

CANADA / JUDGMENT

Drummond v. Brilling

2022 BCSC 1076

COURT

Supreme Court of British Columbia

DECIDED

27 June 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1076 Drummond v. Brilling

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Drummond v. Brilling,

2022 BCSC 1076

Date: 20220627

Docket: E202010

Registry: Victoria

Between:

Melissa Mable Drummond

Claimant

And

Brian Mackenzie James Brilling

Respondent

Before: The Honourable Justice C. Ross

Reasons for Judgment

Counsel for the Claimant:

J.L. Donati

Counsel for the Respondent:

M. Patton

Place and Date of Trial:

Victoria, B.C.

March 7-11, April 1 and 13, 2022

Place and Date of Judgment:

Victoria, B.C.

June 27, 2022

Table of Contents

Introduction. 4

Background. 4

Division of Assets. 8

Governing Legislation. 9

Construction of the Agreement 11

Common Law Principles on Marriage Agreements. 14

Is the Agreement unconscionable?. 16

Were there circumstances of vulnerability or a fundamental flaw in the negotiation process?. 16

Was the Agreement consistent with the objectives of the legislation at the time of signing?. 17

Are the provisions for division of property unfair having regard to the factors set out in s 65(1) of the FRA?. 17

What does the Agreement provide?. 18

Mr. Brilling's Separate Property. 18

Family Home. 18

IG Funds. 18

RBC 1719. 18

RBC RRSP. 19

TFSA. 19

Ms. Drummond's separate property. 19

Remaining assets to be divided. 19

RDSP. 19

Mutual Funds. 20

Is this division of assets unfair, having regard to the factors in s. 65?. 21

The parties' contemplation at the time of the agreement 22

Section 65(1) factors. 24

Conclusion on the division of assets. 26

The Family Home. 27

Child Support. 30

Imputed Income. 31

Mr. Brilling. 33

Ms. Drummond. 39

Conclusion on child support 40

Parental Responsibilities. 41

Vaccination/Medical Decision-Making. 41

Parenting Time. 43

Summary. 45

Costs. 47

Introduction

- [1] This is a family action in which the principal issues to be determined are the division of assets and child support. In addition, the parties have previously agreed on shared custody and a schedule for parenting time. The respondent, Brian Brilling, seeks to vary the scheduling order. The claimant, Melissa Drummond, seeks to have final decision-making authority with respect to medical decisions concerning the children, with all other parental responsibilities to be shared.

Background

- [2] The parties met in 2005 when Ms. Drummond was working as a housekeeper and Mr. Brilling as a maintenance person in a hotel in Jasper, Alberta. The parties commenced cohabitation in May 2004, were then apart for a period and resumed cohabitation in December 2005.

- [3] Prior to the commencement of their relationship, Mr. Brilling was seriously injured in an accident. There is evidence, albeit not medical evidence, that one of the injuries he suffered was a frontal lobe brain injury. Mr. Brilling received a settlement award for his injuries which he invested with IG Wealth Management (the "IG Funds"). At the time of cohabitation, that account was valued at approximately \$250,000.
- [4] Mr. Brilling produced an unsigned cohabitation agreement dated February 2007. It was his evidence that the agreement had been signed by the parties. He alleged that he had kept a copy with his important papers in the matrimonial home and that Ms. Drummond had taken it together with other documents shortly before the separation. Ms. Drummond's testimony was that she had never seen the document before the commencement of these proceedings and that she never signed it.
- [5] Except as it pertains to credibility nothing turns on this agreement since even if it was executed by the parties, it was supplanted by a marriage agreement, which both parties did sign.
- [6] The parties entered into a marriage agreement dated 2010 (the "Agreement"). Mr. Brilling was the party who initiated this step. He stated that his main motivation was to protect his personal injury settlement. It was his evidence that Ms. Drummond objected and they fought about it but eventually she signed. The Agreement was entered into at a time when the Family Relations Act, R.S.B.C., 1996, c. 128 [FRA] was the governing legislation. The parties each received legal advice with respect to the Agreement. The Agreement makes no mention of an earlier cohabitation agreement.
- [7] The parties married on July 3, 2010. At the time of the marriage the IG Funds had increased to approximately \$303,000.
- [8] There are three children of the marriage: J.E.B, born December 1, 2011; K.M.B, born March 12, 2014; and K.L.B, born April 30, 2017 (the "Children").
- [9] During the early years of the relationship, Mr. Brilling was taking the steps necessary to be certified as a plumber/pipefitter. Mr. Brilling had completed the requirements for red seal certification as a plumber/pipefitter by approximately 2013. Between 2010 and 2015 Mr. Brilling was working in Alberta, attracted by the high wages. Ms. Drummond remained in British Columbia looking after the Children. In 2015 Mr. Brilling began full-time employment in Victoria.
- [10] On October 3, 2011, the parties purchased a home in Sooke, British Columbia. The house has a basement suite. The parties agree that the suite rents for approximately \$1,200 per month. The property was registered in joint title. The bank required both parties to be obligated under the mortgage. Mr. Brilling testified that at the time Ms. Drummond's income was greater than his. At the time of the purchase the IG Funds stood at \$336,347. Mr. Brilling withdrew \$150,000 from the IG Funds and used it for the down payment.

- [11] For much of the marriage, Ms. Drummond was out of the workforce, looking after the home and the Children. She completed the requirements for certification as a licenced practical nurse in 2009, taking out student loans to finance her studies. She began work on a part-time basis in July 2018.
- [12] Ms. Drummond currently is employed as a level 1 part-time practical nurse in a job-sharing arrangement, working night shifts three days on and three days off. She testified that there are currently no five-day openings available to her. Her options are limited due to the COVID-19 restrictions in place which preclude her from working at more than one institution. Her employer contributes to a registered retirement savings plan (RRSP). She has no other pension.
- [13] During the course of the marriage, Mr. Brilling kept control of the family finances. He made transfers from time to time between different accounts. Ms. Drummond testified that he was secretive about his income. She did not have access to their savings and investments. One account was converted to a joint account in 2017; however, Mr. Brilling transferred large sums out of that account without her knowledge. These transactions appeared with some frequency during the final troubled years of the marriage.
- [14] Mr. Brilling's evidence with respect to various of the transfers was that he was taking his money back. He testified that as all income earned was his separate property, it was all his money. He also stated that during the period when the marriage was troubled, he wanted to move the money so that Ms. Drummond could not access the funds to leave with the Children.
- [15] At some point prior to 2019 and during a time when he was employed, Mr. Brilling began to take on jobs as a sole proprietor. He first reported income from self-employment on his 2018 tax return; however, Ms. Drummond suggested that he started taking on projects at an earlier date. In any event, since March 2019, Mr. Brilling has worked through his sole proprietorship which is called "Pipeteck Plumbing and Gas". He has not established a separate bank account for his business expenses and income, nor is there a separate VISA card for the business.
- [16] By December 2019 the marriage had become very troubled. Ms. Drummond raised concerns about domestic violence. The Ministry of Children and Family Development ("MCFD") became involved with the family. An initial safety plan was created for the period of December 17 to 31, 2019. A subsequent plan was created with a commencement date of December 31, 2019.
- [17] The parties separated in May 2020, following instances of family violence with involvement of the police and interventions from the MCFD. The relationship had been strained for several years before the separation.
- [18] Following the separation, Ms. Drummond commenced proceedings in Provincial Court. An order was pronounced in that proceeding on May 19, 2020, which provided, inter alia, that:

- a) Mr. Brilling would vacate the matrimonial home;
- b) both parties are the guardians of the Children;
- c) the Children would reside exclusively with Ms. Drummond; and
- d) Mr. Brilling was to have no parenting time pending further order.

[19] By order dated May 26, 2020, the previous order was set aside and provided, inter alia, that:

- a) the parties will communicate only by email or through counsel;
- b) Mr. Brilling shall not attend the former matrimonial home without 24 hours written notice;
- c) Mr. Brilling will have parenting time every weekend commencing May 29, 2020; and
- d) commencing June 26, 2020, the parties will share the Children's residence on a week-on, week-off basis with Mr. Brilling residing in Parksville with his parents.

[20] On September 16, 2022, by consent, the order of May 26, 2020 was varied to provide for parenting time on a three-day rotating basis in Sooke.

[21] Following the separation, Ms. Drummond remained in the family home. She continued to work as a licenced practical nurse at a care facility, working night shifts. Mr. Brilling has not paid child support since separation.

[22] Following the separation, Mr. Brilling gave his old phone to J.E.B. The phone contained text message exchanges between Mr. Brilling and his mother. Ms. Drummond learned from these messages that Mr. Brilling had a safety deposit box that she knew nothing about. At trial, the evidence showed that he had withdrawn \$50,000 from his Royal Bank of Canada (RBC) account and that he had given the funds to his parents to place it in a safety deposit box.

[23] The parties agree that the value to be put on the former matrimonial home is \$850,000, the value provided in the October 21, 2021 appraisal. The mortgage is currently \$9,364. The parties also agree that the yearly rental accommodation has a value of \$14,400.

Division of Assets

[24] The issues in relation to the identification and division of family assets are as follows:

- a) What does the Agreement provide with respect to the division of assets?
- b) Should the Agreement be set aside as unconscionable and if so, would equal division be unfair having regard to the factors in s. 65(1) of the FRA?
- c) If the Agreement is not set aside, should there be reapportionment pursuant to the factors set out in s 65(1) of the FRA?
- d) Should either party be at liberty to purchase the family home?

- e) What are the family assets and how should they be divided between the parties?

Governing Legislation

[25] The FRA was in effect at the time the Agreement was executed. The Family Law Act, S.B.C. 2011, c. 25 [FLA] is now the governing legislation. However, the FLA has a transition provision that is applicable to agreements that were made prior to the coming into force of the FLA. Section 252 provides:

Transition - proceeding respecting property division

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

- (2) Unless the spouses agree otherwise,
- (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
 - (b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

[Bold in original.]

[26] At the commencement of the trial I ruled that, since Ms. Drummond had not agreed to the contrary, the issues relating to the Agreement will be determined pursuant to the FRA, consistent with the transition provision of the FLA.

[27] The relevant provisions of the FRA are:

Equality of entitlement to family assets on marriage breakup

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
- (3) An interest under subsection (1) is subject to

- (a) an order under this Part or Part 6, or
- (b) a marriage agreement or a separation agreement.
- (4) This section applies to a marriage entered into before or after March 31, 1979.

.

Family asset defined

58 (1) Subject to section 59, this section defines family asset for the purposes of this Act.

- (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.
- (3) Without restricting subsection (2), the definition of family asset includes the following:

.

- (b) if property would be a family asset if owned by a spouse, property

.

(ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

- (c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;
- (d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;
- (e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.
- (4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

.

Onus of proof

60 The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

Marriage agreements

61 (1) This section defines marriage agreement for the purposes of this Part and this definition applies to marriages entered into, marriage agreements made and to property of a spouse acquired before or after March 31, 1979.

- (2) A marriage agreement is an agreement entered into by [2 people] before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
 - (a) management of family assets or other property during marriage, or
 - (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.
- (3) A marriage agreement, or an amendment or rescission of a marriage agreement, must be in writing, signed by both spouses, and witnessed by one or more other persons.
- (4) Except as provided in this Part, if a marriage agreement is made in compliance with subsection (3), the terms described by subsection (2) (a) and (b) are binding between the spouses whether or not there is valuable consideration for the marriage agreement.
- .
- (8) A provision of a marriage agreement that is void or voidable is severable from the other provisions of the marriage agreement.

[Bold in original.]

Construction of the Agreement

[28] The provisions of the Agreement that are directly relevant to the present issues include:

- 6. Brian and Melissa will maintain separate bank accounts and joint bank accounts.
 - a. Separate bank accounts will remain the owner's separate property.
 - b. Joint bank accounts will be true joint accounts so that the balance in any such account will at the death of one of the parties belong to the survivor.
- 7. Except as otherwise provided in this Agreement, the following is Brian's separate property ("Brian's Separate Property"), including but not limited to:
 - a. Assets listed in Schedule "A";
 - b. Any company, business or venture developed and operated by Brian during the relationship.
 - c. all-windfalls, such as inheritances, trusts, gifts, or damages for personal injury, received by Brian before or during the relationship, or after it ends.
 - d. Various household contents and personal possessions.
- 8. Brian's Separate Property also includes:
 - a. any income produced by Brian's Separate Property;
 - b. any increase in the value of Brian's Separate Property;

- c. any property acquired in exchange for Brian's Separate Property or with:
 - i. the proceeds from sale of any of Brian's Separate Property or its substitute, or
 - ii. the income produced by any of Brian's Separate Property.
- 9. If Brian's Separate Property or the income from Brian's Separate Property is used to purchase an asset ordinarily used during the marriage for a family purpose, that asset shall be owned by Brian.
- 10. If a portion of Brian's Separate Property or the income from Brian's Separate Property is used for a family purpose, the remainder will remain Brian's Separate Property.
- 11. Brian's Separate Property will remain his separate property during the relationship and after it ends and Melissa gives up forever any claim to Brian's Separate Property.
- 17. Any property acquired by a party during the relationship is the separate property of the party who acquired it, unless:
 - a. It is registered in both parties' names, or
 - b. The parties record in writing that it is co-owned.
- 18. Unless the parties otherwise agree in writing, ownership of co-owned assets will be in the same proportion as the contribution made by each party to the purchase.
 - a. For the purpose of this paragraph, "contribution" means a direct financial contribution and does not include value for labour unless otherwise agreed in writing.
- 20. If property is purchased by one party and is placed in the name of the other or in both names as co-owners, the transaction constitutes a gift;
 - a. A gift received by one party from the other becomes the recipient's separate property.
- [29] The parties are not in agreement with respect to the effect of the Agreement as it pertains to the funds used for the down payment on the purchase of the former matrimonial home. It is common ground that Mr. Brilling withdrew \$150,000 from the IG Funds and used it for a down payment. It is also clear that the parties are registered as joint tenants.
- [30] The parties differ as to the treatment of this transaction under the Agreement. Ms. Drummond contends that Mr. Brilling gifted her \$75,000 of the down payment pursuant to clause 20 of the Agreement, with the intention that they would share equally as joint tenants. Mr. Brilling's position is that no gift was intended. He relies upon the provisions of clauses 17 and 18.
- [31] An inter vivos gift is a gratuitous transfer of property from the owner to another person. The person alleging the gift must establish the donor's intention to make the gift and the delivery of the gift: see *Wettstein v. Wettstein* (1992), A.C.W.S. (3d) 594 at para. 63 (B.C.S.C.).

- [32] In the present case, Mr. Brilling has denied that he intended to make a gift of any portion of the down payment to Ms. Drummond. He stated that it was always his intention and understanding that he would recover the down payment from the sales proceeds.
- [33] Ms. Drummond stated that she understood that if Mr. Brilling took something from the IG Funds and made it family property, then it would be shared by them both. She believed that the down payment formed part of the house that they would share equally. However, she also agreed that Mr. Brilling never said that the down payment or a portion of it was a gift to her but that was her understanding.
- [34] I find that Mr. Brilling did not intend to make a gift to Ms. Drummond of any portion of the down payment. Accordingly, the clauses of the Agreement pertaining to gifts are not applicable.
- [35] In my view, however, the house was registered in both parties' names, and was therefore according to clause 17, co-owned. Pursuant to clause 18, which determines the proportionate share of ownership, Mr. Brilling's proportionate share of the value of the home in relation to the down payment is 38%. Thus, pursuant to the Agreement Mr. Brilling's share is 38% plus half of the remaining equity, or 69%. Ms. Drummond's share is the remainder, 31%.
- [36] Ms. Drummond concedes that the balance of the IG Funds, which amounted to \$245,699 as at November 2021, constitutes separate property of Mr. Brilling pursuant to the Agreement.
- [37] Schedule A of the Agreement does not identify the accounts by number. The joint account (2197) is not listed on the schedule because Mr. Brilling withdrew all funds from the account at around the time of separation. Mr. Brilling testified that the remaining accounts, with the exception of the registered disability savings plan (RDSP), were all in existence at the time the Agreement was signed.
- [38] The remaining separate assets of Mr. Brilling pursuant to the Agreement are
- a) RBC Account 1719;
 - b) RRSP 7327; and
 - c) Tax-Free Savings Account (TFSA) 3870.
- [39] The separate asset of Ms. Drummond is her RRSP account.
- [40] The RDSP account was created after the Agreement was executed. It falls outside the scope of the accounts covered by the Agreement. The parties are also in agreement that the registered education savings plan (RESP) account is not covered by the Agreement.

Common Law Principles on Marriage Agreements

- [41] Marriage agreements are reviewable at common law as a matter of contract and under the applicable statutory regime, which in this case is governed, as noted above, by the FRA: *L.E.M. v. D.M.I.*, 2013 BCSC 450 at para. 79 [*L.E.M.*].
- [42] With respect to the review at common law, a marriage agreement will not be enforceable where it is unconscionable, either in the process leading up to its negotiation and execution, or if it deviates substantially from the statutory objectives set out in the relevant statutes dealing with the consequences of marriage breakdown: *L.E.M.* at para. 81; *Dhaliwal v. Dhaliwal*, 2021 BCCA 72 at paras. 15-20 [*Dhaliwal*].
- [43] As the Court noted in *Dhaliwal* at para. 21, if the agreement is set aside as unconscionable, the statutory regime then applies to the division of property.
- [21] If the agreement is set aside as unconscionable, the statutory regime then applies to the division of property between spouses. Under the FRA, this starts from the presumption of equal division of family assets, a presumption that can only be displaced by demonstrating that equal division would be unfair considering the factors set out in s. 65(1) of the FRA: *S.B.M. v. N.M.*, 2003 BCCA 300 at para. 23.
- [44] If the agreement is not set aside as unconscionable, there is a second stage of review in which the agreement is to be looked at to determine whether the terms of the agreement no longer reflect the parties' intentions at the time of execution and whether it complies at the time of trial with the objectives of the statutory regime: *L.E.M.* at para. 85.
- [45] The analysis is to be conducted through an examination of the factors set out in s. 65(1) of the FRA. The issue to be determined is the fairness of the agreement at the time of the triggering event, in light of the s. 65 factors, see *Dhaliwal* at paras. 22, 24.
- [46] The Court noted in *Dhaliwal* at para. 23:
- [23] This analysis does not start from a presumption that equal division of family assets would be fair but from a presumption that the division under the agreement is fair, unless otherwise shown: *H.S.S. v. S.H.D.*, 2018 BCCA 199 at para. 71.
- [47] Finally, in *Dhaliwal* at paras. 26-27 the Court set out the approach to be followed in this second stage analysis as follows.
- [26] The leading decision on the approach to considering whether an agreement would be unfair in its operation at the time of trial, pursuant to s. 65 of the FRA, is *Hartshorne v. Hartshorne*, 2004 SCC 22. In summary, this stage of analysis requires the judge to first consider what the result at trial would be if the terms of agreement were applied. Secondly, the judge must consider the factors in s. 65(1) to determine whether the agreement operates unfairly, considered in the context of whether the parties' current circumstances were in their contemplation at the time the agreement was entered into: *Hartshorne* at paras. 43-47; *Santelli* at para. 72. This latter stage of the analysis also considers whether the agreement

operates in a way that reflects the objectives of the governing legislation: Miglin at para. 87; Nicholl at para. 30.

- [27] Where the current circumstances were not previously contemplated, the burden of establishing that the agreement operates unfairly, justifying a reapportionment of property division, is somewhat lighter: H.S.S. at para. 57. Where the current circumstances were in the parties' contemplation at the time the agreement was made, the burden to establish that the agreement is unfair is heavier: Hartshorne at para. 47. The goal is to strike an appropriate balance between deference to the parties' intentions and the assurance of an equitable result: H.S.S. at para. 57, citing Hartshorne at para. 47.
- [48] As noted above, the presumptions and burden of proof differ depending on the stage of the analysis. If the marriage agreement is set aside as unconscionable, the statutory regime applies and the analysis proceeds from a presumption of equal division of family assets. If the agreement is not set aside as unconscionable, the analysis under s. 65 proceeds from the presumption that the marriage agreement is fair unless otherwise shown.

Is the Agreement unconscionable?

- [49] The notice of family claim seeks an order setting aside the Agreement. This pleading is directed to a finding on unconscionability at common law. Ms. Drummond submits that the lack of identification in the Agreement of which accounts are to constitute separate property, coupled with the absence of disclosure of the amounts in those accounts, renders the Agreement unconscionable.
- [50] Mr. Brillling noted that the amount of the IG Funds was disclosed prior to execution. In addition, there is no evidence that Ms. Drummond was dissatisfied with the state of financial disclosure at the time the Agreement was executed. There is no suggestion that she requested additional financial disclosure. She had the benefit of independent legal advice and there is no suggestion that her lawyer at the time requested additional disclosure. Finally, the Agreement provides:
3. Both parties are satisfied with the knowledge each has of the other's assets and liabilities and neither of them desires nor requires further or better particulars of the assets and liabilities of the other for the purpose of this Agreement.

Were there circumstances of vulnerability or a fundamental flaw in the negotiation process?

- [51] The first step in the analysis is an inquiry into the circumstances surrounding the negotiation and execution of the Agreement. The Court is to consider if there were circumstances of vulnerability or a fundamental flaw in the negotiation process that vitiated the bargaining process. In the present case I find that there is no suggestion that either party laboured under a significant vulnerability nor was there a fundamental flaw in the negotiation process.

[52] In that regard, I note that both parties had the benefit of independent legal advice. Ms. Drummond's counsel submits that the disclosure of Mr. Brilling's assets was deficient in that the account numbers and totals for the RBC accounts were not listed. However, there is no evidence that these accounts were significant in relation to the IG Funds, the balance of which was disclosed. It is common ground that no additional disclosure was requested.

[53] Mr. Brilling was the one who wanted a marriage agreement and it is clear that the Agreement reflected his wishes. Ms. Drummond did not want such an agreement but ultimately, she did agree, having had independent advice. Her reluctance in the circumstances does not amount to a fundamental flaw in the negotiation or execution of the Agreement.

Was the Agreement consistent with the objectives of the legislation at the time of signing?

[54] Neither party directed submissions specifically in relation to this question. The burden of proof lies with Ms. Drummond to establish that the Agreement is unconscionable. I find that she has not discharged this burden. Accordingly, the analysis moves to the second stage.

Are the provisions for division of property unfair having regard to the factors set out in s 65(1) of the FRA?

[55] As noted In Dhaliwal, this stage of the analysis requires the judge to first consider what the result at trial would be if the terms of the agreement were applied. Secondly, the judge must consider the factors in s. 65(1) to determine whether the agreement operates unfairly, considered in the context of whether the parties' current circumstances were in their contemplation at the time the agreement was entered into, together with whether the agreement operates in a way that reflects the objectives of the governing legislation.

What does the Agreement provide?

[56] The first part of the analysis at this stage is to apply the Agreement and address the financial entitlements from all sources available to each spouse under the Agreement.

Mr. Brilling's Separate Property

Family Home

[57] The parties have agreed that the value of the home is \$850,000. The mortgage is \$9,364. The net equity of the home to be divided is \$840,636. 38% of that amount is \$319,442. The remaining equity is \$521,194 which is to be divided equally. In the result, pursuant to the terms of the Agreement, Ms. Drummond's share of the family home is \$260,597. Mr. Brilling's share is \$580,039.

IG Funds

[58] The balance of the IG Funds which stood at \$245,699 as at November 2021, constitutes separate property of Mr. Brilling pursuant to the Agreement.

RBC 1719

- [59] Pursuant to the Agreement, this account is part of Mr. Brilling's separate assets. There is an issue with respect to the amount to be attributed to this account. As at January 2022, the balance in this account was \$29,081. Following that date, the account was depleted. The balance at the date of trial was \$11,910.
- [60] Mr. Brilling testified that he used about \$10,000 for legal fees. There was a further \$10,000 withdrawal in January 2022. His testimony was that this was used to take three female friends on a weekend vacation. He then stated that he thought he only spent \$5,000 on the vacation but did not account for the balance of the withdrawal.
- [61] It was put to Mr. Brilling that it was not appropriate for Ms. Drummond to pay for his counsel and vacations. His response was that the funds were his to do with as he chose.
- [62] Mr. Brilling's counsel submits that the depletion of the account could be traced to payments for plumbing supplies in relation to the business; however, this explanation is not consistent with Mr. Brilling's evidence.
- [63] In the circumstances, it is in my view appropriate to add back the amounts that Mr. Brilling acknowledged were in relation to payments to counsel and for the vacation, totalling \$15,000. I set the amount for the vacation at \$5,000 because ultimately that was the amount that he acknowledged. The amount to be ascribed to this account is thus \$26,910 (\$11,910 + \$15,000).

RBC RRSP

- [64] Mr. Brilling acknowledged in his testimony that the \$5,000 that he withdrew from the RRSP account should be added back into the total, bringing the amount to \$19,451 (\$14,451 + \$5,000). Pursuant to the Agreement, these funds form part of Mr. Brilling's separate property.

TFSA

- [65] Mr. Brilling testified that the account was opened prior to the execution of the Agreement. The TFSA amount will consist of the \$10,426 balance and the \$50,000 that Mr. Brilling withdrew from that account and gave to his mother to hold in a safety deposit box, for a total of \$60,426.

Ms. Drummond's separate property

- [66] As noted above, this consists of her RRSP in the amount of \$4,104.

Remaining assets to be divided

RDSP

[67] This type of account has been found to be a family asset, see *C.A.L. v. D.E.L.*, 2019 BCSC 1483; *L.E.M.* at paras. 297, 328. Each party's half share is \$21,132 (\$42,264 / 2).

Mutual Funds

[68] Ms. Drummond submits that approximately \$7,500 of the funds withdrawn by Mr. Brilling from the TFSA account in December 2019 has not been accounted for. She submits that they were deposited into mutual funds but that they have not been traced or disclosed. Mr. Brilling admitted that there were additional funds missing from the transfer, but could not account for what happened to those funds.

[69] The state of the evidence does not permit me to make findings with respect to these funds, except to say that they are not accounted for. I am not able to find that these funds are at present an asset that has not been disclosed, or that they were dissipated after separation. In the circumstances, in my view, it is not appropriate to treat this amount as an asset.

[70] Thus, in the result, pursuant to the operation of the Agreement, Mr. Brilling's share of the assets would be as follows:

Share of the home \$580,039

IG Funds \$245,699

RBC 1719 \$26,910

RBC RRSP \$19,451

TSFA \$60,426

RDSP \$21,132

TOTAL \$953,657

[71] Ms. Drummond's share of the assets pursuant to the operation of the Agreement would be:

Share of the home \$260,597

RRSP \$4,104

RDSP \$21,132

TOTAL \$285,833

[72] In addition, there is an RESP account which stands at \$53,753. The parties are in agreement that this account will not be included in the consideration of either family assets or separate assets. That fund will be held in trust by Mr. Billing for the Children. Any unused portion will be divided equally between the parties.

Is this division of assets unfair, having regard to the factors in s. 65?

- [73] The results of the operation of the Agreement are now to be assessed in light of the factors of s. 65(1) of the FRA, having regard to the intentions of the parties, whether the current circumstances were foreseen, and whether the operation of the Agreement reflects the objectives of the statute.
- [74] In engaging in the exercise, the Court is to give appropriate deference to the parties' choices: *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 47 [*Hartshorne*]. The overall process is described in *Hartshorne* as follows:
- [47] The ultimate point then is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on the one hand, and assurance of an equitable result, on the other.
- [75] In conducting the analysis, the court should not conclude that an agreement is unfair simply by demonstrating that it deviates from the statutory matrimonial property regime, i.e., the FRA or FLA: *Johnstone v. Wright*, 2005 BCCA 254 at para. 32, citing *Hartshorne* at para. 67.

The parties' contemplation at the time of the agreement

- [76] There is a paucity of evidence with respect to what the parties contemplated at the time of contract. It is clear that the parties were on the verge of marriage. It is clear that they contemplated having children. Ms. Drummond testified that it was her general understanding that the Agreement contemplated family sharing, buying a house and raising children together. She understood that if Mr. Brilling took something from the IG Funds and made it family property, then it would be shared by them both. She believed that the down payment formed part of the house that they would share equally. She said that they were getting married and she thought it was all going to be 50/50. It is hard to see how, apart from wishful thinking, she could have formed this view given the terms of the Agreement.

[77] Mr. Brilling testified that his intention was to protect the IG Funds, which he saw as security for his retirement. However, the Agreement clearly goes far beyond that simple goal. What was in Mr. Brilling's contemplation is reflected in his conduct with respect to the family finances and in his testimony at trial. He viewed all of the RBC accounts as his sole funds.

[78] I note that Mr. Brilling's conduct in relation to the joint account does not reflect clause 33 of the Agreement which provides:

33. On the first day of every month each party will deposit fifty percent (50%) of the estimated monthly household expenses into a joint account.
- a. Either party may draw cheques or make cash withdrawals from the joint account to pay for:
 - i. The parties general living expenses;
 - ii. Insurance on the contents of their residence; and
 - iii. Any major item the parties agree to purchase.

[79] It is clear from the evidence at trial that Mr. Brilling made frequent withdrawals from the joint account, particularly in the later stages of the marriage that did not fall within the purposes specified in clause 33.

[80] One key question is what the parties contemplated with respect to the ramifications of pregnancy and childcare or the possibility of Ms. Drummond being out of the workforce for a lengthy period time. The parties did not give evidence with respect to their contemplation, if any, of the ramifications of these matters.

[81] The Agreement provides:

O. The parties wish to confirm that:

(iii) either of them may choose not to pursue economic opportunities because of their relationship but each party recognizes that certain sacrifices will be made within, and because of, the relationship, and the consequences of those choices will not be used to avoid the terms of this Agreement.

[82] That is suggestive of a contemplation that time out of the workforce represents a "sacrifice", the consequences of which will not constitute a basis to avoid the terms of the Agreement. However, the terms of clause 33 do not appear to contemplate that there will be a period of time in which one of the parties is not employed in the workforce outside of the home.

[83] In addition, the Agreement provides for the possibility of a review and amendment in clause 41. No such review was requested or undertaken. That is suggestive of a conclusion that the parties believed that the unfolding of events was consistent with what the Agreement contemplated.

- [84] In the result, it is not evident that the parties turned their minds to the possibility that Ms. Drummond would spend a number of years outside of the workforce as a result of pregnancy and child care responsibilities.
- [85] At the time they signed the Agreement both were employed, earning roughly equal salaries. Mr. Brilling had the IG Funds, which he wished to protect. Other than the IG Funds, there is no evidence that either party had any assets of significance. But for the IG Funds, the parties were in a situation of financial equality at the time the Agreement was executed.
- [86] At the time of trial Mr. Brilling's participation in the workforce had not been disrupted to any significant degree. His wage earning potential was significantly higher than Ms. Drummond as a result of completion of his red seal certification. He was able to amass savings during this period. By contrast, Ms. Drummond remained out of the workforce for much of the marriage as a result of pregnancy and child care responsibilities. As noted above, the operation of the Agreement at the time of trial produces a result far from rough equality with Mr. Brilling's share being 77% of the assets, including the IG Funds but excluding the RESP, and Ms. Drummond's 23%.
- [87] I find that the parties did not predict accurately at the time of the formation of the Agreement what their actual circumstances would be at the time of distribution.
- [88] There was evidence from the parties with respect to their intentions concerning the down payment on the house. Mr. Brilling testified that it was his intention that he would be able to recover the down payment at the time the home was sold, which he said was discussed with Ms. Drummond prior to advancing the down payment. She denied any such discussion.
- [89] I accept that preservation of the IG Funds as a source of security for retirement has been a consistent concern for Mr. Brilling. I find that it is more probable that he did discuss that the down payment would be returned to him when the house was sold with Ms. Drummond at the time he made the down payment and more likely than not that she did agree. However, there is no evidence that this was something to which the parties turned their attention at the time the Agreement was executed.

Section 65(1) factors

- [90] This was a moderately lengthy marriage. The parties have been separated for approximately two years. At the time of the marriage, Mr. Brilling had the proceeds of the settlement invested in the IG Funds. There is no evidence that at the time of the marriage either party had any other significant assets. The matrimonial home was acquired in 2011, after the marriage.

- [91] Mr. Brilling places considerable emphasis on the fact that he made virtually all of the mortgage payments. However, this does not take into consideration the contributions that Ms. Drummond made to other family expenses during the period when she was employed or of the fact that she assumed the major share of the responsibilities for child care. Both of these factors formed direct and indirect contributions to the family's finances, which in part enabled Mr. Brilling to have the funds to make the mortgage contributions.
- [92] Mr. Brilling testified that his parents had given him substantial sums of money over the years. It was his evidence that the \$50,000 that he withdrew from the TSFA account and put in a safety deposit box that his parents held represented the sum of these gifts. His mother's testimony supported these contentions. She contends that the \$50,000 represented the total amount of gifts made over the years to Mr. Brilling and the Children. Mr. Brilling submits that these funds should not be found to be family assets and should not be subject to division.
- [93] However, Mr. Brilling also testified that all of the RBC accounts, including the TFSA account, were used for family purposes. There is no accounting from either Mr. Brilling or his mother documenting the gifts. In my view, the complicity of Mr. Brilling's mother in the surreptitious withdrawal of funds during the litigation casts a cloud over her credibility.
- [94] I accept that there were gifts made by Mr. Brilling's parents over the years. I am not able to conclude where those funds went, nor is there any independent corroboration for the total amount of the gifts. I find that Mr. Brilling has not demonstrated that the \$50,000 he removed from the TFSA account was made up of gifts from his parents. In any event the source of the funds as gifts is only one factor to address. As noted, these funds were withdrawn from accounts that were used for family purposes, and thus, I find that these funds form part of the family assets.
- [95] Both parties are currently employed. Mr. Brilling submits that both are self-sufficient and urges the Court to take into account the fact that Ms. Drummond currently has a partner who contributes to the household expense.
- [96] The fact that both parties are currently employed is not a complete picture of their circumstances. At the start of the relationship both parties earned roughly equal salaries. During the course of the marriage Mr. Brilling was able to complete his red seal certification during a period when Ms. Drummond was out of the workforce due to pregnancy and the responsibilities of child care. For much of this time Mr. Brilling was working out of the province, something that he was able to do because Ms. Drummond was caring for their children. His earning capacity at present is substantially greater than that of Ms. Drummond.

- [97] Finally, Ms. Drummond has not sought to treat the IG Funds as a family asset. I note that this is a meaningful concession since there is an argument to be made that funds held for future security, such as this, is a family asset, see *Ogilvie v. Ogilvie* (1995), 14 B.C.L.R. (3d) 296 (C.A.). As such even an equal division of family assets will leave Mr. Brilling with a substantially greater share of the family's financial assets.
- [98] Having due regard for the intentions of the parties and operating from a presumption that the Agreement is fair, and considering the factors listed in s. 65(1) of the FRA, I find the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances.

Conclusion on the division of assets

- [99] In my view, in all of the circumstances, Ms. Drummond has discharged the burden to show that the Agreement is not fair. The Agreement produces a result in which Ms. Drummond's contributions during the marriage are not recognized and in which she disproportionately bears the economic burdens of the dissolution of the marriage. Although the analysis at this stage does not proceed from a presumption of equal division, I find that an equal division of the family assets is appropriate in the circumstances.

- [100] I find the following to be family assets:

Net equity of the matrimonial home \$840,636

RBC 1719 \$26,910

RBC RRSP \$19,451

TSFA \$60,426

Ms. Drummond's RRSP \$4,104

RDSP \$42,264

TOTAL \$993,791

- [101] I find that each party is entitled to a 50% share in the following manner. Ms. Drummond will keep her RRSP, Mr. Brilling will keep the RBC accounts (1719, RRSP, TSFA, and RDSP). There will be an equalization payment to be determined according to the ultimate resolution with respect to the matrimonial home.
- [102] Finally, each party is entitled to the portion of each parties' unadjusted pensionable earnings which have accumulated under the Canada Pension Plan (CPP) from July 3, 2010, the date of the marriage, to May 6, 2020, the date of separation, to be divided under ss. 55, 55.1 and 55.2 of the Canada Pension Plan, R.S.C. 1985, c. C- 8 [CPP].

- [103] Either party may apply for the equalization of the unadjusted pensionable earnings under the CPP and each party will, on request, provide to the other their social insurance number card and birth certificate, with the commencement date being December 1, 2005 and the entitlement date being May 8, 2020.

The Family Home

- [104] Both parties wish to purchase the other's interest in the former matrimonial home. Each has testified that he or she is able to obtain a mortgage in order to buy the other out. Ms. Drummond testified that she was approved for a mortgage of \$600,000 with a co-signer and \$400,000 without a co-signer. Mr. Brilling testified that he was approved for a mortgage of \$680,000 with a co-signer and \$380,000 without. Mr. Brilling's mother testified that she and Mr. Brilling's father have agreed to co-sign a mortgage or, alternatively to lend Mr. Brilling up to \$400,000.
- [105] Ms. Drummond testified that she wants to keep the home to give the Children stability and continuity. The income from the suite is a special feature of the home that would enable her to be able to service a mortgage. She has no other financial supports or prospects and given the current state of the real estate market, she fears that this would represent her only opportunity to own a home. She stated that it is extremely unlikely that she would be able to find suitable accommodation in the immediate area if she is not permitted to purchase the home.
- [106] Mr. Brilling testified that he wanted the home for the Children. He stated that he had paid almost all of the mortgage and taxes until separation and had shared the costs of the utilities during the marriage. He regarded it as his home. In addition, he stated that the home had special value to him because he had made many improvements. He has plans to convert the garage into a second rental suite so that he could earn more income.
- [107] In *Y.U. v. A.S.*, 2004 BCSC 1763, Justice Owen-Flood identified a number of factors to be considered in determining which spouse, if either, should be able to keep the house at paras. 74-78:
- [74] In determining which spouse, if any, should get the house there are a number of factors to consider. The first is the custody of and other arrangements for children. This is not relevant here.
- [75] The second is whether one spouse is less able to replace the home on their own than the other: *Witt v. Witt*, [1984] B.C.J. No. 152 (S.C.). I find on the evidence that each spouse is in a similar position in this regard.
- [76] The third is the relative ability of each spouse to purchase the other's interest. I find that each has sufficient ability to do that.

[77] The fourth is the relative needs of each spouse and reasons for wanting to retain the home: Polson v. Polson, 2000 BCSC 1477. Each spouse wants to retain the home for the same reason, to run a bed and breakfast business. And each, I find, has much the same need to retain the home.

[78] And the fifth is whether one spouse has consistently taken the position at the outset that they wish to keep the property: Lotzkar v. Lotzkar, 2003 BCCA 581. Though the original property was brought into the marriage by the wife, each spouse has consistently wanted to retain the home and establish a bed and breakfast there.

[Bolding in original.]

[108] In the present case the parties have a shared parenting arrangement and both wish to preserve the residence to provide stability for the Children. Both parties have provided evidence that they would have the ability to purchase the other's interest. Both have taken the position from the outset that they wish to keep the property and have advanced strong reasons supporting their request.

[109] I have concluded that Ms. Drummond should be given the opportunity to purchase Mr. Brilling's interest in the home. I am persuaded that she is less able to replace the home with suitable accommodation in the area. The rental suite is likely the deciding factor in finding she is less able to purchase a home suitable for herself and the Children in the area.

[110] Therefore within 45 days of the date of these reasons, Ms. Drummond shall remove Mr. Brilling from the current mortgage and pay to Mr. Brilling an equalization payment in the amount of \$347,835, made up as follows:

Total family assets \$993,791

50% share of the family assets \$496,896

Total family assets assigned to Mr. Brilling \$149,051

Equalization to Mr. Brilling \$347,845

[111] Upon completion of these steps, Ms. Drummond shall retain the home to the exclusion of Mr. Brilling. Mr. Brilling will sign any necessary documents to give concurrent effect to the transfer of his interest in the home to Ms. Drummond. Ms. Drummond will pay for the conveyancing costs of the transfer.

[112] In the event that Ms. Drummond is unable to secure a mortgage sufficient to pay Mr. Brilling in the time specified, Mr. Brilling will have the option to purchase Ms. Drummond's interest in the family home by making an equalization payment calculated as follows:

50% share of family assets \$496,896

Family assets assigned to Ms. Drummond \$4,104

Equalization to Ms. Drummond \$492,792

[113] In the event that neither party is able to purchase the other party's interest on the terms set out above, the home shall be listed for sale with joint conduct of sale.

[114] The proceeds will be divided, subject to the following deductions:

- a) Real estate commissions;
- b) Adjustments for taxes, utilities and municipal fees and levies;
- c) Amounts required to discharge the registered encumbrances;
- d) Legal fees and disbursements relating to the sale; and
- e) All other sales adjustments.

[115] After these deductions, Ms. Drummond shall receive an equalization payment from the net proceeds in the amount of \$144,947 (\$149,051-\$4,104). The balance of the net proceeds shall be divided equally between the parties.

Child Support

[116] There have been no child support payments made by either party since separation. Mr. Brilling seeks to maintain the status quo. Ms. Drummond seeks an order for child support payable by Mr. Brilling based upon an imputation of income. There is no claim for retroactive support.

Imputed Income

[117] The Federal Child Support Guidelines, SOR/97-175 [Guidelines] govern the calculation of income for purposes of the determination of child support. Sections 15 and 16 provide:

Determination of annual income

15 (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

.

Calculation of annual income

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

[118] The relevant provisions with respect to the issue of income for child support purposes in this matter are:

Pattern of income

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

.

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- .
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- .
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- .

Reasonableness of expenses

- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[Bolding in original.]

[119] The B.C. Court of Appeal summarized the governing principles with respect to imputing income in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-37, as follows:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool*

(1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[120] In *D.L.M. v. T.M.J.M.*, 2022 BCSC 127 at para. 31, Justice Forth described the factors to be addressed in assessing the issue, citing Justice Wong in *P.K.C. v. J.R.R.*, 2014 BCSC 932 at para. 99, rev'd on other grounds by consent of the parties 2015 BCCA 179, and aff'd in *S.A.H. v. J.J.G.V.*, 2021 BCSC 2132:

[99] It is established law that a payor spouse is required to work to full-capacity whether in the context of child or spousal support:

- a) Parents have a legal obligation to earn as much as they are capable of earning to meet their obligation to support their children. The court should consider not only the amount of income a spouse was actually earning, but the amount of income a spouse could earn if working to capacity (*Earle v Earle*, 1999 BCSC 283; and *Van Gool v. Van Gool*, (1998), 59 B.C.L.R. (3d) 395 (C.A.));
- b) A payor has an obligation to make reasonable use of his or her capacity to earn income when the opportunity to do so exists. A voluntary decision to down tools and not work while still having capacity and opportunity to earn income will not meet the test of a change of circumstances (*Watkins v. Watkins*, 2013 BCSC 1983);
- c) The burden of adducing evidence of both the reasonableness of the actions of a self-employed professional must fall, at least in part, on that professional who has unique knowledge of the relevant facts. A parent is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. Bad faith is not required (*Edwards v. Edwards*, 2004 BCSC 22); and
- d) Where the court concludes that a payor is intentionally unemployed or underemployed, an order for support should be based on earning capacity (*Babowech v. Von Como* (1989), 35 B.C.L.R. (2d) 246, 18 RFL (3d) 365 at 375 (C.A.); *Marzara v. Marzara*, 2011 BCSC 408 at para. 326).

Mr. Brilling

[121] Ms. Drummond seeks to have income imputed to Mr. Brilling for the following reasons:

- a) Underreporting of income;
- b) Overreporting of expense; and
- c) Underemployment.

[122] Ms. Drummond submits that Mr. Brilling underreported his income in that he took payments in cash which were then not reported and that he directed customers to make their payments out to Ms. Drummond.

- [123] With respect to underreporting income, Mr. Brilling conceded that on occasion in the past he had requested customers to make their cheques out in Ms. Drummond's name so that he would not have to report the income. He also agreed that before separation he had taken payments in cash without reporting it. It was his evidence that this amounted to perhaps \$4,000 to \$5,000 per year, and that it only occurred during periods when he was collecting unemployment benefits under the Employment Insurance (EI).
- [124] He testified that at present he keeps everything on the books except for some small amounts, which he made no effort to quantify. He stated that he did so because he needs as much income as possible to qualify for a mortgage and he fears an audit by the Canada Revenue Agency (CRA).
- [125] Ms. Drummond also alleges that Mr. Billing underreported the income he received from customers to CRA, that in part he did so by depositing customer's payments directly to his VISA account and not into his bank account. In 2020 these deposits amounted to over \$16,000 and in 2021 they amounted to \$12,000 from the period of January to October. Counsel submits that Mr. Billing spent more in a year than he reported as income yet he did not spend his savings nor went into debt.
- [126] Mr. Brilling agreed that he would deposit cheques from customers directly into his VISA account. However, it was his testimony that these amounts were reported as income because he passed all of the invoices over to his accountant. The accountant did not give evidence.
- [127] In cross examination, Mr. Brilling was taken through a series of entries in the RBC chequing account and joint account. The suggestion was made that the total of those entries indicated an annual income for 2019 of approximately \$120,000.
- [128] Mr. Brilling's counsel in submissions presented another analysis of the entries and submitted as follows:
113. Having gone again through those entries the following appears:
- Identified etransfers for named customer deposits into 1719
- \$57,580.89
- E.I. deposits into 1719
- \$11,306.00
- T4 identified deposits from Pro-Western into 1719
- \$9,965.64
- Unidentified deposits into 1719 (transfers between accounts?)
- \$16,900.00

Identified etransfer deposit into 2197

\$17,739.12

Total

\$113,481.51

114. It is respectfully submitted that Mr. Brilling's GROSS business income for 2019 was the total of the identified and unidentified etransfers and deposits. = \$92,211.01. Applying the 1/3 net principle referred to earlier in these submissions, then Mr. Brilling's business income would have been around \$30,837.

115. Adding the \$11,306 received from E.I. his total income for 2019 would have been \$52,107.50.

[129] Mr. Brilling's tax returns show the following total income:

- a) 2017--\$72,178 predominately employment income with \$5,619 EI;
- b) 2018--\$71,291 predominately employment income with \$12,252 gross and \$3,647 net self-employment;
- c) 2019--\$21,264 with \$9,965 employment, \$11,306 EI, \$57,261 gross and (- \$744) net self-employment;
- d) 2020--\$44,889 with \$22,832 employment, \$7,000 other income, \$3,372 EI, \$11,700 gross business income; and
- e) 2021--\$34,162 primarily self-employment based on \$97,437 gross and \$32,024 net.

[130] With respect to the income from self-employment as reported in the tax returns, it appears that on the basis of cross-examination and her own review of the deposit history, Mr. Brilling's counsel concedes that the gross business income for 2019 was \$92,211 and not the \$57,261 that Mr. Brilling reported. Using the 1/3 formula suggested by Mr. Brilling in his testimony, this would suggest a net income in the amount of \$30,737, rather than the (-\$744) reported, bringing total income for the year to \$52,745.

[131] Mr. Brilling's financial statements provide further evidence that suggests that his actual income exceeds what he has reported. In his financial statement sworn July 9, 2020, Mr. Brilling reports total income of \$30,165, annual expenses of \$60,897, assets of \$938,062, debt of \$26,170 and a \$1,500 disposal of property. His financial statement dated November 6, 2021, records total income of \$37,000, annual expenses of \$47,086, assets of \$1,247,704 and debt of \$16,820. Thus, year over year, his reported expenses have significantly exceeded his income, yet he has increased his assets and reduced his debt.

[132] I agree with Ms. Drummond that Mr. Brilling has underreported his income. I do not find his testimony that while he had done so in the past, he now reports all of his income to be credible. In my view, he has shown a willingness to make false statements about his income in the past when it was to his advantage to do so. It is currently to his advantage to report

less income than Ms. Drummond to support his position that he should not have to pay child support. He has already qualified for a mortgage with his current reported income and a co-signer and his parents are willing to co-sign or lend him the funds.

- [133] In any event, the available evidence noted above supports a conclusion that Mr. Brilling's income is underreported, although on the state of the evidence it is not possible to quantify the extent of the underreporting.
- [134] Ms. Drummond submits that Mr. Brilling has taken deductions on his income tax that, while appropriate for purposes of income tax, must be added back with respect to child support. She cites in particular the deductions for home office expense, telephone expense, gas expense and capital cost allowance, citing *Lahar v. Lahar*, 2014 ONCJ 59 at para. 35; *Kowalewich v. Kowalewich*, 2001 BCCA 450; and *Sos-Porritt v. Porritt*, 2015 ONCJ 477 at para. 92 [*Sos-Porritt*].
- [135] Mr. Brilling submits that all of the expenses claimed were reasonable and that they had been claimed by his accountant who had been provided with all of the necessary documents. He agreed that the vehicle expense included both business and personal use. He stated that he maintained an office in his home that he used for work. He stated that the capital cost allowance related to an iPad that was used exclusively for work.
- [136] In the 2021 income tax return, Mr. Brilling claimed \$8,717 as a "business use of home" deduction, \$1,152 for capital cost allowance, \$1,616 for utilities, and \$5,321 for vehicle use.
- [137] There is no suggestion by Ms. Drummond that the expenses claimed by Mr. Brilling are unreasonable for purposes of the calculation of income pursuant to the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). However, that is not the standard for Guidelines purposes where the test is rather whether the deduction results in a fair recognition of the actual income available for child support.
- [138] With respect to the home office deduction, Mr. Brill claimed \$8,717 against a reported total housing expense of \$17,481. This included an amount carried forward of \$4,347.
- [139] In *Sos-Porritt*, Justice O'Connell noted:
- [92] The father has deducted \$4,736.47 of his personal housing expenses (mortgage, utilities and house insurance) as a "business use of home" expense. This is fifteen percent of his total personal housing expenses. There is no evidence that the father regularly meets with clients in his home, or requires a larger home or special space requirements as a commissioned salesperson. The father's housing expenses would likely be the same even if he were not a commissioned salesperson. While the father is certainly entitled to get a tax advantage by properly deducting a business use of home expense, to make these same deductions from income for the purposes of determining child support deprives his children of needed child support. See *Wilson v. Wilson* [2011] O.J. No. 1088; 2011 ONCJ 103; 2 R.F.L. (7th) 233, at paragraph 31. This entire amount should be added back to his income each year for the purposes of the child support guidelines.

- [140] In my view, Mr. Brilling is in the same situation. In particular, there is no evidence that his housing expenses would have been any different had he not chosen to have a home office. The entire amount should be added back into income for Guidelines purposes. However, the amount claimed for the use of the vehicle, capital cost allowance, and telephone expense do appear to be related solely to his business.
- [141] Adding back the business use of home deduction to Mr. Brilling's 2021 return would produce a total income of $\$34,162 + \$8,717 = \$42,879$.
- [142] There is considerable uncertainty over the question of whether Mr. Brilling is currently working the equivalent of full-time hours. As noted above, the Children are with Mr. Brilling for three days each week, corresponding with Ms. Drummond's three-day work schedule. The youngest is not yet in school. Mr. Brilling has not engaged daycare or after-school care for the Children. This would suggest that he is working less than full-time hours.
- [143] In addition, there was some suggestion that he viewed it as his right to only work three days a week because Ms. Drummond worked a three-day revolving shift. During the course of his evidence, he justified this on the basis of Ms. Drummond's work schedule. He agreed that he could engage daycare but stated that he would rather spend time with the Children. He also stated that he was "fine" with earning \$30,000-\$40,000.
- [144] However, Mr. Brilling also stated that he worked more hours on the days that he worked to make up for the time when he had the Children and did not work. He then stated that he actually did take on work during the time the Children were with him and that his mother took care of the Children on at least some occasions when they were with him so that he could work. He also stated that he hired a babysitter as needed. He said that on average he is working 40-50 hours a week "easily".
- [145] On the basis of the present record it is not possible to determine the extent to which Mr. Brilling is turning away work or making himself unavailable for work on days when he has the Children. What is clear is that a choice to do so is not an acceptable reason to reduce his earning capacity, see *MacDonald v. Burnett*, 2016 BCSC 2229 at para. 23 [MacDonald].
- [146] Ms. Drummond provided evidence of a variety of jobs in the area for employees with Mr. Brilling's qualifications. The salaries ranged from \$45,000 to \$124,800 per year, with the majority trending to the higher ranges in the \$60,000 to \$90,000 range.
- [147] Mr. Brilling agreed that he was qualified for these types of positions. He also agreed that there is currently a labour shortage for skilled workers in his trades such that he could obtain employment if he chose to do so. It was his evidence that certain positions were unacceptable because they would require a longer commute. A reluctance to undertake a longer commute in order to earn an income consistent with one's potential was rejected as unreasonable by Justice Cole in *MacDonald*.

- [148] Mr. Brilling's fundamental objection was that he did not want to be an employee. He stated that it had always been his dream to be self-employed. However, the jurisprudence is clear that his children are not to bear the burden of such choices. To the extent to which his choice to pursue self-employment does not produce income consistent with his reasonable earning capacity, income will be imputed.
- [149] I have concluded that Mr. Brilling's reported income does not fairly represent either his actual income that is available for use as child support or his earning capacity. Mr. Brilling is a skilled worker. There are ample employment opportunities available in his field with salaries significantly in excess of what he reports from self-employment. He earned significantly more as an employee than he reports from his business. The reasons for this discrepancy are likely some combination of not working full time, failing to report income, claiming deductions that are not available for Guidelines purposes and possibly lack of customers.
- [150] Ms. Drummond seeks to impute an income of \$90,000 per year.
- [151] I am satisfied that it is appropriate to impute income because I have concluded that Mr. Brilling's reported income is not a fair reflection of either the income available for child support or a reasonable use of his capacity to earn income in a circumstance in which the opportunity to do so exists.
- [152] However, I do not accept that \$90,000 is an appropriate amount to impute. There is no evidence that Mr. Brilling has actually earned this amount in the past. The salaries in the exhibits represent a range and there is no evidence that Mr. Brilling would have the necessary experience or qualification for the highest ranges. In the circumstances, I have concluded that it is appropriate to impute income to Mr. Brilling in the amount of \$75,000.

Ms. Drummond

- [153] As noted above, Ms. Drummond works rotating three days on and three days off on the night shift at a long-term care facility. With the shift differential, her salary is approximately 4/5 of a full-time wage. She has not been able to secure additional shifts at this facility. She undertook additional training in 2021 in the hope of achieving additional employment. As a result of restrictions associated with the COVID-19 pandemic, she is only able to work at one facility, at least at the present.
- [154] I have concluded that it is not an appropriate case to impute income to Ms. Drummond for purposes of Guidelines child support. As I have concluded that Ms. Drummond should be given the opportunity to purchase the family home, \$14,400 should be added to her income if she exercises this option.

Conclusion on child support

[155] In the result, the parties' Guidelines incomes are as follows: for Ms. Drummond, \$49,478 if she does not purchase the family home and \$63,878 if she does; for Mr. Brilling, \$75,000 if he does not purchase the house, \$89,400 if he does.

[156] The child support would be as follows under the three applicable scenarios:

- a) If neither party purchases the family home, Mr. Brilling pays \$1,522 and Ms. Drummond pays \$1,019.70. Setting off the two amounts, Mr. Brilling pays \$502.30 per month to Ms. Drummond.
- b) If Ms. Drummond purchases the house, Mr. Brilling pays \$1,522 and Ms. Drummond pays \$1,300.73. Setting off the two amounts, Mr. Brilling pays \$221.27 to Ms. Drummond.
- c) If Mr. Brilling purchases the house, Mr. Brilling pays \$1,798.60 and Ms. Drummond pays \$1,019.70. Setting off the two amounts, Mr. Brilling pays \$778.90 to Ms. Drummond.
- d) In each case, the parties will share special and extraordinary expenses in proportion to their respective incomes.

Parental Responsibilities

[157] The parties are agreed, with one exception, that they will continue to share in the parental responsibilities with respect to the Children. The one exception is with respect to medical decision-making in general and vaccination in particular.

Vaccination/Medical Decision-Making

[158] Ms. Drummond testified that she and the Children have a family doctor. That doctor refused to take Mr. Brilling on as a patient after a situation in which he was rude and abrupt. She stated that she works with vulnerable senior adults and believes that vaccination against COVID-19 is important to protect her children and her clients. She approached Mr. Brilling about vaccinating the Children before the year end and he refused.

[159] Mr. Brilling agreed that he had refused to agree to having the Children vaccinated for COVID-19. He stated that his view has changed since he and all three Children had COVID-19 in February 2022. He now no longer objects to J.E.B. being vaccinated. He suggested that he is concerned that K.L.B. is too young and says that he would like to confer with Ms. Drummond about that. He is concerned that K.M.B. has or is predisposed to a genetic condition that he has and worries about vaccination in that regard.

- [160] He agreed that he had not raised any of these specific concerns with Ms. Drummond before his testimony at trial, stating that "we do [not] have discussions about anything". There is no suggestion that he sought out medical advice with respect to these concerns. He stated that the basis for his opposition to the relief sought was that he did not want to give up any of his rights.
- [161] In my view Mr. Brilling's conduct with respect to this issue is not consistent with the best interests of the Children. When a difference of opinion arose between himself and Ms. Drummond with respect to vaccination of the Children for COVID-19, he did not discuss his specific concerns with her. He states that he had concerns about whether vaccination was suitable for two of the Children yet he did not seek out advice from a medical practitioner. In the result, the Children were not vaccinated and all were infected with COVID-19. When his views changed to some degree, he still did not communicate that with Ms. Drummond. While Mr. Brilling characterizes this issue as a matter of his "rights", these are responsibilities to be exercised in the best interests of the Children which he has not done.
- [162] In the result, I have concluded that it is in the Children's best interest for Ms. Drummond to make medical decisions with respect to the Children. In the result, I order that Ms. Drummond will discuss non-emergency medical decisions regarding the Children with Mr. Brilling, including the issue of vaccination. In the event no agreement can be reached, Ms. Drummond may make the decision and Mr. Brilling may apply for a review of that decision under s. 49 of the FLA.
- [163] The parties will share all other parenting responsibilities as set out in s. 41 of the FLA. In the event that after consultation, the parties are unable to reach an agreement, the issue shall be referred to the court for direction.
- [164] In addition, I make the following conduct orders:
1. Pursuant to ss. 222 and 227 of the FLA:
 - a) the parties will not question the Children about the other parent or time spent with the other parent beyond simple conversational questions;
 - b) the parties will not discuss with the Children any inappropriate adult, court, or legal matters, including discussing each party's interest in the ownership of the family home, or any financial matters relating to the parties;
 - c) the parties will not blame, criticize, or disparage the other parent to the Children;
 - d) the parties will discourage others from discussing inappropriate adult, court, or legal matters, including discussing each party's interest in the ownership of the family home, or any financial matters relating to the parties with the Children, and will discourage others from blaming, criticizing, or disparaging the other parent to the Children; and

- e) the parties will not disparage either of the parties' new partners to the Children and will discourage others from disparaging either of the parties' new partners to the Children.
- 2. The parties shall put the best interests of the Children before their own interests and:
 - a) encourage the Children to have a good relationship with the other parent and speak to the Children about the other parent in a positive and respectful manner;
 - b) use their best efforts to maintain polite, respectful communications with each other, refraining from negative or hostile comments, criticisms, or arguments in the presence or hearing of the Children;
 - c) protect the physical, psychological, and emotional safety, security, and well-being of the Children;
 - d) exchange in a timely manner information about the well-being of the Children, including progress at school, extracurricular activities, and any illnesses or injuries of a child while in the care of the other parent; and
 - e) inform the other parent promptly in writing of any changes in residence or telephone number and promptly provide the other parent with current information.

Parenting Time

- [165] As noted above, the parties agreed to a shared parenting regime on a three-day rotating schedule to match Ms. Drummond's shifts. Mr. Brilling now proposes that the arrangement be changed to a week-on week-off schedule, either gradually or all at once.
- [166] Ms. Drummond stated that the current arrangement is working well. It would be difficult for her to find child care arrangements to match her work hours. Mr. Brilling would prefer alternating weeks, suggesting that this schedule would work better for his projects and would facilitate planning for the Children.
- [167] In my view, the current arrangement is working well, and is an optimal arrangement at the present time to facilitate both parent's ability to meet the needs of the Children. At this juncture changing to alternating weeks would create significant difficulties for Ms. Drummond.
- [168] Mr. Brilling suggested that the alternating week proposal he favours would give him the opportunity to bid for longer jobs; however, he also claimed that he had child care arrangements when necessary for work. Therefore, I am not satisfied that he demonstrated any advantage. Apart from Mr. Brilling's views, there is no evidence that the present arrangement is not working well from the Children's perspective.
- [169] I find that the current arrangement is in the best interests of the Children and I am not prepared to alter the terms of the current consent order.

[170] Accordingly, I order that:

1. Commencing the date of this order, the parties shall continue to share parenting time with the Children on a three day/night rotating basis, in the following manner:
 - a) The party picking up the Children for their parenting time will pick them up at 3:00 pm from the school or daycare, or if school or daycare is not in session, from the other parent's home.
 - b) In the event one of the parents is unable to pick up the Children at 3:00 pm as a result of work requirements, they will arrange alternate care unless the other parent is able to care for the Children until that parent is able to arrive.
 - c) The parties will continue the three-day rotating parenting time during the holidays.
2. The parties may arrange further or other changes to parenting time by making an agreement in writing in advance.

Summary

[171] In conclusion, I make the following orders:

1. Ms. Drummond and Mr. Brilling are each entitled to 50% of the family assets, which includes the net equity of the matrimonial home, RBC accounts (1719 account, Mr. Brilling's RRSP, TSFA, and RDSP), and Ms. Drummond's RRSP, in the amount of \$496,896.
2. Ms. Drummond will keep her RRSP and Mr. Brilling will keep the RBC accounts. An equalization payment will be made in the following manner:
 - a. Ms. Drummond is given the opportunity to purchase Mr. Brilling's interest in the family home. Within 45 days of the date of these reasons, Ms. Drummond shall remove Mr. Brilling from the current mortgage and pay to Mr. Brilling an equalization payment in the amount of \$347,845. Upon the completion of these steps Ms. Drummond shall retain the home to the exclusion of Mr. Brilling. Mr. Brilling will sign any necessary documents to give concurrent effect to the transfer of his interest in the home to Ms. Drummond. Ms. Drummond will pay for the conveyancing costs of the transfer.
 - b. In the event that Ms. Drummond is unable to secure a mortgage sufficient to pay Mr. Brilling in the time specified, Mr. Brilling will have the option to purchase Ms. Drummond's interest in the family home by making an equalization payment of \$492,792.
 - c. In the event that neither party is able to purchase the other party's interest on the terms set out above, the home shall be listed for sale with joint conduct of sale. Once all the appropriate deductions have been made, Ms. Drummond shall receive an equalization payment from the net proceeds in the amount of \$144,947. Then the balance of the net proceeds shall be divided equally between the parties.

3. Each party is entitled to the portion of each parties' unadjusted pensionable earnings accumulated under the CPP from July 3, 2010, the date of marriage, to May 6, 2020, the date of separation, in the matter prescribed in paras. 102-103 of these reasons.
4. The child support would be as follows:
 - a. If Ms. Drummond purchases the family home, Mr. Brilling pays \$221.27 to Ms. Drummond.
 - b. If Mr. Brilling purchases the family home, Mr. Brilling pays \$778.90 to Ms. Drummond.
 - c. If neither party purchases the family home, Mr. Brilling pays \$502.30 per month to Ms. Drummond.
5. Ms. Drummond will discuss non-emergency medical decisions regarding the Children with Mr. Brilling, including the issue of vaccination. In the event no agreement can be reached, Ms. Drummond may make the decision and Mr. Brilling may apply for a review of that decision under s. 49 of the FLA. The parties will continue to share in all other parental responsibilities with respect to the Children and are subject to the conduct orders set out in para. 163 of these reasons.
6. Commencing the date of this order, the parties shall continue to share parenting time with the Children on a three day/night rotating basis in the manner prescribed in para. 169 of these reasons, and the parties may arrange further or other changes to parenting time by making an agreement in writing in advance.

Costs

[172] The parties have leave to apply to be heard with respect to the issue of costs, provided any such application is brought within 30 days of the date of these reasons.

"C. Ross J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/10/2022BCSC1076.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/drummond-v-brilling-2022>

Prepared on 26 October 2026 · Esheria