

CANADA / JUDGMENT

Foley v. Foley

2025 BCSC 1743

COURT

Supreme Court of British Columbia

DECIDED

24 March 2025

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2025 BCSC 1743 Foley v. Foley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Foley v. Foley,

2025 BCSC 1743

Date: 20250324

Docket: E222853

Registry: Vancouver

Between:

Robert Gerrard Foley

Claimant

And:

Lynn Michelle Foley also known as Lynn Michelle Fitzpatrick

Respondent

Before: The Honourable Justice Morley

Oral Reasons for Judgment

Counsel for the Claimant:

J. Aucoin

The Respondent Appearing

on her own behalf:

L. Foley

Place and Dates of Trial/Hearing:

Vancouver, B.C.

February 10 - 14, 2025

February 18 - 20, 2025

March 4 and 7, 2025

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2025

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I. Overview

- [1] These are edited oral reasons for judgment.
- [2] Last month I heard a divorce trial. The claimant Robert Foley and the respondent Lynn Foley (née Fitzpatrick) began to live together in a marriage-like relationship in May 1993. They got married on September 5, 1998 in Dublin. They separated December 23, 2019. They have two daughters -- the older, who I will refer to as "A", was born August 26, 1999 and is thus now 25, and the younger, who I will refer to as "B", was born May 17, 2004, and is now 20. Property division, child support and spousal support are all in issue.
- [3] More specifically, I must resolve the following issues with respect to property division:
- a) The parties' principal joint asset was fSquared Marketing ULC, a legal marketing firm. While married and for some time after it, Mr. and Ms. Foley were the principals of that firm, with Ms. Foley focusing on strategic marketing and Mr. Foley on IT-oriented projects. The parties were each 50% shareholders. Ms. Foley argues that Mr. Foley sabotaged fSquared and surreptitiously took its clients for his own firm, contrary to a consent order in this proceeding. She asks for a compensation order and/or unequal division of the remaining assets as a result. Mr. Foley argues that the only necessary remedy is to consider Mr. Foley's new firm, as well as Ms. Foley's new firm, as family property, and provide for a division of their value.
 - b) Ms. Foley received a settlement of approximately US\$100,000 in 2021, which was paid into a joint US account. The settlement is clearly "excluded property" under s. 85(1)(c) of the FLA. However, there were numerous other payments into that same account. I must determine how much of the current balance is excluded property.
 - c) Ms. Foley argues that Mr. Foley's management of some investment assets was improvident and asks for unequal division on this basis.
 - d) Another reason for unequal division of assets, which I will consider, is that some of the assets are RESPs or the American equivalents, into which both parties paid and which were intended for the post-secondary education of their children. Because these accounts were in Mr. Foley's name, he had control over how they could be expended, and this has led to

conflict in the past that I will detail. Both parties agree that one party should have control of these accounts and that they should be used for "B's" education and, if there is money left over, after she finishes her education, that it should be paid into RDSPs. But they disagree as to who should have that control, and I will have to decide whether it should be Mr. Foley or Ms. Foley.

[4] I must also decide the following issues relating to child and spousal support:

- a) While the relative incomes of the parties up to the end of 2023 are not contentious, incomes for 2024 and imputed incomes for 2025 and beyond very much are.
- b) "A's" status as a "child of the marriage" is in dispute. Mr. Foley argues she has had the ability to leave the care of her mother since 2022 when she completed her bachelor's degree. Ms. Foley disagrees and says her physical and mental condition and her continuing university studies mean that child support should continue to be payable.
- c) While it is agreed that Mr. Foley is liable to pay child support for "B", Ms. Foley argues this should be calculated based on the child support tables (s. 3(2)(a) support), while Mr. Foley asks for a lesser amount of child support under s. 3(2)(b) of the Child Support Guidelines. I must decide whether "table" support applies and, if not, how to calculate child support.
- d) Finally, if I am unable to address Ms. Foley's loss of employment as a result of the demise of fSquared through property division, there arises a question as to whether I should make an order for spousal support and, if so, I must determine quantum and duration.

[5] For the reasons I will set out, I come to the following conclusions:

- a) Mr. Foley did indeed sabotage fSquared and took its clients contrary to his fiduciary duty to the firm and contrary to the consent order in this proceeding. This was the disposal and conversion of family property for his own benefit that adversely affected Ms. Foley's interest in fSquared. It would be "significantly unfair" to only provide Ms. Foley a half interest in Mr. Foley's new firm. I do not accept that Ms. Foley's own firm is family property. In my judgment, the appropriate thing to do is:
 - i. value the family property as of the end of December 2023, which was the last time there was an independent valuation of it;
 - ii. require Mr. Foley to make a compensation payment equal to half of its value at that time, less Ms. Foley's draw on its equity since then;
 - iii. make Mr. Foley responsible for its remaining liabilities; and
 - iv. give Mr. Foley full ownership of its assets going forward, with certain exceptions I will enumerate.

- b) Ms. Foley did indeed contribute US\$103,000 in excluded property to the joint US account. However, there were other proven contributions that were family income or property. The excluded portion of the account is 11%. This means Ms. Foley had a balance, at the time of separation of US\$145,962.38 and Mr. Foley had a balance, at that time, of \$117,535.68. As a result of subsequent transactions, Mr. Foley retains an interest of US\$13,582.74 in the account, with the remainder belonging to Ms. Foley.
- c) While Mr. Foley's investment strategy turned out to be less advantageous than Ms. Foley's, I disagree with her that this is a basis to depart from equal division of the retirement assets.
- d) It makes sense for Ms. Foley to manage the education accounts, while providing information to Mr. Foley.

[6] Turning to the child and spousal support issues, these are my conclusions:

- a) "A" remained a child of the marriage longer than Mr. Foley argues, but she is now able to provide for herself. I find she was a child of the marriage until the end of August 2024.
- b) I see no reason to depart from ordinary "table support" for "B".
- c) Had Mr. Foley not undermined and then liquidated fSquared, this would not be a case for spousal support. However, because he did, she has to rebuild a business from scratch and so has a needs-based claim for support. In my view, she should receive spousal support at the high end of the Spousal Support Advisory Guidelines ("SSAG"), but it should be for a limited duration of three years.

II. background

- [7] Mr. Foley was born on December 24, 1970, and is thus now 54 years old. Ms. Foley was born on May 16, 1972, and is 52. The parties were originally from Ireland, which is where they met and began dating. They each emigrated to the United States of America in the early 1990s. They began living together on May 21, 1993 and married on September 5, 1998.
- [8] In the first years of their cohabitation and marriage, both parties had six figure incomes working in New York. Ms. Foley obtained an MBA in Communications and Finance at Fordham University.
- [9] As I have mentioned, "A" was born in 1999 and "B" in 2004. When their daughters were young, the Foleys prudently set up tax-sheltered education accounts, known as "529 accounts" in the United States. These continued as RESPs once they emigrated to Canada. Both parties contributed, but Mr. Foley was made the administrator of these accounts.
- [10] In 2007, Mr. Foley left the job market and became the primary caregiver for the children.

- [11] In 2010, the family moved to Canada, following a job opportunity Ms. Foley obtained at Bull Housser Tupper, a Vancouver law firm (now part of Norton Rose Fulbright). Ms. Foley was hired to be the firm's Director of Marketing and Client Development. Ms. Foley's employment was subsequently terminated, for reasons that are not relevant here, leading to a settlement from Bull Housser.
- [12] From 2012 up until a few months before trial, the parties operated a family business, fSquared Marketing ULC ("fSquared"). fSquared provided marketing, branding, and business development for law firms. Most of its clients were small or medium-sized law firms.
- [13] Ms. Foley was the CEO of fSquared. She was the "face" of the business, with primary contact with clients. She assisted law firms with business development, provided training and developed marketing plans. She was the primary representative of fSquared at trade shows.
- [14] Mr. Foley was the COO and was primarily responsible for its website services and IT work. He did the project management for setting up web services for firms. He also took on some of the back office functions, such as bookkeeping, HR and putting together invoices. They each managed about half the staff.
- [15] This was not only a formally equally-owned business, but an equal partnership in substance.
- [16] fSquared was originally structured as a partnership and then became an unlimited liability corporation or "ULC". In both cases, the parties each owned 50% of the equity and were responsible for 50% of the liabilities. The business became successful, generating six figure incomes for both parties.
- [17] The parties separated on December 23, 2019, close to Christmas and Mr. Foley's birthday. Initially, Mr. Foley moved into the office space of fSquared. Both parties continued to deposit the cash flow, all of which came from fSquared, whether as salary, dividends or benefits, into a joint Royal Bank of Canada account. Household expenses for both parties and for the children came out of this account. This situation continued until February 2022 when Mr. Foley established separate finances for himself.
- [18] During the course of the business, both before and after separation, the parties took equal amounts out as salary and dividends and so, until recently, their incomes were equal. There is no issue about their relative incomes up to tax year 2023, which were as follows:

Tax Year

Mr. Foley

Ms. Foley

2020

\$128,239

\$105,815.64

2021

\$190,797

\$190,796

2022

\$200,357

\$203,221.86

2023

\$208,651

\$210,948

[19] Between February 2022 and September 2024, the parties continued to work together in fSquared, while keeping their personal finances separate.

[20] Initially, the parties appear to have continued to be able to work together effectively despite the separation. This began to change once Mr. Foley repartnered and the parties had major disagreements about the financing of "A's" graduate education. "A" graduated with a Bachelor of Arts with a major in Anthropology in June 2022 and was accepted for a MA program at the University of York in England.

[21] Mr. Foley claims that he told his children, when they were young, that their undergraduate education would be paid for, but that they would have to finance their graduate education themselves. There is no contemporaneous documentation corroborating this claim, and Ms. Foley and "A" both deny it. They testified that they expected the education account in "A's" name, over which Mr. Foley had control, to be used for her education until it was used up, including therefore to pay for her expenses at the University of York.

[22] In August 2022, Mr. Foley met with his daughters for lunch, in part to resolve the dispute between Mr. Foley and "A" about financing her graduate education. "A" decided to surreptitiously record the conversation. She explained her reasons as including both her cognitive difficulties with auditory processing and her history of finding her father remembered conversations differently than she did. In the conversation, as recorded, Mr. Foley was at least open to the possibility of using the education accounts to offset tuition and expenses for "A". However, after he found out the conversation had been recorded, he refused to do so, stating in an affidavit filed with this court that this was triggered by finding out "A" had recorded him, complaining that "having a relationship with my daughters was being made conditional by them and their mother on me contributing to ["A's"] Master's program".

- [23] I will note, parenthetically at this point, that Mr. Foley's identification of the education accounts with "A" as beneficiary, as being "his", was what was being disputed, and I do not necessarily accept it.
- [24] Mr. Foley's refusal to help fund "A's" Master's degree undermined his relationship with his daughters, who have not spoken to him since. It also further exacerbated relations between the parties, and this animosity spilled over into the business relationship.
- [25] Mr. Foley testified that by 2023 there was a "complete breakdown" in the business relationship as a result of Ms. Foley's hostility to him, demonstrated by her refusal to meet with him physically to discuss the issues with the firm. He painted a picture of a downward spiral of low morale and lack of profitability.
- [26] Ms. Foley testified that the fundamental business was fine, and the problems -- which she painted as less extreme -- derived from what she characterized as Mr. Foley "checking out" by working less and becoming less available for clients and for the firm's IT employees and contractors. She concedes that she did not want to be in the same physical room as Mr. Foley but denies that this was a serious issue. The firm had long been largely virtual, especially after the Covid pandemic. It stopped having a physical office at all in 2022. The Foleys met frequently, either by themselves or with other employees, by Slack or Teams. Ms. Foley felt that the firm could become profitable if Mr. Foley either returned to his historic level of engagement or stopped drawing a salary.
- [27] Mr. Foley concedes that his billable hours were low in 2023, but says much of his work was non-billable, either administrative within the firm or in the form of projects that were not billed hourly. He did not like to keep track of his time and felt it was one of the privileges of being a principal that he did not have to. In his view, the firm was suffering from a fundamental problem, namely that it had two principals, with equal authority and responsibility, who were unable to work together productively.
- [28] In the calendar year 2023, fSquared lost \$59,548.01 compared with a profit of \$192,610.37 for 2022. It should be noted, though, that the Foleys each took a salary/dividend of approximately \$200,000 from the firm in the same year, so the firm was ultimately still a substantial income-generating family asset, notwithstanding the accounting loss.
- [29] But there was undeniably a fundamental governance problem. The firm was structured as a ULC with each of the Foleys having a 50% share ownership. There was no clear way to resolve disagreements between the principals that they were unable to resolve bilaterally. There had either never been a written shareholder agreement or one had been drafted, but was lost: either way, there was no governance structure for addressing disagreements, unless the principals could work them out. And by 2023 this was becoming increasingly hard for them to do.

- [30] A jointly retained business evaluator valued the firm at \$390,000 as of December 2023. This was a liquidation value, which did not include anything for goodwill or for the firm's ongoing enterprise value.
- [31] In early 2024, Mr. Foley unilaterally withdrew US\$93,124.73 from the couple's joint American accounts. This resulted in an application by Ms. Foley, resolved with a consent order, dated June 4, 2024, which provided that the funds would be returned and that no family property could be disposed of or otherwise dealt with "without agreement in writing" or until further court order, except for ordinary business and living expenses.
- [32] I find that it was an obvious and well-understood corollary of this consent order that there could be no sale or liquidation of fSquared or a transfer of substantially all of its assets without written agreement of both parties or a successful court application by the party seeking sale, liquidation or transfer of the assets. I have no doubt that both parties knew this.
- [33] Over the course of 2024, the firm's problems increased. Its revenues to mid-September were just over \$400,000 compared with \$735,000 in the same time frame the previous year. Its expenses were also lower (roughly \$620,000 compared with roughly \$750,000), but clearly something had to be done either to raise revenues or reduce expenditures for it to become profitable. Total equity was still \$237,463.06 as of September 2024, so the firm was not yet insolvent, but something had to change or it would eventually become insolvent. It seems that the parties understood that this was not sustainable in the long-term and expected that a 7-day trial of this proceeding, scheduled to begin September 16, 2024, would resolve the governance issue one way or the other, and were holding on until then.
- [34] Unfortunately, the trial was bumped for scheduling reasons.
- [35] This was problematic not just from a family law perspective, but also from a business perspective, because one of the issues the trial would have addressed is which of the parties would get control of the company. Mr. Foley testified that he did not believe the firm would be able to survive until this Spring, which was the earliest date the parties could get for a new trial.
- [36] Mr. Foley cannot be criticized for deciding that something needed to be done, because the financial situation was indeed not sustainable in the long term. However, what he proceeded to do is the appropriate subject of criticism and I will make those criticisms.
- [37] I should note that during the events that follow, Mr. Foley was unrepresented. He filed a Notice of Intention to Act in person on September 20, 2024 and counsel did not come back on the record until January 14, 2025.
- [38] On September 22, 2024 at 3:49 p.m., the Sunday afternoon after the cancelled trial was supposed to start, Mr. Foley wrote the following:

Lynn,

As I have expressed many times over the past year or so if the financial situation of the firm is not addressed and improved both on the expense and sales front it will become insolvent. As predicted, I believe we have essentially reached the point if we do not make some radical changes immediately.

Currently expenses run about \$72K per month. I propose we reduce that by approximately \$25K per month for the rest of the year. I have outlined below how I propose we initially do that. [...]

In addition, in order to assist with cashflow I am proposing there is no additional dividend paid out for 2024 and tabled until the company is profitable again.

The result of the above will be a net positive toward cashflow this year of \$116K.

[39] Discussion of cash on hand and payables and more billings were followed with the comment:

On the revenue side I have not seen any recent revenue projections, but I do know that the balance of maintenance to be billed in 2024 is only approximately \$12K.

[...]

[40] By way of explanation, "maintenance", i.e., website maintenance for the law firms that were clients of the firm, was a source of revenue.

[41] Mr. Foley included a table of proposed expenditure restrictions and stated that a decision was needed on them before making a decision on a significant new contract with Lipsitz Green (which would bring in revenue but would also necessitate various commitments).

[42] I note that this email did not assert that dissolution had to occur immediately. It also did not assert that Mr. Foley had full knowledge of the revenues of the firm. This was a reasonable email in itself. However, things did not remain reasonable.

[43] Ms. Foley was unable to review the email before the occurrence of a regular staff Slack meeting on the Monday morning (i.e., September 23, 2024). When the meeting ended, Mr. Foley asked to continue to speak with her. Their meeting went on for about an hour. Unbeknownst to Ms. Foley, Mr. Foley recorded the conversation. A transcript is in the record.

[44] In his examination in chief, Mr. Foley characterized the meeting as ending in an agreement to dissolve the company and as giving him the authority to "do the administrative work" to shut it down. Ms. Foley disputed this, saying that while Mr. Foley was proposing shutting down the firm as an option, there was also a discussion of reducing expenses and getting more revenue, and she only agreed to consider a proposal for dissolution if Mr. Foley put it in writing.

- [45] On a review of the transcript, it is abundantly clear that there was no agreement to dissolve the company and that Mr. Foley was not given authority to do take steps to do that. (As I will discuss, this becomes even clearer in the subsequent email correspondence between the parties.)
- [46] Mr. Foley and Ms. Foley discussed problems with the firm and exhibited a clear disagreement about whose fault that was. Mr. Foley expressed his opinion that the company was "done" and said he will present "options" for shutting it down. But Ms. Foley was clear that she thought a potential contract with Lipsitz Green should be accepted, raising revenue. She told Mr. Foley to "come back to me with a proposal as to what happens when folding the company and how that's gonna work". This is clearly not an agreement to dissolve, but rather a request for a written proposal that she agreed to review and consider seriously.
- [47] Mr. Foley, towards the end of the conversation, says "we have an agreement at this point", but he does not say what the agreement consists in, and Ms. Foley does not confirm that she understands there to be an agreement at all, let alone one to dissolve.
- [48] Further, the parties had entered into a consent order that included a provision that any disposition of family property -- very much including fSquared -- would have to be agreed to "in writing". Both parties therefore knew that there could not be a merely verbal agreement to dissolve fSquared.
- [49] During the conversation, Ms. Foley informed Mr. Foley that her mother was very sick and she was going to have to go to Ireland and also that the family dog had to be put down. All of these were family emergencies.
- [50] There is no possible way of interpreting the conversation as an agreement by Ms. Foley to liquidate fSquared or to authorize Mr. Foley to take steps to do so. I reject Mr. Foley's testimony that this occurred. The most charitable interpretation from Mr. Foley's perspective is that he came out of the conversation thinking Ms. Foley had agreed to shut it down. Even on this interpretation, this indicates he was not really listening to Ms. Foley and was, rather, interpreting her statements based on his own preference for what should happen.
- [51] But, in any event, even this charitable interpretation of Mr. Foley's state of mind could not possibly have survived the subsequent exchange of emails, which I will discuss now. After those emails, there can be no claim on Mr. Foley's part of "wilful blindness" to Ms. Foley's resistance to immediate dissolution: the only reasonable interpretation is that he knew she did not want to dissolve the firm immediately and he charged ahead regardless.
- [52] After the Slack meeting, Ms. Foley reviewed Mr. Foley's email from the previous afternoon for the first time. She then responded with her own proposal and summary of her understanding of the meeting:

Robert,

I would like to summarize my conversation with you on our Slack call that just ended.

1. You admitted that you have held off launching the "Solo & Small" project that the firm has been working on for over a year as you don't wish to designate resources to it although it could be a significant source of revenue.
- [53] By way of explanation, the "Solo and Small" project was about setting up pre-set websites for small firms in which the "look and feel" could be customized, but would otherwise be off-the-shelf. Ms. Leliukh confirmed that Mr. Foley had resisted work on this project, disappeared at crucial times and then criticized staff for making critical decisions on the project when he was unresponsive, but decisions had to be made.
- [54] Ms. Foley went on to say:
 2. You confirmed that you have not contacted any current client to ask for holiday card work.
 3. You admitted that you have held off signing the Lipsitz Green context which would bring in approx. \$200k to the company and give us breathing room to bring in additional work.
 4. You expressed an unwillingness to bring in new clients that could support the firm.

These are my agreements/proposals based upon our discussion:

- [55] She made specific proposals about outsourcing, reductions in payroll, and pursuing opportunities for revenues. She did not agree to reduce dividends. The counter-proposals clearly presupposed that fSquared would continue to operate.

- [56] The email ended as follows:

Please provide your agreement in writing that this is the path we will move forward with, and we can discuss timing of discussions re: layoffs, salary adjustments and contract terminations.

- [57] While the approach Ms. Foley was proposing was not consistent with what Mr. Foley had said in the meeting, it was just a modification of with what he had proposed in his email on Sunday afternoon, of making expenditure reductions to improve cash flow.
- [58] If there was any ambiguity in Mr. Foley's mind about whether Ms. Foley had agreed to dissolution at the meeting, it should have been resolved by this email, which made it abundantly clear that she had not.
- [59] Mr. Foley responded the next morning (September 24) at 10:30 a.m. He opened it with the following claim:

The conclusion of our meeting was that we agreed to close the company as we could not agree on the expense reduction plan and a way forward. Your account below of what occurred is not accurate and also leaves out this very important fact/decision.

- [60] As I have noted, this was not based in the reality of the conversation. It was thus, at best, Mr. Foley projecting what he wanted the conversation to have been. But, in any event, he now knew that Ms. Foley was not agreeing to "close the company" and was instead trying to negotiate an "expense reduction plan and a way forward".
- [61] In this email, Mr. Foley made the claim that the firm was "effectively insolvent", which, as he admitted on cross examination was an exaggeration. He proposed informing the staff at noon that day and proposed "a common communication plan to clients so they are aware of the situation and get that out in the next 24 hours." He offered to "take on the lion[']s share of the administrative work to wrap things up" while Ms. Foley was in Ireland with her mother.
- [62] Ms. Foley responded at 11: 34 a.m. In this email, she arguably acquiesced to the dissolution of the firm, but insisted on a plan first, indicating that she would not be able to focus on those plans in light of the situation with the family dog and her imminent departure to Ireland until "Friday" (i.e., September 27, 2024). She specifically insisted on not informing clients "without a proper communication plan in place including the plan for their hosting".
- [63] This 11:34 a.m. email has to be read together with an email sent 10 minutes later, which stated, as follows:

Robert,

Frankly with everything going on (my mother being seriously ill, dog being euthanized tomorrow, travelling to Ireland tomorrow), I think all decision should be held off for a week so I can properly engage in these decisions.

Lynn

- [64] In short, Ms. Foley was saying that she was open to a discussion about liquidating the firm and how to do so, but would not be able to engage until early October 2024. She was clearly not agreeing to take any steps in that direction until such a discussion took place.
- [65] I find that even though there were clearly problems with the firm, there was no urgency that could reasonably have required action that week. There was still hundreds of thousands of dollars of cash. I further find that Ms. Foley's request for a written proposal for dissolution and a week to consider it was completely reasonable and there was no urgency to act more quickly than that.
- [66] Despite this, Mr. Foley emailed at 12:19 p.m. setting out what was clearly a unilateral course of action. He started with the statement, "As you have not indicated otherwise below, I will move ahead with informing the staff today at 2 pm." This statement was false: Ms. Foley had stated that she wanted to hold off on making decisions until the next week and obviously informing employees that the firm was going out of business and they would be terminated would be an irreversible decision. She had therefore "indicated otherwise" as clearly as possible.

- [67] In that email, Mr. Foley went on to say he would "not be forwarding you 'plans' for your approval, but I will be moving ahead with stopping all out goings as soon as possible and collecting any outstanding payables as we cannot trade in an insolvent manner." As I have noted, the firm was not insolvent and this was within Mr. Foley's means of knowledge. Mr. Foley had no authority to move ahead without Ms. Foley approving plans, and he knew it.
- [68] Mr. Foley said he would tell clients that they would have to find new hosting within 30 days and that fSquared would refund any outstanding funds once they were migrated. This was also without authority. But, as I will discuss, what Mr. Foley actually did was even more prejudicial to Ms. Foley's interests even than what he wrote in this email.
- [69] Ms. Foley objected in no uncertain terms to this course of action in an email at 8:46 p.m., one that was never responded to. It makes it absolutely beyond dispute that Mr. Foley was acting unilaterally and without Ms. Foley's agreement, written or otherwise. The following are relevant excerpts from her email, written shortly before she departed to Ireland:

Let me be very clear. After we spoke, I looked at the numbers and came up with a counter proposal that would keep the company afloat. You are the one who is taking the decision to close the business not me. I believe that with my proposal the company would have a good chance of surviving.

[...]

If you push to move down this path, do not contact any clients until I have a chance to put together a communications plan.

- [70] While Ms. Foley could be interpreted to be acquiescing in a liquidation, she did so under protest and certainly did not provide "written agreement" to do so as was required by the consent order in this proceeding and by her status as 50% shareholder. She not only did not authorize him to lay off the staff without further consultation, which she was promising to engage in by the following week, but objected to any irreversible steps before the parties could consult further. And she explicitly forbade him from communicating with clients until they spoke.
- [71] Obviously, Ms. Foley did not authorize Mr. Foley to cut off her computer access to firm electronic files and emails while she was in Ireland. However, that is what he did on September 27, without any prior notice at all.
- [72] Mr. Foley testified that he did so for financial reasons. I find this to be untrue: there was certainly no urgency to doing this and no reason to do it without warning. Mr. Foley retained his access at the time of trial and other employees and contractors continued to have access. The incremental cost of providing Ms. Foley continued access could not have been significant. I find that his actual motivation must have been to keep Ms. Foley in the dark about what was going on and eliminate her ability to intervene or communicate her version of events to clients, employees and contractors.

- [73] As a result of Mr. Foley's actions, Ms. Foley was locked out of company bank accounts, the company RBC credit card, her company Microsoft account, including access to company email, the company Slack account and a Toggl project management work account that included project work for clients and for the firm. Ms. Foley was unable to complete work in her Toggl account or invoice for completed work on behalf of the firm: the loss from this alone must have been greater than the cost of giving her access (about which Mr. Foley provided no evidence).
- [74] The denial of computer access had collateral effects, including making it impossible for Ms. Foley to do remote banking to access corporate money owed to her for personal expenses, as she was entitled to do under the consent order. Ms. Foley tried emailing Mr. Foley's personal email and business email but received no response.
- [75] The reasonable inference is that disabling Ms. Foley's ability to participate in the firm was, from Mr. Foley's perspective, a feature and not a bug. He wanted to take action when Ms. Foley was on another continent and without access to the systems, and he wanted to make sure she could not exercise financial access, even if legally authorized to do so. I reject entirely his self-serving testimony that he was trying to save the firm money.
- [76] Even though Ms. Foley had explicitly affirmed her right to be party to any communication with fSquared's clients, on September 27, 2024, Mr. Foley sent the following letter, on fSquared marketing letterhead, to all law firms whose websites it hosted:

Dear [Client]:

I will get to the point as there is no easy way of saying this, but after 10 years, fSquared Marketing ULC is closing its doors and will be no more.

As your website is currently hosted with us, we have two options available to you to ensure the seamless continuation of your website and have no interruption of service.

Option 1:

You can find another agency to take over the hosting and maintenance of your website and have it migrated off our servers no later than Thursday Oct 31st. With this option, we will refund you any unused balance of your annual fee. You would probably need to have hired another agency and engaged with us by Oct 15th for this to happen. Unfortunately, these dates are firm.

Option 2:

You can request your website and all associated design and marketing related files for your account are transferred to FLM Design.

If you choose this option, you can also decide to a) have you[r] account balance for hosting and maintenance transferred to FLM Design or b) you can ask for a refund from fSquared Marketing. FLM Design will invoice you separately for the next year. If you choose "a)" FLM Design will invoice you on your next renewal date.

Please advise us, in writing of your decision so that continuity of your website is assured.

- [77] "FLM Design" was the name under which Mr. Foley decided to do business (originally as a sole proprietorship and then as a ULC with the formal name of "Foley Legal Marketing and Design Agency ULC", incorporated on October 2).
- [78] This letter was sent without any notice to Ms. Foley, let alone her agreement. At no point did Mr. Foley tell Ms. Foley that he had a new firm or that he would be providing clients with the option of migrating to it with their only alternative being to find a new entity to host them within less than three weeks.
- [79] The business reality is that it is difficult for clients in this situation to find such alternatives. I find further that if a marketing firm is providing web hosting services, then, in addition to the profitability of those services themselves, this also provides them with an ability to upsell the client even on services that the client could, in principle, obtain from a competitor. So Mr. Foley's actions obviously created a very far-from-fair competition between Ms. Foley and Mr. Foley in terms of where the clients would go once it became clear that they were going their separate ways.
- [80] Mr. Foley signed the letter on behalf of fSquared Marketing ULC, identifying himself as its COO. He included a form that allowed the option of finding a new agency, with the alternative being setting up a new contract with "FLM Design". The document provided the option of authorizing transferring over pre-payments from fSquared to FLM.
- [81] There was no mention of the possibility of using a firm run by Ms. Foley, despite Mr. Foley's suggestion in his direct examination that this option was provided to clients. I reject his testimony on this point.
- [82] Not surprisingly, almost all fSquared's clients preferred to transfer their web hosting to Mr. Foley's new firm, rather than scramble to find new web hosting services. He used his access to fSquared's systems to transfer pre-payments to his new firm. Mr. Foley also pursued contacts of fSquared, including Lipsitz Green.
- [83] In his testimony, Mr. Foley tried to justify his conduct by claiming there was an emergency for fSquared that had to be addressed. I reject this. While things were unsustainable on their current trajectory over a matter of months, there was no such emergency. fSquared's losses were less than the income the parties took from it and it certainly had enough liquidity for Mr. Foley to wait a week, during which time he could have formulated and made explicit his plans. If Ms. Foley unreasonably refused to agree to these proposals, it was open to him to seek a legal remedy either in corporate law or as a chambers application in this proceeding. To be sure, she probably would not have agreed to such an inequitable approach to providing the existing clients with options for where they might go, but it is only from Mr. Foley's perspective that this could be considered an "emergency". There is no firm-oriented explanation for locking Ms. Foley out of fSquared's systems while she was in Ireland, poaching its clients, and transferring its funds to his new firm, although there is of course

an explanation from the perspective of Mr. Foley's self-interest.

- [84] Ms. Foley returned to Vancouver from Ireland on October 25, 2024. As a result, she was able to access fSquared's accounts by going to its physical banking location. She took \$34,692.31 for personal expenses, which she characterized as a dividend. In a remarkable lack of self-awareness, Mr. Foley has characterized this as "misappropriation". She has started her own firm, Right Path Solutions ULC. However, she has not been able to attract more than a few clients at this point.

Credibility

- [85] Many of the issues in this case can be determined without reference to the relative credibility of the witnesses. "A's" status as a "child of the marriage" turns on her own evidence and many of the property division issues are independent of any issue of credibility. However, the causes and consequences of the end of fSquared marketing do tend to depend on credibility, as does whether Mr. Foley communicated he was unwilling to help pay for "A's" Master's degree prior to her embarking on it.
- [86] My conclusion is that on any disputed point of fact, I can give no weight to Mr. Foley's uncorroborated testimony.
- [87] "Credibility" is about whether a witness is telling the truth, as opposed to being deliberately misleading or vague. "Reliability" is about whether the truth, as the witness sees it and relates it, is accurate: it turns on the strength of the witness's perception, memory and ability to relate what is in their own mind.
- [88] Assessing credibility and reliability involves examining the witness's evidence for the ability and opportunity to observe events, the firmness of memory, whether the witness appears able to resist the interests at play to modify his or her recollection, a comparison of the evidence against independent evidence, the plausibility of the content of the witness's testimony, whether the witness changes evidence during direct examination and cross-examination, any motive to lie, and demeanour: *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187. Ultimately, the assessment of a witness's evidence turns on whether it is "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time": *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at p. 356.
- [89] On at least two occasions, Mr. Foley has falsified documents in order to obtain benefits for himself personally. On February 15, 2022, Mr. Foley wrote a letter on fSquared Marketing letterhead to Immigration, Refugees and Citizenship Canada requesting that a permanent resident card be issued to his romantic partner, Sara Aktary. In the letter, he claimed that Ms. Aktary would be a sale representative for fSquared at a conference in Las Vegas. This was knowingly false, as Mr. Foley acknowledged in his direct examination. Ms. Aktary did not work for fSquared.

- [90] Ms. Aucoin argued that I should credit Mr. Foley for acknowledging that he acted wrongfully in sending this letter. But my observation is that Mr. Foley was not really able to understand the seriousness of what he had done, referring to it just as "my bad", minimizing the seriousness of immigration fraud. His reaction in fact confirmed that he has no particular problem lying to authority if he thinks it is convenient.
- [91] In any event, when it came to other lapses of honesty, Mr. Foley did not acknowledge these in direct examination. Rather, it was on being confronted with documentary evidence that he was not telling the truth that he ultimately conceded this to be the case, typically in a way that suggested he did not consider the deception to be a big deal.
- [92] For example, another instance of fabricating a document, more closely connected with this dispute, only came out on cross examination. fSquared's landlord is Troll S Management. When fSquared decided to shut down its physical premises in the fall of 2022, Mr. Foley arranged to have the damage deposit paid as an e-transfer to him. When Ms. Foley asked him about this during their walk through, he claimed that the deposit had been used to offset outstanding rent due. Mr. Foley justified this falsehood in his own mind because Ms. Foley had used a damage deposit on the rental housing used by the family when she moved. When Ms. Foley asked for documentation, Mr. Foley created an email purporting to be from the landlord, but in fact created by him, and forwarded it to Ms. Foley.
- [93] Once this deception was exposed in cross examination, Mr. Foley referred to it as "immature". This characterization trivializes the importance of accounting for corporate and family assets and the serious wrongdoing of forging a document. Mr. Foley is an experienced business person in his fifties, not an adolescent forging a doctor's note to avoid an algebra test. His self-characterization only confirms my concerns about his credibility.
- [94] There are numerous examples of Mr. Foley's testimony in court demonstrating tendency to modify his recollection of events in favour of his interests. For example, he testified that in the September 2024 meeting, Ms. Foley agreed to liquidate fSquared. This was false, as is revealed both by the transcript of the meeting (surreptitiously recorded by Mr. Foley himself) and by Ms. Foley's subsequent emails. Another example is the implausible claim that he cut off Ms. Foley's system access for financial reasons. Another implausible claim, in my view, was that Mr. Foley discussed financing graduate school with his children when they were not yet in high school.
- [95] As a result, I am unable to give much weight to Mr. Foley's uncorroborated evidence on contested matters.
- [96] Ms. Foley, like most witnesses with an interest, spoke from a perspective, but I find her to be a credible, and, for the most part, reliable witness. I find all the other witnesses - Rita Foley (Mr. Foley's mother), "A" and Dariia Leliukh (a former employee of fSquared) to be credible and largely reliable.

A. Did Mr. Foley Tell His Family That the Education Accounts Would Not Be Used For Graduate Degrees?

[97] As I have already mentioned, as a result of my lack of finding credibility of Mr. Foley, I find that did he not tell his family that the education accounts would not be used for graduate degrees. That that did not happen.

B. Did Mr. Foley Deliberately "Disengage" From fSquared?

[98] Mr. Foley and Ms. Foley's testimony is inconsistent on the question of whether Mr. Foley disengaged from fSquared in its last two years of operation. Ms. Foley said there was a dramatic change from how he had acted during the relationship and the first years afterwards. Mr. Foley denied this.

[99] I prefer Ms. Foley's testimony in this regard. Partly this is because Mr. Foley showed himself not to be a trustworthy witness in general. But it is also corroborated by Ms. Leliukh.

[100] Ms. Leliukh testified that Mr. Foley failed to take necessary action to provide for "redirects" from links that became dead as a result the launch of fSquared's new website in Spring 2023. This is crucial from the perspective of maintaining web traffic, because if there is a delay in putting redirects in place, it will no longer be possible for web search engines like Google to find the site. This leads to loss of traffic that was previously built up. This is obviously very important to a marketing firm and one that a marketing firm would be aware of, and I find Mr. Foley certainly would have been aware of this importance.

[101] Ms. Leliukh also testified that Mr. Foley was not available to respond to client concerns and that he undermined the "Solo and Small" project. He dragged his heels on accepting the Lipsitz Green contract on behalf of fSquared, but immediately proposed that they use his new firm once he dissolved fSquared.

[102] I find a remarkable contrast between Mr. Foley's lack of activity during 2023 and the first nine months of 2024, compared to his energetic approach to building up his new firm in the fall of 2024.

[103] Mr. Foley's billings were extremely low in 2023 and 2024. I accept that this did not necessarily reflect the amount of work he did, since there were a number of projects that were completed that he would have been responsible for. However, I find that Mr. Foley "disengaged" in the sense of failing to put in the effort he had historically, that Ms. Foley continued to or that would be normally expected of a co-owner of a small business. Moreover, I find that this was not because Mr. Foley has a lazy disposition. Rather, it was strategic. Mr. Foley proved himself to be quite active once he saw an opportunity to take the assets of fSquared for himself.

C. Other Disputed Points

- [104] It is Mr. Foley's onus under s. 18(2) of the Guidelines to show that salaries, wages or management fees, or other payments or benefits, to or on behalf of persons not at arms-length with his corporation are "reasonable" or they will be included in pre-tax income of the corporation. Mr. Foley included a number of charges from his fiancée, Ms. Aktary.
- [105] The description is vague, the amount paid was well in excess of what would be reasonable for a bookkeeper and the round numbers do not make sense if Ms. Aktary was billing on an hourly basis for genuine work. Before Mr. Foley started the new firm, he paid rent and Ms. Aktary did not. Afterwards, she started to pay rent for their common living space. This suggests to me an income-splitting scheme, rather than a genuine arms-length consultant relationship with FLM. I will attribute all of these payments to FLM's pre-tax income.

III. property division

- [106] Property division in British Columbia is governed by Part 5 of the Family Law Act, S.B.C. 2011, c. 25. Amendments made in May 2023 do not apply here as a result of the transitional provisions in the amending legislation.
- [107] Section 81 of the FLA sets out a presumption of equal entitlement to property and equal responsibility for family debt. That, however, has two kinds of exceptions. The first is that family property that is defined by s. 85 of the FLA to be "excluded property" is presumed not to be divided, but will go to the spouse whose excluded property it is. The second is that there can be a departure from unequal property of the family property that is not excluded property if equal division would be "significantly unfair".
- [108] The primary property division issue that arises in this case is what to do as a result of Mr. Foley's unilateral dissolution of fSquared Marketing and what I can only describe as his poaching of its clients for his new firm.
- [109] There are also two property exclusion issues:
- a) A US\$103,000 settlement Ms. Foley received in 2010 fits within the category of "a settlement or an award of damages to a spouse as compensation for injury or loss" in s. 85(1)(c) of the FLA. Because the money was paid into a US Chase Checking Account ending in 1540 and because other monies was paid into that same account, there is a dispute as to how much of the balance of that Account is in fact excluded. I will address that.
 - b) Ms. Foley also received a settlement of CDN\$27,579.35 from Bull Housser as a result of the termination of her employment there. This was compensation for "lost income of a spouse" and therefore is not excluded under s. 85(1)(c)(ii). I think this is quite clear from the letter enclosing the settlement amounts, so I will not analyze this issue at length.

[110] Finally, Ms. Foley argues for unequal division of retirement accounts on the grounds of what she characterizes as improvident investment by Mr. Foley and each party argues for control of the education accounts.

A. How Should I Address the End of fSquared Marketing?

[111] I accept Ms. Aucoin's argument that the assets of fSquared Marketing can be traced through to FLM. He took the goodwill and its financial assets. On the other hand, I do not see any basis to trace the assets of fSquared into Ms. Foley's new firm, since there is no evidence she took anything but her own skills and reputation. Since fSquared itself has negative value at this point, equal division based on evaluation at the time of trial (the presumptive measure) would be to award half the current value of FLM to Ms. Foley and have both parties responsible for fSquared Marketing's liabilities, but I consider that to be significantly unfair in the circumstances.

[112] That tracing is possible is shown by *Stronks v Stronks*, 2022 BCSC 1966, which had similar facts to those in this case:

[65] Mr. Stronks acted improperly when he transferred significant assets, receivables and the client base from the Old Company to the New Company. The Old Company was a successful venture owned by two equal shareholders, Ms. Warren [formerly Ms. Stronks] and Mr. Stronks. Each was a director, and the company could only act according to their joint resolutions. A single director could not unilaterally dispose of or transfer assets, and none of the transfers of wealth from the Old Company were jointly authorized.

[66] Among other remedies, Ms. Warren seeks a remedy of tracing pursuant to FLA, s. 84(1)(b), which defines family property as inclusive of property acquired by one spouse after separation that is derived from family property existing on the date of separation. There is no doubt that the Old Company was family property, nor is there any doubt that the New Company is largely derived from the Old Company's assets, receivables and client base, which were transferred to it by Mr. Stronks.

[113] While dividing the value of FLM would be "equal division", I could also value fSquared Marketing at an earlier time than trial, and require a compensation payment based on this value. I agree with Ms. Aucoin that this would be an unequal division of property because the value fSquared Marketing had in the past no longer exists. This approach would thus require me first to find that an equal division of what can now be traced from fSquared Marketing is "significantly unfair".

[114] The relevant factors that I would consider in making in this determination are set out at s. 95(2)(f) and s.95(2)(g) of the FLA:

- (f) whether 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;
- (g) the fact that a spouse, other than a spouse acting in good faith,

- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

[115] I find that both these factors apply in the circumstances. Mr. Foley caused a significant decrease in the value of fSquared beyond market trends in its final year of operation and, after September 2024, he disposed of, transferred and converted fSquared's assets, including its relationship with its clients, in a way that adversely affected Ms. Foley's interest in fSquared. It would thus be significantly unfair to value what is left of those assets as of February 2025, in the form of what is traceable into FLM. This unfairness can be addressed by valuing fSquared as it was at December 2023, which Mr. Terpkosh, the joint expert, assessed them at \$390,000, before Mr. Foley caused a significant decrease beyond market trends and before he disposed of, transferred and converted its assets.

[116] The value of fSquared diminished between that time and September 2024, but it would be significantly unfair to have Ms. Foley take the burden of that, since it was the consequence of Mr. Foley checking out and failing to pursue revenue opportunities that were presented to him, despite Ms. Foley's demands that he do so. The loss of value during these nine months was not because of market trends, but was caused by one of the spouses, namely Mr. Foley.

[117] It would be even more unfair to burden Ms. Foley with any additional losses of value after September. Those are clearly the consequences of an attempt by Mr. Foley to deprive Ms. Foley of the value of family property, a disposition or transfer that Mr. Foley clearly intended to defeat her interest and which, even though tracing is possible, has adversely affected it.

[118] In effect, a compensation order would require Mr. Foley to acquire, for value, what he took. This is not total justice, in that there is also the loss of income-earning capacity and there is the question of addressing the fact that Mr. Foley acted contrary to a consent order, but there are separate remedies for those issues (spousal support and a fine). For purposes of property division, a compensation order based on the December 2023 liquidation value would address the significant unfairness of equal division of what remains as of the date of trial.

[119] I agree with Mr. Foley that Ms. Foley's draw on the capital of fSquared in November and December of 2024 of \$34,692.31 needs to be accounted for. It should be deducted from the value of the firm or, equivalently, half of it should be deducted from the compensation payment.

[120] So my calculation then, based on half of \$390,000, minus half of \$34,692.31, is a compensation payment of \$177,653.85 and I will order that that be made. And I will order that that is an equitable charge against Mr. Foley's new firm, but once that is discharged, he has full beneficial ownership of that new firm, including the assets it obtained from fSquared. He also, with specific exceptions, would obtain ownership of the remaining assets of fSquared and is accountable for its liabilities.

B. IP of fSquared

[121] In light of the fact that I am requiring Mr. Foley to, in effect, purchase fSquared, most of the IP of fSquared other than what can reasonably be shared should go to Mr. Foley, including the domain names. WordPress themes can be shared and each party can copy, maintain, and modify separate versions. Each party should provide access to all electronic files as requested and I will make orders with respect to that, and if there are further electronic files that need to be requested, they can be requested up to 30 days from now.

[122] The exception, I think, is the various assets relating to the Solo and Small project. As I have found, Mr. Foley not only did not really participate in that project effectively, but actually actively undermined it. It was something that Ms. Foley was leading. In my view, all the domain names and other associated intellectual property, relating to Solo and Small should go to Ms. Foley. It is significantly unfair not to do that.

C. Registered Accounts

[123] Mr. Foley actively traded his registered accounts, while Ms. Foley took the more conservative and generally accepted investment strategy of a diversified portfolio reflecting the market. Mr. Foley's active approach underperformed the market. Ms. Foley's strategy in fact worked better.

[124] However, to depart from unequal division of the registered account there has to be "significant unfairness". As a general principle, failing to meet the market is not sufficient. I am not persuaded that Mr. Foley acted lacked good faith in making his investments. He was trying to maximize return and it is not a basis for unequal division that a person pursues an unsuccessful investment strategy. I will order equal division of the registered accounts.

D. Education Accounts

[125] While the parties lived in the United States, they set up two "529 accounts", which are the equivalent of RESPs in Canada. The first, with an account No. ending in 5103-01 was in the name of "A", while the second, with an account No. ending in 5103-02 was in the name of "B". However, it is common ground that both accounts can be used for the education of either child. In Canada, they similarly created RESPs in each child's name.

- [126] While Ms. Foley has a number of bases on which she is asking for unequal division, this is the only instance in which Mr. Foley is seeking the default remedy of equal division of the family property. Both parties agree that these should be held to pay for "B's" education and thus offset what would otherwise be s. 7 expenses. It follows that these funds should not really count towards equal division. Both parties also agree that one parent should have custody of the funds in order to reduce unnecessary strain and delay. The question then is which parent should administer these accounts.
- [127] I think Mr. Foley has shown himself not to be the best person to administer the accounts. Although both parties contributed to these accounts, Mr. Foley used the leverage he had as the person named in them in a way that has been unfortunate for everyone, including himself. While he may not have made an explicit commitment, he led both Ms. Foley and "A" to believe that "A's" tuition for her Master's program would be paid out of the education accounts in her name. He then decided he would not do this, giving as his reason the fact that "A" and "B" recorded a conversation with him. He did this without any consultation with Ms. Foley, despite the fact that she had contributed to the RESPs and they were family property.
- [128] In any event, Ms. Foley is the obvious person to administer the accounts since "B" lives with her and she is directly involved in "B's" schooling. This will reduce the time and thereby the expense involved. Mr. Foley argues that by controlling the education accounts, he gets to see what expenses are being made. I disagree that this is a legitimate reason to leave the education accounts under his control. Indeed, his use of this leverage has caused harm to the family as a whole in the past. Every legitimate interest of Mr. Foley's in this regard can be met by an order requiring Ms. Foley to provide him with an account of expenditures from the education accounts. If an inappropriate expenditure is made, Mr. Foley can argue that his s. 7 payments should be reduced accordingly.

E. What Funds are Excluded?

- [129] As I have mentioned, a US\$103,000 settlement Ms. Foley received in 2010 fits within the category of "a settlement or an award of damages to a spouse as compensation for injury or loss" in s. 85(1)(c) of the FLA.
- [130] The US\$103,000 was paid into US Chase Checking Account ending in 1540. However, there were other contributions that clearly were family property. These include a US\$120,000 loan from Mr. Foley's parents, \$107,474.30 for the sale of a family home owned on Washington Street, and \$627,143.27, net of capital gain taxes, for a house at 4 Water Street.
- [131] At separation, the balance in the account was \$263,498.06. This was obviously much less than the approximately million dollars worth of contributions we know about. Clearly the money in the account was used for family expenses. I do not think I need to get into them or try to trace that into particular vehicles. The point is the money just was not there at the time of separation.

- [132] There are various ways of tracing funds paid into a common account, but the default one for the purposes of determining the amount of excluded property under the FLA is the pro rata ex post facto approach: *Mills v. O'Connor*, 2025 BCCA 34 at paras. 77-91. There is a more complicated approach called lowest intermediate balance pro rata approach. In this case, we do not have bank records going back far enough to use this method and, in any event, the Court of Appeal stated that it was normally too complex for family law purposes.
- [133] Under the pro rata ex post facto approach, the court first calculates the proportion of excluded contributions (i.e., excluded contributions/(excluded contributions + family property contributions). In this case, that is 11%. This proportion is then multiplied by the balance at the relevant time (in this case, separation) to quantify the excluded property. 11% of \$263,498.06 is \$28,426.69, so that amount belongs to Ms. Foley and is excluded from division. The remaining \$235,071.37 is family property, to which each party is presumptively entitled to a half share, after accounting for withdrawals since separation.
- [134] It is agreed that the net withdrawal by Mr. Foley since separation is US\$103,952.94 and by Ms. Foley is US\$48,687.21 (at least up to the beginning of trial). That means that US\$13,582.74 of the account today belongs to Mr. Foley and the rest to Ms. Foley.

IV. Child Support

- [135] Both parties agree that "B" remains a child of the marriage and therefore that child support for her is owing. However, they disagree about their incomes, whether child support for "B" should be calculated based on the "tables" or some other means, whether "B" should apply for disability benefits and whether "A" is (or has been) a child of the marriage at all. I will address all these issues in turn and then calculate what I think child support should have been in the past and should be until the next review, which is going to be necessary because of the uncertainty of the parties' current incomes.

A. How to Calculate Child Support for "B"

- [136] Section 3(2) of the Child Support Guidelines state as follows:

Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

- [137] Under s. 3(2) of the Guidelines, the default rule for the calculation of child support for children above the age of majority is "table support". However, it is open to the payor spouse or the recipient for that matter to demonstrate that table support would be "inappropriate". The onus is on the party claiming table support is inappropriate.
- [138] "B" has a severe case of Ehlers Danlos Syndrome ("EDS"). EDS is a genetic disorder of connective tissue caused by abnormalities in collagen. This results in dislocated joints and extremely soft skin, as well as abnormalities in internal organs. "B" either walks with a cane or uses a wheelchair. She is in near-constant pain, which is controlled by extensive medication. She has a lesion on her brain.
- [139] "B" also suffers from postural orthostatic tachycardia syndrome (POTS), which means an abnormally increased heart rate when shifting posture (for example, from sitting to standing). She will pass out dozens of times a day.
- [140] In addition, "B" has severe gastroparesis, which means she has trouble eliminating food. As a result, she cannot eat an ordinary diet. Her gastroparesis results in severe nausea and gastrointestinal pain and she has suffered severe weight loss. She underwent surgery for this condition, which stabilized her weight, but the long-term prognosis of this surgery is still unclear.
- [141] "B" also has a bleeding disorder and iron deficiency. She has ADHD and suffers from mental health problems, including anxiety and depression. I was informed she has nine medical practitioners and specialists.
- [142] Notwithstanding these challenges, "B" has been able to attend university. She lives in residence three or four nights per week but must spend the rest of the time at her mother's home. "B" has a meal plan at the university but is unable to use it because of her dietary needs.
- [143] Mr. Foley argues that "given [B]'s age, her section 7 funded university residence, meal plan, medical expenses and (likely and warranted) receipt of disability benefits, a child support analysis pursuant to s. 3(2)(b) is appropriate."
- [144] However, the evidence before me is that "B's" residence and meal plan do not materially affect the expenses for her at home since she is unable to use the meal plan, and must spend half her week at home. I do not understand why "B's" medical expenses would make an analysis under s. 3(2)(b) inappropriate.
- [145] This leaves the question of whether "B" should try to obtain PWD benefits. I agree with Mr. Foley that this would be desirable, especially because it would give her a long-term source of income independent of her parents, especially if it turns out she is unable to work. Ms. Foley suggested that "B" must pay rent in order to qualify. I am not sure I accept that, but even if it is the case, "B" does pay for residence and there is no reason Ms. Foley could not charge her rent if she lives full-time there. I agree with Mr. Foley that Ms. Foley should assist "B" in making this application.

- [146] I do not see a basis for giving Mr. Foley a "credit" for PWD that was not obtained in the past. In the first place, I do not find fault in "B" in not applying for PWD earlier, nor in Ms. Foley for not pushing her to do so. But even if I did, child support is for actual need and is the right of the child and should not be reduced based on benefits that were not in fact received.
- [147] In my view, the possibility of PWD is not reason for calculating child support under s. 3(2) (a) of the Guidelines in the past or until such time as "B's" PWD application is actually approved. If it is approved, then that would be a reason to adjust Mr. Foley's child support obligation downwards. However, it would not be appropriate to reduce it dollar for dollar, since the point of the PWD is to make more resources available to "B". Rather, under s. 3(2) (b), reasonable expenses are to be split proportional to income. That would be accomplished in my view by reducing the child support obligation based on the table amount by an amount equal to Ms. Foley's share of the parental income multiplied by the amount of PWD.
- [148] I will provide for orders requiring Ms. Foley to assist "B" in making a PWD application and keeping Mr. Foley up to date on "B's" application until it is approved or rejected for a valid reason. Once it is approved, I will provide for a review based on this formula.

B. Is "A" a "child of the marriage"?

- [149] Child support is only payable for "children of the marriage", as defined in the Divorce Act. While Mr. Foley concedes that "B" is a child of the marriage, he argues that "A" is not.
- [150] The relevant legal test is found at paragraph (b) of the definition of "child of the marriage" in s. 2 of the Divorce Act. The issue is whether the child over the age of majority is "unable, by reason of illness, disability or other cause, to withdraw from [the charge of one or both of the spouses] or to obtain the necessities of life."
- [151] An important point to note in this definition is that the focus is less on whether a child is "ill" or "disabled" and more on whether these or any other cause makes them "unable to withdraw" from a parent's charge. It is neither necessary nor sufficient that the child's condition constitute a disability for some other purpose. Not necessary because if a child is unable, as a result of a condition, to withdraw from a parent's care, it does not matter whether the cause is characterized as an illness or disability. Not sufficient because a child with what is indisputably a disability or illness may be able to withdraw from the parent's charge.
- [152] Once a child is over the age of majority, the onus is on the parent claiming child support -- in this case, Ms. Foley -- to satisfy the court that the child is unable to withdraw from their care: *Forrest v. Aerin*, 2022 BCCA 184 at para. 100. The standard is "unable": it is not enough to establish an obligation for support that a child would prefer not to leave home, even if this is for valid reasons and it is in the best interests of the child to remain at home.

- [153] The primary evidence about "A's" ability to withdraw from her mother's care came from "A" herself. Ms. Aucoin conceded that "A" was a credible witness. She was very precise. She neither overstated nor understated her challenges or her strengths.
- [154] Like "B", "A" has EDS albeit not to the same degree. It affects "A's" joints and circulatory system. As a result of her EDS, "A" suffered from a swelling of her kidney (hydronephrosis) to three times its normal size, leading to pain and other problems. She has recently had surgery to address this hydronephrosis, but the long-term consequences of the surgery are unknown. She is expected to have surgery on her other kidney later this Spring.
- [155] "A" testified to mental health problems as well. She suffers from depression, anxiety and what she characterizes as post-traumatic syndrome. She has been diagnosed with ADHD and Autism Spectrum Disorder (ASD). These conditions mean that she is at a disadvantage in tasks that require high levels of executive functioning and control of her attention. She has trouble managing appointments, finds driving too stressful to get a licence and, at least in the past, had difficulty managing money. She suffers from meltdowns, which are deeply distressing and lead to temporary dissociation.
- [156] "A" is also highly intelligent. Her ASD did not lead to intellectual or language delay. She has had substantial academic success, in high school and undergraduate studies, although open-ended long-term projects like finishing a dissertation are a struggle for her. She has felt empowered by getting scientific insight into her own mental health and neuropsychology. She understands at a scientific level her own cognitive limitations and advantages very well. I note that there are also advantages to the ways in which she is different from what is sometimes called neurotypical cognition.
- [157] "A" first enrolled at UVic in September 2017, two years before the date of separation. She returned to Ms. Foley's home with the advent of the COVID pandemic in March 2020. She finished her Bachelor of Arts, working from home, in June 2022. There is very little controversy that she was a child of the marriage up until that point at least.
- [158] Between June and the end of July 2022, "A" went to Ireland on a work-study program in a full-time archeological field school. She returned to Canada and her mother's home on July 29, 2022. In the meantime, she was accepted into a Master's program at the University of York in England. She resided in York from mid-September 2022, where she lived in an off-campus studio apartment provided by her university. She returned home in August 2023 as a result of a secondary bronchitis infection after getting Covid. Since then, she has been working on her coursework and her dissertation.
- [159] "A" did not claim that she cannot work and I find that she could be very successful in the job market. To be sure, she has a special need for structure that some jobs would provide and others would not. Her physical or mental health problems might well require her to take sick days more often than other employees, especially employees her age. She requires accommodation to be successful at work. At the time of trial, she was clearly discouraged by a lack of progress towards fulfilling her Master's degree and "struggled to get out of bed".

I accept that this struggle can be attributed to mental health difficulties that "neurotypical" individuals would not face.

- [160] But "A" not only has considerable intellectual gifts, but also enjoys activities that many of her "neurotypical" peers would find off-putting and difficult, which might be valuable to an employer or on the market. She has never been assessed as being incapable of working and has had various jobs, both for fSquared and in the academic world. She has decided to prioritize academic work, but this may not be the best fit for her once a structured set of classes and assignments is replaced by a need to finish a dissertation.
- [161] Mr. Foley argues that "A" has not been a "child of the marriage" since she graduated from UVic. Ms. Foley argues that she is still unable to leave her care as a result of a disability. I do not agree with either polar position.
- [162] On the one hand, "A" clearly has illnesses and disabilities that make independence more difficult. She had a reasonable expectation that her parents would finance a Master's degree and that pursuing graduate education made sense for her. As a result of this combination of reasonable educational priorities and her limitations, she was not able to leave the charge of her parents.
- [163] But, in my view, she is not presently incapable of independence. "A" has a sophisticated understanding of her own cognition and without understating the difficulties it presents, I think she is fundamentally proud and accepting of who she is. Highly intelligent people with ADHD often find structured intellectual work empowering and then struggle with finishing dissertations. In my judgment, that is the situation "A" is in, and continued economic dependence will not improve that situation. Lack of the kind of structure that attending at classes or at work is part of the problem, both for depression and for pulling out of a lack of direction. It would be good for her to find something more structured and lucrative. That might mean a delay in finishing her MA, but a delay, or even not finishing, would be better than continuing to have a lack of structure. In any event, it is not reasonable to expect Mr. Foley to continue to pay for child support indefinitely. "A" can work, and could be very successful with accommodation and support.
- [164] I find that "A" was a child of the marriage until August 31, 2024. When she was living at home, child support should be determined on the basis of the tables. When she was living abroad, it should be determined on the basis of a 50/50 split in reasonable expenses, including tuition.
- [165] I am not finding that she is no longer disabled. Disability means a lot of things. I find that her physical and mental health issues are real ones and that her greater scientific understanding of her own cognition, while beneficial, does not mean that those are not problems. I do not want to understate her challenges in finishing her degree or suggest that those were her own fault. But her disability no longer means she is unable to withdraw from the care of her parents or obtain the necessities of life.

C. Income Determinations for 2024 and 2025

[166] Pursuant to s. 16 of the Guidelines, a spouse's annual income for the purposes of child support 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.

[167] Both parties are now sole shareholders of their own companies, and s. 18 of the Guidelines applies. Historically, corporate income did not need to be considered because both parties had equal access to corporate monies and determined their annual pay. However, this changed in Fall 2024 for Mr. Foley and will be different for Ms. Foley going forward.

[168] While it is possible in some cases for income for the purposes of child support to differ from what it is for spousal support, there is no reason for that in this case and so I will address income determination the same.

[169] Mr. and Ms. Foley's s. 16 income for 2024 is relatively straightforward. At this point, it appears to be approximately \$144,000. I am not including Ms. Foley's "dividends" at the end of 2024, since they have been treated under property division.

[170] Section 18(1) states as follows:

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

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

[171] Right Path's income was not relevant to Ms. Foley's 2024 income for spousal support purposes, so s. 18 does not matter at this point. It may, however, be important in the future.

[172] Section 18 does matter for Mr. Foley's 2024, but its application is not straightforward. On paper, FLM made \$69,436.44 in 2024. To determine corporate income, I would have to add Ms. Aktary's billings for 2024, which total \$10,000. That comes to \$79,436.44. I do not think it would "fairly reflect the amount of money available for the payment of child support" to exclude FLM's profits altogether, but it would also not be proper to include all of this in Mr. Foley's guideline income, since FLM's profit largely came from the fact that Mr. Foley transferred pre-payments from fSquared to FLM and this does not reflect the total amount of work certainly in 2024. While this is an accounting profit, at least some of it is more in the nature of a transfer of assets, something that is addressed appropriately in the context of property division.

- [173] At the same time, I accept Ms. Foley's evidence, confirmed by Mr. Foley, that web hosting is a high margin business and it gives opportunities to sell other marketing services.
- [174] The "double dipping" principle in *Boston v. Boston*, 2001 SCC 43 does not apply to child support, but just to spousal support. However, I find that in this context the "money available for the payment of child support" and the guideline income for spousal support both reflect a judgment call that should consider the accounting profits of the corporation, but not necessarily be governed by them, especially when they are already addressed in property division. In my view, the appropriate thing to do here is not to rely on FLM's accounting profits, but to attribute an amount commensurate to the services Mr. Foley provides to FLM that is the same as the imputed income for the Fall months of 2024. I find that either way, it is fair and appropriate to attribute to Mr. Foley a guideline income for 2024 of \$200,000, which would imply \$18,666.67 per month of services to FLM over the last quarter of 2024.
- [175] When it comes to 2025 and afterwards, it is very difficult to say anything definitive about what either of these parties will earn. FLM is arguably not strictly a start up since it inherits most of fSquared's book of business. But it has a different business model, one that could arguably give it a higher margin, but on the other hand might have missing pieces. I think it is reasonable to impute an income of \$200,000 to Mr. Foley until more data comes in. I will order that either party can ask for a review after August of each year. At minimum, more will be known then.
- [176] While the tax information will be out of date, I see no reason that the parties cannot provide up-to-date accounting information for each of their firms and, at minimum, more will be known then.
- [177] It is even harder for me to assess Ms. Foley's future income. So far, her firm has had negligible profits: \$957 as of March 2, 2025. But as Mr. Foley points out, she has a higher level of education than he does and many contacts in the legal and marketing industries. She was a Vice President at JP Morgan Chase from 1994 to 2003, had high level jobs at PricewaterhouseCoopers and White & Case LLP in the 2000s and a "head hunter" told her she could earn \$350,000 US if she returned to New York.
- [178] To be sure, as Ms. Foley points out, she cannot return to New York given her obligations to "A" and "B". Indeed, she needs a job with some flexibility of hours, although I think she will likely work at least a 40-hour week. Her firm genuinely is a start up, since it does not start with a continuing service.
- [179] But in light of Ms. Foley's extensive human capital, it would be unreasonable not to impute income to Ms. Foley or to impute it only on the basis of minimum wage. To be sure, it is reasonable that she not earn a six figure income in 2025. A review, which could occur as early as next August, would permit a more informed approach to what she can earn.

[180] I therefore impute an income of \$80,000 to her for 2025 for spousal support purposes, one that can be adjusted in a review once the parties exchange up-to-date financial information in June.

[181] I am not going to try to come to a number for the high point of the SSAG with child support. I think the parties should try to do that first, based on what I have said here and if there are disagreements, come back to me.

D. Calculation of Retroactive Child Support

[182] I now turn to calculating retroactive child support.

[183] As a result of my finding that "A" was a child of the marriage until the end of August 2024, but that table support was only appropriate for her when she was living with Ms. Foley, the following table sets out the monthly child support that Mr. Foley should have paid:

Time Frame

Payor Income

No. of Children for s. 3 purposes

Monthly Support (s. 3)

Jan. 2020-Feb. 2020

\$128,239

1

\$1,181 x 2 months = \$2,362

Mar. 2020-Dec. 2020

\$128, 239

2

\$1,887 x 10 months = \$18,1870

Jan. 2021-Dec. 2021

\$190,787

2

\$2,640 x 12 months = \$31, 680

Jan. 2022-Apr. 2022

\$200,357

2

\$2,653 x 4 months = \$11,012

May 2022-Jun. 2022

\$200,357

1

\$1749 x 2 months = \$3,498

July 2022-Aug. 2022

\$200,357

2

\$2,753 x 2 months = \$5,506

Sept. 2022-Dec. 2022

\$200,357

1

\$1,749 x 4 = \$6,996

Jan. 2023-Aug. 2023

\$208,651

1

\$1,813 x 8 = \$14,504

Sept. 2023-Dec. 2023

\$208, 651

2

\$2,851 x 4 = \$11,404

Jan. 2024-Aug. 2024

\$200,000

2

\$2,749 x 8 = \$21,992

Sept. 2024-Dec. 2024

\$200,000

1

$\$1,746 \times 4 = \$6,984$

Jan. 2025-Mar. 2025

\$200,000

1

$\$1,746 \times 3 = \$5,238$

[184] According to these calculations, the amount of base or s. 3 child support that should have been paid from February 2022 to the end of March of this year is \$140,046.

[185] The parties agree that Mr. Foley has paid \$93,524.58. Leaving aside s. 7 expenses, his retroactive child support payments would be \$46,521.42.

[186] While Ms. Foley complained of the timeliness of Mr. Foley's payment of s. 7 expenses for "B", there is no evidence of any arrears in this regard.

[187] However, if "A" was a child of the marriage during her Master's degree, then her expenses are either s. 7 expenses or, in the case of accommodation expenses, expenses that should be split under s. 3(2)(b) of the Child Support Guidelines. Either way, these would be split 50/50 since incomes were essentially equal at the time.

[188] Ms. Foley submitted three rent installment records for when "A" was in York of £3950 each. One was in 2022 and the other two were in 2023. I find that the best measure of the value was in Canadian dollars at the average conversion rate for the relevant year, which was 1.3013 in 2022 and 1.3497 in 2023. That gives a total, in Canadian dollars, of \$15,802.77 for rent.

[189] In addition, I have a total of £20,150 in payments to the University of York. £10,175 was accrued in 2022 and the remainder in 2023. That creates a total of CDN\$26,703.99. Putting these two figures together creates a total of \$42,506.75, half of which is \$21,253.38.

[190] Ms. Foley referred to uninsured health expenses for "A". I have an email in the record sent July 6, 2024 that claims uncovered expenses for both children. Unfortunately, the amount said to be unpaid at that point includes both children and I understand "B's" have been paid since then, while it is not clear what is attributed to "A". The printed version of the email includes icons indicating PDFs of bloodwork at Life Labs, dental and psychological expenses. I will ask the parties to agree on the amount unpaid here, and if they do not, then this can come back before me.

[191] Leaving aside those health expenses, I find that the total amount of unpaid child support is equal to \$46,521.42 plus \$21,253.38 or \$67,774.80.

V. Spousal Support

- [192] The reason that spousal support is in issue is the way Mr. Foley dissolved fSquared and appropriated its clients. Prior to this, both parties obtained essentially the same income and had similar prospects for income in the future. Had fSquared continued or had it been dissolved in an appropriately consensual way, then a need for spousal support would not have arisen.
- [193] However, because fSquared is no longer and Ms. Foley is not employed by FLM, I must consider spousal support.
- [194] Section 15.2 of the Divorce Act provides for orders for spousal support. Section 15.2(4) provides for "factors" that shall be taken into consideration. Clearly relevant, and taken into account under the SSAG, is the length of time the parties cohabited, in this case 23 and a half years.
- [195] Section 15.2(6) sets out the objectives of spousal support. The relevant objectives in this case are:
- (a) recogniz[ing] any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - ...
 - (c) reliev[ing] any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promot[ing] the economic self-sufficiency of each spouse within a reasonable period of time.
- [196] The statutory language "recognizing economic advantages or disadvantages to the spouses arising from the marriage" is the basis of the traditionally understood "compensatory" aspects of spousal support, explored authoritatively by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813. The language "relieving any economic hardship of the spouses arising from the breakdown of the marriage" is the basis of non-compensatory or "needs-based" spousal support, as explored in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. *Bracklow* and subsequent cases made clear that the concept of "need" is not an absolute one, but is made with reference to the standard of living during the marriage.
- [197] The SSAG are not law, unlike the Child Support Guidelines which, despite their name, are binding legislation. Their purpose is to assist trial judges in determining spousal support under the Divorce Act (or under provincial legislation such as the FLA) by bringing more predictability and stability to that determination. They incorporate the factors and objectives set out in s. 15.2(4) and (6), but it should always be remembered that those factors and objectives are the law, not the SSAG. The SSAG are intended to reflect the law, as it existed when they were first formulated and as it has developed, rather than change it. In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 65, the Court of Appeal stated they are a

"useful tool to assist judges in assessing the quantum and duration of spousal support".

[198] There are two basic formulas for spousal support under the SSAG: "with child support" and "without child support." In this case, the "with child support" formula applies. It depends on four things:

- a) The amount of child support.
- b) The cohabitation time. This is agreed.
- c) The gross income difference.
- d) The point on the range. The formula does not provide a single number, but sets out a low end, mid point and high end based on duration and gross income difference.

[199] In light of the collapse of fSquared, there is a "needs" basis for support for Ms. Foley. Given her high level of human capital, in the absence of new health problems (which would be the basis for a material change in circumstances), this need is not likely to last for a long time. But if no spousal support is ordered, then there will be an asymmetric decline in living standards relative to the time of the relationship, a decline that would be all the more unfair in light of the fact that it was the result of Mr. Foley's post-separation conduct.

[200] I agree with Mr. Foley that there is not a "compensatory basis" as traditionally understood. Ms. Foley worked throughout the marriage and developed higher market human capital than he did.

[201] However, there is a specific economic disadvantage to Ms. Foley arising not from the marriage, but from its breakdown. While this is not a "compensatory basis" as the case law sets it out, at the end of the day, I am bound by what Parliament has said and court decisions should not be read as if they were statutes. In particular, it would be an error to read statements made by appellate courts with the statutory canon of *expressio unius est exclusio alterius*. While the primary example of "economic advantage" and "economic disadvantage" arising from the marriage and its breakdown is the investment of the family unit in one party's marketable human capital at the expense of the other -- the Moge situation -- the situation here is also one in which Mr. Foley gained an economic advantage as a result of the breakdown at Ms. Foley's expense, and that needs to be considered.

[202] In *Stronks*, Burke J. ordered compensatory spousal support in part on the basis of the actions of the husband in that case in transferring assets and receivables from a joint business, which had operated after the separation, to a new business under his sole control.

[203] Mr. Stronks was an electrician. Ms. Stronks did the office work for their joint firm. They were both 50/50 shareholders. What Mr. Stronks did was he transferred the accounts receivable and the clients to a solely incorporated electrician business and, as in this case, the parties did work together in the business for a while after separation.

- [204] While there were more conventional compensatory factors in Stronks in the form of a division of labour during the course of the marriage that disadvantaged the wife, it was the post-marriage destruction of the joint business that resulted in a "high" compensatory award:
- [205] In determining the appropriate level of support as established by the jurisprudence, a strong compensatory claim will be a factor that favours a support award at the higher end of the SSAG ranges:
- [95] Ms. Warren had expected to have a two-year period after the parties' separation to formulate a plan to become fully self-supporting based on the agreement she had reached with Mr. Stronks to continue to run the Old Business. In the five months following the signing this written agreement, Mr. Stronks reneged on his obligations. He transferred the assets and receivables from the Old Business to the New Business, drained their shared accounts and, by December 2019, had cut off Ms. Warren's access to the bank accounts. This, in turn, meant that Ms. Warren no longer had any employment nor savings, leaving her with very little to support her and her children.
- [96] I find, as argued by counsel for Ms. Warren, that a high amount of compensatory support will address her sudden and unexpected loss of employment with the Old Company as a result of Mr. Stronks' misconduct. His actions impoverished her, forcing her to draw on the small amount remaining in the parties' home equity to support herself.
- [206] The present case is analogous to this aspect of Stronks. Justice Burke would not have ordered spousal support at the high end but for the post-separation economic disadvantage, which shows that whether we are going to call it "compensatory" or not, if a party gets an economic advantage and imposes an economic disadvantage by their actions in regard to a joint family business after separation, those are economic advantages or disadvantages to the spouses arising from the breakdown of the marriage, and they are therefore a part of which should be considered as objectives of spousal support.
- [207] I think this is a good case for the "higher" end of the SSAG guidelines, but a limited duration for spousal support (in the absence of a material change in either party's health). In the medium run, Ms. Foley will either earn income at the level she did prior to 2023 or, if she does not, it will be due to factors that have nothing to do with the marriage or its breakdown.
- [208] In the absence of something like a major change in health status --- which would be a material change in circumstances --- Ms. Foley is capable of economic self-sufficiency in the medium run and will likely earn income at the level she did prior to 2023, give or take factors that are not really the result of the marriage or its breakdown. But that is not going to happen for a few years, and the reason is the collapse of fSquared and the appropriation of its clients and other assets by Mr. Foley. There needs to be spousal support for three years because the marriage's breakdown is directly related to her income potential, at least during that period of time.

[209] I will therefore order spousal support at the high end of the SSAG but for a limited duration of three years.

VI. Other Issues

A. Fine for Breach of a Court Order

[210] Under s. 230(2)(b)(iii) of the FLA, a party may ask the court for an order that the other party pay a fine not exceeding \$5,000 for the purposes of enforcing an order made under the FLA.

[211] As a result of Mr. Foley's previous unilateral action, namely the withdrawal of over US\$93,000 from the party's joint account ending in 2692 at Chase Bank, a consent order was entered June 4, 2024 that provided as follows:

1. BY CONSENT, pursuant to section 91 of the Family Law Act, both parties shall be restrained and enjoined from disposing of encumbering, assigning, hypothecating, pledging or in any similar manner dealing with family property [] pending final determination of this action without agreement in writing or until further order of the Honourable Court, save and except for ordinary business and living expenses.

[212] Ms. Foley argues Mr. Foley should have to pay a fine of \$5,000 for breaching this order by disposing of the assets of fSquared in the Fall of 2024.

[213] Mr. Foley argues that he did not understand that he was violating a court order. I find that he must have understood that fSquared was "family property". He knew he had agreed to a consent order that neither party was to dispose of such property, except for ordinary personal and business expenses, without written agreement or further court order. He also knew that he had neither a written agreement or a court order to do what he did.

[214] The standard of proof for s. 230 of the FLA is not the "reasonable doubt" standard for civil contempt of court, and it is possible (indeed common) for a s. 230 order to be appropriate when a finding of civil contempt would not be: *Reehal v. Reehal*, 2020 BCSC 1635. But even for civil contempt, it is not necessary for the contemnor to know, as a matter of law, that what they have done is contrary to the order, so long as the order itself is clear and unequivocal, the alleged contemnor had actual knowledge of it, and the act or omission that constitutes contempt is done or left undone intentionally: *Carey v. Laiken*, 2015 SCC 17.

[215] For a s. 230 order to be appropriate, Ms. Foley must show, on a balance of probabilities, rather than beyond a reasonable doubt, that the June order was clear and unequivocal about what should or should not be done, that Mr. Foley had actual notice of the June order, and that the breach of the order was intentional: *T.A.O. v. D.J.M.*, 2021 BCSC 1724 at para. 48.

- [216] In my view, she has met this burden. The order is perfectly clear that family property, which certainly included fSquared, could not be treated the way Mr. Foley treated it without written agreement from Ms. Foley or a further court order. Mr. Foley definitely had notice of the order. And his acts were undeniably intentional.
- [217] It is not necessary that Mr. Foley also know that what he was doing was unlawful. I suppose it is possible that he did not make the connection in his own mind while he was unrepresented, but he definitely understood about fiduciary duties and must have known that a corporate officer taking corporate opportunities for his own benefit is not consistent with those duties.
- [218] If this had been an ordinary corporate context in which Mr. Foley had no prior marital relationship with the other shareholder, I do not think Mr. Foley would have acted as he did.
- [219] We talk nowadays about the importance of avoiding a "family discount" in the context of violence. Violence in a family context is as bad as violence in any other context and the failure to recognize this in the past is now recognized as a social injustice. By the same token, I do not think we should be having a family discount in the context of financial impropriety. I accept that the Family Law Act puts a limit of \$5,000 on a fine and I am bound by that, but it does not seem to me that Mr. Foley would expect not to have some consequences had he done this to a business partner with whom he had had no familial relationship, so subject to that statutory limitation, I think a similar magnitude of consequence should exist here.
- [220] I find that Mr. Foley deliberately and consciously violated this order in the relevant legal sense. He knew he needed Ms. Foley's written consent to liquidate fSquared, as is indicated by his continual attempts to characterize her responses as such agreement. It is abundantly clear that she did not agree. She could not have been clearer that she did not want any communication with clients before the parties had a further chance to speak. Mr. Foley responded to this by locking her out. This was an egregious and deliberate violation of the June 4, 2024 order.
- [221] This conduct deserves the highest fine permitted by s. 230(2)(b)(iii), namely \$5,000. I will therefore make that order.

B. CPP

- [222] Ms. Foley opposes the standard order for permitting the parties to share their CPP. I am not clear why she does oppose that and there is no basis for that. I will make the standard order.

C. Life Insurance

- [223] Ms. Foley asks that there be an order under s. 170(e) of the Family Law Act that Mr. Foley name "A" and "B" as beneficiaries on a policy of life insurance for as long as he is obliged to pay child support and that he be solely responsible for the premiums.
- [224] Since I have decided that "A" is no longer a child of the marriage, the order cannot go with respect to her. However, I think it is an appropriate one for "B". The difficulty is that I do not have information about whether Mr. Foley currently has a life insurance policy; if so, what its premiums are; whether there is any irrevocable coverage on it, or any other details. If he does not have coverage that can be applied to "B", I do not have information about how available life insurance would be for him or at what premium. I am therefore going to give him an opportunity to either come to an agreement about the amount of coverage or, if the parties do not agree, to arrange to speak to me about it.

D. Order Requiring Matching Payments to RDSPs

- [225] Ms. Foley asks for an order that Mr. Foley match her past and future contribution to RDSPs for both children. However, this is not an available order under the Divorce Act or FLA. Ms. Foley certainly can use child support payments or other payments for this purpose.

VII. Order

- [226] I already made a divorce order on February 20, 2024, to come into effect 31 days later, as provided by s. 12 of the Divorce Act. I believe that means it came into force yesterday.
- [227] I make the following declarations:
- a) The Claimant Robert Gerrard Foley and the Respondent Lynn Michelle Foley began cohabiting May 21, 1993 and separated December 23, 2019.
 - b) [Name redacted], born August 26, 1999, was, until August 31, 2024, a child of the marriage pursuant to paragraph (b) of the definition of "child of the marriage" in s. 2(1) of the Divorce Act.
 - c) [Name redacted], born May 17, 2004, is a child of the marriage pursuant to paragraph (b) of the definition of "child of the marriage" in s. 2(1) of the Divorce Act.
 - d) The guideline income of the Claimant Robert Gerrard Foley for the year 2024 is imputed to be \$200,000.
 - e) The guideline income of the Respondent Lynn Michelle Foley, also known as Lynn Michelle Fitzpatrick, for 2024, was \$144,000.
 - f) The guideline income of the Claimant for 2025 and for future years unless there is a review or written agreement otherwise is imputed to be \$200,000.

- g) The guideline income for the Respondent for 2025 and for future years unless there is a review of written agreement otherwise is imputed to be \$80,000.
- h) The Claimant owes the Respondent \$67,774.80 in retroactive child support.

[228] Unless expressly stated otherwise, I vacate all interim and interlocutory orders in this proceeding.

[229] I make the following orders in relation to child support:

- a) The Claimant must pay \$67,774.80 in retroactive child support to the Respondent.
- b) The Claimant must pay \$1,746 per month in basic child support to the Respondent, commencing April 1, 2025, pursuant to s. 3(1)(a) of the Child Support Guidelines.
- c) The Respondent must assist [name redacted] in applying for Persons with Disabilities designation and benefits under the Employment Assistance for Persons With Disabilities Act.
- d) The Respondent must inform the Claimant of the status of [name redacted]'s application for Persons with Disabilities designation on May 1, 2025 and each month thereafter until an application is accepted or denied.
- e) Following the determination of [name redacted]'s PWD application, the parties may review the Claimant's child support obligations, on the basis that the amount of child support will be decreased by an amount equal to $X \cdot Y / (Y + Z)$, where X is the amount of [name redacted]'s PWD benefits, Y is the Respondent's guideline income and Z is the Claimant's guideline income.
- f) Special and extraordinary expenses, including tuition, housing and meal plan expenses at Simon Fraser University for [name redacted], and dental, paramedical, orthodontic, professional counselling, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses, and contact lenses, are to be shared equally by the Claimant and Respondent. The Claimant must pay his share of special and extraordinary expenses directly where practicable. If the Respondent pays, the Claimant must reimburse his share of the expenses within 30 days of receipt of proof of payment by the Respondent. Proof of payment may be sent by email and the Claimant must provide the Respondent with an up-to-date email for this purpose.
- g) Neither party will incur a special or extraordinary expense, other than tuition, housing and meal expenses at Simon Fraser University, and dental, paramedical, orthodontic, professional counselling, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses, and contact lenses, without attempting to obtain the written consent of the other party. If a party seeks approval of a special or extraordinary expense and it is not approved within 7 days of seeking consent, the party seeking the approval has liberty to apply to court for approval.

- h) On or before June 1 of each year, the parties must exchange all information required by the Federal Child Support Guidelines, including a copy of their tax return, notice of assessment and financial statements of any incorporated or unincorporated businesses. They must also provide up-to-date balance sheets and income sheets using their current accounting software for their businesses for the year beginning June 1 of the previous year and ending May 31. They may do so by email and each party must provide the other an up-to-date email address for this purpose.
- i) On or before August 30 of each year, the parties are directed to make efforts to agree on their respective guideline incomes and consequent child support obligations for the year. If they are unable to agree, they may seek a review.
- j) The Claimant must name [name redacted] as a beneficiary on a life insurance policy and must pay premiums for as long as child support is payable. The parties are directed to attempt to agree on an amount of coverage by April 15, 2025. If they are unable to agree, either party may apply to the court for a determination of the appropriate amount of coverage.

[230] I make the following orders in relation to spousal support:

- a) Spousal support will commence January 1, 2025 and will be calculated based on the high end of the Spousal Support Advisory Guidelines with-child support formula.
- b) Spousal support will continue until the end of 2027.
- c) I direct the parties to exchange calculations of the amount of monthly spousal support owed no later than April 15, 2025.
- d) If the parties are unable to agree on the amount of monthly spousal support owed based on this judgment, either party has leave to apply to the court for an order setting a specific monetary amount for future and retroactive support.
- e) On or before June 1 of each year to which the spousal support order applies, the parties must exchange all information required by the Federal Child Support Guidelines, including a copy of their tax return, notice of assessment and financial statements of any incorporated or unincorporated businesses. They must also provide up-to-date balance sheets and income sheets using their current accounting software for their businesses for the year beginning June 1 of the previous year and ending May 31. They may do so by email and each party must provide the other an up-to-date email address for this purpose.
- f) On or before August 30 of 2025, 2026 and 2027, the parties are directed to make efforts to agree on their respective guideline incomes and consequent spousal support obligations for the year. If they are unable to agree, they may seek a review.

[231] I make the following orders with respect to family property and family debts:

- a) Except as otherwise provided, entitlement to family property and responsibility for family debts, other than those determined to be excluded property, are divided equally.
- b) The Claimant must pay the Respondent \$177,653.85, which represents half the value of fSquared as of December 2023, less the value removed in the form of dividends by the Respondent (the "Compensation Payment").
- c) The Claimant holds Foley Legal Marketing & Design Agency ULC in trust for the Respondent up to the value of the Compensation Payment. Once the Compensation Payment is discharged, the Claimant shall have full beneficial interest in Foley Legal Marketing & Design Agency ULC without any further claim from the Respondent.
- d) The Claimant is responsible for all liabilities arising out of his actions in relation to fSquared Marketing ULC, including the costs of legally dissolving fSquared Marketing ULC, and will indemnify the Respondent for any liability she may accrue in relation to fSquared Marketing ULC from a third party.
- e) The Respondent has full beneficial interest in Right Path Solutions ULC without any claim from the Claimant.
- f) The parties have joint conduct of sale of the property located at Lot 16, Nantucket Shoes, Oregon, USA (the "Oregon Property") on the following terms:
 - i. The Claimant and Respondent must make efforts to select a realtor no later than April 15, 2025. If any issue arises, the parties have leave to apply to the court for directions.
 - ii. The Claimant and Respondent must make best efforts to list the Oregon Property by April 30, 2025.
 - iii. The Claimant and Respondent must execute all documents required for the sale of the Oregon Property.
 - iv. Upon completion of the sale of the Oregon Property, the Claimant and the Respondent must pay the following from the proceeds of sale:
 - 1) All real estate commissions;
 - 2. All usual adjustments between the seller and the purchaser;
 - 3) The legal fees and disbursements relating to the conveyance;
 - 4) Any other incidental expenses of the sale;
 - 5) Withholding tax, in an amount mutually agreed to be paid into Chase Premier Checking Account No. ending in 2692, along with any other anticipated future costs of the sale; and
 - 6) The remaining balance of the net sale proceeds of the Oregon Property will be divided equally.

- v. Each party will be equally responsible for any taxes owing on the sale of the Oregon Property and any accounting advice necessary.
- g) The Claimant will retain the following accounts without further claim from the Respondent:
 - i. 10.031217 Ethereum held in a Gemini Account in the Claimant's name;
 - ii. Chase Premier Checking Account No. ending in 0898 registered in the Claimant's name;
 - iii. Fidelity Account No. ending in 8799 registered in the Claimant's name; and
 - iv. JPMorgan Investment Account ending in 9918 in the Claimant's name.
- h) The Respondent will retain the following accounts without further claim from the Claimant:
 - i. RBC Chequing Account No. ending in 6853 registered in the Respondent's name;
 - ii. RBC Savings Account No. ending in 3551 registered in the Respondent's name;
 - iii. GIC Account No. ending in 7009 registered in the Respondent's name;
 - iv. RBC Savings Account No. ending in 2966 registered in the Respondent's name; and
 - v. RBC Investment Account No. ending in 1850 registered in the Respondent's name.
- i) The Claimant and the Respondent will cooperate to close the Fidelity USD Investment Account ending in 8968. It will be divided equally.
- j) The Claimant and the Respondent will cooperate to close the Chase Savings Account ending in 2692 once all liabilities arising out of the sale of the Oregon Property have been resolved. It will be divided equally.
- k) The Claimant and the Respondent will cooperate to close the US Chase Checking Account No. ending in 1540. It will be divided as follows:
 - i. US\$13,582.74 belongs to the Claimant;
 - ii. The remainder of the account belongs to the Respondent.
- l) The following registered retirement accounts or portions thereof are to be divided equally:
 - i. \$6,025 in RRSP Account ending in 1191-1-3, in the name of the Claimant;
 - ii. \$27,831.65 in RRSP Account ending in 8729, in the name of the Respondent;
 - iii. Fidelity USD 401K Investment Account in the name of the Claimant; and
 - iv. Fidelity USD Rollover IRA Account ending in 1700 in the name of the Respondent.
- m) The parties have leave to seek directions or further orders of the court regarding transfer of registered accounts to implement the equal division ordered in the previous paragraph.

- n) RBC RESP Account No. ending in 4892 is to be transferred in its entirety to the Respondent, to be used to offset the educational expenses of "B". Any remaining balance once "B" has completed her schooling or reached the age of 35, whichever is sooner, shall be paid to the RDSPs of "B" and "A", either equally or in proportion to the Respondent's reasonable determination of their relative financial need.
 - o) NY's 529 USD Account No. ending in 03-02 and NY 529 Account No. ending in 03-01 is to be transferred in its entirety to the Respondent, to be used to offset the educational expenses of "B". Any remaining balance once "B" has completed her schooling or reached the age of 35, whichever is sooner, shall be paid to the RDSPs of "B" and "A", either equally or in proportion to the Respondent's reasonable determination of their relative financial need.
 - p) The Respondent must account to the Claimant about expenditures from the Education Accounts within 30 days of the expenditure.
 - q) Both parties, in their business communication, may refer to themselves as the former "Chief Operating Officer" or "Chief Executive Officer" of fSquared Marketing and may refer to work they did on behalf of fSquared Marketing. With that exception, neither party may carry on business using fSquared Marketing branding, except by written agreement or court order.
 - r) If either party uses fSquared Marketing work product, code, designs and tools, they must alter the "look and feel" so that there is no confusion with fSquared Marketing. The proposed "look and feel" must be presented to the other party seven days prior to use. If there is a disagreement about whether there is potential confusion with fSquared Marketing, either party has leave to apply to court to resolve the disagreement.
 - s) The Claimant must transfer all intellectual property, including all code, websites, designs, specifications and domain names, associated with the "Solo and Small" brand and product to the Respondent.
 - t) Any articles, blog posts, white papers, research or other written work where the Respondent was credited as an author at fSquared Marketing must be provided to the Respondent no later than April 15, 2025 and she may use them for any otherwise lawful purpose.
 - u) The Claimant must take all reasonable steps to permit the Respondent to access her electronic files at his own expense.
 - v) The Respondent will provide the Claimant with prospect information and lists deriving from her time at fSquared no later than April 15, 2025.
- [232] The parties will not be responsible for liabilities accrued after separation and, in particular:
- a) The Claimant will be responsible, and will indemnify the Respondent for, any liability for RBC Avion Visa Infinite Account No. ending in 3722 and Chase United Explorer Account No. ending in 8847.

- b) The Respondent will be responsible, and will indemnify the Respondent of any liability, for Car Loan through Toyota Financing in the approximate amount of \$14,000, RBC Avion Visa Infinite Account No. ending in 7776, RBC Avion Visa Infinite Account No. ending in 3326, RBC Line of Credit Account No. ending in 9994.

[233] The Respondent must maintain the following Registered Disability Savings Plan accounts:

- a) RBC Registered Disability Savings Plan Account No. ending in 9997 for the benefit of "B".
- b) RBC Registered Disability Savings Plan Account No. ending in 6468 for the benefit of "A".

[234] I make the following orders with respect to pensions:

- a) The parties' unadjusted pensionable earnings under the Canada Pension Plan will be divided under ss. 55, 55.1 and 55.2 of the Canada Pension Plan Act (Canada) and either party may apply for equalization of the other's unadjusted pensionable earnings.
- b) The benefits accrued to the Respondent under the Sunlife Defined Contribution Pension Plan (the "Plan") are family property and the Claimant is entitled to a share determined and derived in accordance with Part 6 of the Family Law Act. Either party or the administrator of the Plan may apply for such directions and further order as may be necessary or convenient to facilitate this division. All administrative costs for carrying out the pension division will be divided equally.

[235] The Claimant will retain the 2018 Mazda CX-3 registered in his name without any claim from the Respondent. The Respondent will retain the 2010 Volkswagen EOS and 2023 Toyota Venza registered in her name without any claim from the Claimant.

[236] The parties will retain their personal items and contents of their household without any further claim from the other party.

[237] The Claimant must, within 14 days, give "A" access to her account with the Canadian Revenue Agency at his own expense.

[238] The Claimant must pay a fine of \$5,000 to the Respondent pursuant to s. 230(2)(b)(iii) of the FLA.

[239] The parties have leave to provide affidavit evidence and speak to the appropriateness of an order under s. 170 (e) of the FLA.

[240] The parties have leave to speak to costs.

"J. G. Morley, J."

The Honourable Justice Morley

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