

CANADA / JUDGMENT

D.M.B. v. D.W.A.L.

2018 BCSC 1254

COURT

Supreme Court of British Columbia

DECIDED

25 July 2018

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2018 BCSC 1254 D.M.B. v. D.W.A.L. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: D.M.B. v. D.W.A.L., 2018 BCSC 1254 Date: 20180725 Docket: 16-4729 Registry: Victoria Between: D. M. B. Claimant And: D. W. A. L. Respondent Before: The Honourable Mr. Justice Punnett Reasons for Judgment Counsel for the Claimant: G.E. Coad Respondent on his own behalf: D.W.A.L. Place and Date of Trial: Victoria, B.C. March 5-9, 2018 and March 13, 14 and 16, 2018 Place and Date of Judgment: Victoria, B.C. July 25, 2018

Introduction

- [1] This family law dispute raises issues of property division, spousal and child support and parenting responsibilities. Despite two separate mediations, the assistance of a divorce coach and efforts of counsel the parties failed to resolve matters.

Background

- [2] The parties commenced living together on November 1, 1997, married on March 18, 2000 and separated on May 4, 2014. Mr. L. is 49 years of age and Ms. B. is 47. They have two children, a 15-year-old daughter, C., born on November 12, 2002 and a 12-year-old son, W., born December 1, 2005. At separation the claimant moved from the former family home with the children, initially staying with a friend and then in a rented apartment.
- [3] The claimant is a Provincial Government employee. She is employed as an environmental analyst. She earned a Master's degree during the relationship. During her employment by the Province she was seconded to the Climate Change Secretariat for two years as a manager. She found she disliked the need for meetings with other managers and stakeholders, attending receptions at conferences and the expectation she would network. She lacked the confidence required. She has no desire to return to a management position. She is not comfortable in such a position and she says that she "can't find her voice" with groups.

- [4] Mr. L. is self-employed as an environmental consultant and lobbyist. He operates as a proprietorship. During the parties' relationship he completed a Bachelor's degree, a leadership course through his government employment and substantially completed his Master's in Business Administration. He was employed by the Province in the Ministry of Environment until 2014 when the parties agreed there were better financial prospects in the private sector. He left his employment and set up his business as an environmental consultant and lobbyist. His income is in dispute due to the business expenses he claims. He has one long-term contract paying \$10,486 per month which expires at the end of 2019. He describes that contract as representing two-thirds of his work. Roles in Marriage
- [5] The claimant did most of the housework and cooking. She was also the primary caregiver and was the parent who took the children to medical and dental appointments, attended school meetings and was active in their school. Parenting
- [6] After separation on May 5, 2014 the parties agreed on an interim basis to two weeks to share parenting time on a three-day rotating schedule. On June 3, 2014 the claimant, apparently with advice from then counsel, unilaterally changed the interim parenting arrangement and advised the respondent he would have parenting time every Tuesday evening until Wednesday morning and every second weekend.
- [7] On July 2, 2014, assisted by then counsel, the parties entered into an interim agreement respecting parenting responsibilities for the months of July, August and September 2014. During the summer months the parties shared parenting time to facilitate their respective holidays. They later agreed to a 2-2-5-5 schedule of shared parenting.
- [8] That schedule remained in place until February 2016 when C. commenced residing full-time with her mother until June 2016. Shared parenting then recommenced until August 2017 and in September C. again resided with her mother. She continues to reside with her mother, visiting with the respondent when she wishes to do so. Their son remains on the 2-2-5-5 schedule. It is proposed those arrangements remain in place. Support History
- [9] The respondent paid no spousal or child support from May 2014 until November 2014. The only funds the claimant received during that period was \$679.52 she removed from their joint account.
- [10] After a mediation was held in October 2014 the claimant's then counsel prepared Minutes of Settlement however the respondent refused to sign them and shortly thereafter his counsel withdrew. On November 7, 2014 the respondent withdrew from the mediation process stating in an email that he had provided the claimant with a cheque representing \$1,250 per month for child and spousal support from May to November 2014 less the \$680 paid earlier. He also confirmed providing post-dated cheques of \$1,250 from December 2014 to May 2015. He characterized the payments as "without prejudice payments."

- [11] According to the claimant the Minutes of Settlement accurately describe the agreement reached at mediation. The respondent in his email withdrawing from the mediation did not address whether an agreement was reached. Instead he simply stated he was withdrawing to spend time with his children and focus on his business to grow his income to benefit the children. The claimant does not seek enforcement of the Minutes of Settlement.
- [12] Commencing with the month of May 2015 the respondent reduced the payments to \$650 per month for the months of May to October 2015.
- [13] On August 14, 2015 the claimant signed a notice of intention to make a proposal under the Bankruptcy Act.
- [14] The respondent cancelled payment of the cheques for November and December 2015. When the claimant sent him an email pleading with him to pay child support he replied: I will give you the money you are asking for on Wednesday if you bring a signed copy of the attached Separation Agreement
- [15] He made no support payments from January to March 2016 and then a payment of \$325 in April 2016. No payments were made from May 2016 to April 2017.
- [16] The creditor proposal has been finalized on the basis that 50 percent of the funds to be received by the claimant from the settlement of her Family Law Act ("FLA") claim respecting her half interest in the former family home estimated at \$11,628 is to be paid to unsecured creditors along with a payment of \$18,000 at the rate of \$300 per month commencing in September 2015 for 60 months.
- [17] On May 8, 2017 at a judicial case conference a consent order was made requiring that Mr. L. pay to the claimant child support of \$520 per month commencing May of 2017 payable "forthwith" and on the first of each month thereafter. The order provided that it was made without prejudice to either party pursuing retroactive and prospective child support.
- [18] The May payment was not made forthwith and required the intervention of claimant's counsel to secure its payment. The respondent then paid \$520 per month in May and June 2017, \$540 for July, no payments were made in August and September (in contravention of the order). He paid \$1,020 in October 2017, \$1,048 in November 2017, and \$540 in December 2017. In 2018 he paid \$540 in January, \$475 in February and \$520 in March. Property Issues
- [19] In December 2005 the parties purchased a home on Interurban Road in Victoria, B.C. The claimant inherited \$16,440 in 2005 and used approximately \$13,000 of the inheritance for the down payment on that home. The parties occupied the middle floor of the home and rented out the top and bottom floors. They resided in the home until December 15, 2007, when the claimant discovered the body of the downstairs tenant who had committed suicide. They moved out of the house as a result and resided with the respondent's parents for two and one-half months and then rented a condominium in Royal Oak. The Interurban Road home was rented and then sold in March 2010.

- [20] In June of 2008 the parties purchased what became the family home in the Highlands municipality near Victoria, B.C. (which I will refer to as the "Millstream property," the "family home" or the "matrimonial home" in these reasons). They financed the purchase with a second mortgage on the Interurban Road home. When the Interurban Road home was sold both the first and second mortgages were paid out. The net sale proceeds were approximately \$52,000 to \$57,000 and were used to pay off debts and for "spending money."
- [21] In May of 2014 the claimant learned of the respondent's affairs. She moved out of the family home on May 4, 2014. Initially she resided with a friend and then in June 2014 moved into a two-bedroom condominium. Each child has a room, but she does not, as she sleeps in the living room.
- [22] The parties had been renovating the family home prior to their separation. Those renovations included a new roof and new flooring. Those renovations were substantially completed and paid for before the parties separated. Left incomplete were the baseboards, kitchen counter, exterior of the kitchen window, exterior finishing and an outside deck.
- [23] The respondent remained in the former matrimonial home until February 2016. The home was then rented and then sold on June 30, 2017. The net sale proceeds of \$211,303.48 were placed in trust. By agreement the parties each withdrew \$20,000 for legal fees and an electrical bill of \$1,753.33 incurred to ensure the mobile home on the property had the necessary certificates for its sale. The balance in trust is \$169,550.15.
- [24] The claimant traded in the family's 2010 Jeep Wrangler for a 2005 Volkswagen Golf as she could not afford the payments. Positions of the Parties Parental Responsibilities
- [25] The parties agree that the current parenting regime with W. in a shared parenting arrangement and C. residing primarily with the claimant should continue. However, the claimant seeks to have all of the parental responsibilities in relation to the children. The respondent argues the parental responsibilities for the children should be shared. Child Support
- [26] In regards to child support, the claimant asserts that her line 150 income represents her best earning ability and should be used for support calculations. She says that the court should impute income to the respondent as his line 150 income understates his income because of the amounts he writes off for business expenses.
- [27] The respondent says that child support should be calculated based on his line 150 income plus 25 percent of his business expenses. Spousal Support
- [28] The claimant seeks spousal support for an indeterminate period on both compensatory and non-compensatory bases. She says that her Post Traumatic Stress Disorder ("PTSD") is directly attributable to the marriage and precludes her from advancing in her career.

- [29] The respondent says the claimant is not entitled to spousal support given, he alleges, their relative equality in incomes. If awarded, he says spousal support should be of a limited duration and at the low end of the ranges provided in the Spousal Support Advisory Guidelines (Ottawa: Dept. of Justice, 2008). Property Issues
- [30] The claimant agrees that the respondent should receive \$22,376 from the sale proceeds of the matrimonial home for monies paid by him towards the upkeep or maintenance of the home following separation. The claimant then says she should receive \$13,000 as repayment of her inheritance that she invested in the Interurban home, which was subsequently used to secure the second mortgage on the Millstream home. Finally, the claimant says that after payment of family debts the net proceeds of the sale of the home should be divided equally, but that the respondent's share of the sale proceeds should be held by the claimant as security for future spousal and child support.
- [31] The respondent seeks unequal division of the matrimonial home given his payment of post-separation mortgage payments, repairs, improvements and taxes totalling \$84,130.44. He disputes the claimant's excluded property claim. Costs
- [32] Each party seeks special costs. Expert Evidence
- [33] Ms. B. asserts she suffers from PTSD because of the respondent's conduct during and after the marriage and that such has impaired her employment prospects. She relies on a psychological and vocational opinion prepared by John C. Pullyblank, Ph.D., a registered psychologist. His report is dated December 4, 2017. It was served on the respondent's counsel on December 8, 2017. The respondent sought to introduce a responding report of Dr. Anita Snell, who is also a registered psychologist. The report is dated February 5, 2018 and was served on claimant's counsel on February 8, 2018, 24 days prior to trial. The report was not accepted, firstly because it was served well out of time (it was not ordered until January 26, 2018), and second, because it was a "critique" report and of no assistance to the Court.
- [34] The report of Dr. Snell stated it was prepared to provide a professional opinion respecting whether the report of Dr. Pullyblank was flawed "in its findings with respect to Ms. B.'s psychological and vocational assessment and secondly if the report was flawed, on what grounds." It was prepared without Dr. Snell interviewing the parties and on the basis the writer had "no direct knowledge of either [Ms. B.] or [Mr. L.]." Her report states that "it is an analysis of the means by which Dr. Pullyblank arrived at his conclusions as presented in his Opinion Report."
- [35] The test for admission of an expert report is found in *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20. An expert report must meet these criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and be (d) from a properly qualified expert.

- [36] The report of Dr. Snell objects to the report of Dr. Pullyblank on several grounds including a lack of qualifying language such as "it appears" or "according to" suggesting that Dr. Pullyblank unequivocally accepted Ms. B.'s description of Mr. L.'s behavior. Further Dr. Snell asserts that Dr. Pullyblank did not mention Mr. L.'s version of events. She also states she "did not find compelling evidence" that Ms. B. met the criteria for PTSD. She also criticized a lack of actual behaviors being described.
- [37] In addition, she suggests Ms. B.'s vocational challenges are intermittent and are "not necessarily clearly associated or linked with the alleged 'emotional and verbal abuse' by [Mr. L.]." She then concludes: It is also not the intention of this Rebuttal Report to unilaterally state that [Ms. B.] does not have PTSD. Rather, it is the Writer's conclusion that Dr. Pullyblank did not provide sufficient detailed observations of [Ms. B.'s] behavior to substantiate a diagnosis of PTSD. Furthermore, Dr. Pullyblank's Opinion Report appears to suffer from an inherent bias in favour of [Ms. B.'s] described version of events, which Dr. Pullyblank does not attempt to qualify or further research in any apparent manner. In terms of her vocational capacity, the Opinion Report appeared to fail to establish a balanced recounting of [Mr. L.'s] purported "emotional and verbal abuse" and appeared to fail to provide necessary details concerning the impact of the alleged abuse. In light of the review of [Ms. B.'s] Medical Records which indicated significant periods of time when [Ms. B.] was functionally capable of working, the conclusion is that [Mr. L.] does not appear to be responsible historically or currently for any lost career opportunities [Ms. B.] may have experienced or is experiencing.
- [38] The report of Dr. Snell exceeds the limits of what a psychologist is expected to do when critiquing another psychologist's report. Section 11.36 of the CPBC Code of Conduct (Vancouver, B.C: College of Psychologists of British Columbia, 2014) states: When reviewing reports prepared by other registrants or other professionals, a registrant must:
- b) limit comments to the methods, procedures and processes employed by the registrant or other professional;
 - e) not make any conclusions, diagnoses, assessment of psychological status, or recommendations specific to the individuals who were the subject of the original report;
- [39] The report would likely be of assistance to counsel cross-examining Dr. Pullyblank. The criticisms of how the report is written, and the alleged lack of details regarding observations of Ms. B. are all areas for cross examination. However, the report also treads into areas that are the very questions before the court and violate the rule against opinion on the ultimate issue. I fail to see how such a report assists the court given it comes to conclusions without the benefit of the expert assessing the parties and repeatedly uses words such as "appears".
- [40] I agree with the comments of the Ontario Court of Appeal in *M. v. F.*, 2015 ONCA 277 at paras. 30-34, where the Court stated:

- [30] Several trial judges have admitted critique evidence and then discounted its weight. However, other courts have determined that it is not admissible because it does not meet the criteria set out in *R. v. Mohan*, [1994] 2 S.C.R. 9. In *Mayfield v. Mayfield* (2001), 18 R.F.L. (5th) 328, Justice Wein ruled that evidence critiquing an assessment report was not admissible. After considering the threshold of "helpfulness" often applied in family law cases, she said: Prior to the decision in *Mohan*, the general standard for admissibility of expert evidence was the relatively low threshold of "helpfulness"... [S]ubsequent to *Mohan*, the Court in effect had been asked to function as a "gatekeeper," [T]he standard of helpfulness was explicitly rejected as being too low ... (para. 34).
- [31] She went on to find that critique evidence will "rarely" be admissible. She said that: [I]n most cases, it is simply not necessary or appropriate to have the parties bring forward the evidence of a collateral critique ... it will rarely, if ever, be "necessary" to introduce the critique as original evidence or to call the critique as a witness. (para. 44)
- [32] Her words were cited with approval by this court in *Sordi v. Sordi*, 2011 ONCA 665. This was an appeal from a custody order. The trial judge had refused to admit critique evidence. Epstein J.A. "strongly supported" the view set out in *Mayfield* and said: I find no fault with the trial judge's refusal to admit the [critique] on the basis of (1) its frailties, and (2) the fact that its value - to impeach the report of the court-appointed expert - remained available to the appellant through cross-examination and, ultimately, argument. (para.14)
- [33] When these considerations are applied to Dr. Jaffe's report, it is evident why the trial judge gave it little weight. Dr. Jaffe's self-described task was to "raise concerns" about the court-appointed assessment. It would be difficult to find that such evidence meets the criteria of *Mohan*.
- [34] I too support the view that critique evidence is rarely appropriate. It generally - as here - has little probative value, adds expense and risks elevating the animosity between the parties. See also *Dimitrijevic v. Pavolvich*, 2016 BCSC 1529.
- [41] The report does not meet the test of necessity. It has little probative value and does not assist the Court.
- [42] The respondent also sought to introduce a real estate appraisal from 2015 respecting the former matrimonial home. No notice was given. Its admission was potentially prejudicial to the claimant. In form it failed to comply with the requirements of an expert report. In any event it did not address the value of the home at the time of separation, the effect of the work carried out on its value, and the extent to which the value increased due to such renovations as opposed to the costs of the renovations.
- [43] It was not received into evidence. Disclosure Issues

- [44] The respondent's production of business records was problematic. It was neither timely nor complete. His record keeping, particularly regarding his claimed business expenses, was not organized for transparency.
- [45] At trial Mr. L. explained that each year he went through his receipts that he kept monthly and organized them by category for the purpose of business deductions, and made a list of his monthly personal and business expenses. However, instead of keeping them organized in such a manner he said he then recombined his business and personal receipts and returned them to his monthly collections and threw away the lists showing the items claimed in each category. I note such practice appears illogical and no reason for it was given. At trial he had made no further effort to organize them in order to permit the assessment of his claimed expenses despite repeated requests from counsel to do so. As a result, when questioned he could not provide the details requested. This despite claimant's counsel having made clear since early 2017 that the issue of business expenses claimed was a significant issue in the litigation.
- [46] In addition, the respondent had repeatedly asserted that he had provided his 2014 income tax return despite ongoing requests from counsel for the claimant for its production. When he responded to these requests he did not state he had already provided it, and instead responded that it was not relevant. At one point he stated counsel had his 2014 notice of assessment, apparently viewing that as sufficient. In my view he was deliberately avoiding production of his 2014 return given it provided details of the business expenses claimed and as a result opened his claimed line 150 income to challenge.
- [47] He also failed to produce his accounting and banking records from January 2014 to September 2014 despite claimant's counsel specifically requesting them. They were relevant to his gross income deposits and business expenses. Counsel for the claimant warned Mr. L. on June 18, 2017 and February 16, 2018 that his failure to properly produce documents detailing his business expenses would cause a request that an adverse inference be drawn.
- [48] This court has repeatedly noted the negative effects of inadequate and delayed disclosure. It increases expense, discourages settlement, prolongs the stress of litigation and, where children are involved, negatively affects them (see *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 at para. 9 and *Sebok v. Batis*, 2018 BCSC 585 at paras. 13-15).
- [49] In this instance such negative effects are clear. The lack of relevant and delayed disclosure has been an ongoing issue. At trial it continued as the failure to produce receipts relating to business expenses and the respondent's repeated replies to questions that he would have to check his records that, while apparently present, were not organized and hence were not readily available, have led to uncertainty.

- [50] While counsel for Mr. L. at one point prior to trial offered to organize the records, it was not incumbent on counsel for the claimant to request that counsel do such. Mr. L. cannot now state by way of explanation for his failure to organize the records that his lawyer offered to do so. That was his responsibility to have done.
- [51] There was no plausible explanation given for Mr. L.'s failure to produce the records in a useable form. Given there were specific requests for them the inference is that they would have been produced if favourable to Mr. L.'s case. It can be assumed that they would hurt his position. The requested records were relevant given Mr. L.'s position on deductions from his business income.
- [52] I will draw inferences against the respondent where appropriate. Credibility Respondent
- [53] I did not find the respondent a credible witness.
- [54] The respondent deflected responsibility when asked about questionable decisions made by him. For example, he justified his lease of a "fully loaded" 2015 BMW on the basis that his lawyer thought it was a good idea for his professional image. Mr. L. also said it was required as it was important to show he was successful.
- [55] He more than once asserted that counsel was attempting to "trick" him. He had a tendency not to answer questions, even those requiring a general answer, by saying he would have to check his records, those very records he had failed to properly disclose. When he did respond he was frequently not responsive to the question.
- [56] He tended not to admit any errors or wrongful behavior, always having an explanation. When a copy of his Linked In profile was put to him and he confirmed its accuracy he was asked about the entry that stated he received an MBA from Royal Roads University in 2013. He asserted that he had never put his MBA on his resume or profile and that he must not have properly completed one of the drop-down boxes on the page to indicate the degree was incomplete. He stated it shows up differently on the Website. However, when asked if it was at least misleading as shown on the print out he would not agree that was the case.
- [57] When it was put to him that he had failed to disclose information and that disclosure had been an ongoing issue he confirmed it was but stated he "had done [his] best" to provide it. The emails and exchanges between counsel and between Mr. L. and counsel show that was not the case. He has had a lengthy period of time to produce the relevant financial documents. His blaming his bank for not producing his banking records was not due to their failure but due to his late request to the bank for their disclosure.
- [58] When questions were put to him regarding his business expenses he took refuge in asserting he would have to see the documents. As mentioned those documents were in three boxes, one for each year, separated by month, and combined both business and personal receipts. At the same time, he acknowledged it would be time consuming to separate them back out to recreate the list of those expenses claimed. In essence he relied on his failure to disclose such documents in an organized fashion as a basis for avoiding answering questions at trial.

To have allowed him to revisit the boxes of documents in court in order to re-total and list his business expenses would have led to frequent adjournments and an interminable trial. He knew from the discovery they would need to be organized in order to introduce such evidence. Given the specific requests made to him over the year prior to trial for production of such records I can only conclude such conduct was deliberate. Even though the issue came up at discovery and he was asked if he would review the records his response during the trial was that counsel for the claimant was "badgering me for precise answers" and that he had offered to dig them up then and there but it would take time. He was asked if he agreed to attend to that later and provide answers and his response was he did and got back to counsel with "some" of the requested information.

- [59] When asked why he had violated the May 8, 2017 consent order by not making the August to October 2017 payments and by not commencing payments forthwith resulting in counsel becoming involved he stated he believed because of funds taken by the claimant earlier from their joint account he was in a positive position. That was not an issue raised at the time of the consent order. When the claimant emailed him in October seeking the missing child support payments he responded: Diane-as I mentioned in my last email, I too have many bills to pay from covering all our house costs. So let's agree to access the money held in trust from the house sale.
- [60] At trial he testified respecting several trips that he took with his girlfriend after separation, and said that his girlfriend paid for most of their trips. However, his discovery evidence was that when he took trips with his girlfriend "sometimes she pays for things; sometimes I pay for things." He was asked at discovery to provide details of what he spent on various trips but he failed to do so. I conclude his failure to provide the requested disclosure was an attempt on his part to conceal his expenditures for such holidays.
- [61] I find the respondent's failure to disclose relevant financial information along with his unhelpful form of disclosure was a deliberate effort on his part to avoid disclosure leading to the inference that had such disclosure been made it would have been damaging to his position in this litigation and his financial interests. Claimant
- [62] I found the claimant a credible witness. Her evidence was internally consistent. She was responsive to questions.
- [63] The evidence of her long-time friend Ellen Arnot who grew up with her in a small farming community in Manitoba was that the claimant does not like conflict and that she is a "people pleaser." She does not want to upset people and worries about how people react.
- [64] The claimant's reaction to finding the deceased tenant reveals her vulnerability. The family immediately moved from the home. It was an event that troubled her for several months. She had counselling and suffered flashbacks and nightmares. She went on medical leave. She is easily stressed and suffers from panic attacks.

- [65] The observations of Ms. Arnot are consistent with my impression of the claimant. She was clearly not the dominant party in the marriage. Children
- [66] Guardianship is not in issue. The parties remain guardians of their children. For clarity there will be an order to that effect. There is also agreement that C., given she is 15, will decide how much time she wishes to spend with each parent. The respondent accepts that she wishes to reside with her mother. Their son W., by agreement, will continue the current shared parenting schedule of 2-2-5-5. However, the parties do not agree on parenting responsibilities. At issue is whether, given the post-separation history of parenting issues, the respondent is capable of cooperative co-parenting in the best interests of the children.
Law on Parenting
- [67] Each guardian has the right to exercise all parental responsibilities. However, they must do so in the best interests of the child and must consult with the other guardian or guardians. This right, however, is subject to a court order or agreement (s. 40(2)) of the FLA).
- [68] Parental responsibilities are defined in s. 41 of the FLA:
41. For the purposes of this Part, parental responsibilities with respect to a child are as follows:
- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
 - (b) making decisions respecting where the child will reside;
 - (c) making decisions respecting with whom the child will live and associate;
 - (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
 - (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
 - (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
 - (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
 - (h) giving, refusing or withdrawing consent for the child, if consent is required;
 - (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
 - (j) requesting and receiving from third parties health, education or other information respecting the child;
 - (k) subject to any applicable provincial legislation,

- (l) starting, defending, compromising or settling any proceeding relating to the child, and
- (m) identifying, advancing and protecting the child's legal and financial interests;
- (n) exercising any other responsibilities reasonably necessary to nurture the child's development.

[69] This section provides guidance respecting the factors to be addressed in the best interests of the children. These responsibilities may be allocated between the parents. Position of the Claimant

[70] The claimant submits the respondent has not shown the insight or capacity to make appropriate decisions in the children's best interests. In addition, she points to the ongoing conflicts between the parties over decisions respecting the children. She seeks an order that all of the parenting responsibilities respecting both children be given to her. Position of the Respondent

[71] The respondent seeks shared parenting responsibilities with an order that if the parties cannot agree then they attend mediation to resolve any disputes, or in the alternative, that a parenting coordinator be appointed. He disputes that the parties cannot co-operate regarding parenting and denies that he has not acted in the best interests of the children. Discussion of Parenting

[72] As noted, upon separation the parties agreed, for two-weeks, to shared parenting on a three-day rotation. That continued until early June. On June 5, 2014 the claimant emailed the respondent informing him that after consulting with her then counsel she was changing the schedule so the children would reside with her and the respondent would have parenting time from Tuesdays after school until Wednesday morning and alternating weekends. The respondent refused to agree.

[73] While the respondent characterized the change as a "unilateral" decision of the claimant it is clear that the initial shared parenting regime was only for two weeks and was subsequently extended until early June. The post-separation parenting arrangements were in a state of flux.

[74] On July 2, 2014 assisted by their respective then counsel the parties agreed to interim parenting arrangements for July, August and September 2014 and signed Minutes of Settlement to that effect. They agreed to shared summer vacation time in July and August 2014. For September they agreed to a rotating two-week schedule with alternating weekend times. The Minutes did not address what parenting arrangements would be after September 2014.

[75] To assist with the issue of the children the parties had Marnie Olchowecki interview the children. In her report of October 20, 2014, she summarized the children's reactions to their parents' separation. Thereafter the parties informally continued the shared parenting arrangement, except for C. who remained with the claimant from February to June 2016.

- [76] In the spring of 2017 C. was evidencing signs of stress, visual and auditory hallucinations and low mood. She was brought to the attention of the mental health outpatient program by the Victoria Child Youth Mental Health Team. She reported to the psychiatrist she did not want to go to her father's home. In the summer of 2017 C. advised the parties she wished to live with her mother. The respondent insisted that she speak to someone and as a result a Views of the Child Report was obtained. The Views of the Child Report was prepared by Teh Stratton and is dated October 18, 2017. C. stated she wished to reside with her mother and have every other weekend with her father.
- [77] C. commenced living with her mother full-time in September 2017. She has remained living with her mother since then. The respondent concedes that given her age and expressed desire to live with her mother parenting time respecting C. is no longer in issue.
- [78] The post-separation communications between the parties were not without problems. While some email and text exchanges by the respondent were courteous and resulted in issues regarding the children being resolved others were not. The latter were not insignificant.
- [79] For example, on several occasions the claimant's requests to the respondent respecting the children were ignored or met with a "No!" When an incident arose where the children were kept longer than planned by the respondent at his parents' 50th anniversary leading to the cancellation of plans of the claimant, the respondent accused the claimant of "manipulat[ing] [C.] exploiting her mental health issue to get her to stay with you and become your care nurse." Such inflammatory assertions do not bode well for future cooperation.
- [80] The report of Ms. Olchowecki noted the children's concern with their father's anger and that they feared him. They both said they looked to their mother for care and nurturing. For example, W. does not like to talk to his dad about his health. Mr. L. unfortunately does not concede there is any basis for his children's concerns. He appears to lack insight into his behavior regarding the children. He explains C.'s comment to the psychiatrist that she avoids her father because of a fear of him yelling at her at his house by saying there was "something in it for [C.]. He believes that the month of June 2014 when the children stayed primarily with their mother has "scarred them for life." I note there is absolutely no evidence of such.
- [81] Aside from his lack of insight into his children the respondent's position and actions regarding the children raises issues respecting his ability to make appropriate decisions on the children's behalf.

- [82] For example, in Grade 6 W. was having difficulty in math. His teacher offered to meet with him in the morning and after school to provide him with additional tutoring. The claimant texted the respondent: Hi, I just met with [W.'s] teacher. He is going to help [W.] every morning and after school with his work. So as of tomorrow morning, [W.] needs to be in his classroom at 8:30 am sharp to meet his teacher and he will be staying until 3:30 pm with his teacher. This is every single day from tomorrow morning onwards.
- [83] The respondent responded: I don't support this. Again, please stop making unilateral decisions when it comes to our kids' education.
- [84] The claimant suggested he speak to W.'s teacher. He did not. Instead he texted that W. would "take on extra homework that I will help him with." He also said that "[W.] is very smart and I don't want conformity to the system or receiving 'special treatment' to impact his confidence "
- [85] He blamed the need for assistance as arising from their son not being responsible and accountable for "his stuff." He makes comments such as the claimant being a "super parent" to "show up his dad." It is clear they have dramatically different approaches to and views of parenting. At the same time the respondent appears to centre on how he is viewed and is very sensitive to criticism whether real, implied or simply as perceived by him.
- [86] The extra tutoring did not occur. There is no evidence that the respondent undertook the task of assisting W. with his homework.
- [87] When in the summer of 2017 their son wished to return to Selkirk Montessori after a year at Monterey Middle School the respondent refused to agree. The claimant enrolled him. The respondent emailed Penny Barner, the School Administrator of Selkirk Montessori: Penny-I am disgusted at the role that you have played in coercing [W.] back to Montessori (e.g. offering him free tuition, getting him excited about re-uniting with his old friends) when you knew that his parents did [not] agree on this school change. I will be taking this issue up with the Montessori Board and SD.
- [88] Ms. Barner replied they had not influenced W. in any way but rather the claimant just asked if there was a space and they advised there was and that they have a bursary program for tuition. She denied they got him "excited" about seeing his friends.
- [89] When later the school sought payment of one-half of W.'s school fees the respondent stated that he would pay his half when the claimant paid her half. As the claimant's half was covered by the bursary program he never paid his half. He also at one point threatened legal action against the school.
- [90] During the trial when he was asked if he had picked up his son's report card he said that because he and the principal were "not friends" he would not go and get it. The principal denied any animosity between them.

- [91] Also telling was a student-led parent-student conference at their son's school. When the respondent was reminded of it his response was, "[t]hat won't be happening" and then "[W.] says he doesn't want to go." This contradicts his insistence that the children have to be held accountable and be obligated to meet their commitments.
- [92] The respondent's interaction with the school raises concerns respecting the respondent's ability to deal with the children's schools.
- [93] The respondent professes to be acting in the best interests of his children submitting that he has assisted them and has shown a willingness to collaborate positively with the claimant in making decisions respecting the children. I do not accept the latter assertion. He regards matters involving the children as a matter of control and lacks insight into how his actions affect the children. His approach to dealing with the school, his rejection of a teacher's offer to tutor his son, his failure to even speak to the teacher about that recommendation, his failure to pick up W.'s report card and his blaming of others including the claimant reflect poorly on his ability to exercise his parental responsibilities.
- [94] The perception of the claimant that the respondent acts as if there are no issues respecting the children and any problems are hers, not theirs, is well founded.
- [95] That said, in my view it would not be in the best interests of the children to place all of the parenting responsibilities with the claimant. While there are issues between the parties, and I have concerns respecting the respondent's control issues and lack of insight, it remains important that he be part of his children's lives. I reject the respondent's suggestion they engage in mediation or use the services of a parenting coordinator. The record shows that the respondent's view of resolution by mediation is resolution on his terms and his attaching of conditions to child support payments in the past, for example, makes resolution unlikely. I observe that such behavior is consistent with my impression of his character. Claimant's counsel suggests if mediators or parenting coordinators were to be used the respondent should be responsible for the costs. However, given how he reneged on tuition costs such a situation is likely to simply result in more conflict, something not in the children's best interests.
- [96] The areas that have most in dispute between the parties relate to their differing views of education, the need for tutoring, and the resulting costs. They have different views in such areas. As discussed earlier the respondent has not been primarily responsible for the children's educational needs. His view of how to deal with education related issues has not and will not be in the best interests of the children. His pattern of preferring to spend money for "fun" activities with the children will result in their educational best interests not being addressed. As a result, the parties will share the parental responsibilities as defined in s. 41 of the FLA with these exceptions: Under s. 41, the claimant:
- (a) shall make day-to-day decisions affecting C;
 - (b) and as well shall determine where C. resides;

- (c) with whom she lives;
 - (e) and shall make all decisions respecting both children's education.
- [97] The remaining parenting responsibilities shall be shared regarding W. because of shared parenting and regarding C. given her age and resulting input into such issues. If the parties cannot reach agreement the claimant shall be the ultimate decision-maker subject to the right of the respondent to apply to the court under s. 49 of the FLA. Property Division
- [98] The parties' assets are not substantial. Their major asset was the family home. They disagree respecting division of the sale proceeds from the family home and responsibility for debts. There are also issues respecting division of certain financial assets but no disagreement on division of pensions and CPP benefits. Position of the Claimant
- [99] The claimant seeks equal division of the family assets. She also seeks credit for excluded property (her inheritance contribution to their first house purchase) and acknowledges the respondent is entitled to a credit for household renovations carried out after the parties' separation. Position of the Respondent
- [100] The respondent seeks unequal division of the family residence to reflect his payment of post-separation mortgage payments, property taxes, repairs and improvements. His claim amounts to \$84,130.44 over and above his one-half interest in the former home. Law
- [101] Part 5 of the FLA governs property division. Upon separation each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common, and is equally responsible for family debt (s. 81). Section 87 provides that all family property and family debt is to be valued according to its fair market value at the trial date. An unequal division is sought by the respondent hence ss. 95, 96 and 97 apply. A reapportionment of family property only arises if an equal division would be significantly unfair (s. 95(1)(a)).
- [102] In *Nanara v. Nanara*, 2017 BCSC 1447, Abrioux J. summarized the applicable principles as follows:
- [63] Certain of the key principles include:
- (a) the FLA espouses a presumption of equal division of family property, the entitlement to which exists independent of contributions or use. However, unequal contribution after separation can be a relevant consideration in reapportionment: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 44;
 - (b) the court must first "go through the notional exercise" of equal division, then consider if equal division would be significantly unfair. "Significantly unfair" means "compelling or meaningful having regard to the factors set out in s. 95(2)". There must be "very persuasive reasons" from departing from equal division: *Parton v. Parton*, 2016 BCSC 1528 at para. 71 [Parton]; *Dheenshaw v. Gill*, 2017 BCSC 319 at paras. 44-45; *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44;

(c) lack of financial disclosure is a factor which may be taken into account in considering whether an unequal distribution is appropriate: *Bamford v. Mulyati*, 2017 BCSC 945 at para. 43; *Ahmadi-Abbasabadi v. Ahmadian*, 2017 BCSC 648 at para. 171;

(d) reapportionment is meant to remedy substantial unfairness but does not require both parties to be in absolute equality. *Parton* at para. 108. Discussion of Property Division

[103] Property division issues that arise in this litigation include the issues of excluded property, the alleged improvements to the home and their impact on its value and the nature of various debts and their division. Excluded Property

[104] Not all property owned by the parties is family property. Section 85 of the FLA defines classes of property excluded from the definition of family property:

85. (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse; (b.1) gifts to a spouse from a third party;
- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or (ii) lost income of a spouse;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and (ii) that is settled by a person other than the spouse;
- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[105] Excluded property was addressed by the B.C. Court of Appeal in *V.J.F. v. S.K.W.*, 2016 BCCA 186. There the husband received a \$2 million gift which was then used to purchase property put into the sole name of the wife for creditor protection purposes. At trial the funds were found to no longer be excluded property under s. 85 of the FLA. They were family property to be divided equally. The husband argued on appeal that s. 85(1)(g) provides that once excluded means always excluded. The Court of Appeal held the excluded property regime is not a complete code but builds upon existing common law and equitable principles so that the law governing, for example gifts and the presumption of advancement, still applies.

- [106] Section 85(1)(g) is a tracing provision. In *H.C.F. v. D.T.F.*, 2017 BCSC 1226, Mr. Justice Voith stated:
- [78] A further factor is relevant. Accompanying the excluded property provisions of the FLA is a "tracing" provision that takes into account the fact that property is often deployed in various ways over time. Paragraph 85(1)(a)-(f) of the FLA lists the items that constitute excluded property. Paragraph 85(1)(g) creates the "tracing" requirement. It reads, "[excluded family property is] property derived from property or the disposition of property referred to in any of paragraphs (a) to (f)" [emphasis added]. If property can be "traced" from excluded property, it remains excluded. If not, then it becomes divisible family property under the FLA.
- [79] In *F. (V.J.)* at para. 56, *Ive. to app. dism'd.* [2016] S.C.C.A. No. 295, Newbury J.A. considered that "derived" is broader than "received" and equivalent to "arising or accruing" while "disposition" is a transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, and lease. In footnote one to *F. (V.J.)*, Justice Newbury wrote: Although this point was not argued, I regard the use of "derived from" in the FLA as possibly opening the door to a more flexible approach than the arcane rules of tracing, such as the rule in *Clayton's Case*, might permit. I also note that at paras. 50 and 69, the trial judge described the funds as having been "co-mingled" with funds derived from family property to purchase the property on West 33rd; but I as I understand it, the judge did not intend to suggest that 'tracing' in a non-technical sense was impossible, and he did not decide the case on that basis. It is doubtful that the 'co-mingling' of funds would preclude a court from tracing them into property purchased with such funds: see *Foskett v. McKeown* (2000), [2001] A.C. 102 (U.K. H.L.) at 131 and *Tracy (Guardian ad litem of) v. Instalogs Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357 (B.C. C.A.) at paras. 31 and 41-3; and see generally Lionel Smith, *The Law of Tracing* (1997) and Maddaugh and McCamus, *The Law of Restitution* (looseleaf at ch. 5-7); and it is more doubtful in my view that it would preclude a finding that property is 'derived from' such funds. [Emphasis added by Voith J.]
- [80] In *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 59, Harris J.A. agreed with Madam Justice Newbury's obiter remarks that the language of s. 85(1)(g) of the FLA suggests a more flexible approach than the formal rules of tracing.
- [107] In this case the property in issue as excluded property is the inheritance received by the claimant. As noted earlier the claimant inherited \$16,440 by way of two payments in the summer and fall of 2005. She initially intended to pay down her student loan, however instead \$13,000 was used as a down payment on their first home on Interurban Road in Victoria, B.C., purchased in December 2005. The equity in that home was then used for a second mortgage to purchase the Millstream property. Upon the sale of the Interurban home the second mortgage was paid off.

- [108] The evidence in support of the inheritance consists of the executor's statement of receipts and disbursements. That the claimant received the inheritance was not challenged nor was her evidence that approximately \$13,000 was used to purchase the Interurban home. While Mr. L. argued there was a lack of supporting information he did not cross-examine the claimant on this issue. He also submitted she had testified that she had received proceeds from the sale of the Interurban house and used that to pay debts. Her evidence however was that the parties jointly paid off debts. There was no evidence that the debts were not family debts.
- [109] I accept the claimant's evidence respecting the inherited funds notwithstanding the lack of documents relating to the purchase and sale of the Interurban residence. I am satisfied that the inheritance used to purchase the Interurban residence flowed through to the Millstream property by reason of the second mortgage. As a result, the sum of \$13,000 is excluded property. Reapportionment
- [110] I turn next to the reapportionment claim of the respondent.
- [111] The respondent while renovating the property after separation also resided there. He therefore had the benefit of the residence. The claimant however had to pay rent. The respondent submits that he should be credited with all house expenses incurred by him after the parties separated. Those expenses claimed by the respondent were: Expense or Credit Dates Amount Mortgage payments Jan. 1 - June 1, 2017 \$14,418.00 2016 \$26,772.00 2015 \$25,991.96 June 1 - Dec. 31, 2014 \$14,516.46 TOTAL \$81,698.42 Rent in Lieu May 2014 - Jan. 2016 \$36,000 (\$1,800 per month) Rent Received March 1 2016 - April 2017 \$26,975.86 Deposit Returned N/A -\$1,075.00 TOTAL \$61,900.86
- [112] The claimant submits as part of the division of assets it must be recognized that while she had to rent accommodation the respondent had the benefit of residing in their jointly owned home. The respondent produced a document setting out the house income and expenses. He has addressed the issue of his occupation of the home by showing rent in lieu of \$1,850 per month from May 2014 to January 2016, a total of \$36,000. The claimant is content with such an amount being used to recognize the respondent's use of the property. The respondent did not dispute that was his position.
- [113] Therefore according to the respondent he is entitled to \$19,797.56, being the amount paid by the respondent less credit for rent received and rent paid in lieu (\$81,698.42 - \$61,900.86).
- [114] However, in addition the respondent seeks payment for the expenses he says he incurred renovating the home, which include: Expense Amount Note New roof \$5,900.00 "House renovations - DH" \$25,659.00 Storage locker rent during renovations \$2,500 Jointly requested home appraisal \$600.00 Pest removal \$1,200.00 House care and maintenance \$7,200.00 \$200/month Property Taxes \$2,000.00 TD bank paid as a protective disbursement Kitchen renovations \$13,039.00 Kitchen counters \$3,045.00 Electrical \$1,789.88 Flooring \$1,400.00 TOTAL \$64,332.88

- [115] This means, according to the respondent, that his total housing related costs since separation are \$84,130.44, being \$19,797.56 added to \$64,332.88.
- [116] The respondent seeks a credit of \$84,130.44 for the above because he says he should not be solely responsible for those costs as they benefited both parties. In addition, he submits that they were necessary expenses to rent and sell the house as they increased its value and both parties will benefit from that. The claimant accepts that certain of the expenses claimed were incurred however she does not accept that they were all incurred after separation. Nor does she accept the respondent has shown an increase in value in the home because of the expenditures.
- [117] The roof replacement cost of \$5,900 was paid on the respondent's credit card prior to separation as were the renovation costs of \$25,569. The flooring costs claimed of \$1,400 was also paid before the parties separated, as were the "house care" expenses claimed above. Since these debts pre-dated the parties' separation they are not debts the respondent can claim. In addition, the claimant says that the storage locker rental fee was unnecessary. I agree. Therefore, the debts relating to the house incurred after separation were: Expense Amount Appraisal \$593.25 Pest removal \$1,260.00 Taxes \$2,000 Kitchen \$13,039.00 Countertops \$3,045.00 Electrical \$1,789.88 "Rhino Labour" \$649.37 TOTAL \$22,376.50
- [118] These expenses do not fall into the s. 86 definition of family debt as they were incurred not for the maintenance of the former family home but rather for improvements and renovations. Therefore s. 94 of the FLA applies.
- [119] Section 94(1)(a) of the FLA allows the Supreme Court to "order an unequal division of family property or family debt or both, if it would be significantly unfair to equally divide family property or family debt, or both." Section 94(2) sets out the list of factors that may assist the court in coming to a decision to unequally divide family property or debt:
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (f) where a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- [120] The valuation of contributions post-separation is not determined by the funds expended on family property. Rather it is determined by the increase in value beyond market trends due to the work carried out and considered in the context of reapportionment (see: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 39-44).
- [121] The respondent has not shown there was an increase in value due to his post-separation expenditures. He has not established it would be significantly unfair to equally divide family property.

- [122] Notwithstanding the lack of evidence on this issue the claimant has agreed to reimbursement to the respondent of \$22,376.50 for renovation expenses and that amount shall be credited to the respondent.
- [123] In addition, the respondent claims the value of the Jeep taken by the claimant is \$26,400 less the debt encumbering it of \$12,818 resulting in a net value of \$13,618. He bases this on an online search. The claimant says she traded it in because she was on the eve of losing it to repossession. The trade-in allowance was \$22,813.41 less the charge against it of \$12,818.41 leaving a net value of \$9,995. The 2005 Golf was valued at \$9,995 but subsequently needed a new transmission. The claimant submits that she over paid and as a result there should be a \$5,000 credit to her, not the \$9,995. I do not accept that submission. I fix the net value of the jeep at \$9,995 as the best evidence of its value is its trade-in. The respondent's truck retained by him has a value of \$2,000. The set-off for the two vehicles is \$7,995 resulting in net funds to the claimant to be debited for \$3,997.50 and the respondent credited that sum. Debts at Separation
- [124] Certain debts are in dispute. First, the respondent claims \$11,476 for business taxes and GST owed by him at separation. He proposes this be addressed by totalling his GST and tax debt for the whole of 2014, dividing that total by 12 months and then multiplying it by 4.5 months to calculate the sum due at separation. His proposal is problematic as he testified that his earnings for 2014 increased significantly from late summer to fall but failed to disclose his bank statements in order to calculate his earnings between January 1, 2014 and May 5, 2014. As a result, his actual tax and GST debt owing at separation cannot be determined.
- [125] If Mr. L. wished to have this debt shared at separation it was incumbent upon him to provide the evidence necessary to ascertain the sum due. He has failed to do so. His claim for such debt to be treated as family debt is dismissed.
- [126] Mr. L. also seeks to be reimbursed for a company debt of \$10,310.44 owing on his Royal Bank Visa at the date of separation. He testified that initially in 2014 he ran his business expenses through his personal account up to September 2014. However, he failed to produce evidence of what was in his "business account" at separation. Such funds would need to be taken into account as he cannot claim a debt for his business without divulging any sums that would be a credit. His failure to produce his bank records from January to May 2014 prevent the necessary set-off calculation.
- [127] This claim is also dismissed.

- [128] The remaining family debts are not in dispute. Those debts may be summarized as follows: Debt Claimant Respondent Note Joint line of credit \$15,586.48 Part of consumer proposal but agreed respondent responsible TD Visa \$6,878.51 AMEX \$6,228.96 Coast Capital Line of Credit \$4,643.73 Coast Capital Line of Credit \$7,051.64 Student Loan \$9,834.00 Pacific Leaders Student Loan \$21,144.01 National Student Loan Centre \$1,923.03 MBNA credit card \$18,140.95 TOTAL \$61,367.10 \$30,064.21
- [129] As noted earlier in order for reapportionment of family property and family debt to be ordered equal division must be "substantially unfair." The respondent has not shown that to be the case particularly given his failure to disclose the entirety of his financial records. There is no basis for reapportionment of family property and family debt. Order regarding Property Division
- [130] The following chart illustrates the division to be ordered: Asset/Debt Amount Note
Millstream Property Net Sale Proceeds \$211,303.48 Amounts paid out for legal fees and electrical bill -\$41,753.33 Agreed by the parties Creditor Payout -\$41,907.02 Pursuant to the claimant's creditor proposal Remaining Total \$127,643.13 Family Debts Respondent's debts \$30,064.21 To be paid to respondent Respondent's housing costs \$22,376.50 To be paid to respondent Claimant's creditor proposal \$18,300.00 To be paid to claimant Claimant's inheritance \$13,000.00 To be paid to claimant Remaining Total of Sale Proceeds \$43,902.42 Division Half of remaining total net sale proceeds \$21,951.21 To be paid to respondent Value of the Jeep \$3,997.50 To be paid to the respondent Half of remaining total net sale proceeds, less value of the Jeep \$17,953.71 To be paid to the claimant Remainder \$0 RRSPs and Pensions
- [131] The parties agree that their respective employment pensions were roughly equivalent. The respondent's is now part of his RRSP. The parties agree that the claimant shall retain her employment pension and the respondent his RRSP. CPP
- [132] Each releases all claims against the other's Canada Pension Plan benefits. Incomes of the Parties
- [133] Each party seeks to impute income to the other for the purposes of support. Position of the Claimant
- [134] The claimant submits the respondent's income is greater than he acknowledges both regarding his claimed gross income and his net income. His gross income relates to deposits shown to his business account exceeding his gross income declared for tax purposes. The net income issue involves both the issue of his true gross income and the legitimacy of business expenses claimed by the respondent for tax purposes. The claimant submits that income should be imputed to Mr. L. of \$175,000 per year starting with 2014 based on the records disclosed, his spending habits and his lifestyle.

- [135] The claimant submits that no income should be imputed to her as she is fully employed and, in the circumstances, does not have to seek to advance further in her career. Position of the Respondent
- [136] The respondent asserts the claimant is underemployed, that she can earn more and has an obligation to do so. He also argues the claimant's vacation time, sick benefits and pension should be included in her income.
- [137] He says that his business expenses should not be added back into his income in an amount greater than 25 percent, that the majority of his income comes from one contract that expires at the end of 2019 and that the contract can be terminated on three months' notice. He emphasizes that as an independent consultant he lacks security and his income is based on his ability to continue to obtain contracts. Law on Imputing Income and Insufficient Disclosure
- [138] The calculation of a spouse's income for child support purposes is governed by sections 15-20 of the Federal Child Support Guidelines, S.O.R./97-175. Section 16 mandates line 150 income as the starting point. That amount is then adjusted under Schedule III of the Guidelines which addresses several deductions and allowances.
- [139] Section 19(1)(f) permits imputing of income for child support purposes where there has not been proper disclosure of a spouse's income. Section 19(1)(g) permits the Court to impute income to a spouse where the spouse unreasonably deducts expenses from income. Section 21 sets out the payor spouse's obligation to file and produce tax returns and in addition financial statements where they are self-employed. Sections 22 and 23 permit the court to draw an adverse inference where the required financial information is not produced and to impute income in such amount as the court considers appropriate.
- [140] The onus is on the party seeking to impute income to show on a balance of probabilities, on a rational and evidentiary basis, that income should be imputed.
- [141] In *Wiebe v. Treissman*, 2017 BCSC 1523, Kent J. summarized the law on disclosure and determination of a spouse's income in the context of a self-employed individual as follows:
- [92] It is of course central to any determination of a spouse's income for child support purposes that the spouse make full and proper disclosure of all financial information necessary for that determination. Non-disclosure has often been called the "cancer" of family litigation. Insofar as child or spousal support claims are concerned, s. 19(1)(f) permits imputing income to any spouse who fails to make proper disclosure of his or her income information.
- [93] The disclosure requirements set out in the Guidelines are supplemented by Rules 5-1 and 9-1 of the Supreme Court Family Rules which pertain to financial disclosure and discovery of documents respectively. Among other things, these rules provide for: • mandatory production of detailed financial statements and supporting documentation; • ongoing and updated disclosure where information becomes inaccurate or incomplete by virtue of later changed circumstances; • production of corporate documentation and information both by

the spouse holding the corporate interests and by the corporation itself; and · in the event of non-disclosure, imposing fines, drawing adverse inferences and/or attributing income in such amount as the court considers appropriate.

- [94] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. It is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense. It is not the other party's responsibility to hire, nor is it the court's obligation to appoint, an accountant or other professional to assess and challenge the reasonableness of the deduction, although of course both are at liberty to do so in appropriate circumstances. For a recent affirmation of these principles, see *Cunningham v. Seveny*, 2017 ABCA 4. [Emphasis added by Kent, J.] Gross Income
- [142] The gross income of the respondent was in issue given the respondent's lack of disclosure, conflicting documents and the respondent's explanations for the apparent discrepancies.
- [143] His banking records, although not complete, reveal the following deposits of gross income reported and actual deposits made to the account:
- | Year | Line 150 Income | Gross Income | Bank Deposits | Difference between Gross Income and Deposits |
|------|-----------------|--------------|---|--|
| 2014 | \$105,191.26 | \$171,036.01 | Unknown | Unknown |
| 2015 | \$113,834.71 | \$168,324.09 | \$198,404.47 (for 11 months - June statement missing) | \$30,080.38 |
| 2016 | \$116,823.51 | \$150,145.79 | \$189,440.96 | \$39,405.18 |
| 2017 | Unknown | Unknown | \$189,482.21 (for 11 months - February statement missing) | Unknown |
- [144] Before trial counsel for the claimant requested an explanation of the discrepancies between gross income reported and total deposits from the respondent's counsel, who then forwarded the respondent's explanation: There will be a few reasons for this
1. There's sometimes a delay in payment from when work is done, and so revenue recognized at different time/year (CRA advice).
 2. Retainers are not calculated as revenue until work done and drawn on (CRA advice).
 3. BCUMOMA pays for some office equipment (e.g. computers, printers) not calculated as revenue.
 4. Some deposits are simply flow through for sub consultants not revenue.
- [145] His explanation under cross-examination was that the difference could be explained by reimbursements. The respondent was well aware the discrepancies were an issue before trial. He apparently did not try to determine the reason for the differences between what he says he earned and what he deposited before giving evidence. His answers were, in the words of counsel "cavalier", and his offer to retrieve and produce the receipts from the three boxes of material mid-trial was impractical and amounted as discussed earlier to non-disclosure.

- [146] Not until making his submissions did Mr. L. produce a table summarizing his 2015 invoices and how the disbursement portion of them would account for the approximately \$30,000 difference. This was too late. It was not in evidence and as a result counsel did not cross-examine him on it. His "table" was not supported by invoices. He did not explain why he did not introduce such evidence despite the ongoing requests from counsel prior to trial. This is another example of the difficulties created by his failure to properly disclose documents.
- Business Expenses
- [147] If a party unreasonably deducts expenses from their income then section 19(1)(g) of the Guidelines permits the court to add income. Section 19 applies to sole proprietorships and partnerships. What is reasonable for the purposes of income determination in the family law context is not necessarily consistent with what deductions are permitted under the Income Tax Act (Guidelines section 19(2), *Dornik v. Dornik*, 1999 BCCA 627).
- [148] Determining what are reasonable deductions should involve a detailed analysis of the deductions claimed in order to assess the items that make up the sums deducted. In May of 2017 counsel for the claimant asked that the respondent produce copies of all receipts for the business expenses claimed and all receipts for the motor vehicle expenses claimed along with the respondent's mileage log. He was reminded of the sought-after disclosure by letter in June of 2017. The requests were repeated by letter on February 16, 2018 to then counsel for Mr. L. noting that what had been only recently disclosed were three boxes filled with receipts with no reference to the business expenses claimed.
- [149] Notwithstanding the failure of the respondent to provide the documents necessary to analyse the business expenses in detail the Court may still undertake an assessment of the claimed deductions.
- [150] In *Ursel v. Ursel*, 2014 BCSC 1219, Dorgan J. usefully summarized the rationale for, and the approach to be taken, when determining what income is available for child support:
- [22] The leading case on s. 18 of the Guidelines is *Kowalewich v. Kowalewich*, 2001 BCCA 450. In her analysis, Huddart J.A. explained that the Guidelines are intended to permit an impartial assessment of the funds available to a spouse to pay support; they "are not just about actual income as a parent directly or indirectly determines it to be" (para. 42). To that end, s. 18 is designed to permit the court to "lift the corporate veil" in appropriate circumstances in order to ensure that the money the payor lists as income actually reflects all of the money available for support (para. 43, quoting *Baum v. Baum* (1999), 182 D.L.R. (4th) 715).
- [23] The court then held that, in determining whether the "total income" figure fairly reflected the money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the Guidelines, the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17. (See para. 45.)

- [24] The approach set out in s. 18(a) -- the pre-tax income approach, as opposed to the personal services approach -- applies where the nature of the spouse's relationship with the corporation is such that they have control over the corporation and thus should receive a financial return for their "entrepreneurial capacity and investment" (para. 48). That applies to the present case as Mr. Ursel has sole control of HiQual and UCC.
- [25] Under s. 18, the onus is on the payor to provide evidence that some or all of the corporation's pre-tax income is not available to the payor for the purposes of support: *Hausmann v. Klukas*, 2009 BCCA 32.
- [26] As is apparent from s. 18(2), personal benefits paid by a corporation on behalf of a shareholder, officer, or director will be considered in the calculation of income, "often by adding that amount back into the pre-tax corporate income that thus becomes available as income for support purposes": *Jenkins v. Jenkins*, 2012 NSSC 117 at para. 24; *Stevens v. Stevens*, 2012 BCSC 1698 at para. 16. As stated in *K.S.F. v. S.M.F.*, 2011 BCSC 1563, "the owner spouse must state business income and allocate expenses honestly and transparently. Expenses must be reasonable and for legitimate business purposes, considering all the circumstances" (para. 54). Even charitable donations by the corporation must be added back in to the pool of available income: *Boykiw v. Boykiw*, 2013 BCSC 1107. [Emphasis added by Dorgan, J.]
- [27] For example, in *Hadjioannou v. Hadjioannou*, 2013 BCSC 43, the court found that the tax deductions from the corporate income included expenses which provided a personal benefit to the respondent. Telephone, internet and vehicle expenses, along with food, meals and entertainment were all included in that category. The court added these expenses back in, noting that it would "not be appropriate ... to deduct this type of ordinary living expense from the claimant's employment income" and that therefore it was not appropriate to permit its deduction when income flowed through a corporation. (See also *Reis v. Bucholtz*, 2008 BCSC 1156, *aff'd* 2010 BCCA 115.)
- [28] Under the Guidelines, the court also has a discretion, under s. 19(1)(g), to impute income to a spouse where the spouse "unreasonably deducts expenses from income." Section 19(2) clarifies that "the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act." In *Stevens*, *supra*, the court indicated that "add back" for expenses, even in a corporate situation, could take place under either s. 18 or s. 19. The respondent in that case was half-owner of a company that ran a lodge property north of Fort St. John. The court found that the company paid for the respondent's lodging, food, utilities, vacations and other expenses, and chose as a result to impute \$16,000 to the respondent's income under s. 19(1)(g).
- [29] In Mr. Ursel's case there is some difficulty in determining exactly how ss. 18 or 19 would apply to his income. The available financial information was, unfortunately, somewhat limited. Generally speaking, where the payor spouse is the shareholder of a corporation, the payor should provide the corporation's full financial statements as well as the evidence

necessary to meet the onus in Hausmann. Although it is not required, it can be useful to call experts to testify as to the financial needs of the business and the purpose and legitimacy of any expenses. Here the court received no evidence of that sort and it is correspondingly difficult to assess the full extent of the pre-tax corporate income or the legitimacy of alleged business expenses.

- [30] In *Riemersma v. Riemersma*, 2013 BCSC 474, Rogers J. emphasized that the court has a discretion, in assessing income, "to employ common sense when it analyzes financial information" (para. 39). That is what I intend to do here. I also follow the lead of Barrow J., in *C.J.R. v. S.P.J.*, 2009 BCSC 264, where the defendant dentist was the sole shareholder of his professional corporation. The plaintiff argued that \$42,000 in expenses -- in particular, vehicle expenses, professional fees, travel, and telephone -- were "essentially personal in nature." The court assessed the expenses and determined that a portion of these expenses should be added back, emphasizing the defendant's failure to adduce evidence on the point.
- [151] Not all of the respondent's deductions for business and motor vehicle expenses are challenged.
- [152] The business expenses claimed for tax purposes were:
- | Expense | 2014 | 2015 | 2016 |
|------------------------------------|-------------|-------------|-------------|
| Advertising | \$8,178.43 | \$5,695.27 | \$2,000.07 |
| Meals and Entertainment | \$3,377.44 | \$5,733.36 | \$1,954.56 |
| Insurance | \$1,244.56 | \$1,244.56 | \$0 |
| Interest | \$254.98 | \$86.00 | \$325.78 |
| Business tax, fees, licences, dues | \$243.96 | \$576.28 | \$0 |
| Office expenses | \$2,345.67 | \$1,550.09 | \$592.52 |
| Supplies | \$275.97 | \$627.48 | \$1,297.18 |
| Legal, accounting | \$3,425.75 | \$185.01 | \$157.19 |
| Management and administration | \$254.98 | \$0 | \$0 |
| Maintenance and repairs | \$24,783.76 | \$0 | \$674.80 |
| Salaries, wages and benefits | \$897.43 | \$1,636.50 | \$2,649.10 |
| Travel | \$4,567.89 | \$16,790.54 | \$9,275.40 |
| Telephone and utilities | \$1,654.55 | \$2,873.08 | \$0 |
| Delivery, freight | \$106.93 | \$0 | \$0 |
| Motor vehicle expenses | \$13,732.47 | \$12,740.57 | \$10,053.15 |
| TOTAL | \$65,344.87 | \$49,738.69 | \$28,979.75 |
- [153] The respondent also claimed business use of home expenses:
- | Expense | 2014 | 2015 | 2016 |
|--------------------|-------------|-------------|--------------|
| Heat | \$3,987.56 | \$578.00 | \$0 |
| Electricity | \$0 | \$2,400.00 | \$2,400.00 |
| Insurance | \$881.64 | \$881.64 | \$376.98 |
| Maintenance | \$3,987.45 | \$4,303.38 | \$0 |
| Mortgage Interest | \$13,343.76 | \$13,343.76 | \$0 |
| Property Taxes | \$2,132.65 | \$2,132.65 | \$0 |
| Garbage | \$354.54 | \$446.55 | \$384.72 |
| Sub-total | \$25,450.69 | \$24,085.98 | \$34,740.26* |
| Minus Personal Use | \$17,084.26 | \$19,335.29 | \$30,397.73 |
| Allowable Claim | \$8,366.43 | \$4,750.69 | \$4,342.53 |
- [154] The result was, not including the unaccounted-for income deposits:
- | Expense | 2014 | 2015 | 2016 |
|---------------------------|--------------|--------------|--------------|
| Gross Profit | \$171,036.01 | \$168,324.09 | \$150,145.79 |
| Less Business Expense | -\$65,344.87 | -\$49,738.69 | -\$28,979.75 |
| Net Professional Income | \$105,691.14 | \$118,585.40 | \$121,166.04 |
| Less business use of home | -\$8,366.43 | -\$4,750.69 | -\$4,342.53 |
| Net Income | \$97,324.71 | \$113,834.71 | \$116,823.51 |
| Plus employment income | \$7,866.55 | \$0 | \$0 |
| Line 150 income | \$105,191.26 | \$113,834.71 | \$116,823.51 |

- [155] The respondent pushes (and exceeds) the boundaries of what is a legitimate business expense. His "home office" was an area in the living room of the family home. The costs claimed for establishing that office area included \$3,045 for the cost of the kitchen counters in the residence because business clients might attend at his home office and "want a cup of coffee." Aside from the obviously questionable nature of the deduction, the evidence is that because the home was so far from Victoria he went to meet his business contacts, they did not come to him. There was no evidence from the respondent that he ever actually entertained a business contact at his home.
- [156] On direct examination he explained that advertising included such expenses as giving out tickets to Whitecaps games, meeting with business contacts for lunch, money spent on golf tournaments and the like. I note he indicated his personal interest and participation in soccer and golf. At his discovery however, he stated when asked where he advertised that he would have to look at his business records to "precisely answer that question" and could not say in a general way what expenses were included. Again, I am of the view he was not being frank in his response.
- [157] He testified that he claimed for heat and electricity because they increased as they were on more as he was working from home. He disputed that insurance, maintenance and property taxes would be the same whether or not he was working at home. He conceded the mortgage interest payment would remain the same but stated he generated more garbage because of working at home.
- [158] Regarding his 2015 BMW he leased in September of 2014 he was asked whether it was "fully loaded" and responded that it was "all leather" as it was important to have to show he was successful. Although he was asked to produce his mileage log he stated he could not find it.
- [159] As a result, the total expenses claimed for advertising, meals, insurance, maintenance and repairs and his motor vehicle have not been justified as business expenses.
- [160] Other evidence supports the claimant's contention that the respondent's actual income exceeds his line 150 claimed income. For example, his financial statement sworn on September 18, 2014 claims an income of \$90,000 with expenses of \$109,500. His financial statement sworn on May 19, 2017 claims income of \$116,823.51 but annual expenses of \$154,848.00. His February 9, 2018 financial statement claims income of \$116,823.51 but expenses of \$135,476.88.
- [161] In addition, despite stating in his financial statements that he was making income tax payments and debt payments, his unsecured debts have increased from \$61,399.37 (including the house renovation debt of \$25,659.00) in 2014 to an incomplete total of \$134,546.16 in 2018, which includes income tax debts totalling \$87,069.08. Therefore, his non-income tax debts have remained roughly the same. As a result, it appears he is meeting his stated needs in part by not paying his taxes.

- [162] I am satisfied that an assessment under section 19(1)(g) reveals that a significant portion of the business expenses claimed are personal and must be added back to his declared income. Mr. L. has not met the burden of showing why such funds are not available for the purposes of calculating support.
- [163] In addition, the deposits to his business account that exceed the gross income he reported for 2015 and 2016 in the sums of \$30,000 and \$39,000 respectively have not been satisfactorily explained. He has not shown that they related to expense reimbursement. His lack of disclosure of complete 2014 bank records permitted no similar analysis for that year.
- [164] What has been established on the balance of probabilities is that Mr. L. cannot have been living the lifestyle he has been living on his reported line 150 income. His true income is significantly greater.
- [165] For example, evidence of his lifestyle includes a June 2017 trip to London and Paris with his girlfriend, her two children and his two children. He also travelled with his girlfriend to Arizona in 2017 and to Mexico in December 2017. He testified that his girlfriend paid for most of the Europe and Arizona trips and all of the trip to Mexico and that at most he spent a few thousand dollars in total for the two trips he contributed to. He produced no documented evidence confirming who paid what and in what amounts. The trips included attendance at Wimbledon, soccer games and a casino in Monaco. He acknowledged as well that he bought diamond earrings for his girlfriend in December 2016 costing over \$2,000 and a necklace in 2017 for around the same amount.
- [166] I find that he minimized his actual holiday expenses given the fact that when residing with his girlfriend they shared expenses and given his failure to establish the actual sharing of vacation expenses.
- [167] The exercise of imputing income in this case then is a matter of taking into account Mr. L.'s gross income, his claimed business expenses to be added back, his claimed personal expenses, his failure to disclose and his inconsistent explanations along with his lifestyle in order to arrive at an income figure. In my view 70 percent of his claimed business and household expenses should be added back into his line 150 income. This results in an income of \$156,789.17 for 2014, \$151,977.28 for 2015 and \$140,149.11 for 2016 or an average of \$149,638.48 per year.
- [168] Because of the non-disclosure, resolution of the imputation of income is necessarily an estimate. A three-year average should be used as that is the approach provided for in section 17 of the Guidelines and doing so is not unfair. I therefore impute income to the respondent and fix his Guidelines income at \$150,000 per annum for the years 2014, 2015, 2016 and 2017.
- [169] I turn to the respondent's submission that income should be imputed to the claimant because she is underemployed. Law on Imputing Income where Allegation of Underemployment

- [170] In *Beissner v. Matcheusik*, 2015 BCCA 308, the Court addressed the test for a finding of underemployment:
- [44] Third, the judge found that the father was underemployed. In reaching that finding, the court did not have to conclude that the father was intentionally evading or minimizing his child support obligation or that he was intentionally underemployed or unemployed. It only had to determine what income the father was capable of earning: *Barker v. Barker*, 2005 BCCA 177. The test for a finding of underemployment from *Donovan v. Donovan*, 2000 MBCA 80, was adopted by this Court in *Watts v. Willie*, 2004 BCCA 600 at para. 16, and followed in *McCaffrey v. Paleolog*, 2011 BCCA 378 at para. 46:
- [16] In *Donovan v. Donovan* (2000), 190 D.L.R. (4th) 696, 2000 MBCA 80, Madam Justice Steel gave the judgment of the court and wrote at para. 21: The following guidelines may be considered when determining whether to impute income. (See Dr. Julien D. Payne, *Imputing Income, "Determination of Income, Disclosure of Income"*, Child Support in Canada, Canrab Inc., August 3, 1999).
1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income. [Emphasis in original.]
- [171] The respondent's position that the claimant is not fulfilling her potential apparently led to the expert report of Dr. Pullyblank being tendered. In that report he said: As the main issue for the present assessment, [Ms. B.] was asked to [describe] the behaviour of her ex-husband, [Mr. L.], that she had found problematic (see Appendix C). In discussing this, [Ms.

B.] would periodically display a visible trauma reaction in which she had difficulty forming her thoughts, and showed what in my opinion were dissociative features before coming to a point where she could articulate her experiences. The assessment was not, therefore, something she approached at all casually, but in fact was quite distressing for her. In terms of the pattern of their relationship, [Ms. B.] described a slow but steady decline in their marriage. However, she said that the last 5 years were particularly problematic. [Ms. B.] described recurring but unpredictable emotional and verbal abuse such that [Mr. L.] could be fine, and then apparently suddenly shout and scream at [Ms. B.] and their children with notable vitriol, after which he may return to a normal state and would apparently be surprised that anyone saw a problem. Whatever the source of these unpredictable episodes of emotional and verbal abuse, it was apparent from interview and document review that they effectively eroded [Ms. B.'s] emotional functioning over time in a manner similar to what we see in our practice with First Responders (i.e., Soldiers, Police, Paramedics, etc.). Her anxiety level grew and each day she would be vigilant to what [Mr. L.'s] behaviour would be like. [Ms. B.] has good achievements, but her personality style is that of someone who is warm, incisive, but not well-suited to conflict. Interview and document review suggests that the direct effect of [Mr. L.'s] outbursts, and the secondary effect of worrying about the impact of this emotional and verbal abuse on their children, contributed to the development of anxiety and depression. [Ms. B.] reported that [Mr. L.'s] behaviour seemed to deteriorate when he entered a Master's programme, and during the particularly distressing last 4 months, after he entered a new job. By her description, she became worried that [Mr. L.] would escalate even further to physical abuse, and she related a Counsellor telling her that an episode where he had held his son to the ceiling was the basis for the Counsellor to report the incident to Child Protection if [Ms. B.] did not leave the home. In addition, [Ms. B.] was faced with indications of [Mr. L.'s] infidelity. She left the home on May 4, 2014, approximately 3 1/2 years prior to the present assessment. As described above, what was notable about [Ms. B.'s] presentation was the very intense level of emotional distress she was experiencing 3 1/2 years after separating from [Mr. L.]. In our initial interview, she indicated that she had always found it distressing to stand up to [Mr. L.], as that would typically trigger even more abuse. She appeared to effectively see litigation and the present assessment as standing up to him and was very distressed by that, to the point where she would visibly dissociate (disconnect from surrounding events). This was exacerbated by a more intensive recent barrage of emotional and verbal abuse by [Mr. L.] around the sale of their home and their divorce. Her high level of recent distress was also described in the medical records. Careful structured interview of [Ms. B.] according to current diagnostic criteria (DSM-5) revealed that she meets criteria for Posttraumatic Stress Disorder (PTSD) that I would describe as Moderate to Severe given her presentation. It is further my opinion that she meets DSM- 5 criteria for Major Depressive Disorder, Mild to Moderate. In practical terms, [Ms. B.] is experiencing an extremely high level of anxiety with regard specifically to her abuse by [Mr. L.], and her heightened distress is readily triggered by reminders of him. Unfortunately, triggers of that nature are also present in her work setting, where [Mr. L.] used to work, is currently a stakeholder, and therefore is well-

known. As part of the present assessment, [Ms. B.] was administered a battery of psychological tests (see Appendix B). Self-report measures of personality and emotional functioning were valid for interpretation. Consistent with the findings from clinical interview, the findings describe an introvert who prefers to get her work done on her own, but is sensitive to the well-being of others, uncomfortable with conflict, and will typically shy away from leadership roles. Against the backdrop of this personality style, [Ms. B.] experienced protracted and unpredictable episodes of verbal abuse from her husband. As a result, the findings consistently show high levels of both generalized and posttraumatic anxiety, as well as depressed mood. Although test responding is not a sufficient basis on its own for diagnosis, [Ms. B.'s] responding was consistent with the findings from clinical interview in showing strong symptoms of PTSD, as well as Mild to Moderate features of depression. [Ms. B.'s] very strong emotional reaction to completing tests of PTSD suggest a Moderate to Severe degree of this condition, with likely impairment of day-to-day functioning, as also described during clinical interview.

[172] Dr. Pullyblank reached these conclusions: Recommendations and Concluding Comments (Opinion) I will now address the matters that you framed in your referral letter:

1. Whether [Ms. B.] suffers from any psychological condition(s). As described above, it is my opinion that [Ms. B.] suffers from (DSM-5) Posttraumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD).
2. Whether the psychological condition(s) was caused by or materially contributed to by the marriage to [Mr. L.]. [Ms. B.] has experienced, as most people do, symptoms of anxiety and depression at periods on the past, and likely experienced PTSD that resolved by about 2 years following exposure to a sudden death. However, it is my opinion that she has experienced a prolonged period of PTSD, continuing now 3 1/2 years following her separation and likely starting perhaps years before then, directly as a result of the prolonged emotional and verbal abuse by [Mr. L.] when they were married, and continuing since their separation. [Ms. B.] continues to be triggered by even talking about [Mr. L.], and by any other reminders of him (e.g., hearing shouting).
3. Whether that psychological condition(s) will negatively impact her employability including advancements/promotions. It is important to note that [Ms. B.'s] employability is being assessed in the context of significant emotional distress that may obscure her potential to a degree. We do not have the opportunity to meet [Ms. B.] without the impact of years of abuse by [Mr. L.]. However, it is my opinion that there are 2 factors that affect [Ms. B.'s] capacity for advancements and promotions. With regard to the first of these, I have participated in the selection and development of Executives in the resource industry and in the Provincial Government. In my opinion, [Ms. B.] does not present as someone who is well-suited, or strives for, a leadership role. She is at heart a Technician and perhaps a Helper, but not necessarily a Leader. I have worked with introverted leaders who are, for example, uncomfortable dealing with networking or conflict, so people like [Ms. B.] can be promoted because of their strong intellect and insights, but as was her experience, leadership may not

be a comfortable or sustainable role for [Ms. B.]. However, in reflecting on [Ms. B.'s] potential for advancement it is again important to remember that we are effectively seeing her at her worst. It is also important to recognize that [Ms. B.] has had the bulk of her career to date affected by [Mr. L.]. She describes him as directing their trajectory, and we know that for a number of years he has had a toxic effect on [Ms. B.]. Therefore, while I am inclined not to see [Ms. B.] as a natural leader, it is particularly difficult to be confident about what her potential might have been without at least 17 years of influence by [Mr. L.]. In my opinion, the second factor affecting [Ms. B.'s] employability at present is the ongoing emotional distress (PTSD and MDD) that is the result of the prolonged emotional and verbal abuse by [Mr. L.]. In my opinion, [Ms. B.'s] vocational functioning has been directly and adversely affected by the abuse by [Mr. L.] and this continues to be the case at present. This is certainly apparent in periods of distress so bad that she had to take time off work. At present, I think that secondary to her diagnosed conditions and ongoing distress with regard to [Mr. L.], there is a high potential for presenteeism. In other words, while she may show up to work, her productivity is likely to be reduced, and as she describes, she is prone to oversights and mistakes, particularly when she is emotionally triggered. Therefore, it is my opinion that [Ms. B.'s] psychological conditions secondary to the abuse by [Mr. L.] negatively impact on [Ms. B.'s] employability, including advancements and promotions. At her present level of functioning, she is much less likely to produce impressive work and in my opinion it will be challenging enough for her to sustain employment at all at her present level of functioning, much less advance to different or more advanced duties. Given her distress and the degree to which she has been punished by the abuse for standing up for herself, it is my opinion that she is not suited to a leadership role for the foreseeable future. Her experience in 2011 is, unfortunately, an example of the kind of outcome that would be expected, where she was unable to speak up for herself. A very significant factor with regard to [Ms. B.'s] employability is that her work setting is full of triggers to remind her of her abuse by [Mr. L.]. To the degree that she remains in her work setting, she will continue to experience reminders of her abuse. This is more likely to contribute to her stalling or backsliding in her career there, not advancing.

4. The likelihood of [Ms. B.'s] recovery. In my opinion, [Ms. B.'s] psychological condition, particularly her PTSD, is quite severe. As it persists and she has to continue to deal with [Mr. L.] and any more outbursts from him, this will continue to fuel the condition as well as build the secondary factor of depression. As noted, her work setting serves to trigger her symptoms to a degree. However, the major trigger is interactions with [Mr. L.]. To the degree that she has to interact with him and/or experience or visualize his negative reactions, this will erode forward progress in her recovery. The impact of this on [Ms. B.] will depend on future arrangements about parenting and other factors. Otherwise, the trauma [Ms. B.] has experienced as a result of [Mr. L.] is substantial and will not be particularly easy to treat. I would expect her recovery to be prolonged, to take a number of years, with the duration being even more prolonged to the degree that she has to have unprotected contact with [Mr. L.].

5. Treatment recommendations. In my opinion, [Ms. B.] needs to begin weekly psychotherapeutic sessions to address her PTSD and MDD as soon as possible. The typical recommendation in a situation such as this would be for referral to a Registered Psychologist (typical rate \$200.00 per hour), with an allowance for at least a year of sessions. As alluded to above, sessions while [Ms. B.] is faced with the confrontation of litigation are unlikely, in my opinion, to make substantial progress, but will likely have a focus on providing support and helping [Ms. B.] with emotional regulation and decision-making during that time. If [Ms. B.'s] situation with [Mr. L.] does achieve some kind of quiescence (perhaps with the ongoing assistance of an intermediary), then slow progress may be achievable with a clear treatment plan. Exposure-based treatments such as Cognitive-Behavioural Therapy (CBT) or EMDR (Eye Movement Desensitization and Reprocessing) are recommended for PTSD. [Ms. B.] is currently working with a Counsellor and this person may be able to implement an appropriate treatment plan. In my opinion, it is also appropriate for [Ms. B.] to receive assistance in considering her career options at this point. This may be included in her work with her with a Counsellor or Psychologist, or she may benefit from a referral to a Career professional. Considerations that could be reviewed once the stress of litigation has subsided could include whether it is in [Ms. B.'s] best interests to remain in her current position, consider a lateral transfer somewhere with fewer reminders of [Mr. L.], or consider a career change. Imputation of Income to the Claimant
- [173] The respondent argues that the claimant is not fulfilling her potential, that she has good work reviews, has held management positions before and can earn more by seeking better positions. While the claimant for two years had a management role she found such a position trying and it had an adverse effect on her mental health and ability to cope. Having observed the claimant throughout the trial I am of the view the assessment of Dr. Pullyblank is correct. The claimant is coping but that is all. As her experiences with prior management positions have shown she does not thrive in such roles.
- [174] I am satisfied that the respondent dominated the relationship and I accept he did so at times with anger and yelling. The children's comments were revealing. As mentioned previously, when Ms. Olchowecki interviewed the children in 2014, both children said their father's anger was frightening to them. Teh Stratton who interviewed C. in 2017 for her "hear the child" report stated that C. reported that when on a trip to Europe, her father and his new girlfriend were "fighting a lot" and "he was starting to treat her like he treated mom - almost like she wasn't a person, more like a maid or servant."
- [175] I note that the respondent did not challenge the claimant's evidence respecting his anger and yelling. I accept as well the claimant was vulnerable to such conduct.

- [176] On the evidence I am satisfied that the claimant's current employment and income is what she is capable of earning. I further find that continuing in that employment position is reasonable in all of the circumstances. The respondent has not met the burden of showing the claimant is intentionally under-employed. I am satisfied the claimant given her training, personality and circumstances arising from the marriage is earning what can be expected of her, a conclusion I would have reached without the report of Dr. Pullyblank.
- [177] I impute no income to the claimant. In addition, I reject the respondent's submission that the claimant's vacation time, sick benefits and employer pension contributions are to be added to her income. There is no legal basis for that. Her income then is that shown on line 150 of her tax return for each year. Those tax returns show line 150 income of \$70,153.95 for 2014, \$72,461.85 for 2015 and \$70,957.25 for 2016. While her tax return was not filed by the time of trial her T-4 for 2017 shows gross income of \$69,734.80. Child Support including s. 7 Expenses
- [178] It is not in issue that Guidelines child support is payable in accordance with the parties' incomes and the parenting regime on a set-off basis. What is in contention is the matter of s. 7 expenses. In particular the issues of school fees for W. and tutoring for C.
- [179] The school fees for W. arise from his attendance at the Montessori school. The parties had agreed to their children attending that school and it was not until 2016 that the respondent objected based on alleged insufficient discipline. In my view the fact the parties had, except for one-year, enrolled W. in the Montessori school and given W. is happier there the s. 7 expenses are legitimate s. 7 expenses.
- [180] Regarding C.'s tutoring, the respondent objects because she is taking certain courses by distance learning, and requires tutoring in those subjects and apparently he is of the view that if she requires assistance she should return to regular high school. The evidence is that C. is comfortable with the schooling arrangement having left conventional schooling because of stress and depression. She requires assistance. The tutoring costs are also legitimate s. 7 expenses.
- [181] The parties shall share s. 7 expenses in accordance with their incomes. However, any bursary or fee reductions the claimant obtains from the Montessori school because of her financial circumstances shall be applied to her proportionate share of such expenses.
- [182] Given the history of the parties' interactions respecting s. 7 expenses and the behavior of the respondent the claimant shall have the power to incur as s. 7 expenses all costs of tutoring and counselling relating to the children. If the respondent disagrees he can apply to the Court. Spousal Support Law on Spousal Support

- [183] The claim for spousal support is made under s. 15.2 of the Divorce Act and ss. 160-162 of the FLA. The objectives and factors to be considered mirror each other in the two Acts (Liu v. Liu, 2014 BCSC 1110 at para. 35). Entitlement to spousal support may be based on contractual, compensatory or non-compensatory factors (Moge v. Moge, [1992] 3 S.C.R. 813; Bracklow v. Bracklow, [1999] 1 S.C.R. 420). In Chutter v. Chutter, 2008 BCCA 507, the court commented:
- [49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (Bracklow, at para. 27; Moge, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (Bracklow, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (Moge, at 864). (ii) Compensatory support
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868: The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.
- [51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" [emphasis added].

- [52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870: Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement ... As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution. [Emphasis added, internal citations omitted.]
- [53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:
- [11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.). [Emphasis added.] (iii) Non-compensatory support
- [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (*Bracklow*, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (*Bracklow*, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.
- [55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10: "Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the

spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

- [56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:
- [21] ... self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
- [57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":
- [41] I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could meet his stated expenses with the income available to him. After attributing \$800-\$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expenses and, therefore, was not entitled to support.
- [58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to *Yemchuk* as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed *Allaire* in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).
- [59] Non-compensatory support was also considered in *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 25 R.F.L. (6th) 235. In that case, the parties divided assets of close to \$7 million, and the wife was awarded time-limited spousal support on non-compensatory grounds. The trial judge had found that the wife was not entitled to spousal support on either compensatory or non-compensatory grounds: she was not financially disadvantaged by the marriage; she was both highly trained and capable of stepping back into the work force; and she was able to earn investment income from her share of the capital assets. On appeal, Saunders J.A., for

the court, held that the trial judge's analysis of the wife's needs and means was "impermissibly narrow"; in part because it had not taken into account the marital standard of living or the husband's post-separation standard of living:

- [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from a business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to spousal support, their absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
- [69] Both the question of hardship to Mrs. Hodgkinson ([15.2(6)(c)]) and her self-sufficiency ([15.2(6)(d)]) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain the highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in these circumstances she is entitled to a degree of comfort well beyond "basic needs".
- [74] It was an error, in my view, for the trial judge to fail to recognize these several aspects. The arrangement between the parties during marriage as described by the trial judge, in my view, required consideration of spousal support from the perspective of the standard of living that is still reasonably available to them, although in two residences. While recognizing that Mrs. Hodgkinson is not necessarily entitled, step for step, to Mr. Hodgkinson's standard of living, something closer is required.
- [60] The trial judge distinguished Hodgkinson on the basis that the wife had been awarded non-compensatory support for the time required to restore her career, whereas in this case the appellant had been continuously employed for many years. However, the factual differences between Hodgkinson and this case do not diminish the principle that an analysis of the support-seeking spouse's "needs" under non-compensatory support, i.e., the objectives of ss. 15.2(6)(c) and 15.2(6)(d) of the Divorce Act, requires some consideration of the standard of living enjoyed by the parties during the marriage and by the other spouse after the marriage.
- [61] Finally, I note that in *Fisher v. Fisher*, 2008 ONCA 11, 88 O.R. (3d) 241, the Ontario Court of Appeal recently reiterated the principle that self-sufficiency is a relative concept encompassing more than the ability to meet basic expenses:

- [53] Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation. ...
- [184] In *Ursel*, Dorgan J. reviewed some of the leading cases on spousal support including Chutter saying:
- [61] The compensatory basis for spousal support is meant to recognize the economic advantages and disadvantages that accrue to spouses as a result of their marriage and its subsequent breakdown. While economic disadvantage is most often suffered by a spouse who limits paid employment in order to care for children or otherwise act as a homemaker, there can still be economic consequences where both spouses are fully employed during and following the marriage. Disadvantages may arise from specific decisions -- for example, declining a promotion, refusing a transfer, or leaving a position to allow the other spouse to take advantage of an opportunity for advancement -- but in many cases disadvantage may be less tangible than these examples suggest.
- [62] That issue was addressed in *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal ref'd [2009] S.C.C.A. No. 41. The case involved a two-income family, and the Court of Appeal, in finding entitlement to support, commented as follows:
67. ... While there was no evidence that the appellant had missed a promotion or lost an opportunity for further training as a dental hygienist while she was primarily responsible for the care of the parties' son, that does not mean that her prospects for future financial success were not diminished by the role she played in the marriage.
- [63] They found that the wife had been constrained in her employment choices by her role as a mother. In particular, she arranged her work schedule to accommodate the child's needs, choosing to limit her employment to work that allowed her to be present when the child came home from school. In comparison, the husband's business career was given priority.
- [64] It is often difficult for one spouse to prove the exact extent, or even the exact source, of disadvantage. However, as noted in *Sahrman v. Otto* (1995), 17 R.F.L. (4th) 324 (B.C.C.A.), the court can assess the economic disadvantage that flows from the breakdown of a marriage by applying common sense to "evidence of a general nature rather than the subject matter of detailed expert or valuation evidence ... the real loss to such a spouse is often less than tangible and thus not easily quantified in the form of such evidence."
- [65] It appears that courts have taken this to heart in assessing entitlement to spousal support in two-income marriages. For example, in *N.A.J. v. P.L.J.*, 2014 BCSC 948, the parties were in a relationship for 21 years and had a child together. The claimant worked throughout as a school teacher (other than a maternity leave) and at the time of relationship breakdown had

achieved the top of the pay grid for teachers with her qualifications. The respondent, who was an entrepreneur who owned a number of companies, denied that the claimant was entitled to spousal support. The court disagreed, saying that while it was true that the claimant had reached the top of the pay grid, that "does not end the inquiry. Simply because there is no evidence that the claimant has ever missed promotions or lost an opportunity for further training as a result of the role assumed by her as principal caregiver for the parties' children, does not mean that her prospects for future financial success were not diminished by that" (para. 285). The court emphasized that her career was subservient to the respondent's requirements and goals as a businessman and that as a result a disadvantage flowed to her even as a corresponding advantage flowed to him. See also *Gonabady-Namadon v. Mohammadzadeh*, 2009 BCCA 448, for an award of spousal support in similar circumstances.

- [66] The assessment of the economic consequences does not stop at the assessment of the disadvantages suffered by the recipient spouse. The advantages received by the other spouse, tangible and otherwise, must be taken into account: *Chutter*.
- [67] For example, in *Hartshorne v. Hartshorne*, 2010 BCCA 327, the husband claimed that the wife had made "no contribution to the advancement of his career because he was an established lawyer when their relationship began" (para. 58). The court pointed out that this ignored the wife's contribution as primary caregiver to the children, and the ways in which her assumption of this role "gave him the opportunity to devote his time to the advancement of his professional development" (para. 58). *Chutter* involved another form of advantage: both parties had worked together in growing a business that designed and manufactured waterslides. The wife assisted the husband by acting as a secretary and taking orders, which the court said highlighted "the joint efforts of the parties in establishing the business." Following separation the husband continued to run the business and the court pointed out that the wife's contribution had allowed him to develop his business to its current level.
- [68] In *Moge* the court indicated that the longer the marriage, "the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution." In *W. v. W.*, 2005 BCSC 1010, *Martinson J.* made a number of useful observations about the relevance of this "marital standard of living" in assessing a compensatory claim for support:
- [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.

- [69] In other words, it is often possible to make a rough assessment of the economic consequences of the marriage simply by reference to the disparity in income and assets (and resulting disparity in standard of living) following a separation. Where one party comes out of a long-term marriage with access to a higher standard of living than the other, it is possible to infer that some compensation is necessary.
- [70] The relative standards of living are also relevant in assessing the non-compensatory basis for support, often referred to as "needs-based" support. The objective of non-compensatory support is to narrow the gap between the needs and means of the spouses following marriage breakdown (Chutter at para. 54). Marriage is a joint endeavour, such that on breakdown, spouses may have an obligation to contribute to their former partner's needs even in the absence of any compensatory grounds for support. In long-term relationships, "need" can be assessed by taking into account the relative standards of living of the spouses following the marriage breakdown: *Tedham v. Tedham*, 2005 BCCA 502.
- [71] Many claims involve aspects of both compensatory and non-compensatory principles. The court does not need to "decide on one basis for support to the exclusion of the other" (Chutter, para. 49), but instead must consider how all four objectives under s. 15.2 of the Divorce Act apply to the facts of the case. Discussion of Spousal Support
- [185] As noted this marriage was a two-income relationship. In addition, both parties worked on their respective educations. Ms. B. obtained her Master's and Mr. L. almost completed his. It is not disputed that Ms. B. also assumed responsibility for the vast majority of child care and household duties. She did most of the cooking, attended school meetings and took the children to medical, dental and other appointments. She stated the respondent was more of a "fun vacation dad." Mr. L. became a leader in his department and developed the experience and connections he turned to when he started his own consulting firm.
- [186] I am satisfied that Mr. L.'s success can in part be traced to the role and efforts of the claimant during the marriage. She shouldered the greater responsibility for the household and the children along with being employed.
- [187] The respondent submits that the claimant is "well set up" in her job and that he and the claimant had relatively equal earnings during the marriage. He argues she is self-sufficient, is working as noted earlier below her potential and has no entitlement to spousal support.
- [188] During the marriage the parties had a reasonable lifestyle. They had two vehicles and a home on 1.25 acres. Their family trips included one to Disneyland and one to Paris. Mr. L. indulged his interest in golf. They did not just get by but rather had a comfortable lifestyle.
- [189] Post-separation the parties have lived very different lifestyles. While the claimant has resided in a two-bedroom condominium with the children having their own rooms and her sleeping in the living room, the respondent resided initially in the former matrimonial home and then in a two-bedroom and den apartment followed by a three-bedroom townhouse. He then moved into a five-bedroom and den rental home with his girlfriend in

Oak Bay where they shared equally the rent of \$6,000 per month. In 2017 he moved into his present three bedroom and den rental home at \$3,450.00 per month. He has also taken holidays as mentioned and attended Wimbledon and World Cup Soccer matches and spent time at a casino in Monaco. He has also taken holidays in Arizona and Mexico. He also contributed \$6,000 a year to his RRSPs for each year after separation. He has a housekeeper who attends twice weekly for \$150 per week.

- [190] The claimant has relied on the food bank and has borrowed funds from her mother, including \$5,000 to fix the transmission on her car and at other times when she ran short her mother would loan her \$300 to \$500. She also borrowed funds from her brother which she has paid back. She has made a proposal in bankruptcy and her mother is on her creditor proposal.
- [191] She has struggled emotionally during the marriage and after it ended. She has suffered from anxiety, depression and panic attacks and as mentioned was recently diagnosed with PTSD.
- [192] The claimant seeks both compensatory and needs based support of indefinite duration.
- [193] Whether or not the claimant's PTSD was caused or contributed to by the behavior of the respondent, her vulnerability to his actions and her need for counselling have been established.
- [194] I am satisfied the claimant is entitled to spousal support on both a compensatory and non-compensatory basis. On a compensatory basis because of her role in the marriage which included assumption of responsibility for the household and child care and on a non-compensatory basis because of their disparate incomes and lifestyles post-separation.
- [195] As determination of spousal support was dependant on resolution of the parties' respective incomes the DivorceMate calculations remain for counsel to prepare. Mr. Coad has agreed to do so. I will address later in these reasons the arrangements for providing such calculations. Determining spousal support will await receipt of those calculations and further submissions from the parties. Retroactive Spousal and Child Support
- [196] The claimant seeks retroactive spousal and child support to the date of separation. The respondent opposes any such order. Law and Discussion
- [197] The leading authority on retroactive child support is *D.B.S. v. S.R.G.*, 2006 SCC 37. The factors to be considered include the conduct of the payor, the delay of the recipient in seeking support, the children's circumstances and the potential hardship to the payor if retroactive support is ordered. Those factors apply regarding a claim for spousal support as well (*Ducharme v. Rempel*, 2016 BCCA 198). In *Ducharme* the court stated:
- [17] I begin by noting that the same factors are to be taken into account whether retroactive child or spousal support is in issue. It is the weighing of those factors that will differ: concerns about the applicant's delay and misconduct "carry more weight" in relation to spousal support (*Kerr* at para. 208). In contrast, the entitlement of a child to support is generally so

compelling that those factors will be less significant in the exercise of the court's discretion to make a retroactive award. The underlying facts are, however, relevant to both types of support applications.

- [18] It is to be remembered as well that although the majority in D.B.S. identified four factors to be considered, Mr. Justice Bastarache began by saying:
99. I will now proceed to discuss the factors that a court should consider before awarding retroactive child support. None of these factors is decisive. For instance, it is entirely conceivable that retroactive support could be ordered where a payor parent engages in no blameworthy conduct. Thus, the British Columbia Court of Appeal has ordered retroactive support where an interim support award was based on incorrect financial information, even though the initial underestimate was honestly made: see *Tedham v. Tedham* (2003), 20 B.C.L.R. (4th) 56, 2003 BCCA 600. At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix. [Emphasis in original.]
- [198] Then counsel for the claimant sent a letter to Mr. L. on November 26, 2015 when he ceased making child support payments. She put him on notice that his obligation to pay child support continued whether or not there was an agreement and that if he failed to make the payments he would "ultimately be facing a significant debt."
- [199] The Notice of Family Claim was filed November 10, 2016. It included a claim for child and spousal support. On October 27, 2017 an Amended Notice of Family Claim adding a claim for child support and spousal support retroactive to the date of separation.
- [200] In D.B.S. at paras. 120-125 the Court stated that an award of retroactive child support is not limited to the date of an application or formal notice. The appropriate date is when effective notice was given that being "any indication by the recipient parent that child support should be paid" (para. 121).
- [201] The respondent has engaged in blameworthy conduct throughout the proceeding. Despite being required to do so and being requested to do so he did not disclose his 2014 income tax return until February 2018. He failed to produce further relevant documents respecting his business expenses and even at trial did not produce them in a fashion capable of their being assessed choosing instead to leave them disorganized in three boxes. He never produced all of his bank records.
- [202] After the October 2014 mediation he paid \$8,070 to the claimant and then \$1,250 for the months of December 2014 until April 2015 when he reduced the payments to \$650. Those payments were acknowledged by him as representing child and spousal support for the period of May 2014 to November 2014 plus ongoing child and spousal support of \$1,250.
- [203] He stated he would pay support if the claimant signed his version of a "fair" separation agreement.

- [204] In November 2015, the respondent was put on notice by Ms. B.'s prior counsel and later by present counsel that he had an obligation to pay spousal and child support and that if he failed to pay he could be accumulating a large debt.
- [205] As noted earlier a consent order was granted at the Judicial Case Conference on May 8, 2017 ordering the respondent to pay child support of \$520 per month commencing May 1, 2017 and continuing on the first day of each month thereafter. The order was made without prejudice to either party to argue the issue of child support, both retroactive and prospective.
- [206] Counsel for the claimant submits that Mr. L. should pay child and spousal support retroactive to the date of separation. The issues of child and spousal support were first raised by the claimant shortly after separation.
- [207] As a result, I find that retroactive child and spousal support is payable from June 1, 2014. The calculation of such shall account for the payments made by the respondent. In addition, the child support shall be calculated based on a shared parenting regime from June 1, 2014 to present date except from February to June 2016 and September 1, 2017 onward when C. resided with and continues to reside with the claimant.
- [208] Counsel requested once the incomes of the parties were determined to provide DivorceMate calculations to the Court. In addition, that will permit the parties to make submissions on the child and spousal support issues
- [209] Mr. Coad will prepare DivorceMate calculations based on the incomes determined in these reasons. Those calculations of child and spousal support shall take into account the parenting arrangements since June 1, 2014 to the date of trial less payments made by Mr. L. and shall be provided to the court with written submissions on the amounts claimed. The written submissions of the claimant shall be provided within 15 days of these reasons and the respondent shall have 15 days from his receipt of the claimant's calculations and submissions to respond with his written submissions. The claimant shall then have seven days to reply. In the event such deadlines are not feasible for the parties given summer vacations may be planned they may agree to a different schedule. If they are unable to agree on an alternate schedule they have liberty to apply.
- [210] In addition, in her opening the claimant sought an order for security for child and spousal support. However, neither party made submissions on such. If in light of these reasons if the claimant still seeks an order for security for support the parties may provide written submissions on that issue on the schedule noted above.
- [211] Mr. L.'s share of the house proceeds shall remain in trust pending determination of the retroactive support award and the issue of security for support. Costs

- [212] The claimant seeks special costs as a sanction against Mr. L. for his conduct throughout the proceedings. She has been substantially successful in the litigation and is entitled to her costs. I turn then to her claim for special costs. *Law on Special Costs*
- [213] Special costs "are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties" (*Young v. Young*, [1993] 4 S.C.R. 3 at 134). The word reprehensible is a word of wide meaning. As noted by the British Columbia Court of Appeal in *Garcia v. Crestbrook Forest Industries* (1994), 119 D.L.R. (4th) 740 at para. 17 (CanLII) "[i]t encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke."
- [214] In *Hu v. Dickson*, 2015 BCSC 218, the court gave examples of such conduct at para. 49:
- [49] In *Kim v. Hong*, 2013 BCSC 2248, Justice Griffin quoted extensively from the judgment of Justice Williams in *Schwabe v. Dr. Lisinski*, 2005 BCSC 1284, where he summarized a number of cases in an effort to discern the kinds of conduct that had been characterized as reprehensible and thus warranting an award of special costs. Justice Griffin also categorized the conduct that had been found to justify an award of special costs in a number of family cases. From her reasons, it is apparent that the kinds of conduct that warrant an award of special costs include the following: · acting with an improper motive, such as to intimidate, exhaust or financially drain the other party in the hopes that they will give up or soften their position in the litigation; · dissipating and/or not disclosing assets; · abusing the court's process by, among other things, failing to disclose documents, delaying in disclosing documents, failing to respond to reasonable requests, causing unnecessary interlocutory applications, and breaching the Rules of Court in a manner that prejudices the other party;' · misleading the court, through outright fabrications or through evasive and/or equivocal responses; and · disobeying a court order.
- [65] The purpose of special costs is to chastise a party for reprehensible conduct and, in doing so serve to deter such conduct and preserve access to justice. This objective would be seriously undermined in matrimonial litigation if the court is constrained in awarding special costs out of a concern to maintain the balance achieved through the substantive orders. The court does not accept that the balance is upset by an award of special costs. The substantive orders reflect the parties' rights, at law, that arise on the breakdown of their relationship. A special costs award is directed at something entirely different - namely the preservation of access to justice.
- [66] From another perspective, it could be said that the respondent's reprehensible conduct has already upset the balance by causing the claimant to incur significant unnecessary expense. Look at that way, an award of special costs will work to restore that balance.
- [215] While financial hardship is a factor for the court to consider in an award of costs, it is insufficient on its own for a departure from the usual rule that costs should follow the event (*MacLean v. Mio*, 2011 BCSC 148 at para. 47).

[216] In *Casses v. Canadian Broadcasting Corp.*, 2016 BCSC 949 at para. 18, the court noted:

[18] Special costs may be awarded where a party made the resolution of an issue far more difficult than it should have been, or where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party. See *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914, at para. 11.

[217] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 the court described situations in which special costs may be ordered at para. 11:

- (a) where a party pursues a meritless claim and is reckless with regard to the truth;
- (b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
- (c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
- (d) where a party made the resolution of an issue far more difficult than it should have been;
- (e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
- (f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
- (g) where a party brings a proceeding for an improper motive;
- (h) where a party maintains unfounded allegations of fraud or dishonesty; and,
- (i) where a party pursues claims frivolously or without foundation.

[218] The respondent's conduct criticized by the claimant is:

- (a) Breaching Madam Justice Dorgan's May 8, 2017 order for child support by not making the first payment "forthwith" something he could easily have done by e-transfer as he had with past payments. Instead various emails were required before he ultimately transferred it on May 11, 2017.
- (b) Again, breaching that order by failing to pay child support as ordered for the months of August, September and October, 2017.
- (c) When the claimant sought the above payments, Mr. L. replied, "if we settle, you will have money, and we can move on," a clear attempt to have his way and to secure settlement on his terms.

- (d) Mr. L. failed to make the disclosure required under the Supreme Court Family Rules, B.C. Reg. 169/2009, the Guidelines and the FLA and what he supplied was late (February 9, 2018) and incomplete.
- (e) His failure to disclose generally when requested throughout the litigation increased the expense to the claimant.
- (f) On the agreed sale of the former matrimonial home he threatened not to complete unless he was paid for house expenses most of which were paid for prior to the parties' separation.
- (g) He continued until trial to demand repayment of what he called "house costs since separation" when most of the funds were paid prior to separation.
- (h) He raised concerns respecting the claimant's parenting alleging a failure of the claimant to make sure C. attended school by producing computer generated absentee notices from the school when he knew they resulted from a computer error and in doing so created a misleading impression.
- (i) Despite C. at the age of 15 wishing to reside with her mother he insisted on a Views of the Child Report but would not agree to its production until after the claimant brought a court application to obtain a Views of the Child Report.
- (j) He was not responsive on Discovery and his answers at trial were vague, equivocal and evasive.
- (k) He gave evidence of and advised the claimant in emails during the course of the litigation, that his business was declining, when in fact it was not.

[219] In family litigation, when one spouse has greater financial resources than the other, the temptation to abuse the court's process so as to put the other spouse to excessive effort and expense can only be effectively neutralized by the willingness of the court to award special costs where such abuse occurs. In order to preserve access for justice for future litigants it is necessary to punish behaviour that deliberately attempts to thwart access to justice.

[220] The conduct engaged in by the respondent during this litigation is unfortunately not uncommon in family litigation. It increases the stress of the litigation and its cost. In particular knowing of the claimant's vulnerability to his actions the respondent continued in his course of conduct. He clearly was attempting to pressure her into settling on his terms, something I find was a continuation of the pattern of his behavior during their marriage. Inevitably such conduct affects the children and is not in their best interests. The respondent appeared oblivious to the impact of his conduct, repeatedly attempting to paint himself as the reasonable and objective party. Such attempts were patently transparent.

- [221] The cumulative conduct of the respondent justifies an award of special costs in favour of the claimant. While often a fine is appropriate for a failure to disclose in this case the lack of disclosure was repeated and continuing including trial. A fine would not sufficiently address the respondent's reprehensible conduct. An award of special costs will.
- [222] The respondent was not successful and is therefore not entitled to costs however I will address his claim for special costs. He sought special costs against the claimant alleging her conduct in unilaterally changing parenting arrangements in June of 2014 and demanding support of \$6,500 per month (both of which occurred when the claimant had previous counsel) was reprehensible and deserving of rebuke and wasted mediation and legal costs. He also alleges a failure of the claimant to engage in good faith in arbitration and negotiations to settle supports such an award.
- [223] I reject the submission of the respondent for special costs. As is apparent from these reasons the respondent's demands were unreasonable, he withdrew from mediation, he failed to make proper disclosure and breached a court order. The reprehensible conduct was his, not the claimant's. Summary of Orders
- [224] A divorce was granted at trial.
- [225] For the reasons given herein I make the following orders: Guardianship, Parenting and Parenting Responsibilities Guardianship
- [226] The parties shall remain the guardians of the children.
- [227] If either guardian dies, the remaining guardian shall be the guardian of the children with all parental responsibilities. Parenting Responsibilities
- [228] The parties will share s. 41 of the FLA parental responsibilities regarding the children except the claimant only will have the following s. 41 parental responsibilities under s. 40(2) of the FLA:
1. Making day-to-day decisions affecting C., where she resides, and with whom she lives.
 2. Making decisions about the children's education.
- [229] The remaining parenting responsibilities are to be shared. If the parties cannot reach agreement the claimant shall be the ultimate decision-maker subject to the right of the respondent to apply to the court. Parenting Time
- [230] The parties will share parenting time regarding their son W.
- [231] C.'s primary residence will be with the claimant. Parenting time with C. is at her discretion given her age. Property Division Excluded Property
- [232] The claimant's \$13,000 inheritance is excluded property. Expenses

- [233] By consent the respondent shall be reimbursed from the house sale proceeds in the sum of \$22,376.50 for renovation expenses. Family Debts
- [234] The claim of the respondent that the GST and business tax of \$11,476.00 is a family debt is dismissed.
- [235] The claim of the respondent respecting \$10,310.44 owing on his Royal Bank Visa at separation as a family debt is dismissed. Pensions and RRSPs
- [236] The claimant shall retain for her own use her employment pension and the respondent shall retain for his own use his RRSPs.
- [237] Each party shall retain their own Canada Pension Plan Benefits. Summary of Division
- [238] The net house sale proceeds of \$127,643.13 shall be disbursed as follows once the issues of retroactive support and security are determined: Asset/Debt Amount Note Millstream Property Net Sale Proceeds \$211,303.48 Amounts paid out for legal fees and electrical bill - \$41,753.33 Agreed by the parties Creditor Payout -\$41,907.02 Pursuant to the claimant's creditor proposal Remaining Total \$127,643.13 Family Debts Respondent's debts \$30,064.21 To be paid to respondent Respondent's housing costs \$22,376.50 To be paid to respondent Claimant's creditor proposal \$18,300.00 To be paid to claimant Claimant's inheritance \$13,000.00 To be paid to claimant Remaining Total of Sale Proceeds \$43,902.42 Division Half of remaining total net sale proceeds \$21,951.21 To be paid to respondent Value of the Jeep \$3,997.50 To be paid to the respondent Half of remaining total net sale proceeds, less value of the Jeep \$17,953.71 To be paid to the claimant Remainder \$0 Income and Support Imputed Income
- [239] Income is imputed to the respondent for the years 2014 to 2017 of \$150,000 each year.
- [240] The income of the claimant for the years 2014 to 2017 shall be her line 150 income. No income is imputed to the claimant.
- [241] The claimant is found to be a resident of British Columbia.
- [242] The respondent is found to be a resident of British Columbia. Prospective Child and Spousal Support
- [243] Guidelines child support is payable in accordance with the parties' incomes and the parenting regime on a set-off basis.
- [244] Expenses related to C.'s tutoring and W.'s attendance at the Montessori school are appropriately classified as s. 7 expenses.
- [245] In addition, the claimant is entitled to spousal support to be determined after submissions related to the appropriate DivorceMate calculations (see discussion under retroactive support in this regard). Retroactive Child and Spousal Support

- [246] Retroactive child support and retroactive spousal support from June 1, 2014 shall be paid to the claimant in a sum and in a manner to be determined after further submissions from the parties.
- [247] Mr. Coad will prepare DivorceMate calculations based on the incomes determined in these reasons. Those calculations of child and spousal support shall take into account the parenting arrangements since June 1, 2014 to the date of trial less payments made by Mr. L. and shall be provided to the court with written submissions on the amounts claimed. Those written submissions of the claimant shall be provided within 15 days of these reasons and the respondent shall have 15 days from his receipt of the claimant's calculations and submissions to respond with his written submissions. The claimant shall then have seven days to reply. In the event such deadlines are not feasible for the parties given summer vacations may be planned they may agree to a different schedule. If they are unable to agree on an alternate schedule they have liberty to apply.
- [248] If security for future support is sought written submissions on that issue shall be provided on the schedule noted above for submissions on support.
- [249] Mr. L.'s share of the house proceeds shall remain in trust pending determination of the retroactive support award and the issue of security for support. Costs
- [250] The claimant is awarded special costs to be taxed before the registrar if not agreed to. The claim of the respondent for costs is dismissed. "R.D. Punnett, J." The Honourable Mr. Justice Punnett

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Prepared on 28 October 2026 · Esheria