CANADA / JUDGMENT

Fornwald v. Fornwald

2023 BCSC 1322

COURT
Supreme Court of British Columbia

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2023 BCSC 1322 Fornwald v. Fornwald

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fornwald v. Fornwald,

2023 BCSC 1322

Date: 20230731

Docket: E62497

Registry: New Westminster

Between:

Darrell James Fornwald

Claimant

And

Marlene Beverly Fornwald also known as Marlene Beverly Uberall

Respondent

Before: The Honourable Justice Walkem

Reasons for Judgment

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Place and Date of Trial:

Abbotsford, B.C.

May 29-31, 2023

June 1, 5-9, 2023

Place and Date of Judgment:

New Westminster, B.C.

July 31, 2023

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INTRODUCTION

[1] This trial is unique in that it occurs approximately ten years after the parties' separation. At the time of trial, the claimant-husband, Darrell Fornwald ("Mr. Fornwald"), was 63 years old. The respondent-wife, Marlene Uberall ("Ms. Uberall"), was 70 years old.

[2] The parties initially claimed March 1, 1998 as their date of cohabitation. During argument, the parties clarified this was an error. Both agreed their actual date of cohabitation was earlier, and may have occurred as early as 1996. The parties agreed to a cohabitation date of July 1, 1997, though as I will address later in these reasons, this became a point of dispute on the valuation of particular family assets. For the purposes of these reasons, I fix the date of cohabitation as July 1, 1997.

[3] The couple married in November 2002 and separated in February 2013. From the date of separation, and until trial, the parties maintained some joint bank accounts. The parties' joint finances remained partly intermingled through these accounts until 2020.

[4] There are no children of the marriage.

BACKGROUND

[5] Mr. Fornwald was formerly a construction worker. As he progressed through his career, he was invited to begin working on cranes and developed an expertise in this area. When the couple began to live together, Mr. Fornwald was earning approximately $65,000 per annum. He had no significant assets and had a negative net worth due to his outstanding debts.

[6] At the beginning of her career, Ms. Uberall worked as a bank teller and then in the profit and loss division of Dairyland. Later, she worked as a stewardess with various airlines. In 1989, Ms. Uberall was diagnosed with chronic fatigue syndrome, and went on long term disability ("LTD") through her insurance coverage with Air Canada. During the course of the couple's relationship, Ms. Uberall's personal income was drawn from her LTD.

[7] In terms of personal assets, Ms. Uberall owned a home at 8043 139A Street, Surrey (the "139A Property"), with approximately $4,000 remaining on the mortgage at the time of cohabitation. She also had been gifted (though the gift had not yet been perfected) a home at 104 Glynde Avenue, Burnaby (the "Glynde Property") from her father.

[8] Over the years, Ms. Uberall's health condition has worsened. Initially, it impacted her ability to awake before 10:00 a.m., now she sleeps for longer hours each day. Ms. Uberall has been hospitalized several times in recent years with gastrointestinal illnesses.

CREDIBILITY

[9] The factors to be considered when assessing credibility were summarized by Justice Dillon in Bradshaw v. Stenner, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, as requiring "an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides". Features relevant to assessing credibility include: the witness's ability and opportunity to observe events; their ability to resist influence to modify recollection; collateral evidence; whether testimony seems unreasonable or unlikely; and, the presence of any motive to lie or stretch the truth.

[10] I found Mr. Fornwald to be straightforward on some points, while appearing to be evasive and less forthright on others. Specifically, Mr. Fornwald had a remarkable level of recall for numbers when discussing the purchase price or serial numbers of cranes, or the different account numbers of the business or shared accounts. He was unable, however, to recall, or appeared evasive, on details such as the value of his ATV recreational vehicles; amounts paid to his new partner by his company; what expenditures marked for a "Jeep" on accounts were

for while denying he or his new partner owned a Jeep; or, details of an account held in the United States at the Bank of America. The inconsistencies in his recall suggested to me he was less than truthful on those details. Mr. Fornwald's lack of recall was in areas involving his assets, and supported a minimization of the extent of assets available to him.

[11] I found Ms. Uberall to be a straightforward and credible witness. She was clearly frustrated at the allegation she had misappropriated large sums of cash, and at the devaluation and minimization of her role in the family enterprise. Ms. Uberall admitted to using corporate funds for personal expenses, which is borne out on the record, while Mr. Fornwald minimized his use of funds for similar purposes.

[12] Mr. Fornwald maintained that he solely generated family business revenue with little to no contribution by Ms. Uberall. Ms. Uberall acknowledged Mr. Fornwald's contributions and hard work in building and maintaining the family businesses.

LEGAL FRAMEWORK

[13] Under the Family Law Act, S.B.C. 2011, c. 25 [FLA], each spouse is entitled to a presumptive one-half interest in family assets and debts upon separation, including all real and personal property, business interests and investments.

[14] Property may be excluded from equal division under s. 85 of the FLA, if it is acquired by a spouse before the relationship began, or is an inheritance or gift to one spouse from a third party. The Court of Appeal in Shih v. Shih, 2017 BCCA 37 [Shih] at paras. 41-42, held that the party seeking exclusion under s. 85 must establish, on a balance of probabilities, with clear and cogent evidence, that the property should be excluded. Judges are permitted to draw reasonable inferences in balancing the evidence as a whole when the evidence is less than clear or precise: Shih at para. 44.

[15] Per s. 84(1)(a) of the FLA, increases in the value of any excluded property during the course of the relationship owned by one or both spouses at the date of separation, or acquired by one or both spouses after separation if it derives from (the disposition of) property encompassed by s. 84(1)(a), may also be considered family property.

[16] Under s. 87, all family property and debt is to be valued according to its fair market value at the date of the hearing. The court may set a valuation date at another date if it is found, per s. 95(1), it would be significantly unfair to value an asset or debt at the trial date. This may be the case, for example, if a party has significantly reduced or increased an asset or debt during the separation period, to their own advantage or based solely on their own effort.

[17] Reapportionment of family property and debt is permitted under s. 95(1) of the FLA. This reapportionment is restricted to situations where equal division would be "significantly unfair" based on consideration of the factors listed in s. 95(2), which include:

95 (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

(a) the duration of the relationship between the spouses;

(b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(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;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[18] In Jaszczewska v. Kostanski, 2016 BCCA 286 [Jaszczewska] at para. 41, the Court of Appeal referred to the "significant unfairness" test as a "stringent threshold" and adopted the reasoning of Justice Butler in Remmem v. Remmem, 2014 BCSC 1552 [Remmem] at para. 44, that: "[i]t is necessary to find that the unfairness is compelling or meaningful." The Court observed, at para. 42, that "reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense." Justice Brown contemplated the meaning of "significantly unfair" in L.G. v. R.G., 2013 BCSC 983 at para. 71, finding that: "Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division." See also: Singh v. Singh, 2020 BCCA 21 at paras. 130-134; and, Brody v. Brody, 2019 BCSC 1950 at paras. 31-33.

ISSUES FOR DETERMINATION

[19] The parties have agreed on the following proposal regarding division of assets:

· Both will retain their personal bank accounts as theirs and they are not subject to division;

· Post-separation debts incurred by each party will remain their sole responsibility;

· Mr. Fornwald will retain his recreational vehicles and his 2010 Audi as his sole and personal property;

· Ms. Uberall shall retain as her excluded interest in the Glynde Property;

· Joint personal accounts, whose amounts are nominal, are to be closed and divided equally; and

· The parties should be granted a divorce.

[20] Issues for determination include:

a) Division of family assets, including real property and family business assets:

· remaining excluded interests of the parties; and

· whether either party is entitled reapportionment of family assets in their favour.

b) Division of debt; and

c) Spousal Support.

Real Property

139A Property

[21] When the couple first began to live together, and for approximately six years, they resided at the 139A Property. Shortly after they began living together, the couple took out a $50,000 mortgage on the 139A Property, $18,000 of which was used to pay back funds Mr. Fornwald owed to his family. Ms. Uberall purchased a car with mortgage funds and she paid for the car payments. The existing mortgage of approximately $4,000 was included in the new mortgage amount. Mr. Fornwald paid his share of the mortgage.

65th Ave Property

[22] The 139A Property was sold in 2003 and proceeds went into a down payment on the former family home located at 14041 65th Avenue, Surrey (the "65th Ave Property"). The parties lived together at the 65th Ave Property until separation.

[23] The parties initially agreed that $155,000 of the value of the 65th Ave Property should be credited as Ms. Uberall's excluded property, based upon March 1, 1998 being the agreed year of cohabitation. At trial, the evidence showed the date of cohabitation was earlier, perhaps by several years, than either party had considered. Mr. Fornwald then resiled from the agreement of $155,000 being credited to Ms. Uberall as excluded property, and argued the excluded property amount should be lowered by $20,000-$50,000.

[24] I do not make any adjustment to the agreed upon exclusion. No other valuation was available to reflect the earlier cohabitation date. Both parties had difficulties identifying the cohabitation date, and eventually agreed upon the date which formed the basis of the original agreed upon exclusion.

[25] The 65th Ave Property is currently appraised at $1,440,000. There is an outstanding mortgage as of February 28, 2023 against it of $98,436.69. The outstanding debt includes monies borrowed for the family businesses. Ms. Uberall has lived in the 65th Ave Property since separation, and would like to buy out Mr. Fornwald's interest.

Glynde Property

[26] Ms. Uberall inherited the Glynde Property from her father, a gift perfected in 1999. The Glynde Property is of great sentimental value to Ms. Uberall. Her father built the home and it is where she grew up. Her father gifted Ms. Uberall and her two siblings with separate properties as part of their inheritance from him. Ms. Uberall received the Glynde Property as her inheritance. Ms. Uberall was originally gifted the Glynde Property in the late 1980s, but title was transferred back to her father to avoid tax consequences for him. Her father continued to have care and control of the Glynde Property and to collect rental income from it, during his lifetime. It appears that her father was alive after the 1999 transfer of the Glynde Property to Ms. Uberall. Ms. Uberall intended rental income from the Glynde Property to be her retirement income, and then to gift the house to her niece on her death so that it remained in their family.

[27] Equity in the Glynde Property was used to finance the start up of family businesses. The amounts were never paid off, and these events ultimately lead to the sale of the property.

[28] Mr. Fornwald lived for about one month at the Glynde Property post-separation, then moved in with his new partner, Ms. Spain. Mr. Fornwald argues the Glynde Property should have been rented at market rates to help offset costs of carrying the financing held against the home. Ms. Uberall says the home was not in rentable condition as it was being updated and having improvements made. Ms. Uberall says Mr. Fornwald could have lived at the Glynde Property, but choose not to do so. He claims the distance was too far from his work, though the evidence was that he worked at various locations in the Lower Mainland.

[29] Mr. Fornwald further argues the Glynde Property should have been sold to pay off the debt for the cranes a long time ago. Ms. Uberall refused to sell Glynde Property because the loan against the property was for the cranes. She testified she felt proceeds from renting the cranes should pay for the debts incurred against the property. Further, she planned to keep the Glynde Property as a source of retirement income and for the reasons outlined above.

[30] In around 2018 or 2019, Ms. Uberall rented the Glynde Property to her nephew who was in construction, with the understanding that he would help with renovations as part of their agreement for reduced rent. Unfortunately, due to some mental health difficulties he experienced, her nephew did not help with the renovations as agreed. He paid rent

sporadically, before paying no rent for ten months and then moving out. The rent Ms. Uberall collected from her nephew was reflected in her tax returns in the amount of $14,706 net rental income for 2019.

[31] When Mr. Fornwald stopped contributing any funds to their joint accounts in 2020, as discussed below, Ms. Uberall paid property taxes for both the 65th Ave Property and the Glynde Property from her personal funds.

[32] Ms. Uberall says she used a $36,500 inheritance from her sister to repair and upgrade the Glynde Property and seeks to have $30,000 of this amount credited as her excluded property. Mr. Fornwald disputes Ms. Uberall is entitled to be credited the $30,000. Mr. Fornwald says that, during the course of the relationship and after separation, he regularly maintained the Glynde Property and used his own funds to do so. Evidence also showed some maintenance and repairs were paid for through a family business.

[33] The value of the Glynde Property was approximately $380,000 when the gift from Ms. Uberall's father to Ms. Uberall was perfected. The Glynde Property has sold for $2.8 million, and the sale was expected to complete on June 29, 2023.

[34] Combined, Ms. Uberall seeks to have a total of $410,000 recognized as her excluded property in the Glynde Property ($380,000 value of original gift + $30,000, inheritance from sister invested in the property).

[35] The parties agree Ms. Uberall is entitled to a $380,000 credit for her excluded property interest, based on the value of the Glynde Property when it was gifted to her.

[36] The expected capital gains tax payable on the Glynde Property is $605,000 which will be payable by Ms. Uberall when she files her taxes for 2023. Combined legal fees and closing costs will be approximately $100,000. An agreement between the parties provides that Mr. Fornwald will pay $300,000 of the capital gains tax, and one-half of closing costs.

Summary of Findings: Real Property

[37] I find Ms. Uberall is entitled to the initially agreed upon exclusion of $155,000 for the 65th Ave Property and $380,000 for the Glynde Property. I find that Ms. Uberall did invest the inheritance from her sister in the Glynde Property, and that she contributed more toward its maintenance and upkeep in terms of funds and personal efforts. However, I am unable to find that the $30,000 should be credited as Ms. Uberall's excluded property, given that both parties contributed to its maintenance and improvement, and it was treated as a family asset.

FAMILY BUSINESSES

[38] The couple created two companies together, Apex Tower Cranes Ltd. ("Apex") and DJF Construction Services Ltd. ("DJF"). Ms. Uberall remained the bookkeeper for Apex and DJF up until approximately 2020.

[39] Mr. Fornwald created a third company, PC Crane Ltd. ("PC Crane"), primarily through the unilateral transfer of intangible assets from the family businesses post-separation, as discussed below.

Use of Glynde Property to Finance Businesses

[40] Early in their relationship, Ms. Uberall urged Mr. Fornwald to explore working with cranes. The couple decided to use the equity in the Glynde Property to finance a line of credit to purchase cranes that were the foundation of Apex. The initial RBC Homeline line of credit ("Home LOC") used to purchase the cranes was in the amount of $790,000.

[41] The financing taken against the Glynde Property has not been paid off and has been the source of dispute between the parties. The interest costs to service the Home LOC secured against the Glynde Property were substantial. Payments made to the Home LOC covered financing carrying costs (interest), but very little of the principal was paid down. At trial, the outstanding balance on the Home LOC was approximately $789,991.31.

Valuation of DJF & Apex

[42] A jointly instructed financial report by Rosanne Walters, a chartered professional accountant and business valuator, dated October 28, 2022, provided a valuation of all three businesses (the "Walters Report"). The parties appeared to agree a 50/50 valuation of the three businesses was appropriate, notwithstanding they owned different share percentages of the businesses and that PC Crane was created post-separation.

[43] DJF was incorporated on June 7, 1999. Ms. Uberall owns 30% shares in DJF and Mr. Fornwald 70%. Mr. Fornwald is currently the only director of the company. The Walters Report valued DJF at $135,554.

[44] Apex was incorporated on March 23, 2007. The parties initially purchased four cranes using the equity in the Glynde Property to secure the financing, which were then owned and rented out by Apex. Each party holds a 50% share in the company and Mr. Fornwald is the sole director. The Walters Report valued Apex at $112,000.

[45] In addition to the purchase of the cranes, additional funds were borrowed against both the Glynde Property and the 65th Ave Property to run the businesses. In their testimony, the parties estimated between $145,000 to $200,000 was borrowed against the 65th Ave Property and additional funds were taken out from the Home LOC secured against the Glynde Property.

Transfer of Family Business Assets to PC Crane

[46] Mr. Fornwald incorporated PC Crane in January 25, 2014 and is the sole director and shareholder. After the creation of PC Crane, Mr. Fornwald began to divert revenue from Apex to PC Crane. Ms. Uberall says Mr. Fornwald told her the "cranes were on the ground" and not generating income.

[47] It was Ms. Uberall's evidence that in and around 2020, finances were very tight and money from crane rents deposited by Mr. Fornwald into the Apex 2100 account were insufficient to cover costs for family expenses. She says she began to withdraw her own personal funds to cover costs for Apex and to cover financing charges for loans taken against the Glynde Property and the 65th Ave Property. Ms. Uberall paid money from her personal account, including $63,318 for Glynde Ave Property taxes; $26,035 for 65th Ave Property taxes; and, transferred $22,000 to cover joint bills.

[48] After separation, in approximately 2015, Mr. Fornwald began to divert family business assets, revenue, goodwill and business to PC Crane, a company he owned solely. During the period PC Crane was growing as a business, Mr. Fornwald told Ms. Uberall that there was little business or money. Ms. Uberall was unaware family business assets were being transferred to Mr. Fornwald's own business, PC Crane, over a period of five years.

[49] Ms. Uberall argues, post-separation, that Mr. Fornwald strategically diminished the financial picture of the family business, and dissipated assets without her knowledge and consent. In 2020, Mr. Fornwald sold a crane belonging to Apex and put the proceeds into a separate Vancity Apex account that only he had access to. Mr. Fornwald sold another crane in 2021 and also put those proceeds into the Vancity Apex account which was not accessible by Ms. Uberall.

[50] At his examination for discovery, Mr. Fornwald admitted he opened this separate account to keep the money from Ms. Uberall. Sale proceeds from these two cranes serviced interest for the loans, however, none of the proceeds went toward the principal on the Home LOC secured against the Glynde Property used to purchase the cranes. Mr. Fornwald retained at least $75,000 personally from the crane sales.

[51] Ms. Uberall believed, until the disclosure process in this litigation, that the family businesses were in desperate financial straits. Her testimony was that she did not begin a claim for spousal support earlier because she did not believe there was any money. Ms. Uberall argues Mr. Fornwald controlled operations of the family businesses, devalued them, and by 2020 had completely ousted her from them. This position is supported by the Walters Report.

[52] Ms. Uberall argues Mr. Fornwald engaged in blameworthy conduct in excluding her from the family businesses and ultimately, transferring business, goodwill and intangible assets of the family businesses to PC Crane.

[53] Mr. Fornwald acknowledges there was a transfer of intangible assets, client base and goodwill from Apex to PC Crane.

[54] The Walters Report characterized the transfer of family business assets to Mr. Fornwald solely as follows:

89. Based on our analysis of PC's historical general ledger reports, we did not observe a large initial capital investment to start the business; however, our analysis and discussion with Mr. Fornwald indicated that PC's start up benefited from the transfer of intangible assets from DJF to PC. These intangible assets were comprised of DJF's customer base and commercial goodwill. Without this transfer, PC would likely not have been able to generate similar levels of revenue and earnings as quickly.

90. As discussed in Sections A and B above, in 2015 Mr. Fornwald began to transfer DJF's intangible assets to PC and by the end of 2016 this transfer was complete. DJF no longer generated revenue from its former clients and all former DJF business now occurred in PC.

91. In 2017, our analysis of PC's historical general ledger reports indicated that part of Apex's revenue and expenses were diverted to PC by Mr. Fornwald. At first, the revenue and expenses were combined with the net amount of the Apex Transactions reported as an amount due from Apex. Then from 2018 to 2022, PC began to report Apex's revenues and expenses as if they were its own. At the Valuation Date, Apex's crane was rented to Syber Concrete.

92. Taking these factors into account, PC would not have been able to generate its historical levels of revenue, earnings, and declared dividends without the benefit of DJF's intangible assets or Apex's net revenue.

[Emphasis added.]

Crane 0809

[55] A point of disagreement between the parties was with regard to the ownership of "Crane 0809" and whether it should be included in the valuation of PC Crane. Crane 0809 was originally purchased by Ms. Uberall's brother-in-law. After her sister's death, and the parties' separation, Ms. Uberall's brother-in-law seems to have lost interest in the crane. According to the Walters Report: "It is Ms. Uberall's position that Crane 0809 has been effectively abandoned by its former owner, Ms. Uberall's brother-in-law, and for all intents is the property of Mr. Fornwald's business, PC Crane."

[56] Mr. Fornwald has operated and collected rent from Crane 0809. He has also maintained and stored it. At trial, Mr. Fornwald argued Crane 0809 was not an asset of PC Crane, but rather a gift to him personally, and should be not considered in the valuation of PC Crane. However, in an affidavit filed in the litigation, Mr. Fornwald asserted that Crane 0809 belonged to PC Crane.

[57] The Walters Report noted:

93. In addition to the net rental income from an Apex crane, PC generated additional rental revenue from [Crane 0809]

95. However, during our review of PC's financial statements and general ledger reports, we noted that 0809 did not appear as an asset in any of its records or the records of Apex or DJF. Upon further investigation, on October 4, 2022, Mr. Fornwald informed us that this crane is not owned by PC and that it belongs to an unidentified third party who no longer associates with Mr. Fornwald or PC. He allows PC to rent it out in exchange for storing and maintaining it. At the date of this report, we have not been provided any evidence to document this arrangement.

[58] The estimated mid-point value of PC Crane without the inclusion of Crane 0809 is $141,005. The Walters Report values PC Crane at $181,005, with the inclusion of Crane 0809.

Contributions Toward the Family Enterprise

[59] There was a considerable disagreement between the parties about the degree to which they each contributed to what I refer to as the "family enterprise" which includes the family businesses and family property; or, generally, the upkeep and support of the life they built and shared together.

[60] Mr. Fornwald says that he did most of the work associated with the companies, and argues it was his expertise in construction and cranes, and his labour, which built the businesses. He suggested, in argument, that he was solely responsible for the business revenue, and Ms. Uberall made no meaningful financial contribution.

[61] Mr. Fornwald acknowledges that until approximately 2020, Ms. Uberall provided bookkeeping services for Apex and DJF. He suggests she was not officially trained in this capacity and that there were delays in some years in getting the books to the accountant. Ms. Uberall did not draw a salary for her bookkeeping for the family business. This was, in part, because she wished to avoid any impact on her LTD benefits.

[62] Ms. Uberall argues the real property she owned formed the basis of the couples' family property. Ms. Uberall contributed the assets (139A Property and Glynde Property) which provided the equity needed to finance the family businesses, and the down payment to purchase the 65th Ave Property. Ms. Uberall agrees Mr. Fornwald brought his knowledge of construction and cranes, and that his expertise and labour was essential to the businesses. Ms. Uberall further acknowledges Mr. Fornwald worked hard. Ms. Uberall says, however, that she also contributed to the couples' personal and business life, and finances, and that her contributions should not be dismissed.

Summary of Initial Findings: Family Businesses

[63] Based on the Walters Report and the admissions of Mr. Fornwald, I accept that a transfer of intangible assets, goodwill, and ultimately, Apex's business to PC Crane occurred. This transfer occurred without the knowledge of Ms. Uberall, and adversely affected her interest in family property. Mr. Fornwald, conversely, benefitted greatly from the transfer.

[64] I find that Crane 0809, which PC Crane rents out and benefits from, should be included in the valuation of PC Crane, valuing PC Crane at $181,005 as per the Walters Report.

BANK ACCOUNTS AND INVESTMENTS

RRSPs and TFSAs

[65] Each of the parties has RRSPs and TFSA investments. Ms. Uberall withdrew approximately $118,000 from her investments in total, to fund different expenses as well as this litigation and paid taxes on this amount between February 2022 and the time of trial. For this reason, Mr. Fornwald seeks a different presumptive date for the valuation of Ms. Uberall's investment accounts. Ms. Uberall argues her investments should be valued at the time of trial. Mr. Fornwald argues this valuation date would be significantly unfair as Ms. Uberall has withdrawn large amounts to her sole benefit. Ms. Uberall grew her investments, and then depleted them, post-separation. Mr. Fornwald proposes they be valued at the high point since separation, and that his investments (which were not drawn down) be valued at trial, which is also their high point since separation.

Ms. Uberall's Investments:

February 10, 2022

At Separation

Present

RBC RRSP 3549

$176,576.78

$100,212.79

$71,363.99

RBC TFSA 0959

$18,588.23

$6,659.57

$557.00

Mr. Fornwald's Investments:

RBC RRSP 2036

$18,185.77

$44,055.41

RBC TFSA 1987

$10,062.56

$24,770.04

Bank Accounts

Joint Accounts

[66] The parties, at the time of separation and currently, have two joint accounts with RBC, a joint chequing account ending in 4605 and a joint savings account ending in 2751. After the couple separated in 2013, and through to the time of trial, they maintained these joint accounts, as well as a general operating account for Apex ("Apex 2100").

[67] A significant source of dispute between the parties was about what happened to funds Mr. Fornwald says he deposited into the Apex 2100 account. Mr. Fornwald argues he deposited approximately $1.5 million into the Apex 2100 chequing account between February 2013 and January 2020. Mr. Fornwald says this money was generated through his efforts and labour solely. He says he intended that the money be used to: (1) pay for the vendors and expenses of Apex; (2) cover financing costs (LOC and RBC Homeline of credit and mortgages); and (3) to provide Ms. Uberall with money for personal expenses. He acknowledges that an accounting shows that approximately $435,791.46 was used to pay vendors. He argues there is no accounting for the over $1 million not paid to vendors and suggests Ms. Uberall took, or otherwise had the benefit of, this money

[68] The money deposited into Apex 2100 was most often transferred to the joint RBC chequing 4605 account by Ms. Uberall. She would sometimes transfer money to the couple's joint savings account (RBC 2751). Ms. Uberall says she would transfer money back to the Apex 2100 account where needed to cover bills paid from that account. Each party had access to the joint chequing and savings accounts, as well as Apex 2100.

[69] Ms. Uberall followed a strategy of moving funds around to ensure interest payments to service the loans used to purchase the cranes and for business operating expenses, were covered, and that payments to vendors were made. Some of the money Mr. Fornwald includes in the $1.5 million, which he says that he deposited, are actually funds Ms. Uberall moved out of Apex 2100 and into the couples' joint personal accounts, and then moved back into Apex 2100 to cover Apex's bills.

[70] Ms. Uberall agrees she personally withdrew funds transferred from Apex 2100 to the RBC joint chequing account, including to pay for living expenses, make payments on a Bay Credit Card, and TFSA purchases for herself. Ms. Uberall estimates she kept between $5,000-$10,000 of the amounts deposited, annually, between the years of 2015 to 2019.

[71] Each party appears to have taken amounts out of the accounts, or ran personal expenses through them, especially immediately post-separation. Both of the parties put some personal expenses on the Apex 2100 account.

[72] Throughout submissions, Mr. Fornwald maintained that Ms. Uberall had access to $1.5 million that he says he provided, and suggests Ms. Uberall used this money personally. Ms. Uberall says Mr. Fornwald used these funds as well, and much of it was spent on covering joint business and household bills.

[73] What I was able to ascertain from the evidence is that Ms. Uberall used funds deposited into the Apex 2100 account to pay: Home LOC interest and principal payments; TD mortgage payments; $15,000 to Mr. Fornwald's vehicle payments and vehicle insurance; Ms. Uberall's own vehicle insurance, of approximately $2,721; Mr. Fornwald's life insurance; and, each party's visa credit card payments. Though these calculations are not exact, Ms. Uberall suggests the following payments were made from the deposits to Apex 2100 (from which Ms. Uberall transferred funds to the parties' joint RBC chequing account): mortgage payments of $225,449.95; $60,000 towards the Home LOC (which was then driven up again when Mr. Fornwald stopped making deposits to the Apex 2100 account and she needed to cover business expenses from the account); monthly interest on the Home LOC used to purchase the cranes, at approximately $2100/month from 2015-2020, for a total of $151,200. In some instances, these withdrawals were credited as shareholder loan repayments, rather than income, to avoid immediate tax consequences.

[74] Many account statements for the jointly held accounts are not available to either party this far after the fact, and so a precise accounting of the funds is not possible. Nor is it possible to determine with certainty who gained a greater financial benefit from the funds deposited into the joint accounts. I find that a significant portion of funds deposited were used to pay for business expenses, to service interest payments on amounts the couple had borrowed to start their businesses and for their personal expenses.

[75] As of 2020, Mr. Fornwald ceased any deposits into the parties' joint accounts.

Bank of America Account

[76] Mr. Fornwald testified to having a Bank of America American dollar account with his new partner. The account is used to pay their USD visa, as well as to pay for business, personal and travel expenses. This account was not disclosed, nor is it known the amounts transferred to, or held in it. Limited information shows a transfer of $19,400 into this account from Mr. Fornwald and, over the course of one month. The full extent of this account is unknown. Ms. Uberall argues she should be credited with $10,000 to account for

this undisclosed account.

Summary of Findings: Business and Investment Accounts

[77] Overall, the evidence is strongly against Mr. Fornwald's assertion that he deposited $1.5 million into the Apex 2100 business account which Ms. Uberall then used for her personal purposes. In fact, the funds from the Apex family business were largely used to pay vendors and to service loan debt. Personal expenses of both parties were paid from this account.

[78] As the parties continued to hold joint accounts post-separation, and until trial, detangling each other's finances from one another would be a nearly impossible task and, borrowing from the words of Justice Smith in Yip v. Yip, 2016 BCSC 1595 at para. 15, akin to requiring the court to conduct a forensic audit of the parties' expenditures over several years post-separation.

[79] To a limited extent, the parties' finances remained comingled until 2020, when Mr. Fornwald stopped depositing money into the Apex 2100 account. While the joint business and chequing accounts remained, as did the business accounts, at the same time Mr. Fornwald undertook the unilateral transfer of business assets to PC Crane and to a newly created Apex account that only he had access to, without the knowledge of Ms. Uberall.

[80] The current values of the joint accounts are nominal, and the parties agreed they should be closed and any funds divided equally between the parties. Per the submissions of the parties, I have not included these amounts in the calculations.

DEBTS

[81] A portion of the proceeds of the sale from the Glynde Property are to be used to discharge the Home LOC and also the outstanding mortgage on the 65th Ave Property. These payments will discharge outstanding debt incurred during the relationship. Debt acquired by the parties' post-separation shall be borne by each of them.

[82] The debts of DJF and Apex were paid off from the crane sales. Ms. Uberall should not be responsible for any debt accrued after that date. The Walters Report took any business debt into account in valuing the businesses. Each party should be responsible for all personal debt not addressed here.

VEHICLES

[83] Ms. Uberall's 2000 Camaro, valued at $5,500, is family property. The 2009 GMC truck Mr. Fornwald owned at separation was traded in for $40,000, which he then applied as a down payment on his current truck. These amounts $5,500 (Ms. Uberall's Camaro) and $40,000 (Mr. Fornwald's truck) are family property.

OTHER ASSETS

[84] Financial records of Mr. Fornwald show payments toward Jeep-related expenses. Notations for $1,000 for "Jeep Insurance", and two online transfers of $500 each for "Jeep" are recorded out of Mr. Fornwald's Vancity account. Mr. Fornwald testified he did not know what these referred to, and denied he or his current partner owned a Jeep. In addition, PC Crane records show other non-arms length payments to his current partner, Ms. Spain, which were not accounted for as potential income splitting in the Walters Report.

[85] I have taken Mr. Fornwald's incomplete financial disclosure, and evidence that not all assets available to him were disclosed, into account when determining whether reapportionment is necessary or appropriate in the circumstances.

LEGAL FRAMEWORK

[86] It is important to distinguish division of assets, reapportionment and spousal support: Narayan v. Narayan, 2006 BCCA 561. The court should first divide family property and debt, determine any reapportionment, and then determine spousal support. Not considering these matters separate from each other could create confusion and blur the distinctions between the factors relating to division of family assets and debt, and those relating to spousal support.

[87] The process for considering whether an equal division of family property is unjust was set out by Justice Forth in Prasad v Prasad, 2021 BCSC 430, as involving a two-stage analysis:

[64] At the first stage, the court must determine the extent of family property in accordance with ss. 84-86 of the FLA and undertake the notional exercise of dividing property equally. The second stage requires the court to determine whether the equal division would be significantly unfair, taking into account the factors in s. 95(2) of the FLA.

[88] In Jaszczewska, at paras. 47 and 49, the Court observed it may be necessary to determine family property, by "globally pooling" it and then effecting a distribution of each piece of family property to achieve a fair and equitable result between the parties.

[89] I first make a nominal division of family assets and debt and then determine whether a reapportionment in favour of either party is appropriate. A nominal 50/50 division of family assets/debts, per my findings on family assets would be as follows:

Asset

Value

(Minus excluded interests and after any debts have been removed)

Mr. Fornwald

Ms. Uberall

Real Property

65th Avenue Property

1,186,563

593,281.50

593,281.50

Glynde Property

925,009

462,504.50

462,504.50

Sub-total real property interests

2,111,572

1,055,786

1,055,786

Business Interests

Apex Cranes

112,000

56,000

56,000

DJF

135,554

67,777

67,777

PC Crane

181,005

90,502.50

90,502.50

Sub-total business interests

428,559

214,279.50

214,279.50

Investments

Mr. Fornwald's TFSA 1987

24,770.04

12,385.02

12,385.02

Mr. Fornwald's RRSP 2036

44,055.41

22,027.71

22,027.71

Ms. Uberall's TFSA 0959

557

278.50

278.50

Ms. Uberall's RRSP 3549

71,363.99

35,681.99

35,681.99

Sub-total investments

140,746.44

70,373.22

70,373.22

Vehicles

Mr. Fornwald's truck interest

40,000

20,000

20,000

Ms. Uberall's Camaro

5,000

2,500

2,500

Sub-total vehicles

45,000

22,500

22,500

Total of all amounts of assets each party will receive on an equal division:

$2,725,877.44

$1,362,938.72

$1,362,938.72

[90] The above chart presumes a valuation of Ms. Uberall's investment accounts at trial.

[91] I cannot include a proper valuation of the US dollar Bank of America account. The evidence showed a deposit of at least $19,400 into this account. However, the full extent of this account (either at trial or over time) is not known. Also unaccounted for at least, are non-arms length transactions to Mr. Fornwald's new partner from PC Crane, and a Jeep. Overall, I find that there has not been full disclosure and that on a balance of probabilities Mr. Fornwald has assets available to him that have not been accounted for. I find Mr. Fornwald has dissipated assets from the family businesses, and failed to disclose hidden assets.

[92] The parties expressed the desire that Ms. Uberall would acquire Mr. Fornwald's interest in the 65th Ave Property, and Mr. Fornwald would acquire Ms. Uberall's share of the businesses. Based on the calculations above, Ms. Uberall would pay to Mr. Fornwald $593,281.50 for his share of the 65th Ave Property. Mr. Fornwald would pay to Ms. Uberall $214,279.50 for her share of the businesses. The difference in this exchange, upon an equal division of assets, would have Ms. Uberall paying to Mr. Fornwald $379,002.

Reapportionment Analysis

[93] Ms. Uberall argues a reapportionment of the family assets 70/30 in her favour is appropriate and argues Mr. Fornwald dissipated family assets post-separation in bad faith. Conversely, Mr. Fornwald argues a reapportionment in his favour would be appropriate as it was his labour which built and grew the companies Mr. Fornwald argues that Ms. Uberall squandered away funds from the joint personal and business accounts that were generated solely by his efforts. I have rejected Mr. Fornwald's argument regarding the joint accounts. Mr. Fornwald further argues that Ms. Uberall's investment accounts should be valued at

their high point, rather than at trial.

[94] Reapportionment of family assets or debts under s. 95(2) requires "something objectively unjust, unreasonable or unfair in some important or substantial sense": Jaszczewska at para. 42. The relative contributions of either spouse to the acquisition or maintenance of family property should only be considered in specific, and constrained, circumstances when considering a departure from equal distribution: Jaszczewska at paras. 43-44.

[95] Beginning with Ms. Uberall's investment accounts, Mr. Fornwald pleads s. 95(2)(f) and s. 95(2)(g) in support of a different presumptive valuation date given that Ms. Uberall drew down on them significantly in the year prior to trial. Both parties appear to agree the primary reason for this was so Ms. Uberall could fund this litigation.

[96] In Kumagai v. Campbell Estate, 2018 BCCA 24 at para. 76, the Court of Appeal held that finding a different presumptive date would require a threshold finding that to divide at the trial date would be significantly unfair as per s. 95(1). In Rana v. Ullah, 2022 BCCA 192, the Court of Appeal held that in coming to a finding of significant unfairness:

[44] s. 95 ensures there are persuasive reasons for unequal division, but preserves the trial judge's discretion to consider any factor that contributes to significant unfairness. In the family law context, legal principles assist the judge to reach an outcome that is reasonable and fair to both parties and evidence is not compartmentalized in a mechanical fashion, rather it is considered globally: Zilic v. Zilic, 2021 BCCA 107 at para. 34.

[97] As it specifically relates to Ms. Uberall's depletion of her investment accounts, I find s. 95(2)(f) and s. 95(2)(g) to be of particular relevance, in determining whether a departure from the presumptive norm would be significantly unfair.

[98] Both s. 95(2)(f) and s. 95(2)(g) require a finding that a spouse, after separation, caused a significant or substantial decrease in the value of family property. Section 95(2)(f) requires that this decrease be "beyond market trends" while s. 95(2)(g) requires a finding this was done in bad faith: Yerbury v. Yerbury, 2019 BCSC 271 at para. 60. I find Ms. Uberall did decrease the value in her investment accounts beyond market trends, however, I also find the context in which this occurred relevant to whether this rises to the level of significant unfairness.

[99] While I do find that Ms. Uberall dissipated family assets in drawing down the amounts, she also contributed to them post-separation (as Mr. Fornwald did to his RRSP and TFSA). Ms. Uberall points out that she did not have access to other sources of funds. Up until 2020, the parties had shared assets, which Ms. Uberall relied upon both pre- and post-separation. She utilized, and exhausted, her own resources to cover costs related to the family properties and for basic personal expenses leaving her with minimal funds to cover the cost of litigation and ongoing living expenses. This is unlike Mr. Fornwald who had business income, including from family assets he had unilaterally transferred to PC Crane, to live off of and to fund his costs in this litigation.

[100] In S.L.C. v. J.R.C., 2020 BCSC 463, this Court considered a request to reapportion assets on the basis of the respondent-husband's dissipation of family assets and non-disclosure of assets. Regarding non-disclosure of assets, Justice Winteringham found the respondent-husband had dissipated corporate assets, failed to disclose assets and hidden assets. Accordingly, she found an equal division would result in significant unfairness to the claimant-wife, having particular regard to the factors in s. 95(2)(f) and (g) of the FLA: S.L.C., at paras. 210, 216 and 218.

[101] In addition to the unilateral transfer of the family business assets to PC Crane, and the dissipation of assets to the exclusion of Ms. Uberall, Mr. Fornwald effectively edged Ms. Uberall out of any financial benefit from the joint business ventures beginning in 2015 and solidifying by 2020. This resulted in Mr. Fornwald having the sole benefit of any income generated by the businesses and their assets, including to fund this litigation, while Ms. Uberall was forced to rely completely on her own savings and investments.

[102] On consideration of all of the factors under s. 95(2), including whether both parties acted in bad faith, I do not find the presumptive date of valuation of the investment accounts to rise to the level of significant unfairness. The parties' RRSP and TFSA accounts are to be valued at the time of trial.

[103] Regarding the remaining family assets, and in particular the family business, I reject Mr. Fornwald's assertion he solely generated the business income, and his corresponding attempts to diminish the contributions of Ms. Uberall. Each contributed to the family enterprise in their own way. Ms. Uberall's real property provided the equity they needed to purchase the four cranes which began the joint family venture. The crane and construction aspects of the businesses were largely operated using Mr. Fornwald's knowledge and labour. Ms. Uberall took care of the bookkeeping, paid business and family bills, kept track of monies owed to vendors, or to the bank to service loans the parties had taken out and continued to do so until approximately seven years post-separation. When she was well enough, Ms. Uberall also painted the cranes as part of their maintenance.

[104] Ms. Uberall had primary responsibility for taking care of the household, and took an active hand in maintaining (both personally, and through finding and directing tradespeople) the family properties. Mr. Fornwald contributed to yard work and assisted with other maintenance and upkeep of those properties.

[105] The argument put forward by Mr. Fornwald relies upon outdated notions which underestimate and devalue the contributions of partners (primarily women) who do work that is less physical or less visible (keeping the books as opposed to renting out and caring for the cranes), or unpaid work in the home (keeping the household, maintaining the properties). The argument rests upon stereotypes which undervalue contributions and work historically identified as "women's work". Initially, courts dealt with this issue as unjust enrichment claims to assign value to the contributions of women (see: Peter v. Beblow, [1993] 1 S.C.R. 980, 1993 CanLII 126; Sorochan v. Sorochan, [1986] 2 S.C.R. 38, 1986

CanLII 23). The family law regime, including that under the FLA, has expressly remedied this situation through a presumptive equal division of family assets and debt. Spousal support regimes, both federal and provincial, likewise address this presumption.

[106] There may be circumstances in which the relative contribution of a spouse will amount to significant unfairness and support an unequal division of assets: Jaszczewska at paras. 43-44. However, as noted by the Court of Appeal in Khan v. Gilbert, 2019 BCCA 80 at para. 32, this typically only occurs in cases where there are "marked, prolonged and intentional or unexplained disparities in contributions to family burdens".

[107] I reject Mr. Fornwald's argument that all business success was solely as a result of his contributions. I find both parties contributed to the combined family enterprise, including the family businesses, and also maintenance and upgrade of the real properties. Overall, both Ms. Uberall and Mr. Fornwald worked hard and contributed to the family enterprise in their own way and according to their strengths and abilities. I find they were co-venturers in the acquisition and development of the family businesses. I do not find this is a situation in which it would be appropriate to import a relative contribution analysis as proposed by Mr. Fornwald.

[108] I do find it relevant to the analysis under s. 95(2) to note that while the couple were co-venturers during their relationship, the financial balance between them tipped significantly in Mr. Fornwald's favour post-separation. Mr. Fornwald transferred intangible assets, goodwill and revenue of the family businesses to his personal company. He disposed of family business assets without Ms. Uberall's knowledge and had full control of proceeds of those sales. He led Ms. Uberall to believe the family businesses were in financial trouble, and over time cut her completely out of family business operations, while also ceasing to contribute to shared expenses as he had done for the seven years post-separation.

[109] As stated above, a finding of significant unfairness requires something beyond simply unfair. It requires a finding of unfairness that is weighty, meaningful or compelling, having regard to the factors set out in s. 95(2): Remmem at para. 44; E.H.H. v. C.L.M., 2017 BCSC 1299 at para. 106.

[110] Mr. Fornwald argues Ms. Uberall did not contribute to the financial maintenance of the family properties, with the exception of financial contributions post-separation. For the same reasons as outlined with respect to the family businesses, I reject this argument.

[111] The parties had a relationship that lasted approximately 16 years, perhaps longer. At the time of trial, Ms. Uberall was 70 years old and living off of income from Canada Pension Plan, Old Age Security and her Air Canada Pension, earning $30,530 per year. The amounts she lives on are modest, at best.

[112] Over the years since separation, Mr. Fornwald has maintained a comfortable lifestyle and healthy income at levels equal to, or above his lifestyle during the marriage. He regularly travels and eats out with his new partner. He owns recreational vehicles worth several times

over Ms. Uberall's annual income. He is employed by a business he owns (PC Crane) and can continue to work into the future. Conversely, Ms. Uberall is in a very different position. She does not enjoy the fruits of the family enterprise in which she was a co-venturer. The Glynde Property, which Ms. Uberall's father built, and which Ms. Uberall intended to use to finance her retirement then pass onto her niece, has been sold. Although the approximate $2.5 million rise in equity in the Glynde Property can be credited to market trends, it is noteworthy that while Mr. Fornwald has dissipated joint family assets within Apex and DJF to the exclusion of Ms. Uberall, he again will benefit from assets that may have sustained her.

[113] It was also borne out on the evidence that Mr. Fornwald has assets and income that he has failed to disclose, and their valuation is not possible due to his lack of disclosure. As stated by the Court of Appeal in He v. Guo, 2022 BCCA 355 at para. 39, "[n]on-disclosure fouls family litigation and calls for strong court response". Strong measures are justified in discouraging non-disclosure, however, it is important to "not make something out of nothing": Wu v. Sun, 2011 BCCA 239 at para. 41. I do not find that to be the case here. I find Mr. Fornwald both intentionally dissipated assets to his sole benefit, and hid or diverted assets despite evidence on the record indicating their existence.

[114] I find, on a balance of probabilities, that to divide family assets equally would result in a significant unfairness to Ms. Uberall, per s. 95(2)(c), (f), and (g) of the FLA.

[115] I find it would be appropriate to achieve fairness between the parties to reapportion the family assets as follows:

· Each party to keep their own RRSPs and TFSAs listed here. This results in an unequal distribution (from disclosed investments) of RRSPs $27,308.58 in Ms. Uberall's favour and TFSAs $24,213.04 in Mr. Fornwald's favour.

· Mr. Fornwald will keep all businesses (per the agreement of the parties).

· After the mortgage against the 65th Ave Property is paid from the proceeds of the Glynde Property sale, Ms. Uberall is entitled to keep the 65th Ave Property in her sole name. The value of 65th Ave Property of $379,002.00 (the amount Ms. Uberall would have paid to Mr. Fornwald after the value of the businesses which he will keep is considered) is reapportioned in Ms. Uberall's favour.

· Remaining family assets are subject to a 50/50 apportionment.

SPOUSAL SUPPORT

[116] Ms. Uberall seeks spousal retroactive and prospective support on compensatory (needs based) grounds under both the FLA and the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.). Given that an order under the Divorce Act would have precedence if an order was made under both, I analyze Ms. Uberall's claim under the Divorce Act. I note the principles under both pieces of legislation are very similar, though the process for varying orders made under each are different.

Guideline Income

[117] The Walters Report sets out the Guideline income of Mr. Fornwald from 2013 to 2023, as reflected in the following chart. Ms. Uberall's income is drawn from her income tax documents. Ms. Uberall's income from 2013-2019 reflects the addition of $10,000 she says she kept personally from the Apex 2100 account, and a corresponding reduction in Mr. Fornwald's income for those years, The following chart also reflects a reapportionment of a lumpsum payment from Sunlife Ms. Uberall received in 2016, to account for underpayment in that year, and a number of previous years:

Year

Guideline Income of Mr. Fornwald

Guideline Income of

Ms. Uberall

2013

$219,000.00

$68,539.00

2014

$122,000.00

$65,498.36

2015

$358,000.00

$44,869.11

2016

$114,000.00

$52,195.48*

2017

$88,000.00

$56,163.00

2018

$215,000.00

$42,083.17

2019

$267,000.00

$51,171.00

2020

$327,000.00

$33,934.00

2021

$241,000.00

$30,530.00

2022

$241,000.00

$30,530.00

2023

$241,000.00

$30,530.00

*(This year had an elevated income amount, which included a correction of underpayments that had been made to Ms. Uberall in LTD benefits in previous years. In this table the repayment is reapportioned to the years it was accrued in.)

Legal Framework

[118] Relevant provisions of the Divorce Act are as follows:

Spousal Support Order

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Terms and conditions

(3) The court may make an order under subsection (1) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(4) In making an order under subsection (1) the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

(5) In making an order under subsection (1) the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(6) An order made under subsection (1) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Retroactive Spousal Support

[119] In Parton v. Parton, 2018 BCCA 273 [Parton], the Court of Appeal discussed principles which apply to retroactive spousal support claims where asset reapportionment has occurred:

[42] The fact that a spouse has received substantial assets via property division does not defeat a spousal support claim, even where property has been reapportioned in favour of the support-seeker: Chutter at paras. 79-82; Bodine-Shah v. Shah, 2014 BCCA 191 at paras. 70-71. As Justice Smith explained in Bodine-Shah, in some cases property division may address all or most of the objectives of spousal support and thus eliminate or reduce the need for a spousal support award, but in others it may not. This is particularly so where entitlement to spousal support is based predominantly on compensatory principles. Where property has been reapportioned in favour of a support-seeking spouse, that spouse's entitlement to and the quantum of support is determined by the extent to which the reapportionment adequately compensates for the economic consequences of the marriage and its breakdown, including any claims for compensatory and non-compensatory support: para. 71. In the absence of reapportionment, when spousal support is determined the usual considerations apply.

[120] Ms. Uberall makes a claim for retroactive spousal support to 2015. The principles regarding retroactive spousal support are set out in the Spousal Support Advisory Guidelines: The Revised User's Guide English Edition, (Canada, Department of Justice: April 2016), at s. 20 as follows:

The law of retroactive spousal support was revised and restated in Kerr v. Baranow, 2011 SCC 10, after the release of the SSAG. The Supreme Court of Canada ruled that the retroactive child support analysis of D.B.S. v. S.R.G., 2006 SCC 37, with some modifications, should be applied to the determination of retroactive spousal support. The D.B.S. factors are:

i. the reasonable excuse for any delay in seeking support by the recipient;

ii. the presence or absence of blameworthy conduct by the payor;

iii. the circumstances of the support recipient; and

iv. any hardship to the payor occasioned by a retroactive award.

[121] Mr. Fornwald argues Ms. Uberall's claim for retroactive spousal support should be dismissed given the passage of time between the date of separation and the date she brought her claim.

[122] Ms. Uberall argues she did not know there was any money to base a spousal support claim on. Initially in 2020, when the cranes were sold, she believed the businesses were in desperate financial straits. Mr. Fornwald diverted family business assets to his own company. He sold two cranes owned by Apex and created a bank account for the Apex family business that Ms. Uberall did not have access to. It was only after the Walters Report that Ms. Uberall appreciated how money had been transferred to Mr. Fornwald's new company and to himself personally.

[123] Mr. Fornwald argues that Ms. Uberall has not made out a case for retroactive spousal support.

[124] Mr. Fornwald seeks to have one-half of the payments he made to service the debt on the Glynde Property and 65th Ave Property credited to him as having paid spousal support between the parties. This amount is approximately $328,000. Mr. Fornwald further argues, because Ms. Uberall did not rent out the Glynde Property for market rent, the amount of prospective rent she could have earned should be deducted from any spousal support he owes.

[125] I do not agree that Mr. Fornwald's paying interest charges on financing used to purchase the cranes for the family businesses should be credited as spousal support. I also do not agree potential rent on the Glynde Property should be deducted from spousal support owed. Mr. Fornwald had the option of living at Glynde, and elected not to do so. The evidence was that Ms. Uberall was renovating and updated the property. Further, where Ms. Uberall did rent out the Glynde Property, this amount is reflected in her income. Ms. Uberall additionally spent her own funds for such things as property taxes and other items.

[126] Ms. Uberall seeks retroactive spousal support of $427,140 based on the imputed incomes set out in the Walters Report, taking into account a $10k per year credit to Mr. Fornwald for any amounts she used personally from the Apex 2100 account.

[127] I consider that the reapportionment of assets has achieved fairness between the parties in terms of any claim Ms. Uberall may have for retroactive spousal support, and, that the rationale for spousal support has been addressed through this reapportionment. I therefore make no award of past retroactive spousal support.

Prospective Spousal Support

[128] Ms. Uberall applies for prospective compensatory and non-compensatory (needs based) spousal support. The principles governing entitlement to compensatory and non-compensatory support were set out in in Moge v. Moge, [1992] 3 S.C.R. 813, 1992 CanLII 25 [Moge], and Bracklow v. Bracklow, [1999] 1 S.C.R. 420, 1999 CanLII 715 [Bracklow].

Compensatory Spousal Support

[129] In Chutter v. Chutter, 2008 BCCA 507, the BC Court of Appeal outlined the purpose and rationale for compensatory spousal support, based upon the principles in Moge and Bracklow as follows:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic

consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse"

[Underlined emphasis added; italicized emphasis in original.]

[130] A compensatory award should continue until compensation is achieved even if the spouse has achieved self-sufficiency: Chutter, at para. 79.

[131] The importance of the marital standard of living in lengthy marriages has been identified as a factor in determining appropriate quantum of compensatory spousal support. In Moge, at 870, the Supreme Court of Canada stated:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Citations omitted.]

Non-Compensatory (Needs Based) Spousal Support

[132] Non-compensatory support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union": Chutter at para. 54. Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state. Need alone may be sufficient to ground a claim for spousal support: Bracklow, at para. 43. Need is something more than basic necessities and varies according the circumstances of the parties: Chutter, at para. 55. Need does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence.

Analysis

[133] The parties have experienced a reversal of fortunes, from the time their relationship began, to the time of trial. The lives of each of the parties is now quite different. Mr. Fornwald and his new partner frequently vacation internationally, dine out regularly, and enjoy a comfortable lifestyle. According to Mr. Fornwald, he and his new spouse have nearly equivalent independent incomes. Mr. Fornwald owns assets which include recreational vehicles worth well over $100,000. The value of these recreational vehicles alone is nearly three times the amount of Ms. Uberall's annual income. As I have found above, asset disclosure by Mr. Fornwald is incomplete. The full extent of the assets Mr. Fornwald has access to is not known, but I am satisfied those assets are greater than he has disclosed.

[134] Ms. Uberall's standard of living since separation has significantly decreased. She lives off of income from different pensions, totaling $30,530 per year. She has had to withdraw from her RRSPs to fund this litigation. She testified she now needs to be very conscious of spending, and is frugal with her money. She does not go on vacations, and eats out rarely.

[135] Ms. Uberall's contributions, of equity to finance family businesses, her bookkeeping services and her keeping of the family home and properties significantly improved and supported the earning potential of Mr. Fornwald while diminishing the assets she held in real property prior to the relationship.

[136] The Glynde Property that Ms. Uberall inherited from her father, and which she planned to use as a source of retirement income, has been sold to pay off the family business debt. Ms. Uberall's ability to generate income is limited by her age and health conditions. At the end of this process, Mr. Fornwald will be left with businesses from which he generates income, and has good prospects to continue to generate significant income into the future. If he decides to no longer work, he has the ability to hire people to carry out tasks needed to continue to operate the businesses.

[137] The parties' relationship lasted for approximately 16 years (from 1997-2013). Ms. Uberall was approximately 60 years old at separation. Under the Spousal Support Advisory Guidelines , duration of spousal support on the facts of this case would fall within the Rule of 65 which provides for indefinite support where:

the marriage has lasted five years or longer, if the years of marriage plus the age of the support recipient at the time of separation equals or exceeds 65

The "rule of 65" recognizes that length of marriage cannot be the only factor in determining the duration of spousal support in marriages without dependent children. Age is also a significant factor as it affects the ability to become self-supporting."

[138] As a result of the separation, Ms. Uberall's lifestyle has diminished considerably, while Mr. Fornwald has continued the lifestyle he enjoyed during the marriage. I have found that the lifestyle difference, in large part, results from Mr. Fornwald's transfer of family business assets to his private company. He continues to benefit from Ms. Uberall's contribution to his career.

Conclusion: Prospective Spousal Support

[139] I find Ms. Uberall is entitled to receive compensatory and non-compensatory spousal support in the high-range, based on Guideline incomes as set out in the Walters Report, of $241,000 for Mr. Fornwald and $30,530 for Ms. Uberall. On a monthly basis this is $5,262 per month.

Lump Sum Spousal Support

[140] The Court of Appeal in Parton, at para. 47, contemplated that a lump sum spousal support may be appropriate and emphasized the need to distinguish the purpose of a lump sum spousal support award from the effect of such an order. The Ontario Court of Appeal in Davis v. Crawford, 2011 ONCA 294 [Davis] at para. 62, noted that though any lump sum spousal support order will involve the transfer of property from one spouse to another, the redistribution of assets is not the purpose of spousal support.

[141] Factors to weigh in considering the advantages or disadvantages of such an award (per Davis at paras. 60-69), are specific to each case, and could include to: relieve against financial hardship; the payor's ability to pay the award without undermining their own ability to be self-sufficient; and, a weighing of the advantages and disadvantages of a lump sum award against episodic payments.

[142] Given the age of the parties, and the current availability of the resources (in the form of the proceeds from the Glynde Property) to finance a lump sum payment, as well as the concern given Mr. Fornwald's incomplete disclosure, I find that a lump sum award would be appropriate in the circumstances.

[143] I find that spousal support in the amount of $315,720 (representing five years of high-range spousal support) is payable in a lump sum from Mr. Fornwald to Ms. Uberall from his share of the proceeds of the Glynde Property. Though Ms. Uberall's entitlement to spousal support, absent any reapportionment, would fall in the indefinite range, I find that with the reapportionment of family assets which has occurred, this is a result which achieves the objectives of spousal support as set out in the Divorce Act.

DIVORCE

[144] Subject to s. 12 of the Divorce Act, the claimant, Darrell James Fornwald, and the respondent, Marlene Beverly Fornwald, also known as Uberall, who were married at Honolulu, Hawaii, United States of America on November 23, 2002, are divorced from each other. The divorce to take effect on the 31st day after the date of this order.

"A. Walkem J."

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