

CANADA / JUDGMENT

Block v. Block

2020 BCSC 1694

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1694 Block v. Block

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Block v. Block,

2020 BCSC 1694

Date: 20201109

Docket: E96905

Registry: Kelowna

Between:

Angela Maria Block

Claimant

And

Lorne Christopher Block

Respondent

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Claimant:

S. Murray

Counsel for the Respondent:

M. Koochin

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 23, 2020

Place and Date of Judgment:

Kelowna, B.C.

November 9, 2020

INTRODUCTION

- [1] The claimant, Angela Block seeks retroactive child support for the two children of her marriage to the respondent, Lorne Block. That retroactive support is sought pursuant to the terms of a separation agreement (the "Separation Agreement") entered into between the parties on June 23, 2014.
- [2] Mr. Block agrees that some retroactive child support is payable but disagrees with the amounts sought by Mrs. Block.
- [3] The parties have agreed that the years for which retroactive child support is payable are for the five twelve month periods from July of one year to June of the following year. Those five twelve month periods commence in July 2015 and end in June 2020.
- [4] The parties have also agreed that for each of those twelve month periods Mr. Block's child support obligations must be determined based upon an assessment of his prior year's income.
- [5] Previously outstanding issues concerning Mr. Block's past and future responsibility for extraordinary child support expenses have been settled between the parties.

ISSUES

- [6] The disputes as to the amount of retroactive support payable by Mr. Block include disagreement concerning whether, and if so to what extent, monies received by Mr. Block from the re-financing and subsequent sale of a commercial building (the "Commercial Property") from which Mr. Block historically operated his commercial kitchen supply and service business, is to be included in his income in determining the amount he must pay for child support.
- [7] Mr. Block operates that business (known as Block's Commercial Kitchen Equipment Services) through CAJE Ventures Ltd. (the "Company").
- [8] Primarily in issue are the tax years 2015, 2017 and 2018 and the retroactive child support payable in the 12-month period commencing in July following the relevant taxation year.
- [9] Mrs. Block claims retroactive child support of approximately \$167,000.

[10] Mr. Block submits that he should be required to pay arrears totalling approximately \$55,000.

BACKGROUND

[11] The parties were married on September 7, 2002 and separated on June 15, 2011. The two children of their marriage are now 14 and 16 years old. As noted above, Mr. and Mrs. Block entered into the Separation Agreement that is the subject of this application on June 23, 2014.

[12] Clause 7 of the Separation Agreement provides:

7. The parties agree that Chris will continue to pay Angela the sum of \$940 per month for the support of the Children pursuant to the Consent Order, dated January 28, 2013, and that, commencing April 15, 2014, Chris will make the payments on the 15th of each and every month thereafter for so long as the Children are "children" as defined by the Family Law Act and for so long as the Children continue to be enrolled full-time in post-secondary institutions. So long as the children are taking a bachelors degree or a two year diploma course or the equivalent.
8. The Parties shall share all special or extraordinary expenses for the Children in proportion to their respective incomes pursuant to Section 7 of the Federal Child Support Guidelines. In accordance with, the Consent Order, dated January 28, 2013, Angela's guideline is \$69,000 and Chris has a guideline income of \$62,000, as such, Angela will pay for 53% and Chris will pay for 47% of the Children's section 7 expenses.

[13] Clauses 10(a) and (b) of the Separation Agreement provide:

10. For so long as child support is payable, the parties shall:
 - (a) exchange their respective notices of assessments, income tax returns (along with all attachments), and corporate financial information by no later than June 1st of each year, commencing June 1, 2014; and
 - (b) make adjustments to the amount of child support, and their proportionate share of the Children's section 7 expenses, to be paid by Chris to Angela in accordance with the Federal Child Support Guidelines by July 1st of every year.

[14] Notwithstanding those provisions, the parties did not adhere to their respective obligations to provide the required financial information when required. In result, Mr. Block has, since April 15, 2014 paid basic child support for the two children of \$940 per month without adjustment.

[15] The parties have however, now provided the required financial information so that the required adjustments to Mr. Block's child support obligations can be determined.

[16] Pursuant to s. 16 of the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines"), the starting points for Mr. Block's child support obligations (as recorded in his Line 150 income returns) for the relevant tax years are:

- 1) 2014: \$107,200;
- 2) 2015: \$330,400;
- 3) 2016: \$100,115;
- 4) 2017: \$59,834; and
- 5) 2018: \$226,101.

[17] The child support issues that arise on this application are, however, also impacted by the following property division of the Separation Agreement:

- 1) The former family residence (subject to a mortgage in the amount of approximately \$235,000), and having an assessed value of \$390,000 was received by Mrs. Block;
- 2) The Company including the Commercial Property (encumbered by a promissory note under which approximately \$61,752 remained owing) and having an assessed value of \$556,000 (less a \$10,000 tax exemption) was received by Mr. Block;
- 3) Mr. Block was required to pay Mrs. Block \$143,000 within 90 days of the Separation Agreement in order to equalize the division of assets and was required to assume all tax liabilities of the Company; and
- 4) The parties agreed that the Commercial Property was the "main asset" owned by the Company and that, in addition to it being used in the operation of the Company's business, it generated approximately \$5,000 per month from units to other parties.

[18] The evidence establishes that in order to pay Mrs. Block the \$143,000 property equalization payment required by the Separation Agreement, Mr. Block:

- 1) Was required to cause the Company to re-finance the Commercial Property to allow a \$280,000 dividend to be paid to Mr. Block so that he could make the equalization payments and also pay taxes assessed on the dividend;
- 2) In late 2017, Mr. Block caused the Company to sell the Commercial Property resulting in a capital gain on disposal of \$647,605; and
- 3) The Company then paid Mr. Block a dividend in 2018 of \$266,800 from those sale proceeds which he used to purchase a personal residence.

[19] The child support issues in this case are thus, complicated by the fact Mr. Block's income from the Company in the years for which retroactive child support is payable under the Separation Agreement has been derived from a combination of employment income, different types of dividends and shareholders loans.

- [20] Because of the various means by which he has received income over the years, not all of Mr. Block's yearly income from all of those sources is reflected on Line 150 of his yearly income tax returns.
- [21] Child support income issues and necessary adjustments that arise in some, but not all years, include:
- 1) Deductions made by the Company for automotive expenses that are allowable as corporate expenses but must be accounted for as income under the Guidelines for child support purposes;
 - 2) Deductions for amortization expenses claimed by the Company that are allowable as corporate tax deductions must, however, under s. 18 of the Guidelines, be considered when determining Mr. Block's income for child support purposes;
 - 3) Adjustments to dividend income required under s. 5 of Schedule III of the Guidelines, to reflect dividends actually received rather than the taxable amount of a dividend paid to Mr. Block; and
 - 4) Imputation of income to Mr. Block under s. 19(1) (h) of the Guidelines on tax free dividends paid from the Company's capital account to him as a shareholder.
- [22] In addition to those adjustments I must also consider:
- 1) How a shareholder loan from the Company to Mr. Block in 2018 should be treated for child support purposes?
 - 2) Whether funds left in the Company from the sale of the Commercial Property should be treated as Mr. Block's income for child support purposes in 2018?
 - 3) Whether, in all of the circumstances, it is necessary or appropriate to apply the income averaging provisions of s. 17(1) of the Guidelines in determining Mr. Block's income for child support purposes for one or more of the years in issue?

DISCUSSION AND ANALYSIS

- [23] Given the disparity in the parties' respective submissions concerning the determination of Mr. Block's income for child support purposes (especially in the 2015, 2017 and 2018 taxation years), and the myriad of ways in which income from the Company was distributed to Mr. Block; together with the ways in which the distributed income was generated by the Company it is necessary to address in some detail the positions advanced by the parties in respect of each relevant taxation year.

2014

- [24] Mrs. Block submitted that Mr. Block's income for child support purposes in 2014 should be assessed as being \$118,679, while Mr. Block initially asserted it should be assessed as \$111,679.
- [25] After discussions during submissions Mr. Block agreed that his income for 2014 upon which his child support obligations for the 12-month period commencing July 2015 and ending June 2016 should be assessed as being \$118,679.
- [26] That agreed upon amount is comprised of the Canada Revenue Agency's assessment of Mr. Block's 2014 Line 150 income (\$107,250) plus amortization expenses claimed by the Company of \$11,429.

2015

- [27] Mrs. Block submitted that Mr. Block's income for child support purposes in 2015 should be assessed as being \$291,429, while Mr. Block submitted it should be assessed as being \$110,359.
- [28] In 2015, Mr. Block's Line 150 income was \$330,400 all of which was derived from dividends paid to him by the Company. Pursuant to s. 5 of Schedule III of the Guidelines Mr. Block is entitled to adjust that amount to account for the actual dividends received rather than the taxable amount. That adjustment results in his income for child support purposes from those dividends being \$280,000.
- [29] Mrs. Block submitted that amortization in the amount of \$11,429 deducted by the Company from its corporate taxes in 2015 should also be added to those actual dividends so that in her submission Mr. Block's total income in 2015 should be assessed as being \$291,429.
- [30] It was, however, as noted above a term of the Separation Agreement that Mr. Block pay Mrs. Block \$143,000 within 90 days of the signing of the Separation Agreement to equalize the parties' division of their assets and was also required to assume all tax liabilities of the Company.
- [31] As also noted above, in order to pay Mrs. Block the required equalization payment Mr. Block was required to cause the Company to re-finance the Commercial Property to allow a \$280,000 dividend to be paid to him so that he could pay Mrs. Block \$143,000 as well as taxes assessed on that dividend.
- [32] Mr. Block submitted that in all of these circumstances it would be grossly unfair to treat the receipt of a non-recurring one-time dividend derived from the re-financing of the Commercial Property for the sole purpose of making that equalization payment as his income for child support purposes.

- [33] Mr. Block accordingly submitted that in 2015 income should be imputed to him in the amount of \$110,359 for child support purposes to reflect an amount similar to income earned by him from the Company's operations in 2014 and 2016 rather than by inclusion of the funds received by him from any corporate re-financing required to make the equalization payment.
- [34] Mr. Block's submissions require consideration of s. 17(1) of the Guidelines which provides:
- 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.
- [35] In *Brown v. Brown*, 2014 BCCA 152 [Brown], the Court considered s. 17(1) of the Guidelines in relation to non-recurring dividends paid to Mr. Brown that were attributed to him at the sole discretion of his employer as part of a share purchase arrangement. Those dividends did not form a part of his regular income. He had no choice but to use the dividends to finance the purchase of the shares. If he had not entered into the share purchase arrangement he would have foregone the dividends entirely.
- [36] In considering whether those dividends should be included in Mr. Brown's income for child support purposes under the Guidelines the chambers judge stated at para. 20 (quoted at para. 5 by the Court of Appeal in *Brown*):
- [20] While the dividend that Mr. Brown received was classified as income for tax purposes, it was not discretionary income, because he was required to apply it entirely to the debt for purchase of his shares. It therefore had no impact on his ability to pay support or his lifestyle. I agree that the purchase gets him an asset, that is the shares in his employer company, that may well have great value some day, but it is an asset that he cannot currently sell or borrow against. It would be unfair to take it into account in settling Guideline income for the purpose of a retroactive award.
- [37] In upholding that conclusion Mr. Justice Groberman stated at paras. 33 to 35 in *Brown*:
- [33] Because the dividends received by Mr. Brown do not represent a resource that could have been available to him to pay child support, I do not see the objective set out in s. 1(a) of the Guidelines as supporting their inclusion in Mr. Brown's Guideline income.
- [34] While s. 1(a) of the Guidelines is the provision most often considered in determining whether it is fair to include particular amounts in Guideline income, s. 1(d) can also play an important role. The Guidelines attempt to establish objective criteria for determining Guideline income, and to ensure that child support orders are consistent and predictable. In order to achieve this goal, courts have, in determining whether non-recurrent dividend income should be excluded under s. 17(1), attempted to characterize the nature of the income and to analogize it to other forms of income that are clearly included or excluded in

calculating Guideline income.

[35] It is for that reason that courts dealing with s. 17 of the Guidelines have, in addition to considering whether income might be immediately available for the payment of child support, also considered whether the amount in issue is analogous to ordinary income, or is, instead, simply a return of capital (see, for example, *Vincent; Grossi v. Grossi*, 2005 BCCA 47; *Ewing v. Ewing*, 2009 ABCA 227, leave to appeal ref'd [2009] S.C.C.A. No. 386 at paras. 32 and 35). Because child support obligations generally depend on income rather than on property holdings, the sale of an asset by an individual (absent a capital gain or a failure to use property reasonably to generate income) will not typically affect the individual's Guideline income. In order to give consistent treatment to spouses whose assets are held in corporations, returns of capital - not to be confused with returns on capital - will often be excluded from Guideline income, even if the return of capital is structured as a dividend. It would, taking into account the objectives of the Guidelines, and particularly s. 1(d), generally be unfair to include such amounts in Guideline income.

[Emphasis added.]

[38] In this case, the dividends received by Mr. Block in 2015 from the corporate re-financing of the Commercial Property arose from a return of capital that was for the most part required for the specific purpose of paying Mrs. Block \$143,000 to equalize the parties' property division.

[39] The Company's financial statements establish that its long term debt was increased by \$270,000 by way of that re-financing as part of the \$280,000 actual dividend paid to Mr. Block.

[40] Mr. Block was required to pay income tax on that dividend in the amount of approximately \$83,000 in order to pay Mrs. Block the required \$143,000 equalization payment.

[41] Accordingly, approximately \$223,000 of the \$280,000 dividend received by Mr. Block in 2015 was dedicated directly or indirectly to the payment of the equalization payment. As in *Brown*, none of those funds represented a resource that was available to Mr. Block to pay child support.

[42] In all of those circumstances I am satisfied that it would be unfair to include the whole of the dividend paid to Mr. Block in 2015 as his income for child support purposes.

[43] In reaching that conclusion, I also rely upon the decision of the Court of Appeal in *Dunnett v. Dunnett*, 2018 BCCA 262 [Dunnett] adopting factors referenced by the Alberta Court of Appeal in *Ewing v. Ewing*, 2009 ABCA 227 [Ewing] that I will later discuss with respect to Mr. Block's 2018 income.

[44] I do not, however, find that the whole of the income tax payable by Mr. Block as a consequence of the equalization payment should be deducted in determining his 2015 income for child support obligations.

- [45] That is so because, if the whole of the income tax payable on the dividend as well as the equalization payment to Mrs. Block is deducted, only the balance of the actual dividend income of \$280,000 (that being \$57,000) plus amortization expenses in the amount of \$11,429 deducted by the Company in 2015 (being in total) \$68,429 would be available for child support purposes.
- [46] That amount is significantly less than Mr. Block's income in 2014 (\$118,679) or in 2016 (\$109,119) as I will next discuss.
- [47] I accordingly find that application of s. 17(1) of the Guidelines should be applied so that in 2015 income in the amount of \$114,000 should be imputed to Mr. Block for child support purposes.

2016

- [48] Mrs. Block submitted that Mr. Block's income for child support purposes in 2016 should be assessed as being \$134,119, while Mr. Block asserted that it should be assessed as being \$104,123.
- [49] In 2016, Mr. Block's Line 150 income consisted of \$64,015 in employment income and \$35,100 in taxable dividends. After adjustment of his dividend income to the actual amount received (\$29,745) rather than the taxable amount his total income was \$93,760. In addition to those amounts, the Company deducted amortization expenses in the amount of \$10,359 which Mr. Block agrees should be added to these amounts.
- [50] Accordingly, without further adjustment Mr. Block's total income for child support purposes in 2016 would be \$104,119.
- [51] Mrs. Block submitted, however, that "at least \$30,000 in automotive expenses" should be added to that amount.
- [52] That submission is based upon the Company's automotive expense deduction rising "from \$9,413 at the 2015-year end to \$66,250 at the 2016-year end without explanation".
- [53] Mrs. Block deposed that she has observed that Mr. Block drives a white GMC truck with a company logo on it for personal purposes and that he has an older blue Chevrolet that she believes is not roadworthy.
- [54] She also relied on the fact that Mr. Block has listed an older (1985) Chevrolet truck (acquired in March 2006) as his only personal vehicle on his latest Form 8 financial statement to support her assertion that Mr. Block uses a Company truck for personal purposes.
- [55] In response Mr. Block deposed that:
26. The Claimant has accused me of running personal vehicle expenses through my business. This is entirely not the case. All vehicle expenses outlined in the corporate financial statements are valid business vehicle expenses. We pay our subcontractors mileage of \$.50 per kilometer which can certainly add up during the year. Our own trucks average 80,000

kilometers per year. We presently have three trucks in the business. Up until October, 2019 we had four. The company has owned no less than three vehicles, used by my employees and myself, at any given time since May, 2015. The average cost of each truck is about \$60,000. The tire bills average \$3,000 per truck per year with vehicle maintenance costs of \$6,000 approximately per truck per year. Fuel costs range from \$2,400 per month to \$4,000 per month for all of the trucks. I have my own pickup truck outside of the business which I use for personal use and my wife Lara's vehicle is personal to her. The company does not pay for our personal vehicles. The financial statements in all respects are fair and accurate, including with respect to the vehicle expenses claimed.

- [56] Given Mrs. Block's observations and given that all of the personal and corporate documentation that would verify Mr. Block's use or non-use of the white GMC for personal purposes is in his control and has not been produced in this litigation to support his assertions I have concluded that some amount of the vehicle expenses claimed by the Company should be included in his income for child support purposes.
- [57] I do not, however, accept that the amount to be included should be "at least \$30,000" as Mrs. Block asserts.
- [58] It is not disputed that in 2016 the Company had four trucks and that the total expenses deducted for those four trucks was approximately \$66,000. Of that total amount approximately \$16,650 in expenses per truck would therefore have been deducted. If Mr. Block, used one of the trucks for his personal use as deposed by Mrs. Block part of that vehicle expense deduction should be attributed to Mr. Block as income for child support purposes. Doing the best I can with the evidence available, I find that \$8,325 of the Company's vehicle expenses should be included in the determination of Mr. Block's income for child support purposes in 2016.
- [59] In result, I find that Mr. Block's total 2016 income for child support purposes was \$112,444.

2017

- [60] Mrs. Block submitted that Mr. Block's income for child support purposes in 2017 should be assessed as being \$311,739, while Mr. Block asserted that it should be assessed as being \$197,000.
- [61] In 2017, Mr. Block's Line 150 income consisted of \$59,834 of employment income. No dividend income was declared.
- [62] The Company's financial statements, however, record that dividends in the amount of \$81,272 were paid to Mr. Block.
- [63] It has now been established that those dividends were paid tax free to Mr. Block from the Company's capital dividend account.

- [64] Although ss. 83(2) and 89 of the Income Tax Act, R.S.C. 1985, c. 1, allow payment from a company's capital dividend account tax free to shareholders, by application of s. 19(1)(h) of the Guidelines Mr. Block's income for child support purposes should be grossed up to reflect income taxed at his usual rate.
- [65] Although the parties have agreed that the dividend in issue must be grossed up they do not agree upon the amount of that gross up.
- [66] Mrs. Block has submitted that it should be \$87,881 while Mr. Block submitted that it should be approximately \$66,000.
- [67] Given that the parties did not submit verifiable calculations to support the methodology employed by each of them I am unable to accept either amount (that being an approximate average of the two amounts).
- [68] Doing the best I can with the competing submissions and the paucity of evidence adduced I have concluded that Mr. Block's 2017 Line 150 income should be adjusted to \$218,000 to account for his employment income; the actual dividend paid by the Company; and an imputed tax gross-up of \$77,000 under s. 19(1)(h) of the Guidelines.
- [69] A further \$9,008 of amortization deducted by the Company must also be included as his income for child support purposes resulting in Mr. Block's 2017 income for child support purposes being, at minimum approximately \$227,000.
- [70] Mrs. Block once again, however, submitted that vehicle expenses of at least \$30,000 should be added to Mr. Block's 2017 income. She further submitted that "an unreasonably high cash on hand at year-end of \$38,669" should be added as additional income for child support purposes.
- [71] As with my conclusions with respect to Mrs. Block's vehicle expense submissions for 2016 I attribute \$8,325 of the expenses for one truck to Mr. Block as his personal use.
- [72] I do not accept that the Company's cash on hand at year end should also be added to his income. I accept Mr. Block's submission that the Company operates a business in which year end cash on hand may fluctuate depending upon many factors unrelated to yearly profits.
- [73] In result, I find that Mr. Block's 2017 income for child support purposes was \$235,325.
- [74] Mr. Block did not seek to have s. 17(1) of the Guidelines applied to reduce his income for 2017 and in all of the circumstances I am not satisfied that attribution of income to him in the amount of \$235,325 in 2017 would be unfair.

2018

- [75] Mrs. Block submitted that Mr. Block's income for child support purposes in 2018 should be assessed as being \$554,812, while Mr. Block asserted that it should be assessed as being \$129,121.

- [76] In determining Mr. Block's income for child support purposes for 2018 it is essential to record that the vast majority of the funds that he received in 2018 derived from the Company's sale of the Commercial Property at the end of 2017.
- [77] To that extent, as with Mr. Block's income in 2015, what is in issue is the extent to which a non-recurring payment of funds to a shareholder from the disposition of a corporate capital asset should be included in the determination of the recipient's income for child support purposes.
- [78] However, unlike the re-financing of the Commercial Property to equalize the parties' property division, the proceeds of sale from the disposition of the Commercial Property in 2017 were, in large part, used by Mr. Block for his personal use in acquiring a home.
- [79] The Company's financial statements record that the Company realized \$647,605 from the sale of the Commercial Property and a Statement of Adjustments related to the completion of that sale indicates that the Company received net sale proceeds of \$721,403.
- [80] Although that discrepancy was not substantively addressed by the parties, I have concluded that given what is in issue is the treatment of funds received by Mr. Block from the Company in determining his income in 2018 for child support purposes it is not necessary to further address any apparent inconsistency in the recording of the proceeds of sale.
- [81] The evidence establishes that in late 2017 Mr. Block and his new wife purchased a new home in Kelowna for a purchase price of \$1.2 million. Mr. Block and his wife contributed \$346,118.75 to that purchase and obtained a mortgage in the amount of \$881,207.19 to complete the purchase.
- [82] Mr. Block has stated in an affidavit filed in this proceeding that:
- I decided that it as prudent to sell the commercial building owned by the company primarily because I wanted to purchase a home of my own. Up until that point in time I did not own my own home. The Claimant certainly owned her own home. She retained the family home when we separated. A dividend was paid out to me of \$266,800 in 2018 which funds were derived from the sale of the commercial building owned by the company.
- [83] Consistent with that evidence is the fact that in 2018 Mr. Block's Line 150 income was \$266,800 all of which was comprised of dividend income.
- [84] After adjustment of his dividend income to the actual amount received rather than the taxable amount by application of s. 5 of Schedule III of the Guidelines his actual income from that dividend was \$226,101.
- [85] That amount is the starting point for Mrs. Block's submissions that Mr. Block's income for 2018 for child support purposes should be \$554,812.
- [86] Those submissions are based upon her assertions that included in Mr. Block's 2018 actual dividend income of \$226,101 should also be the following amounts:

- 1) \$82,785 recorded on the Company's balance sheet for its year ending January 31, 2018 as being "Due from Shareholder" in that amount;
 - 2) \$35,000 being "approximately one half of automobile expenses deducted from corporate income"; and
 - 3) \$210,926 cash left in the Company in 2018.
- [87] In response, Mr. Block submitted that as with the re-financing of the Commercial Property in 2015 his income for 2018 should be based on an imputation of income rather than upon the actual dividend received and also disputed that the monies recorded as a loan to shareholder should be included in his income.
- [88] Mr. Block further submitted that monies held in cash in the Company should not be attributed to him as income because he intends to use those funds in future to purchase a smaller replacement commercial building.
- [89] In discussing Mr. Block's income for 2015 that was derived substantially from the financing of the Commercial Building to equalize the parties' property division under the Separation Agreement I alluded to the decision of our Court of Appeal in Brown as well as its decision in Dunnett that adopted income determination factors referenced by the Alberta Court of Appeal in Ewing.
- [90] I considered Brown to be of specific import because, as in Brown, none of approximately \$223,000 of the \$280,000 dividend received by Mr. Block in 2015 in relation to the equalization payment represented a resource that was available to him to pay child support.
- [91] That was also an important consideration in my application of the Dunnett/Ewing factors in the determination of Mr. Block's income for child support purposes.
- [92] Because the 2018 dividend received by Mr. Block in 2018 was dedicated primarily to the purchase of a home for his personal use rather than to equalize the parties' property division the income determination factors identified in Dunnett and Ewing must specifically be addressed.
- [93] In Dunnett, at paras. 22 to 25 Madam Justice Fisher for the Court wrote:
- [22] Although the capital gains received by Mr. Dunnett were amortized over five years, they are of a non-recurring nature, as they were paid from a one-time sale of the shares of his business. Whether these gains should be excluded depends on an assessment of "the fairest determination" of income. What is fair is to be determined in accordance with the objectives set out in s. 1 of the Guidelines.
- [23] There are many cases where the objective that children benefit from the financial means of their parents (s. 1(a)) is of primary importance. It was recognized in *Mariangeli v. Mariangeli* (2003), 66 O.R. (3d) 40, where Mr. Justice Weiler stated:

- [30] While the courts have differed in their approach when dealing with non-recurring income, the recurring theme is that the child of the marriage should benefit from a sudden increase in lifestyle and money available to the family.
- [24] This statement of the law has been referred to with approval in this court, in *Brown*, and the Alberta Court of Appeal in *Schick v. Schick*, 2008 ABCA 196. However, there are numerous factors that should be taken into account in assessing whether the inclusion of a non-recurring capital gain should be included as a fair determination of income. In *Ewing v. Ewing*, 2009 ABCA 227, the court observed as follows:
- [32] Determining whether a section 16 calculation is fair frequently involves consideration of non-recurring gains. Courts should be alert to the nature of any non-recurring gain and whether it is derived from the sale of capital. That is particularly true when the sale involves capital which forms the basis of a payor's income, and whenever capital is sold the court should consider the effect of that sale on future income. In *Kowalewich v. Kowalewich*, 2001 BCCA 450 (CanLII), 155 B.C.A.C. 143, the British Columbia Court of Appeal noted that making money available for support purposes, when it may be needed to maintain a going concern, would be equivalent to killing the goose that laid the golden egg. Moreover, depending on a payor's age, a sale of assets may be the basis of a payor's retirement fund, which, in the usual case, is not used to increase a family's lifestyle but is invested to provide future income. In that case, the investments of capital are available for future support.
- [33] Thus, the nature of the sale of a capital asset, or other extraordinary gain or fluctuation in income, should always be considered when determining fair income. Frequently the fairest method of income may be to exclude the gain. On the other hand, where a non-recurring gain is in the nature of an employment bonus, in the sense that it is truly income for work done, its inclusion in section 16 income may not make that method of calculation unfair. The sale of stock options as part of annual compensation may be such an example.
- [34] In addition to considering the nature of the non-recurring gain, or fluctuation of income, it is also important to consider the purpose of support orders when deciding whether a section 16 calculation of income is fair. Support orders are directed at ensuring that, to the extent possible, that children enjoy the same standard of living they would have experienced if the marriage had not broken down. Thus, when determining a fair and reasonable income, the day-to-day standard of living the family would have enjoyed, had it remained intact, is relevant. A court might want to consider whether a specific non-recurring gain would have resulted in a change in lifestyle of a particular family, had it remained intact.
- [25] The court then set out a list of matters that a court might consider in assessing a fair determination of income at para. 35:

Is the non-recurring gain or fluctuation actually in the nature of a bonus or other incentive payment akin to income for work done for that year?

Is the non-recurring gain a sale of assets that formed the basis of the payor's income?

Will the capital generated from a sale provide a source of income for the future?

Are the non-recurring gains received at an age when they constitute the payor's retirement fund, or partial retirement fund, such that it may not be fair to consider the whole amount, or any of it, as income for child support purposes?

Is the payor in the business of buying and selling capital assets year after year such that those amounts, while the sale of capital, are in actuality more in the nature of income?

Is inclusion of the amount necessary to provide proper child support in all the circumstances?

Is the increase in income due to the sale of assets which have already been divided between the spouses, so that including them as income might be akin to redistributing what has already been shared?

Did the non-recurring gain even generate cash, or was it merely the result of a restructuring of capital for tax or other legitimate business reasons?

Does the inclusion of the amount result in wealth distribution as opposed to proper support for the children?

[94] Although what was in issue in Dunnett was the treatment for child support purposes of capital gains on the sale of the shares of Mr. Dunnett's business, I am satisfied that the principles enunciated by the Court apply equally to the funds received by Mr. Block from the sale of the Commercial Property.

[95] I accordingly next turn to my consideration to each of the Ewing factors adopted by the Court in Dunnett in determining the extent to which, if at all, the dividends received by Mr. Block that were derived from the sale of the Commercial Property should be included in his income for child support purposes in 2018:

- 1) Was the non-recurring gain actually in the nature of a bonus or other incentive payment akin to income for work done that year?

This factor favors the exclusion of the dividends as income in 2018.

- 2) Was the non-recurring gain a sale of assets that formed the basis for Mr. Block's income?

The evidence establishes that although the Commercial Property was not the primary source of the Company's yearly income it did provide some rental income and at least indirectly either reduced the amount of rent required to be paid for Mr. Block's business operations or gave rise to an operational expense that was somewhat artificial in that it was not paid to a third party.

This factor favors the inclusion of at least some amount of the dividend received as income for child support purposes.

- 3) Will the capital generated from the sale provide a source of income for the future?

This factor favors the exclusion of the dividends used to acquire personal property that will not generate income in future.

- 4) Were the non-recurring gains received by Mr. Block at an age that they constitute his retirement or partial retirement fund such that it may not be fair to consider the whole amount or any of it as income for child support purposes?

The evidence adduced by the parties does not specifically address this factor, however, the substitution of a principal residence which will not attract capital gains upon its disposition is not entirely dissimilar to a retirement fund. I find this factor to be neutral.

- 5) Is Mr. Block in the business of buying and selling capital assets year after year such that those amounts, while the sale of capital are in actuality more in the nature of income?

The sale of the Commercial Property was a one-time event. This factor weighs in favor of the exclusion of the dividend as income for the purposes of child support.

- 6) Is inclusion of the amount necessary to provide proper child support in all of the circumstances?

There is little evidence before me as to the needs of the children or evidence that those needs have not been met. However, given the fact that the retroactive payments which are necessary in this case are substantial, I am satisfied Mr. Block's determination to purchase a home for personal use rather than keep a corporate asset with some income earning features favors the inclusion of at least some amount of the dividend received as income for child support purposes.

- 7) Is the increase in income received by Mr. Block due to the sale of assets which have already been divided between Mr. and Mrs. Block so that including them as income might be akin to re-distributing what has already been shared?

This factor weighs heavily in favor of excluding the dividend received from the sale of the Commercial Property as income for child support purposes. The sale of the Commercial Property that was received by Mr. Block as a share of family assets and his purchase of a home with some of those proceeds does not greatly alter the property division negotiated between the parties. Inclusion of those sale proceeds as income would substantially do so.

- 8) Did the recurring gain generate cash or was it merely the result of a restructuring of capital for tax or other legitimate business reasons?

The gain from the sale resulted in the generation of cash but in substance the purchase of the home by Mr. Block substituted at least a part of the capital from the sale into another capital asset. This fact favors exclusion of at least some of the dividend as income for child support purposes.

- 9) Does the inclusion of the amount result in wealth distribution as opposed to proper support for the children?

Inclusion of the dividend as income would not amount to wealth distribution in the sense that Mrs. Block would receive more assets than she agreed to receive pursuant to the Separation Agreement. I consider this factor to be neutral.

[96] After consideration of all of those factors I have concluded that it would be unfair to include all of the dividend income received by Mr. Block from the sale of the Commercial Property as his income for child support purposes in 2018.

[97] I am, however, satisfied that to the extent the sale resulted in the diminishment of income earned by the Company through rent of the commercial units in the Commercial Property and the increase in costs to the Company's operations by reason of the need to rent third party premises for business operations the Company's earning ability was lessened. So too was its ability to remunerate Mr. Block for his work.

[98] As noted above in the Separation Agreement the parties agreed that the Commercial Property generated \$60,000 annually from its leased units.

[99] The Company's financial statements for the year ending January 31, 2017, however, record that the Company received rental income in 2017 of \$23,364 and that in 2016 (a full year) it received \$28,920.

[100] Since the Commercial Property was sold in December 2017 I am satisfied that the yearly rental income received by the Company from the Commercial Property was approximately \$29,000.

[101] When the Commercial Property was sold the Company lost at least that amount of revenue.

[102] In its financial statements for the year ending January 31, 2019 the Company recorded paying \$32,000 in rent in the first full year after the disposition of the Commercial Property. That amount reflects an increase of \$24,000 over the \$8,000 in rent that was recorded as being paid in 2018. I am accordingly satisfied that yearly rent to third parties now payable by the Company is at least \$24,000 more than before the Commercial Property was sold.

[103] I am satisfied that in all of the circumstances attribution of \$29,000 in lost revenue as well as \$24,000 in rent now paid to third parties (totalling \$53,000) of the dividends received by Mr. Block as a consequence of the sale of the Commercial Property should be included as his income in 2018 for child support purposes.

[104] I also find that the \$82,785 recorded on the Company's balance sheet for its year ending January 31, 2018 as being "Due from Shareholder" in that amount should be included in his 2018 income.

[105] In reaching that conclusion, I rely upon and apply the decision of this Court in *Katchen v. Katchen*, 2015 BCSC 103 in which Mr. Justice Greyell stated at para. 28:

- [128] For the purpose of determining the appropriate taxable income of each party the cash withdrawal must be recognized in the year the cash was actually withdrawn notwithstanding the claimant and respondent may actually be obligated to pay the tax on the shareholders loans in their respective 2014 personal taxation years.
- [106] I do not, however, accept Mrs. Block's further assertion that the balance of funds left in the Company from the sale of the Commercial Property or from operations in the amount \$210,926 should also be included in determining Mr. Block's income for child support purposes in 2018 because those funds were available to be distributed to him and were not needed to fund the Company's ongoing operations.
- [107] In rejecting that submission, I accept Mr. Block's evidence that he intends to purchase a smaller commercial building or strata unit from which to operate the Company's business. That would be a legitimate use of those corporate profits that would convert one capital asset into another. It would coincidentally have the potential to increase corporate profits to the extent that the Company would not be required to pay rent to third parties.
- [108] As with previous years I do not accept Mrs. Block's submissions concerning attribution of 50% or more of corporate vehicle expenses to Mr. Block as his income in 2018.
- [109] Given that corporate vehicle expenses in 2018 increased to approximately \$74,000 I include \$9,250 in Mr. Block's income for child support purposes to account for my assessment of his personal use of one Company automobile.
- [110] In result, I find that Mr. Block's income for child support purposes in 2018 was \$145,135.
- [111] In all of the circumstances, I do not find that it is necessary or appropriate to apply income averaging under s. 17(1) of the Guidelines with respect to Mr. Block's 2018 income to achieve a fair result.

SUMMARY

- [112] In summary I find that Mr. Block's income for child support in the years in issue to be:

- 1) 2014: \$118,679;
- 2) 2015: \$114,000;
- 3) 2016: \$112,444;
- 4) 2017: \$235,325; and
- 5) 2018: \$145,135.

- [113] If, based upon those findings, the parties are unable to agree upon the total amount of child support payable by Mr. Block in addition to that which he has paid there will be a reference to the Registrar.

[114] Because of submissions advanced during argument I have not determined Mr. Block's income for child support purposes for 2019. If the parties are unable to agree upon that amount they may apply. I will not be seized of any such application.

COSTS

[115] Unless there are matters of which I am unaware, given the divided success of the parties on this application they will each bear their own costs.

"Davies J."

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