

CANADA / JUDGMENT

Cohoon v. Stobo

2023 BCCA 479

COURT

British Columbia Court of Appeal

DECIDED

21 December 2023

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2023 BCCA 479 Cohoon v. Stobo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cohoon v. Stobo,

2023 BCCA 479

Date: 20231221

Docket: CA48354

Between:

Reid Gordon Cohoon

Appellant/

Respondent on Cross Appeal

(Respondent)

And

Aleka Jennifer Stobo

Respondent/

Appellant on Cross Appeal

(Claimant)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated May 17, 2022 (Stobo v. Cohoon, 2022 BCSC 817, Vancouver Docket E191361).

Counsel for the Appellant:

P.M. Daykin, KC

B. St. Pierre

Counsel for the Respondent:

J.M.W. Cudmore

A.L. Colpitts

Place and Date of Hearing:

Vancouver, British Columbia

September 19, 2023

Place and Date of Judgment:

Vancouver, British Columbia

December 21, 2023

Written Reasons by:

The Honourable Mr. Justice Voith

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant challenges the trial judge's order declining to treat inherited monies used to pay down debt on the family home as excluded property, and the order to pay a compensatory spousal support award of indefinite duration to the respondent. The respondent cross-appeals for a higher award of spousal support. Held: Appeal allowed in part. The judge properly identified the legal considerations relevant to determining whether property that is transferred from one spouse to the other is excluded property or, conversely, becomes family property. The judge also properly considered the facts and evidence in determining that the appellant intended to make a gift to the family when he used his inheritance to pay down debt on the family home. The appeal of the order relating to the division of family property is therefore dismissed. Regarding the compensatory support issue, though aspects of the judge's findings were either inaccurate or failed to recognize other relevant evidence, they did not amount to a misapprehension of the

evidence. However, the judge's conclusion that the appellant would not have achieved success in his chosen field without the respondent's contributions, expressed the legal issue before the judge too narrowly. The judge should have inquired further about the economic consequences of the parties' respective contributions during the marriage. The judge erred in failing to consider the parties' mutual conferral of benefits, and where the parties stood in economic terms at the time of their separation. In the circumstances of this case, there was no basis for the judge's compensatory support order. Accordingly, the appeal of the spousal support order is allowed, and the cross-appeal seeking to increase the amount of spousal support is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Voith:

- [1] This appeal arises out of a family law dispute where the primary issues before the judge related to the division of family property and spousal support. The appellant, Mr. Cohoon, raises two issues on appeal.
- [2] First, Mr. Cohoon contends the judge erred by not treating the inherited funds he used to pay down debt on the family home as excluded property.
- [3] Second, he submits, on various bases, that the judge erred by concluding that the respondent Ms. Stobo's contributions to the care of the parties' daughter and to the enhancement of his career during the early years of their relationship, formed the basis of a compensatory entitlement to spousal support. He further submits that that award should not have been made on an indefinite basis.
- [4] Ms. Stobo, in turn, has cross-appealed seeking to increase the amount of spousal support the judge ordered Mr. Cohoon to pay.
- [5] For the reasons that follow, I would dismiss Mr. Cohoon's appeal of the judge's order that declined to treat inherited monies used to pay down debt on the family home as excluded property. I would, however, allow his appeal of the judge's spousal support order.
- 1) Background and overview of the judge's reasons
- [6] The parties met and began cohabiting in 1995 when they were both in their early 20s. They married in 2007 and separated in January 2019. They had one daughter who, at the time of trial, was 25 years old and financially independent. The appellant and respondent were 51 and 50 years old, respectively, at the time of trial.
- [7] The judge succinctly summarized the career paths of the appellant and respondent as follows:
- [3] In the early years of their relationship, neither party made much in the way of income and they had no assets. When their daughter was a baby, they lived in a van and had what Ms. Stobo described as a "hippie lifestyle." For a period of time they made a living making and selling drums at craft fairs. Eventually, Mr. Cohoon made his way into the film industry where he worked as a grip, and then a key grip, on film sets around the Lower Mainland. Mr. Cohoon continues to work as a key grip in the film industry and he has established success

in that field.

- [4] Mr. Cohoon operates his business through two solely owned corporations. 10823292 BC Ltd. is a company through which Mr. Cohoon charges out his personal services as a key grip (the "Service Company"). 0818033 BC Ltd. dba Reid Grip ("Reid Grip") is a company through which Mr. Cohoon rents grip equipment out to film productions. Expert evidence was provided to assist the Court in valuing these two companies (the "Companies") for the purposes of family property division.
- [5] For the first few years after the birth of their child, Ms. Stobo stayed home and did not engage in paid employment. In 2003, she enrolled full-time in the midwifery program at the Department of Medicine at UBC. Upon completing that course in 2007, she commenced working as a midwife. She worked as a midwife until late 2021, operating through a company of which she is the sole officer, director and shareholder: Coast Midwifery Ltd. ("Coast Midwifery"). She testified that she was not happy as a midwife and by 2017, she had started to explore alternative career options. In 2018, she enrolled in an executive MBA program. She graduated with her MBA in the spring of 2020. In February 2022, a few weeks before trial, Ms. Stobo accepted a full-time job as a relationship manager with Allan Financial.
- [8] The judge addressed Ms. Stobo's spousal support claim and said:
- [78] With respect to Ms. Stobo's compensatory claim, I find it relevant that the parties met when they were young adults and neither had assets or firm plans about their career futures. Within a year of their meeting, Ms. Stobo was pregnant. A decision was made that she would stay home with the parties' daughter for a period of time, and this enabled Mr. Cohoon to work and build his business and reputation in the film industry. It is not seriously contested that Ms. Stobo performed the majority of domestic responsibilities in the home. Meanwhile, Mr. Cohoon pursued a career in an extremely challenging industry, with punishingly long hours and almost no time flexibility. Mr. Cohoon would not have been able to pursue a career in the film industry if Ms. Stobo had not been home looking after the parties' child and maintaining the home.
- [80] Due to the roles played in the marriage, Mr. Cohoon's career trajectory was uninterrupted. Ms. Stobo spent seven years as the primary parent and homemaker. This alone gives rise to a compensatory claim.
- [81] It must be noted that the parties did not have a traditional marriage for the entirety of their long relationship. While Ms. Stobo stayed home to look after their child from 1996 until 2003, once she commenced her full-time education to become a midwife, the roles in the marriage became much more equal. Ms. Stobo was able to obtain the education she required to pursue the career she wished to have.

- [82] Nevertheless, the fact remains that Mr. Cohoon would have been unable to achieve the substantial success he has achieved in the film industry were it not for the contributions of Ms. Stobo. I therefore find that Ms. Stobo has established entitlement to spousal support on a compensatory basis.
- [9] The judge engaged in a thorough analysis of the parties' incomes and fixed Mr. Cohoon's and Ms. Stobo's incomes, for the purposes of the Spousal Support Advisory Guidelines, at \$200,000 and \$100,000, respectively. No issue arises from those findings. She found "this [was] an appropriate case for the low range" under the Guidelines and fixed support in the amount of \$3,000 per month. She ordered that spousal support be "for an indefinite period but subject to a review". Each of these discrete orders has been appealed or cross-appealed.
- [10] The judge also explained that Mr. Cohoon received an inheritance from his father (the "Inheritance"). The amounts he received, when he received those monies and what purposes the Inheritance was applied to were not in dispute. What was in issue was an amount of \$667,885 that Mr. Cohoon received from his father's estate that he used to retire debt on the family home (the "Home"). That debt consisted of two mortgages and a line of credit. Mr. Cohoon argued that he did not intend to gift these monies to the family when he paid off the secured debt on the Home and that he was entitled to an exclusion for the inherited funds used for this purpose.
- [11] The judge rejected this submission and found the monies could not be excluded. The equity in the Home was to be divided equally. The judge said:
- [18] In this case, Mr. Cohoon took no steps to document that the portion of the Inheritance that he used to pay down the secured debt on the Home was intended to be excluded property and not a gift to the family. Nor did he testify to this at trial. Mr. Cohoon testified that his primary reason for paying off the debts on the family home was to eliminate the high monthly debt servicing costs.
- [19] The historical use of the LOC supports the conclusion that Mr. Cohoon intended to make a gift to the family when he used a portion of the Inheritance Funds to pay off the debts on the Home. The debts on the family home were a joint obligation, accrued by the high living costs of the couple, who regularly used the equity in the Home to fund their lifestyles.
- [20] Counsel for Mr. Cohoon submits that he paid off the debt on the Home with the intention of making the \$600,000 LOC available to him later to purchase an investment property. While I accept that the couple had, over the years, some discussions about purchasing an investment property, I do not accept that Mr. Cohoon's plans in this regard were anything more than speculative at the time he paid off the debts on the Home. His evidence, at its strongest, was that his long-term hope was to purchase an investment property. However, the evidence does not establish that this ever manifested itself in a concrete plan. It is clear on the evidence that Mr. Cohoon intended the family to benefit from the payment of the secured debts on the Home and in doing so, he was making a gift to the family. There is no exclusion available with respect to these funds.

- [12] The parties raised numerous issues at trial and they accept most of the judge's findings and conclusions. Two issues arise from Mr. Cohoon's appeal and Ms. Stobo's cross-appeal:
- a) Whether the portion of the Inheritance used to pay off debt on the Home is excluded property; and
 - b) Whether Ms. Stobo is entitled to compensatory spousal support and, if so, the amount and duration of such support.
- 2) The excluded property issue
- i) Standard of review
- [13] The appellant's primary submission is that the judge "ignored" a body of case law where courts have found that the use of an inheritance or gift to buy jointly owned property, or to pay down joint debt, does not result in a loss of the exclusion. He contends this failure gives rise to an error of law.
- [14] Respectfully, I do not consider this submission as faithful to the judge's reasons. The judge properly focussed on Mr. Cohoon's intentions when he used the Inheritance to pay down debt on the Home and she made findings of fact based on that issue. Those findings of fact are entitled, absent some palpable and overriding error, to deference: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10; *Brazinski v. Brazinski*, 2023 BCCA 359 at para. 42.
- ii) The legal framework
- [15] The appellant accepts the judge properly described the relevant legal framework for the issue before her when she said:
- [16] Pursuant to s. 85 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], inheritances to a spouse are excluded property and do not form part of the family property subject to presumptive equal division under s. 81 of the FLA. However, excluded property can become family property where one spouse gifts excluded property to the other: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 75.
- [17] In determining whether a spouse has made a gift of excluded property, the presumption of advancement that pertains to gifts between spouses applies: *V.J.F.* at para. 77. However, like any evidentiary presumption, the presumption of advancement only applies if the evidence is insufficient to establish the transferor's actual intent at the time of the transfer: *Fuller v. Harper*, 2010 BCCA 421 at para. 42; and *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 40. In all cases, the court must look at the evidence with respect to the transfer to determine whether the transferor intended to make a gift when the transfer was made.

[Emphasis added.]

See also *Pisarski v. Piesik*, 2019 BCCA 129 at para. 41; *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 25.

- [16] There was an issue for some considerable time about the extent to which the presumption of advancement was relevant under Part V of the Family Law Act, S.B.C. 2011, c. 25 [FLA]; see the discussion in *Namdarpour* at paras. 26-40. The appellant accepts that debate is not engaged on this appeal as the judge did not rely on the presumption of advancement to arrive at her conclusions.
- [17] I also observe the FLA was amended by the Family Law Amendment Act, S.B.C. 2023, c.12, which received Royal Assent on May 11, 2023, subsequent to the judge's decision. Section 81.1 of the amendments establish that the presumption of advancement and resulting trust "must not be applied" to questions respecting the ownership of property as between spouses. If property is excluded, the "exclusion applies despite any transfer of legal or beneficial ownership of the property from a spouse to the other spouse": s. 85(3). Under the transitional provision (s. 24), these amendments do not apply to pre-existing proceedings and, accordingly, are not relevant in this case: see *Brazinski* at para. 41.

iii) Analysis

- [18] There is considerable consistency in the decisions of this Court on how trial judges are to determine whether property that is transferred from one spouse to the other is excluded property or, conversely, becomes family property. In *Venables v. Venables*, 2019 BCCA 281, Justice Griffin said:
- [89] The onus to show that property owned by one of the spouses is excluded property is on the party claiming the exclusion: FLA, s. 85(2).
- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: *V.J.F.* at paras. 74-79; *Namdarpour* at para. 46.
- [19] This focus on the intention of the transferring spouse was properly identified by the trial judge. With that focus in mind, she found that Mr. Cohoon "took no steps to document that the portion of the Inheritance that he used to pay down the secured debt on the Home was intended to be excluded property [n]or did he testify to this at trial". She found the historical use of the parties' line of credit "support[ed] the conclusion" that Mr. Cohoon intended to make a gift to the family when he paid off the debt on the Home. She also found that Mr. Cohoon's plans to buy an investment property were not "anything more than speculative at the time he paid off the debts on the Home". Each of these findings and inferences was properly supported in the record before the judge.

- [20] Mr. Cohoon argues, however, that the judge failed to refer to various authorities that were brought to her attention, where a spouse made a payment towards the debts of the family and those payments were treated as excluded property. He contends that the judge failed to appreciate that excluded property can be used to benefit a family and nevertheless retain its character as excluded property.
- [21] In my view, this submission does not advance Mr. Cohoon's position. Certainly, there are cases where trial judges have concluded that gifts or inheritances, used to buy a joint property or to pay down joint debts, retained their character as excluded property: see for example *Thornett v. Thornett*, 2018 BCSC 2312 at paras. 38-40, 52 and *C.L.M. v. M.J.S.*, 2017 BCSC 799 at paras. 492-493. However, there are other decisions where, in similar circumstances, judges have concluded that potentially excluded property became family property: see for example *Gallo v. Gallo*, 2022 BCSC 1118 at paras. 36, 52-60; *World v. World*, 2021 BCSC 1177 at paras. 18-24; *Small v. Small*, 2020 BCSC 707 at paras. 13-15, 121-125.
- [22] While the broad factual circumstances of a transaction may inform a judge's assessment of a transferring spouse's intentions, those factual circumstances will generally not, without more, determine whether a gift or inheritance remains excluded property or, alternatively, loses that character. In each case, the trial judge must consider the whole of the facts and evidence (including the nature of the transaction) before them to determine the transferor's intentions.
- [23] The judge properly understood the central issue before her, addressed that issue and made findings of fact that were open to her. In my view, there is no merit to this first ground of appeal.
- 3) The spousal support issue
- [24] Mr. Cohoon contends the judge made various errors when she awarded Ms. Stobo spousal support, on a compensatory basis, of \$3000 per month for an indefinite period. He submits the judge erred in misapprehending the facts and in misapplying the law in relation to entitlement to compensatory spousal support. He argues the judge failed to consider whether Ms. Stobo "achieved compensation" during the marriage and erred, in principle, in making an indefinite support award.
- i) Standard of review
- [25] Support orders attract significant deference and should not be reversed absent an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras.10-12, 1999 CanLII 691; *Loesch v. Walji*; 2008 BCCA 214 at para. 14; *Rozen v. Rozen*, 2016 BCCA 303 at para. 18. The discretion involved in making a support order "is best exercised by the judge who has heard the parties directly": *Hickey* at para. 12.

[26] Findings of fact based on a material misapprehension of the evidence or on a failure to consider relevant evidence are themselves errors of law: *Housen* at para. 46.

ii) The general legal framework

[27] A proper consideration of the factors and objectives that inform the need for spousal support first requires an understanding of the manner in which the parties' property has been divided. This is because "the results of the property division will affect the relative condition, means and needs of the parties": *Chutter v. Chutter*, 2008 BCCA 507 at para. 75. Thus, the equitable distribution of the advantages and disadvantages arising from a marriage and its breakdown can be achieved through the division of assets, an award of spousal support or a combination of both: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 849, 864-66, 1992 CanLII 25; *Tedham v. Tedham*, 2005 BCCA 502 at paras. 63-64.

[28] Ms. Stobo sought an order for spousal support under Part 7 of the FLA. Mr. Cohoon, in turn, contended that spousal support should be determined under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The judge observed that the parties seemed to agree that there was no meaningful difference between the two statutory schemes and, following the guidance in *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20, she proceeded to decide spousal support in accordance with the Divorce Act.

[29] Section 15.2 of the Divorce Act governs spousal support orders. Sections 15.2(4) and 15.2(6) address the factors the court is directed to consider and the objectives of such an order:

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [30] Canadian courts recognize three distinct bases upon which a spousal support award may be made: compensatory, non-compensatory and contractual. These three models for support are not mutually exclusive. Nevertheless, in this case the judge's spousal support award was made on a compensatory basis and I have focused on the principles that guide such awards.
- [31] The Supreme Court of Canada first laid out the theoretical principles and basis for compensatory spousal support in *Moge* and later in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715. Since then, a long line of cases from this Court have applied those principles. It is now well-settled that the underlying goal of compensatory support is the equitable sharing of the economic consequences of a marriage or its breakdown. It is intended to provide "redress from economic disadvantages arising from the marriage (such as diminished earning capacity and sacrificed career opportunities to take on childcare responsibilities) or the conferral of an economic advantage upon the other spouse (such as contributions to enhanced career development)": *Hague v. Hague*, 2022 BCCA 325 at para. 36, citing *Parton v. Parton*, 2018 BCCA 273 at para. 39 and *Chutter* at paras. 50-51. See also *Moge* at 864; *Marquez v. Zapiola*, 2013 BCCA 433 at para. 33 and *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 44.
- [32] Marriage, in the eyes of the law, is an economic partnership. If one partner makes economic sacrifices, it is generally to improve the circumstances of the family as a unit. This arrangement of mutual benefit is disturbed upon the breakdown of a marriage. Absent some form of compensation, a spouse's financial sacrifices will often be borne exclusively by that spouse in the form of diminished earning capacity, and the financial benefits conferred on the other spouse will, absent compensation, exclusively benefit the advantaged spouse. Compensatory support, therefore, attempts to equitably share the economic consequences of a couple's roles and their choices during the marriage: *Rozen* at para. 34, citing *Zacharias* at para. 44; *Moge* at 863-865.

iii) Analysis

- [33] Earlier, I identified the paragraphs in the judge's reasons that set out the basis for her spousal support award. That award was anchored by several findings:
- a) Within a year of meeting, Ms. Stobo was pregnant: "A decision was made that she would stay home with the parties' daughter for a period of time, and this enabled Mr. Cohoon to work and build his business and reputation in the film industry";
 - b) Mr. Cohoon's "career trajectory was uninterrupted" while Ms. Stobo "spent seven years as the primary parent and homemaker";
 - c) Once Ms. Stobo commenced her full-time education in 2003, the roles in the marriage became "much more equal" and she was able to "pursue the career she wished to have";

- d) Ms. Stobo was not "particularly economically disadvantaged by the breakdown of the marriage" and, accordingly, her entitlement to support "on non-compensatory grounds [was] weak".
- [34] Mr. Cohoon argues the judge misapprehended the evidence before her. He contends that aspects of these findings cannot be supported and that they ignore other important evidence. In particular, he says the evidence established that for the first number of years of their marriage, he worked as an assistant photographer and their financial situation was precarious. He did not become involved in the movie industry until a number of years later. He also contends that, from the outset, he and Ms. Stobo agreed that she should become financially independent and pursue her education and that she did this, to varying degrees, from 1996 onwards. Further, there was no "decision" that she should defer her education to advance his career, nor did she do so.
- [35] Different components of these submissions are accurate. While neither party gave precise or detailed evidence about Mr. Cohoon's early work history, that evidence was better developed by Mr. Cohoon. He graduated with a diploma in photography, from Langara College, shortly after the parties met. He then worked as an assistant photographer on a freelance basis. Sometimes these freelance jobs would last a day and sometimes they would last four to five days. He said this "lasted for probably three or four years where I was on and off". These jobs had little to do with the film industry or with advancing his career in the film industry. Mr. Cohoon gave evidence of one non-union job in these early years, where he worked as a production assistant on either a commercial or a video, and Ms. Stobo gave other evidence about Mr. Cohoon doing small non-union film work.
- [36] Mr. Cohoon also described the family's somewhat difficult living circumstances. When their daughter was first born, they lived for about 18 months, at reduced rent, in a house his grandfather owned. When that home was sold, they moved a dozen different times over the next 18 months. They then moved to Nelson to stay with friends as he "wasn't making a lot of money as a photo assistant" and they were "having a hard time making ends meet".
- [37] It was during this time that he started to work in film and learned about a film union called IATSE. Mr. Cohoon testified that when they moved to Nelson, he had "just gotten into the IATSE 891 permittee program".
- [38] The second component deals with Ms. Stobo's activities. Mr. Cohoon does not question that Ms. Stobo took care of their daughter and most household obligations while he worked. But he says she began to study, with his encouragement, and with varying degrees of intensity, soon after their daughter was born. Indeed, it was common ground that from the outset Mr. Cohoon encouraged, and was supportive of, Ms. Stobo going to school and becoming financially independent and that it was for her to decide what she wanted to do.

- [39] When the parties met, Ms. Stobo was a few credits short of her high school diploma. She obtained that diploma and she then took training to become a doula. She also took a number of post-secondary courses at Capilano College at different times between 1998 and 2003.
- [40] In or around September 2000, she went to Ontario with their daughter for about six months to participate in a traditional Indigenous midwifery program. Mr. Cohoon, who was then completing his probationary period as a "permittee", followed her to Toronto. Though he was able to get a few days of film work, there were fewer opportunities for him in Toronto. Nevertheless, Ms. Stobo accepted that Mr. Cohoon was prepared to move indefinitely to be with her and their daughter. She further agreed that though she had received some bursaries, her program had been paid for through Mr. Cohoon's income.
- [41] Shortly thereafter, Ms. Stobo learned that the entity through which her program was offered would not be able to obtain the liability insurance necessary for its students to undertake their practicums. Ms. Stobo and Mr. Cohoon jointly decided to return to Vancouver.
- [42] Upon her return, Ms. Stobo took courses at Capilano College and at a school in New Westminster that allowed her to become a breastfeeding counsellor. Ms. Stobo then decided to enter a four-year midwifery program at the University of British Columbia. She applied to enter the program in 2002 but was not accepted. She required some further courses which she obtained through Capilano College. She entered the UBC program in 2003 by which time her daughter was also in elementary school. The degree was paid for through a loan that was secured by the mortgage on the parties' home, through some bursaries and through Mr. Cohoon's income.
- [43] The following exchange between Ms. Stobo and her counsel is relevant:
- Q. Okay. And did you and [Mr. Cohoon] discuss these plans for you to pursue this education, this career?
- A. Yes. This was something that we kind of worked towards basically since the birth of our daughter. It was really -- once I knew that this was something that I wanted to do it was well known and [Mr. Cohoon] supported this absolutely.
- [44] The third and related component arises from the judge's finding that "[a] decision was made that [Ms. Stobo] would stay home with the parties' daughter for a period of time". There is no evidence in the record of any such "decision" being made, though this is, in fact, what occurred. The judge recognized that when the parties met, neither of them had any assets "or firm plans about their career futures". Ms. Stobo was thinking of perhaps becoming a kayaking guide. The judge also noted that when the parties first met, they sold handmade drums at various markets. When their daughter was born, Ms. Stobo neither gave up an existing job nor did she suspend pursuing any intended career. She simply became, in her words, a "stay-at-home mom".

- [45] Instead, it was the birth of their daughter that caused Ms. Stobo to "[become] enthralled with pregnancy, birth [and] midwifery". It was only thereafter that Ms. Stobo began to pursue the various interests and qualifications I have described. Each bit of experience and education led to the next and Ms. Stobo's aspirations grew as she did.
- [46] The foregoing summary, which is largely uncontested, is at odds with aspects of the judge's findings. It was not accurate to describe Mr. Cohoon's early career trajectory as "uninterrupted". It was inaccurate to suggest that his career in film commenced when the parties decided that Ms. Stobo would stay at home with their daughter. It was similarly inaccurate to suggest that Ms. Stobo's career ambitions were somehow suspended until she entered the UBC program in 2003.
- [47] In my view, though aspects of the judge's findings are either inaccurate or fail to recognize other relevant evidence, these inaccuracies do not rise to the level of a misapprehension of the evidence. The threshold required to demonstrate a misapprehension of the evidence is "stringent": *R. v. Swales*, 2014 BCCA 350 at para. 48. Appellate intervention is only warranted when the misapprehension is substantial, material and essential to the reasoning process: *R. v. Lohrer*, 2004 SCC 80 at para. 2; *R. v. Caron*, 2018 BCCA 212 at para. 46.
- [48] Further, a "meticulous accounting" of the disadvantages suffered by one spouse or the benefits received by the other is not required when assessing whether compensatory support is appropriate: *Zacharias* at para. 51.
- [49] The assistance Ms. Stobo provided to Mr. Cohoon for a period of time early in their marriage was capable, in concept, of grounding an entitlement to compensatory spousal support. That assistance, together with the length of the marriage, gave rise to a "prima facie" compensatory claim: *Zacharias* at para. 50.
- [50] However, the judge was required to do more before she could find that an actual entitlement to compensatory support was established. As I observed earlier, compensatory claims can be established on the basis of sacrifices made by one spouse that create some form of diminished earning capacity on the part of that spouse, or by virtue of some benefit that has been conferred on the other spouse that will, absent compensation, exclusively benefit that spouse. However, not every sacrifice by one spouse or advantage conferred on another spouse leads to a compensatory support award. The judge's core conclusion, that Ms. Stobo's compensatory claim was made out because Mr. Cohoon "would have been unable to achieve the substantial success he [had] achieved in the film industry were it not for the contributions of Ms. Stobo", was too narrow. A more searching enquiry and analysis of the economic consequences of the parties' respective contributions was required. Respectfully, in my view, the judge erred when she failed to engage in that further enquiry. In this case, the judge should have asked whether these parties, who had both built successful careers in the areas of their choosing, continued to suffer any residual economic disadvantage, or enjoy a corresponding advantage, that warranted compensation.

- [51] Section 15.2(6) of the Divorce Act, which addresses the objectives of spousal support, focusses on economic and financial concerns. Section 15.2(6)(a)-(c) respectively emphasize "economic advantages or disadvantages", "financial consequences arising from the care of any child" and "economic hardship of the spouses arising from the breakdown of the marriage". In *Moge*, Justice L'Heureux-Dube, at 848, confirmed: "[T]hat, in determining spousal support it is important not to lose sight of the fact that the support provisions of the [Divorce Act] are intended to deal with the economic consequences, for both parties, of the marriage or its breakdown" [Emphasis in original].
- [52] In the context of rejecting Mr. Cohoon's claim for an unequal division of family property, the judge said:
- [69] The problem with Mr. Cohoon's argument is that it fails to recognize the significant sacrifices both parties made in order to benefit one another's careers. It is true that Mr. Cohoon's income helped fund Ms. Stobo's education. It is also true that the years Ms. Stobo spent out of the workforce raising their daughter allowed Mr. Cohoon to work long hours and advance his career in the film industry. It is precisely these kinds of mutual sacrifices and conferrals of benefit, impossible to quantify with precision, present in almost all marriages in different degrees and capacities, that have caused our law makers to put in place a presumptive equal division. To suggest that Mr. Cohoon suffered significant unfairness because Ms. Stobo ended the marriage with two university degrees and he had none is to consider significant unfairness through an overly narrow lens that fails to take into account the many other benefits he obtained over the course of the marriage as a result of the contributions of Mr. Stobo, including career benefits.
- [53] I acknowledge that the division of family property and claims for spousal support engage different considerations and principles. Nevertheless, in my view, the judge erred in failing to consider this same mutual conferral of benefits, and where the parties stood in economic terms at the time of their separation, when she addressed Ms. Stobo's compensatory support claim.
- [54] I do not understand the judge found that the first branch of the compensatory support inquiry was engaged. Ms. Stobo did not "[forego any] career opportunities" nor was she "handicapped by the marriage": *Bracklow* at paras. 39 and 40. She did not make "economic sacrifices" nor was her "career advancement permanently reduced" by the contributions she made to her child and husband: *Moge* at 863 and 882. This was not a case, as in *H.S.S. v. S.H.D.*, 2018 BCCA 199 at para. 126, where the Court referred to the trial judge's finding that the wife's "assumption of the primary parenting role in the marriage required her to relinquish her promising career opportunities in order to devote herself to providing care and stability to the family". Nor, as was the case in *Chutter*, did the parties agree that Ms. Stobo's career would be secondary to Mr. Cohoon's: para. 82.

- [55] To some degree, the opposite was true. Mr. Cohoon, from very early on in their relationship, encouraged Ms. Stobo to study, pursue her dreams and become self-sufficient. Ms. Stobo initially stayed at home with their daughter because her own career aspirations were modest and because the parties' financial circumstances were strained. However, she ultimately achieved her career aspirations and it does not appear, based on the evidence, that she was delayed in doing so. As noted earlier, her aspirations evolved with time.
- [56] Nevertheless, the fact that Ms. Stobo initially cared for their daughter and home did allow Mr. Cohoon to work long hours and to become established in the film industry. He was provided with a benefit. He became established in his career before Ms. Stobo became established in hers.
- [57] In a sense, their career successes were staggered. Mr. Cohoon gained access to the film industry while Ms. Stobo stayed with their daughter, acquired further education and decided what she wanted to do professionally. Ms. Stobo then went back to school to get her degree and she was supported in this endeavor, financially and otherwise, by Mr. Cohoon.
- [58] After Ms. Stobo returned to school in 2003, the judge found the parties' respective contributions to the marriage were "much more equal". Ms. Stobo obtained her degree in 2007 and for the next approximately 12 years, or until the parties separated, Mr. Cohoon and Ms. Stobo contributed their "time, efforts and income to their mutual benefit": *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 27.
- [59] There was no evidence that Mr. Cohoon received any additional economic benefit from being able to establish his career before Ms. Stobo established hers. Nor was there any evidence that Ms. Stobo would have been in a different economic position had she obtained her professional qualifications a few years earlier. Either of these circumstances might well have shifted Ms. Stobo's "prima facie" claim for compensatory support to an actual entitlement to such support.
- [60] These considerations are supported by the well-known comments of Justice Martinson in *W. v. W.*, 2005 BCSC 1010, that were quoted by the trial judge:
- [14] It is sometimes argued that the disadvantage to the primary parent is off-set by the advantage that person receives by obtaining a share of the assets accumulated. In my respectful view this approach does not take into account how the advantages and disadvantages can arise based on the roles spouses play.
- [15] Raising children is a round the clock endeavour. The primary income earner is in a position to earn money to accumulate assets often in large part because that person is relieved of many aspects of that 24 hour a day job. When the relationship ends, it is not just the secondary earner who receives assets. The primary earner also receives a share, often half, of the assets.

[16] Therefore, in a typical case, the primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher income earning ability because of full participation in the work force, substantially unencumbered by child care responsibilities. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse often does not have the same income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award.

[Emphasis added.]

[61] It is apparent that the third of these considerations, which anchors a compensatory claim, must be thoughtfully considered. In particular, it is important to consider whether an initial detriment to one spouse, or an early conferral of a benefit to the other, supports a compensatory support award. This will often turn, in significant measure, on whether one spouse "does not have the same income earning ability at the time of separation because of the role played in the marriage": *W. v. W.* at para. 16.

[62] This statement is supported by a related consideration. In *Zacharias*, this Court addressed the trial judge's assertion that the "longer the marriage, the more it weighs in favour of an award of compensatory support": para. 19. Justice Groberman, for the Court, said:

[47] In my view, the premise, as stated by the judge, must be qualified. The significance of a long marriage is as stated in *Moge* at 870:

As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[48] Thus, the fact of a long marriage does not, in and of itself, support an award of compensatory support. Rather, it supports such an award if the court concludes that such an award is necessary to achieve a parity of living standards, and if the court accepts that "presumptive claim" as the appropriate goal.

[63] In *W. v. W.*, Justice Martinson made the following observation, quoted in *Chutter* at para. 55, about the same statement from *Moge* at 870:

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims [Citations omitted.].

[Emphasis added.]

- [64] What, then, were the parties' likely standards of living as they left the marriage? As noted, the judge determined that Ms. Stobo's non-compensatory claim was weak. Specifically, she said:
- [84] Ms. Stobo's entitlement on non-compensatory grounds is somewhat harder to discern in this case than in other long marriages, in part because the parties lived so far beyond their means, that the marital standard, while lavish, was unsustainable for both parties. Put another way, Ms. Stobo can no longer afford the lifestyle she enjoyed with Mr. Cohoon, but neither Ms. Stobo nor Mr. Cohoon could afford that lifestyle while they were enjoying it. Both parties are now left in a state of relative financial precariousness. I do not find that Ms. Stobo is particularly economically disadvantaged by the breakdown of the marriage and therefore I find that her entitlement on non-compensatory grounds is weak.
- [65] The finding that Ms. Stobo was not "particularly disadvantaged by the breakdown of the marriage" is not formally challenged. The judge's finding that both parties spent excessively throughout their marriage is similarly unchallenged by either party.
- [66] It is, however, useful to compare the parties' respective property, or distributions from property, and incomes following the judge's findings to consider what potential standard of living remained available to each of them upon the dissolution of their marriage.
- [67] In considering the parties' respective standards of living, the court does not require that each party match the other "step for step": *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 74. It does, however, seek to achieve a "rough equivalency" as between them: *W. v. W.* at para. 11. When the resources of the parties are insufficient to allow them to enjoy the marital standard of living, it is usually reasonable to allocate their resources so that each of them enjoys "a similar standard of living": *Zacharias* at para. 56.
- [68] I will first address the question of property. Mr. Cohoon derived his income through two companies. He charged out his personal grip services through what the judge defined as the "Service Company". He also rented out grip equipment (equipment that supports cameras and lighting) to film productions through "Reid Grip". Mr. Cohoon invested an amount in Reid Grip that was excluded property which the judge calculated at \$264,961. The judge found that the portion of Mr. Cohoon's two companies that was family property was \$825,039. Approximately \$535,000 of this value was attributable to Reid Grip. The only asset of the Service Company was an "amount due" from Reid Grip to the Service Company. After allowing for distributive income taxes, associated with Mr. Cohoon notionally having to incur a tax liability when he withdrew money from the two companies to pay Ms. Stobo, the judge determined Ms. Stobo was entitled to \$334,019.50.

- [69] The judge also divided the amounts the parties received from the sale of the Home. After making various adjustments, including an adjustment for the \$334,019.50 owed to Ms. Stobo, Ms. Stobo received \$911,723.28 from the sale of the Home while Mr. Cohoon received \$258,496.29. The difference between those two amounts is \$653,226.99.
- [70] On the income side of the equation, and after making different adjustments for various reasons, the judge found, as noted earlier, that Mr. Cohoon had a Guideline income of \$200,000 derived through his two companies, while Ms. Stobo had a Guideline income of \$100,000.
- [71] The income Mr. Cohoon generated from his companies varied significantly from year to year. The income he generated from Reid Grip from 2016 to 2020 averaged approximately \$75,000 per year, while the average income he generated from the Service Company, based on his own labor over this same period of time, was approximately \$120,000.
- [72] If Mr. Cohoon liquidated or sold Reid Grip he would, depending on the means of disposition, generate an after-tax amount between \$560,000 and \$656,000. I leave aside for present purposes that approximately \$265,000 of this amount would be excluded property. The liquidation of Reid Grip would increase Mr. Cohoon's available funds and roughly equalize the amounts Mr. Cohoon and Ms. Stobo would have available for their housing needs or to be otherwise invested to supplement their incomes. Ms. Stobo would have \$911,723.28 and Mr. Cohoon would have between \$818,496 (\$258,496 + \$560,000) and \$914,496 (\$258,496 + \$656,000).
- [73] Further, after the liquidation or sale of Reid Grip, the parties' respective Guideline incomes would also now be roughly equivalent. Mr. Cohoon would generate an approximate annual income of \$120,000 through his Service Company and Ms. Stobo would have an income of \$100,000.
- [74] There is a further and related lens through which the same question might be addressed. When a party is entitled to compensatory support, they are generally only entitled to such support until "compensation is achieved": Tedham at para. 60; Chutter at para. 79; Parton at para. 45. The court will generally consider that compensation is achieved when "the recipient spouse's standard of living is equivalent to the standard enjoyed during the marriage": Zacharias at para. 58. In circumstances where neither party is likely to continue to enjoy the marital standard of living, what is important is that they continue to enjoy roughly equivalent standards of living.
- [75] The evidence I have referred to indicates that compensation for Ms. Stobo was, in a sense, "achieved" during the marriage. This was so through the division of the parties' family property and their respective Guideline incomes. I have emphasized the "general" nature of these principles because there will be cases where some different measure of support is appropriate: Zacharias at para. 57.

[76] In my view, this rough equivalency in the parties' ongoing ability to maintain their respective standards of living was, in the circumstances of this case, inconsistent with the compensatory spousal support order made by the judge. In my view, that spousal support order should be set aside.

Disposition

[77] I would dismiss Mr. Cohoon's appeal of the judge's order that all equity in the Home was family property notwithstanding his use of inheritance money to pay down secured debt on the Home. I would allow Mr. Cohoon's appeal of the judge's spousal support order. This necessarily means I would dismiss Ms. Stobo's cross-appeal to increase the amount of her spousal support.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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