he continued to pay child and spousal support based on a Guidelines income of \$341,000. To do so, he took cash from Betts Co. by way of dividends.

ii. Positions of the Parties

- [175] Ms. Betts seeks retroactive support from the date of these reasons to January 2020, with credit to Mr. Betts for the support he has paid to date.
- [176] Mr. Betts submits that any and all claims to retroactive support up to and including the date of a final order should be dismissed as fully paid.

iii. Analysis

- [177] Ms. Betts' claim to retroactive support is based largely on her recalculation of Mr. Betts' income from 2020 to present. As discussed, she seeks to recalculate his income based on a combination of averaging over four years and including a portion of additional income from the PNW companies.
- [178] For the reasons set out above, I would not adopt Ms. Betts' calculation of Mr. Betts' income. Instead, retroactive support, if appropriate, should be based on his actual or imputed Guidelines income since separation.
- [179] Mr. Betts has paid interim support since March 15, 2021, based on his T4 employment income. However, Ms. Daum's analysis, as summarized under Scenario 1 in the table above, establishes that his Guidelines income was higher than his T4 employment income- at least until October 31, 2022 - because of dividends and adjustments pursuant to Schedule III of the Guidelines.
- [180] On October 22, 2021, Ms. Betts gave notice that she considered the amount of support paid by Mr. Betts to that date without court order to be inadequate.

- [181] I would not award retroactive support prior to the date on which Ms. Betts gave this notice. There is no evidence that Mr. Betts' conduct was "blameworthy" in the sense explained by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 105-109 so as to justify an earlier date for retroactive support. There is no evidence that Mr. Betts threatened, misled, or pressured Ms. Betts in any way. There is no evidence that he failed to disclose material financial information about his income. Prior to October 22, 2021, he was entitled to assume that the steps he took to provide informal support for Ms. Betts and the children were sufficient.
- [182] For these reasons, I would order Mr. Betts to pay retroactive support from November 1, 2021 to November 1, 2022, based on the Scenario 1 income from Ms. Daum's report, less the amounts he actually paid for interim support over that time period.
- [183] Mr. Betts has overpaid interim support since November 1, 2022. The reduction in his income on October 31, 2022, was a material change in circumstances. From November 1, 2022, to present, I would calculate support payable based on a Guidelines income of \$225,000 per year. Mr. Betts is entitled to a credit based on the difference between what he would have been required to pay from November 1, 2022 to September 1, 2023, based on an income of \$225,000 and what he actually paid. He may apply that credit against any retroactive support owing.

B. Child Support and s. 7 Expenses

- [184] The parties agree, based on their split parenting arrangements, that child support should be calculated on an offset basis in accordance with s. 8 of the Guidelines.
- [185] The amount of child support Mr. Betts and Ms. Betts must notionally pay one another, and the net amount Mr. Betts must pay Ms. Betts, follows from my determination of their incomes and the levels of support set by the Guidelines.
- [186] I would not require the parties to reallocate the children's expenses since the date of separation under s. 7 of the Guidelines. I have factored Mr. Betts' payment of these expenses into my decision to limit the timeframe for retroactive child support to November 1, 2021.
- [187] Going forward, the s. 7 special expenses will be shared by the parties proportionate to their respective incomes: Mr. Betts will pay 86% and Ms. Betts will pay 14%.

C. Spousal Support

- [188] Ms. Betts is entitled to spousal support on an ongoing basis in the mid-range recommended by the Spousal Support Advisory Guidelines (the "SSAG") using the incomes I have imputed to the parties.

- [189] I agree with Mr. Betts that the entitlement is primarily needs-based, or based on non-compensatory grounds, given that Ms. Betts did not sacrifice a career outside the home as a result of her role during the marriage. I agree that the evidence shows she had the time and the opportunity to return to hairdressing or makeup if that was her choice.
- [190] Ms. Betts argues that spousal support should be indefinite, in other words, the duration should not be specified in the order.
- [191] In most circumstances, the courts do not establish a fixed duration of spousal support in an initial order: *J.A.F. v. J.J.F.*, 2019 BCSC 507 at para. 82.
- [192] The SSAG at section 8.5 recommend that, for marriages with dependent children, initial orders be indefinite, subject to the usual process of review or variation. The SSAG provide two reasons for this recommendation. First, the tests for duration are not intended to impose time limits on initial orders, but rather structure for an ongoing process of review and variation. Second, duration in cases with dependent children is fact-specific and should vary based on the education, skills and work experience of the recipient spouse.
- [193] In this case, I have found that Ms. Betts is currently capable of earning a very modest income only. I have imputed income to her based on her estimate of what she could earn as a medical aesthetician. While she is entitled to spousal support, Ms. Betts must recognize the support will end at some point and she will need to try to earn more money. A review would provide a valuable means of addressing her efforts to become self-sufficient and the duration of spousal support.
- [194] On the other side of the equation, Mr. Betts' actual income may remain stuck at \$170,000. It could also increase above the \$225,000 I have imputed to him. Either way, a review of spousal support would provide a means of revisiting his support obligations.
- [195] In addition, the parties' means and needs are likely to change with a sale of the shares or assets of Betts Co.
- [196] Accordingly, I would make the order of spousal support indefinite, but order a review no later than September 1, 2028, or the date of a sale of the shares or assets of Betts Co., whichever is sooner. This will be without prejudice to the normal process of review and variation under the Guidelines and legislation.

V. CONCLUSION

- [197] For the reasons set out above, I would make a final order based on the draft proposed by Mr. Betts, with the following changes:
- a) The Court finds Mr. Betts' income for the purposes of child and spousal support to be \$225,000 per year.

- b) Mr. Betts must pay retroactive child and spousal support for the period of November 1, 2021 to October 31, 2022, based on the Scenario 1 income from Ms. Daum's report, less the amounts he actually paid for interim support over that time period.
 - c) Mr. Betts is entitled to a credit based on the difference in the child and spousal support he would have been required to pay from November 1, 2022 to September 1, 2023, based on an income of \$225,000, and what he actually paid as interim support over that time period. He may apply that credit against any retroactive support owing under this order.
 - d) The commencement date for ongoing child and spousal support will be September 1, 2023.
 - e) Going forward, s. 7 special expenses will be shared by the parties as follows: Mr. Betts will pay 86% and Ms. Betts will pay 14%.
 - f) There will be a review of child and spousal support no later than September 1, 2028, or the date of a sale of the shares or assets of Betts Co., whichever is sooner.
 - g) For so long as Ms. Betts is a shareholder of Betts Co. or the Trust, she is entitled to access to any and all financial records of those entities and of the PNW companies in which Betts Co. holds shares.
- [198] I ask that counsel change the division of the real estate aspect of family property in the final order to reflect these reasons for judgment.
- [199] I ask that counsel recalculate the amount of child and spousal support in the final order based on these reasons for judgment. In the event they are unable to agree on any terms of the final order, they may ask to appear before me by MS Teams at 9:00 am on any mutually available date.
- [200] The parties may speak to costs. Mr. Betts has been substantially successful in the outcome of the trial. However, I have raised Ms. Betts' concern with the use of Ms. Daum's valuation report as a possible costs consideration. There may be other factors of which I am unaware. If the parties cannot agree on costs, Ms. Betts may deliver submissions in writing within 28 days of the date of these reasons, to which Mr. Betts may respond within 14 days.
- [201] I am grateful to counsel for their helpful written and oral submissions.

"Elwood J."

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