

CANADA / JUDGMENT

Haley v. Haley

2022 BCSC 1945

COURT

Supreme Court of British Columbia

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2022 BCSC 1945 Haley v. Haley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Haley v. Haley,

2022 BCSC 1945

Date: 20221108

Docket: E192864

Registry: Victoria

Between:

Carmel Irene Haley

Claimant

And

Chester Owen Haley

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Claimant:

T. Luchies

S. Wall, Articled Student

Counsel for the Respondent:

K. Melbye

J. Holm

Place and Date of Trial:

Victoria, B.C.

March 3-4, 7-11 and 29, and September 14, 2022

Place and Date of Judgment:

Victoria, B.C.

November 8, 2022

Table of Contents

Introduction.. 4

Background facts.. 5

The parties' early life. 5

The parties' marriage and family life prior to the move to Singapore. 6

The move to Singapore. 7

The return to Canada. 8

Separation and post-separation.. 10

Child and spousal support payments after separation.. 12

The parties' current circumstances. 14

ISSUES.. 15

ANALYSIS.. 16

Issue 1: Division of Assets and Debt 16

Legal Framework. 16

Summary of property and debt disputes. 17

Analysis. 18

(a) Island Savings Line of Credit repayment 18

The Steeves Order 18

The parties' positions. 19

Discussion. 19

(b) The claimant's 2019 tax debt	22
(c) The Prince George House.	23
(d) The claimant's shareholder interest in Matte Investments.	24
The expert evidence.	24
Discussion.	26
(e) The claimant's interest in Bon Voyage.	29
(f) Otters Close House.	30
(g) Spending from the Next Stage account in 2018.	31
(h) The value of the Ranger Tug.	33
The expert evidence.	33
Discussion.	35
(i) Remaining items in dispute.	37
Issue 2: Determination of income.	38
Legal framework.	38
Discussion.	39
Summary of issues.	39
The parties' incomes in 2019 and 2020.	41
The claimant's income.	41
The respondent's income.	41
The parties' incomes in 2021.	43
The claimant's income.	43
The respondent's income.	45
The parties' incomes for ongoing support	46
The respondent's income.	46
The claimant's income.	48
Summary of determination of the parties' income.	49
Issue 3: Child support	49
Ongoing child support for Joshua.	50

Retroactive child support 52

How much child support was owed in the pre-trial period?. 53

Issue 4: Spousal support 54

Legal principles. 54

Entitlement 55

Quantum.. 56

Retroactive spousal support 57

2019. 57

2020. 57

2021. 58

2022 - Ongoing support 60

Duration.. 60

Issue 5: Should the claimant pay a fine for non-disclosure?. 60

ORDERS.. 61

Introduction

- [1] This trial concerns disputes over child and spousal support--both retroactive and ongoing--and division of family property and debt. A particular focus of the trial is the determination of the parties' income for support purposes.
- [2] The parties separated in May 2018 after a 24-year marriage. They are now both 51 years old. The parties have three children, who are now 27 (Shayna), 23 (Johanna), and 20 (Joshua). It is common ground that only Joshua remains a child of the marriage. Throughout their marriage, the respondent worked while the claimant mostly stayed at home and had primary responsibility for the children and the family home. There is no question that the claimant has a strong claim for compensatory spousal support.
- [3] After the parties separated, their finances remained intermingled until early 2019. The claimant continued to live in the family residence with Johanna and Joshua. She financed her personal expenses and the family expenses with money from the respondent's personal consulting company, as she had done during the parties' marriage. During this period of time, the respondent did not pay child or spousal support.
- [4] In early 2019, the financial arrangements between the parties changed. The respondent unilaterally, and without notice, cut off the claimant's access to accounts and credit cards that the claimant had relied on to support herself and the children, and he removed a large sum of money from their joint line of credit. The respondent purported to have taken these

steps as means of safeguarding these funds. The immediate effect of his actions was to leave the claimant--who was already in a situation of vulnerability following the parties' separation--without any readily accessible financial resources. The longer-term effect was to create an atmosphere of distrust and hostility between the parties that continued to be evident at the trial of this proceeding.

- [5] One matter that is not in dispute between the parties is the claimant's request for a final order of divorce. The respondent consents to this relief. I am satisfied that the requirements for a divorce order pursuant to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act] are met in this case.

Background facts

- [6] I will review the background facts by way of providing a narrative context to the various matters in dispute, noting where there are significant conflicts in the evidence. The conflicts are addressed in the Analysis section of this judgment.

The parties' early life

- [7] The claimant was born and raised in Prince George, B.C. She has 10 siblings. The claimant's father and mother owned a number of companies, primarily in the construction and real estate businesses. The parent company is Matte Investments Ltd. ("Matte Investments"). Matte Investment's principal business activities are the leasing and development of properties, earning management fees, and holding shares of subsidiary companies. The claimant, and each of her siblings, own non-voting shares in Matte Investments, which they were gifted at birth. One of the issues that must be resolved in this proceeding is whether the claimant's shares in Matte Investments have any value.
- [8] After the claimant graduated from high school, she attended one term of community college, with a view to taking courses that would permit her to transfer to university. The claimant did not return for a second term. The only other post-secondary education program the claimant completed was an eight-month course for make-up artistry in the television and film industry. The claimant did not pursue a career in this field.
- [9] The claimant worked at a variety of part-time jobs during high school, including babysitting and working at a gas station. After high school, she worked as a waitress, a tree planter, and a labourer at one of her father's construction companies. In the fall of 1993, she started working at Ave Maria, a gift and speciality store in Prince George that was owned by a company affiliated with Matte Investments. The claimant started in a retail position, and eventually took on a management role.

- [10] The respondent was born in Nova Scotia. After graduating from high school, the respondent enrolled in an undergraduate program at St. Francis Xavier University. The respondent attended St. Francis Xavier for two years. During this time, he travelled to Prince George during the summer to work as a tree planter. After his second year, the respondent moved to Prince George to work at a lumber mill. He intended to continue his undergraduate studies at the University of Northern British Columbia ("UNBC").
- [11] In November 1993, the claimant and the respondent met in Prince George through mutual friends. They were soon dating. In December 1993, the parties began to live together in Prince George in a house that the claimant had constructed on land given to her by her father (the "Prince George House"). The claimant's parents did not approve of the parties living together when they were not married. The claimant's parents pressured the respondent to find a place of his own. The respondent moved in with the claimant's brother for a period of time.

The parties' marriage and family life prior to the move to Singapore

- [12] The parties were married in August 1994. After the marriage, they lived in the Prince George House. The claimant continued to work at Ave Maria. The respondent attended UNBC until about 1995 or 1996 as he attempted to complete his undergraduate degree. The respondent did not receive his degree, as he ended up one course short of the degree requirements.
- [13] The parties' first child, Shayna, was born in 1995. The claimant took 6 months of maternity leave, and then returned to work full-time at Ave Maria. The respondent enrolled in an entrepreneurial course, and worked at an employment agency. In around 1997 or 1998, he started a computer business in Prince George with a partner.
- [14] The parties were still living in Prince George when their second child, Johanna, was born in 1999. In July 1999, the family moved to Red Deer, Alberta, where the respondent started a computer franchising business. They sold the Prince George House and used the proceeds towards the purchase of a house in Red Deer. They later sold that house and purchased a second house in Red Deer.
- [15] The claimant did not work for the first year following the family's move to Red Deer. The respondent's computer business in Prince George eventually closed, and he sold his business in Red Deer. Both parties then looked for work. The claimant found a job at Cleo's, a women's clothing store in a local mall. She worked there until the birth of the parties' third child, Joshua, in November 2002. The claimant took a one-year maternity leave after Joshua's birth. She then returned to her job at Cleo's. The claimant found retail work to be difficult in terms of managing family demands. For a brief period of time, she ran a home daycare, but she did not enjoy this work.

- [16] In 2005, the respondent enrolled in an MBA program at the University of Calgary, which he completed in 2007. At the time, he was working in the human resources department of the David Thompson Health Region. The respondent was able to complete his MBA degree by taking class on weekends. Through the respondent's connections, the claimant also secured a one-year contract with the Health Region, assisting with the implementation of a patient information system.
- [17] In late 2005 or early 2006, the parties moved from Red Deer to Calgary, after the respondent obtained employment with the Calgary Health Region. The parties sold their house in Red Deer, and used the proceeds to purchase a house in Calgary. The claimant did not work outside the home during the time the family lived in Calgary.

The move to Singapore

- [18] Following his graduation from the MBA program, the respondent accepted a contract with an American health care company, Eclipsis, for a project in Singapore. The entire family moved to Singapore in December 2007, where they lived for the next six years. The claimant did not work outside the home during this time.
- [19] The respondent eventually became a general manager for the Asia-Pacific region after Eclipsis merged with another company, Allscripts. The respondent was paid a high salary, and also received bonuses, commission, and stock options. In at least one of the years that the family lived in Singapore, the respondent earned over \$1 million. His employer also covered the family's housing expenses, car lease, and the children's private school tuition fees.
- [20] The claimant says the family was "living the dream" in Singapore. They were financially well-off after years of living from paycheck to paycheck. The respondent says the family's affluence came at a personal cost to him. His job required him to travel a significant amount, in some years up to 200 days. The respondent found the travel to be taxing and tiring. The respondent's travel schedule was also taxing for the claimant, who was left to care for the children in the respondent's absence. The school the children attended was 20 kilometers away from their home. Among other parenting responsibilities, the claimant had to transport the children to school and back each day.

The return to Canada

- [21] By 2012, the parties had started to consider a move back to Canada. The respondent had, by this time, become worn down by the travel required of him in his work. The parties were also experiencing some marital issues. They eventually decided to return to Canada in the spring of 2013 following Shayna's graduation from high school in Singapore.

- [22] In December 2012, the parties purchased a house on Lake Cowichan (the "Creekside House") in anticipation of moving to British Columbia. They also looked into private schools for Johanna and Joshua, and settled on Brentwood College on Vancouver Island.
- [23] The family returned to Canada from Singapore in June 2013. They initially lived in the Creekside House. Within a few months of returning to Canada, the parties had purchased a house in Mill Bay (the "Mill Bay House"). As of November 2013, the Mill Bay House was the family's primary residence. During this time, Johanna was in grade 9 and attending Brentwood College as a day student. Joshua was in grade 5, and attending an elementary school in Duncan. Shayna was attending university.
- [24] At the time of the family's return to Canada, neither party was working. The respondent referred to himself as "semi-retired" at this time, although the parties had different perceptions of what this meant. The respondent says he actually hoped to retire after the difficult years in Singapore; the claimant says the respondent only jokingly referred to himself as semi-retired, and it was always his plan to return to work in some capacity in Canada. The parties did have significant savings from their time in Singapore. They were able to purchase the Creekside House and Mill Bay House without any financing.
- [25] In the fall of 2013, the respondent accepted a position as chief operating officer with QHR Technologies Inc. ("QHR"), based in Kelowna. The respondent commuted from Mill Bay. The job entailed more travel than the respondent had anticipated, including monthly trips to Toronto. The job with QHR ended in the spring of 2014.
- [26] After leaving his job at QHR, the respondent incorporated a company, Next Stage Management Concepts Inc. ("Next Stage"), with a view to performing consulting work. The parties were equal shareholders in Next Stage, and they split income for tax purposes. The respondent did a variety of contract work through Next Stage over the next year.
- [27] In 2015, the parties purchased a share in a Remax franchise in Cowichan Valley for \$30,000, and they both enrolled in a real estate course. The Remax venture was short-lived. They sold back their interest in the franchise after a year for the same amount that they had purchased it for.
- [28] In 2015 or 2016, the parties sold the Creekside House and purchased another house on Cowichan Lake (the "Swordfern House"). At this time, the parties also took out a line of credit with Island Savings Credit Union (the "Island Savings Line of Credit") with a limit of \$825,000. The Island Savings Line of Credit was secured by the Swordfern House and the Mill Bay House.
- [29] In 2016, the respondent, through Next Stage, began a contract on a project to implement a patient information system for the Vancouver Coastal Health Authority ("VCHA"). The contract continued for two years. During this time, the respondent commuted between Mill Bay and Vancouver.

- [30] Other than through the short-lived Remax franchise, the claimant did not work outside the home after the parties returned to Canada. She continued to have primary responsibility for managing the children's school and extracurricular activities. Shayna was enrolled in a business program at the University of Victoria. She graduated with an undergraduate degree in the spring of 2016. In the fall of 2016, Joshua started attending Brentwood College where his older sister Johanna was enrolled.

Separation and post-separation

- [31] The parties separated on May 3, 2018. At the time of the separation, there were no formal arrangements in place for child or spousal support. The claimant continued to live in the Mill Bay House with Johanna and Joshua, and she covered her personal expenses and the children's expenses through income from the Next Stage account, as she had done during the parties' marriage. The respondent stayed primarily at the Swordfern House when he was not in Vancouver. In the summer of 2018, he rented an apartment in Victoria. The claimant says the respondent told her not to worry about the financial details, and that they would sort it out eventually.
- [32] In September 2018, the respondent incorporated a new personal consulting company, 1180946 B.C. Ltd. ("118"). Thereafter, the respondent's consulting income--including through a contract he started with the Vancouver Island Health Authority in early 2019--was paid into his 118 account.
- [33] The lack of a formal arrangement between the parties for the respondent to pay child and spousal support left the claimant feeling vulnerable. She says that by the time of the parties' separation, the respondent was in a new relationship. The claimant felt that her own financial security was tenuous. In May 2018, the claimant removed \$200,000 from the Island Savings Line of Credit. She returned the funds four days later after speaking to the respondent and receiving his assurance that they would sort out their financial situation. In July 2018, the claimant withdrew \$150,000 from the Next Stage account after discovering that the respondent was possibly looking to purchase property with his new partner. She returned these funds two days later after once again receiving assurance from the respondent.
- [34] The informal financial arrangements between the parties came to an end in early January 2019. By this time, it appears, the respondent had become concerned with the amount the claimant was spending from their joint funds. Without any notice to the claimant, the respondent unilaterally cancelled two of the plaintiff's credit cards, removed all but \$3,000 from their joint bank accounts, and also removed the \$520,000 that was remaining in the Island Savings Line of Credit.
- [35] At the time the respondent took steps to cut the claimant off from access to funds, the claimant was at the World Junior Hockey Tournament in Vancouver with the two younger children. She attempted to order dinner for the family, and found that her credit cards had

been cancelled. She then discovered that funds were also gone from the parties' bank accounts and the Island Savings Line of Credit. The claimant spoke to the respondent the next day. He confirmed to her that he had taken all the money, and advised that he intended to assume sole responsibility for the parties' financial affairs from then onward.

- [36] The respondent says he removed the funds for "safekeeping" in order to curb excessive spending by the claimant. He says he proposed to the claimant that he would return the funds if they both agreed to have joint signatures on the Island Savings Line of Credit. No such agreement was ever reached. One of the issues in dispute between the parties is the proper accounting of the Island Savings Line of Credit funds removed by the respondent in the division of family debt.
- [37] The informal post-separation arrangements between the parties also extended to their living situation. It was agreed that the claimant would reside primarily at the Mill Bay House. The respondent was to use the Swordfern House when he was not at his Victoria apartment, with the claimant having access over the summer months. This arrangement also led to conflict. Each of the parties accuses the other of not respecting boundaries, and accessing the properties without adequate notice.
- [38] In the fall of 2018, the claimant changed the locks at the Mill Bay House in order to prevent the respondent's access. In April 2019, the respondent moved permanently into the Swordfern House, and advised the claimant that she could no longer use the property. After April 2019, the respondent had sole use of the Swordfern House, and also of a 31-foot 2016 Ranger Tug (the "Ranger Tug") the parties owned that was moored at the property.

Child and spousal support payments after separation

- [39] In February 2019, the respondent started paying the claimant a monthly amount for child and spousal support. The parties agree that in 2019, the respondent only owed table monthly child support for Joshua, who was still attending Brentwood College and living primarily with the claimant. Johanna graduated from high school in the spring of 2018. She attended Western University in Ontario starting in the fall of 2018, and lived with the respondent over the summer of 2019. Shayna, as noted, graduated from university in 2016, and was living independently. There is some dispute between the parties as to whether the respondent was obliged to pay monthly table child support for Johanna as well as Joshua for periods of time in 2020. I will resolve that dispute in the Analysis section of this judgment in addressing retroactive child support.
- [40] The respondent unilaterally determined the monthly amount of support he would pay the claimant using a DivorceMate calculation that assumed his income was \$187,800. This amount was the total taxable dividends from Next Stage in 2018. Based on his calculations, the respondent determined that he would pay the claimant monthly child and spousal support in the combined amount of \$5,446.92. In some months, the respondent paid a lower amount to account for expenses, such as the purchase of a plane ticket for Johanna, that he

decided should reduce his support obligation.

- [41] In September 2020, the respondent unilaterally reduced the base monthly support amount to approximately \$4,300 to account for the fact that Joshua was, by this time, attending boarding school rather than living with the claimant. The respondent continued to reduce the monthly payments on occasion to account for expenses he believed should be deducted.
- [42] In 2021, the claimant's application for a variety of interim relief, including spousal support, came on for hearing. The order of Justice Steeves, issued March 31, 2021 (the "Steeves Order"), included the following terms related to spousal support:
2. Spousal support will be calculated for the Claimant based on her income of \$11,200 and the Respondent's income of \$250,000.
 3. The effective date of spousal support will be February 1, 2021 to include the filing date of the subject application.
 4. To reflect the long term marriage, spousal support will be at the high end.
- [43] It should be noted that the respondent's income in Term 2 of the Steeves Order was based on his self-report. I presume it consisted of the respondent's base salary with his current employer, Teladoc Health Canada Inc. ("Teledoc"), without inclusion of the other aspects of his compensation. The Steeves Order did not include a term setting the monthly amount of spousal support. The parties subsequently agreed that the monthly amount would be \$9,552. The respondent has paid this amount in spousal support since February 1, 2021.
- [44] The respondent's monthly support payments between February 2019 and February 2021 were not pursuant to a court order or an agreement between the parties. For this reason, the respondent was unable to claim a tax deduction for the support payments, and the claimant was not required to declare the payments as income. The respondent says this resulted in unfairness to him in the pre-trial period, in that he overpaid spousal support.

The parties' current circumstances

- [45] The claimant has not worked since the parties' separation. She has a plan to open a tap house and bicycle shop in Cumberland, B.C. To that end, she has incorporated a company, and has also taken some courses on relevant topics. Beyond this, the claimant has not, to date, taken active steps to establishing the business. It is her hope to pursue this opportunity in the future once she has received her share of the family property.
- [46] The claimant's line 150 income in 2019 and 2020 was \$9,516 and \$12,001, respectively. This consists primarily of dividends and director's fees that the claimant receives from her interest in Bon Voyage Estate Limited Partnership ("Bon Voyage"), one of the subsidiary companies of Matte Investments. Bon Voyage's principal business activity is the operations of a motor inn and restaurant in Prince George, B.C. The claimant's interest in Bon Voyage is one of the disputed issues that must be resolved in the division of family property.

- [47] In July 2020, the respondent was hired by Livongo Health Canada ULC ("Livongo"), as a full-time employee in a management position. A short time later, Livongo was purchased by Teladoc. The respondent remains employed by Teladoc, although as of the time of trial he was waiting for formal confirmation of his employment, role, and salary at Teladoc. Pursuant to his employment contract with Livongo, the respondent earns a base salary of \$250,000, and additional non-base salary compensation such as bonuses and stocks. In 2021, the respondent's T4 income was \$739,541. One of the issues to be resolved in this case is whether the respondent's spousal support obligation going forward should be based on his 2021 T4 income, as the claimant maintains, or some lesser amount to reflect the uncertainty in the respondent's employment compensation, beyond his base salary.
- [48] The Mill Bay House and the Swordfern House were both sold prior to trial, and the net sale proceeds have been paid into court. There have been some interim distributions, including an interim distribution of \$500,000 to each party that I ordered, by consent, during the trial.
- [49] After moving out of the Mill Bay House, the claimant lived in a trailer for a few weeks, and then found a basement suite to rent in Cumberland. In April 2021, the respondent purchased property on Otters Close in Duncan, B.C. (the "Otters Close House") with his new partner. The claimant asserts an interest in the Otters Close House on the theory that it was purchased with family property.

ISSUES

[50] The following issues arise for resolution:

- 1) What is the appropriate division of family property and debt?
- 2) What are the parties' incomes for the purpose of calculating child and spousal support, both retroactively and on an ongoing basis?
- 3) What are the respondent's retroactive and ongoing child support obligations?
- 4) What are the respondent's retroactive and ongoing spousal support obligations?
- 5) Should the claimant be ordered to pay a fine in relation to her failure to disclose documents in this trial?

[51] As noted, both parties consent to a final order for divorce.

ANALYSIS

Issue 1: Division of Assets and Debt

Legal Framework

- [52] Section 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides that, subject to an agreement or order which states otherwise, spouses have a presumptive entitlement to an equal interest in all family property and are equally responsible for family debt.
- [53] Section 84(1)(a) of the FLA defines family property to include all real and personal property that is owned by at least one spouse on the date of separation or in which at least one spouse has a beneficial interest that is not excluded property under s. 85. Pursuant to s. 84(1)(b) of the FLA, family property also includes property acquired by a spouse after separation if the property is derived from property that is referred to in s. 84(1)(a).
- [54] Family debt includes all financial obligations incurred by a spouse during the relationship and also after separation if it is incurred for the purpose of maintaining family property: FLA, s. 86. A party seeking division of post-separation debt bears the burden of establishing not only the existence of the debt but also that the debt was incurred during the parties' relationship or to preserve or maintain family property: *Unger v. Conrad*, 2018 BCSC 507 at paras. 67-69.
- [55] Section 87 of the FLA provides that the value of family property is based on its fair market value. The value of both family property and family debt is presumptively to be determined at the date of trial.
- [56] Pursuant to s. 95 of the FLA, a court may order an unequal division of family property or family debt, or both, if an equal division would be "significantly unfair" having regard to the factors enumerated in s. 95(2).

Summary of property and debt disputes

- [57] The parties agree that May 3, 2018 was the date of separation. As such, each party is presumptively entitled as of May 3, 2018, to an undivided half interest in all family property and is equally liable for family debt.
- [58] A number of issues related to property division have been resolved by way of either a pre-trial consent order or agreement. The remaining issues in dispute are as follows:
- (a) What amount must the respondent pay to the claimant in relation to the \$520,000 he removed from the Island Savings Line of Credit?
 - (b) Is the tax owed by the claimant in relation to her 2019 T5 from Next Stage a family debt?
 - (c) Is the Prince George House excluded property?
 - (d) To what extent, if at all, did the claimant's shares in Matte Investments increase in value after the parties' marriage?
 - (e) Is the claimant's interest in Bon Voyage excluded property?

- (f) Did the respondent's interest in Otters Close derive from the parties family property?
- (g) Is the respondent entitled to reimbursement from the claimant for her disproportionate spending from the Next Stage bank account in 2018?
- (h) What is the value of the Ranger Tug?
- (i) How should the remaining disputed items from the claimant's Scott Schedule be allocated?

Analysis

(a) Island Savings Line of Credit repayment

[59] I have already reviewed the unfortunate circumstances of the respondent's withdrawal of \$520,000 from the Island Savings Line of Credit in January 2019. There is no question that the respondent must account for this money. The dispute is over the deductions that the respondent can legitimately claim from the amount he must return. I will first review the background and the parties' positions in order to frame the dispute.

The Steeves Order

[60] There are terms in the Steeves Order that address the issue of the Island Savings Line of Credit funds. The relevant terms are as follows:

5. The net amount of \$520,000 from the line of credit, held in the account in the name of the Respondent, will be returned to the line of credit account. The net amount will not include expenses related to:
 - a. school fees for the children;
 - b. property taxes;
 - c. a renovation cost for the Swordern property in order to get it ready for sale;
 - d. legal fees for the valuation; and
 - e. the valuation itself.
6. The Respondent will provide to the Claimant receipts for all these expenses.
7. The parties may agree on other expenses to be deducted from the amount that would go back in to the line of credit.
8. A full and detailed accounting of the line of credit and money moving back and forth will be done at trial.
9. The payments set out here will be completed by April 16, 2021. The Respondent will confirm that has been done in writing to the Claimant.

[61] Despite the terms of the Steeves Order, the respondent did not repay the funds prior to April 16, 2021. It appears that the parties, despite engaging in discussion after the Steeves Order, could not reach agreement on the amount of the repayment. When the Mill Bay House and the Swordfern House were sold, the Island Savings Line of Credit--which was secured by the properties--was automatically paid out with the sale proceeds. The net proceeds remain in the trust account of the respondent's counsel. It is common ground that the respondent must pay 50% of the net funds to the claimant, following appropriate deductions. As noted, the dispute is over what deductions are appropriate.

The parties' positions

- [62] The respondent submits that the net amount left from the Island Savings Line of Credit funds, following deductions, is \$258,882.84. He says that funds spent to date have primarily gone to maintaining family property and paying s. 7 expenses, including the children's tuition. He has provided a reconciliation to support his position, along with receipts to prove that the expenses claimed were incurred. The respondent relies on term 5 of the Steeves Order as justification for spending the funds on some of the listed items.
- [63] The claimant says that the only expenses properly claimed by the respondent are those relating to s. 7 expenses, including the children's tuition and orthodontic costs. The claimant agrees those costs should be divided in proportion to the parties' income. In her reply submissions, the claimant acknowledged that certain limited expenses related to the Swordfern House may also be divided, but only where supported by receipts. The claimant disputes that the Steeves Order was intended to finally determine any issue related to the accounting of the Island Savings Line of Credit funds, but rather argues that it was an interim order intended to set out the terms on which the respondent would return the funds pending trial. By way of example, the claimant disputes that she must share in the expense of the respondent's legal fees related to the valuation of the Swordfern House, despite the fact that this was a category of expense the respondent was entitled to withhold under the Steeves Order.

Discussion

- [64] I begin with two preliminary points that frame my analysis. First, the respondent says that the Island Savings Line of Credit funds that he withdrew constitute a family debt under s. 86 of the FLA to the extent that the debt was incurred for the purpose of maintaining family property in the post-separation period. I did not understand the claimant to dispute the respondent's position, although she does emphasize that the onus is on him to justify and prove any expenditure.
- [65] The second preliminary point concerns the implications of the Steeves Order. I agree with the claimant that the Steeves Order was not intended to constitute a final resolution of any issues in relation to the Island Savings Line of Credit. Instead, it was an interim order which addressed the terms on which the funds would be returned--which, again, did not actually

occur--pending trial. The Steeves Order expressly provides that: "A full and detailed accounting of the line of credit and money moving back and forth will be done at trial." For this reason, I do not consider that the categories of expenses listed in Term 5 of the Steeves Order are binding on me in determining the question of whether the claimant is jointly responsible for any expenses.

- [66] There is no question that it was wrong of the respondent to unilaterally remove funds from the Island Savings Line of Credit, and to otherwise cut off the claimant's access to financial resources. He conceded as much at trial. The respondent apparently considered himself entitled to exercise sole decision-making authority in using family property to pay for family expenses, while leaving the claimant entirely reliant on his discretion. The claimant had no control over the respondent's decision to withdraw the funds, or the manner in which the funds were spent. I agree with the claimant that the onus must be on the respondent to strictly prove the legitimacy of expenses he claims as a deduction from his obligation to repay the claimant. I also agree that the respondent should be liable for any financial consequences--such as interest payments--of his unilateral decision to withdraw the funds. However, I disagree to some extent with the narrowness of the claimant's conception of what expenses were properly incurred.
- [67] I do not propose to engage in a line-by-line review of the spreadsheet the respondent has prepared for the purpose of trial to show the payment of money from the Island Savings Line of Credit funds. Instead, I will set out the principles on which I find the accounting must occur, and leave it to the parties to prepare the necessary calculations in order to determine a repayment amount.
- [68] I conclude that the following categories of expenses--taken from the respondent's spreadsheet--should be shared equally by the parties where supported by an invoice on the basis that the expenses were incurred to maintain family property:
- 1) repairs and renovations of the Swordfern House;
 - 2) insurance and property tax for the Swordfern House;
 - 3) repairs and renovation of the Ranger Tug;
 - 4) insurance for the Ranger Tug; and
 - 5) vehicle repair costs, where the vehicle is family property.
- [69] The following categories of expenses are s. 7 expenses that should be shared by the parties in proportion to their income:
- 1) tuition and school fees for Johanna and Joshua; and
 - 2) orthodontic costs for Johanna and Joshua.

[70] The following categories of expenses were not incurred to maintain family property and they are not s. 7 expenses. The claimant is not responsible for any portion of these expenses:

- 1) legal fees, including fees related to the valuation of the Swordfern House;
- 2) Joshua's ski trip and new computer;
- 3) accounting fees paid in relation to Next Stage or 118 in 2019; and
- 4) any increased interest payments accruing from the respondent's unilateral decision to withdraw the Island Savings Line of Credit Funds.

[71] There remains a dispute over the parties' respective financial responsibility for the cost of the business valuation of Matte Investments, which was paid from the Island Savings Line of Credit Funds. The claimant says that the respondent should be entirely responsible for the cost of the business valuation because it was prepared at the respondent's insistence, and in the result supported the claimant's position that her shares in Matte Investments had no value. In my view, that is a matter more properly addressed in determining the costs of this proceeding. I will be providing the parties with an opportunity to make further submissions on costs, and therefore will make no direction at this time regarding the appropriate division of the expense of the business valuation.

[72] The parties are also at liberty to seek a further hearing before me if they cannot agree on a final reconciliation of the funds out of the Island Savings Line of Credit in light of the directions I have given.

(b) The claimant's 2019 tax debt

[73] The claimant incurred a tax debt of \$37,722 in relation to a T5 slip that she received from Next Stage for the 2019 tax year. The T5 slip reported taxable dividends to the claimant from Next Stage of \$159,275. The respondent's accountant delivered the T5 slip to the claimant without advance notice or discussion. The reported dividends gave rise to the tax debt.

[74] I do not understand the respondent to take issue with the proposition that the dividends reported on the T5 slip related to funds used for the parties' expenses in 2018 before they separated their finances. Next Stage was not actively operating in 2019. In these circumstances, I agree with the claimant that the tax debt is family debt that should be equally divided. It can be conceived of alternatively as: (i) a latent tax liability that relates to a period of time prior to the parties' separation, or (ii) a debt incurred in the post-separation period that went to maintain family property. In either case, it is subject to equal division as family debt.

(c) The Prince George House

- [75] It is common ground that the Prince George House was, at one time, the claimant's excluded property pursuant to s. 85(1)(a) of the FLA. It was property acquired by the claimant before her relationship with the respondent began. The real question is whether the evidence supports an intention by the claimant to retain the Prince George House as excluded property, rather than gifting it to the respondent, or alternatively whether the presumption of advancement applies.
- [76] There is some controversy in British Columbia on the question of whether the presumption of advancement continues to apply under the FLA. However, in the circumstances of this case, there is no need for me to address the question as I am able to reach a conclusion about the claimant's actual intention at the time she transferred her interest in the Prince George House into the parties' joint names: *Namdarpour v. Vahman*, 2019 BCCA 153 at paras. 26-40.
- [77] In my view, the evidence in the present case supports a finding that the claimant intended to gift her interest in the Prince George House at the time the parties married. I rely on the following evidence:
- The Prince George House was the family residence from the time the parties were married;
 - The claimant did not testify that she intended to maintain her interest in the Prince George Property, rather than gift it to the respondent, and such an intention is not reflected anywhere in the evidence;
 - The claimant sold the Prince George House when the parties moved to Red Deer in 1999, and the parties used the proceeds to purchase a house in their joint names;
 - Further properties were purchased by the parties in their joint names, in Red Deer and Calgary, with proceeds from the sale of the first house in Red Deer; and
 - There is no evidence that the claimant took any steps over the course of the parties' 24-year marriage to maintain the excluded property despite the growing financial interdependence of the parties.
- [78] In these circumstances, I reject the claimant's argument that the Prince George House remained excluded property; rather, I find she intended to gift it to the respondent.
- (d) The claimant's shareholder interest in Matte Investments
- [79] There is no question that the claimant's non-voting shares in Matte Investments are excluded property. The claimant has owned these shares since she was born. The respondent argues that the claimant's shares substantially increased in value over the course of the parties' marriage, primarily as a result of Matte Investment's property acquisition and the increase in property values over time. Pursuant to s. 84(2)(g) of the FLA, the respondent seeks an equal division of the increase in the value of the claimant's shareholder interest after the parties' marriage.

The expert evidence

- [80] On the application of the respondent, Master Harper ordered on December 17, 2020, that Chris Ounsted, a chartered professional accountant, be appointed to conduct an evaluation and/or forensic audit of the claimant's share interest in Matte Investments. Mr. Ounsted subsequently prepared a valuation report, dated February 8, 2022, which was tendered as an exhibit at this trial. He attended trial and was questioned on the report by both parties.
- [81] As reviewed by Mr. Ounsted, the claimant, her parents, and her siblings have collectively held 9,900 Class A common non-voting shares in Matte Investments since the time of the parties' marriage. The claimant holds 849 Class A shares, as does each of her 10 siblings. Her parents hold 561. The only Class B common voting shares are held by the claimant's parents. As of December 31, 2017, the claimant's parents hold 100 Class B shares. There are no shareholders in Matte Investments other than the claimant, her siblings, and her parents.
- [82] In determining the fair market value of the outstanding shares in Matte Investments, Mr. Ounsted adopted a going-concern approach rather than a liquidation approach, due to the nature of the Matte Investments business and assets, as well as the long-term nature of its operations. Within the going-concern approach, Mr. Ounsted valued the shares in Matte Investments on the basis of the fair market value of the company's net assets, less its liabilities. Using this approach, Mr. Ounsted opines, subject to certain limitations, that the value of the outstanding shares of Matte Investments as of December 31, 1995 is in the range of \$2 million to \$2.6 million. The limitations relate to gaps in the records available to Mr. Ounsted from 1995, including financial statements. Mr. Ounsted opines that the value of the outstanding shares as of December 31, 2017 is in the range of \$17,150,000 to \$18,950,000. This would indicate an increase of between \$15,150,000 and \$16,350,000 in the value of the outstanding shares in Matte Investments after the parties' marriage.
- [83] However, Mr. Ounsted allocates 100 percent of the fair market value of the outstanding shares to the Class B shares held by the claimant's parents. He opines that the Class A shares, including those held by the claimant, have no value. This allocation is based on Mr. Ounsted's review of the company's articles (the "Articles") that are applicable at the two valuation dates. The Articles provide that the Class B shareholders hold 100 percent of the votes, and thus control who the corporate directors are. The corporate directors determine which share class can be paid dividends, as well as the amount to be paid to Class A shareholders in the event that shares are redeemed. The Articles do not restrict the payment of dividends to one class of share holders to the exclusion of the other class. The Articles are silent on shareholders' liquidation entitlement. Mr. Ounsted notes that no dividends have ever been paid to either class of shareholders in Matte Investments.
- [84] In order to assist the Court in the event that the Court determines, contrary to Mr. Ounsted's opinion, that the Class A shares have value, Mr. Ounsted provides two alternative scenarios for attributing value to the Class A shares. The two alternative scenarios are as follows:

- (1) a pro-rata value is assigned to the Class A and Class B shares, with a voting premium for the Class B shares; or
 - (2) the Class B voting shares are treated as "skinny voting" shares whereby the Class B shareholders control Matte Investments but have no entitlement to dividends.
- [85] On the first scenario, Mr. Ounsted values the claimant's shares in Matte Investments as \$1.302 million with no minority discount, and \$651,000 with a 50% minority discount. A minority discount reflects the disadvantages of owning a minority interest in a company. Mr. Ounsted's valuation on the first scenario applies a 15 percent voting premium to the Class B voting shares.
- [86] On the second scenario, Mr. Ounsted values the claimant's shares in Matte Investments as \$1.39 million with no minority discount, and \$695,000 with a minority discount. In valuing the claimant's shares on this scenario, Mr. Ounsted assumes that the Class B shares have some value, despite the absence of any prospect for financial return, because they would have to be transferred in order for a purchaser to have voting control. Mr. Ounsted therefore allocates a value of 10 percent to the Class B shares under the second scenario.

Discussion

- [87] The respondent's submissions focussed on criticisms of Mr. Ounsted's approach to valuing the outstanding shares in Matte Investments by reference to the net value of the company's assets. The respondent says Mr. Ounsted ought to have conducted appraisals of the properties owned by Matte Investments and its subsidiary companies rather than relying on BC Assessment values. He emphasizes the gaps in the information available to Mr. Ounsted, particularly in relation to the 1995 valuation. He says that Mr. Ounsted should not have applied a minority discount, given that Matte Investments is a closely-held family corporation.
- [88] It is only necessary to address these criticisms if I reject Mr. Ounsted's primary opinion that the claimant's Class A shares have no value. As I understand the respondent's position, he advances three reasons for rejecting Mr. Ounsted's primary opinion. First, the respondent says that the claimant, and her siblings, may be entitled to apply for shareholder remedies under the Business Corporations Act, S.B.C. 2002, c. 57 [BCA], including an order for the liquidation and dissolution of Matte Investments. In that event, the court would determine a fair value for the claimant's shares. Second, the respondent says that the claimant's shares are analogous to locked-in registered accounts ("LIRA"s) or a benefit formal pension, which have values that may be realized in the future. The FLA provides for the division of increases in value to property such as a LIRA and pension during a marriage. Third, the respondent says the Court should draw an adverse inference from the claimant's failure to call her mother and brother Chris Matte as witnesses, as they would have been best positioned to speak to the intent of the company's Articles. Chris Matte is the Chief Executive Officer (the "CEO") of Matte Investments.

- [89] None of the respondent's arguments persuade me to reject Mr. Ounsted's primary opinion that the claimant's shares in Matte Investments have no value.
- [90] First, the respondent's submission that the claimant's shares have value due to the potential availability of certain remedies under the BCA was advanced for the first time in closing submissions. The respondent did not adduce evidence, including expert evidence, on this point. I am left to guess the outcome of a hypothetical oppression proceeding by a non-voting shareholder who holds one-12th of the company shares in circumstances where the company Articles do not entitle the shareholder to dividends or any remedy on liquidation. It would then be necessary to determine whether, and to what extent, the hypothetical remedies increased the value of the shares over the course of the marriage. The evidence does not support such an exercise. The respondent did not even put this theory of value to Mr. Ounsted in cross-examination. It is purely speculative.
- [91] Second, I agree with counsel for the claimant that the analogy the respondent attempts to draw between the claimant's shares and a LIRA or pension is misplaced. As counsel for the claimant notes, LIRAs and defined pension plans are property with a defined value that is held in trust for the beneficiary with restrictions on how and when they can use the funds. Mr. Ounsted did not opine that the claimant's shares had value, but that she was restricted in her ability to use the funds; rather, he opined that the shares had no value at the time of the parties' marriage and have no value now. Thus, there is no increase in value to divide.
- [92] Third, there is no basis to draw an adverse inference in this case. An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound. The inference is not to be drawn if the witness was equally available to both parties: *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35; *Singh v. Reddy*, 2019 BCCA 79 at para. 27. It would have been open to the respondent to call evidence from the claimant's mother and brother if he considered it necessary to do so. The fact that the claimant's mother and brother were originally on the claimant's witness list does not, in my view, change the analysis. The claimant is not obliged to call witnesses that she considers unnecessary for her case.
- [93] The nature of the adverse inference I am asked to draw is unclear in any event. The respondent says that the claimant's mother (as a founding shareholder), and brother (as the CEO) had the best evidence about the intent of the company in terms of the rights of non-voting shareholders. The respondent suggests that the evidence of these potential witnesses might have provided insight into the intent of the company beyond what is apparent in the Articles and the other information that Mr. Ounsted considered. The specific inference I am asked to draw is not particularized.
- [94] It is deserving of note that Mr. Ounsted consulted extensively with Chris Matte in the course of preparing his valuation, and therefore it is not the case that Mr. Ounsted was deprived of relevant information. The respondent says Mr. Ounsted was not obliged to go behind the

Articles and press Mr. Matte about the intent of the company given the "narrow confines" of his valuation exercise. I reject this characterization of Mr. Ounsted's report. Mr. Ounsted was jointly retained by the parties to determine the value of the claimant's shares in Matte Investments. He performed this task. The respondent may be unhappy with Mr. Ounsted's analysis, but none of his arguments persuade me to reject Mr. Ounsted's opinion on the value of the claimant's shares. I accept Mr. Ounsted's opinion that all of the value of the outstanding Matte Investments shares is allocated to the Class B voting shares, and that the claimant's Class A shares have no value.

[95] Before concluding on this issue, I must address one final argument that was alternatively advanced by the respondent. The respondent says if no value is allocated to the claimant's shares that would permit a compensation order, then a fair resolution is to order that half of the claimant's shares in Matte Investments be transferred to the respondent.

[96] The respondent's proposed alternative resolution might be appropriate if the claimant's shares in Matte Investments were family property, but they are not. The shares are excluded property. The family property consists only of any increase in the value of the shares during the parties' marriage. For the reasons stated, I accept Mr. Ounsted's opinion that the value of the claimant's shares in Matte Investments did not increase during the parties' marriage. There is, therefore, no family property to divide in relation to the claimant's shares in Matte Investments.

(e) The claimant's interest in Bon Voyage

[97] The claimant holds 1.75% of the shares in Bon Voyage. In his report, Mr. Ounsted valued the claimant's interest in Bon Voyage as \$113,000 as of December 31, 2017. There is no evidence of the value of the claimant's shares in Bon Voyage as of the time she acquired them in 2010, or at any time prior to December 31, 2017.

[98] The claimant says the shares were gifted to her by her parents, and therefore they are excluded property pursuant to s. 85(1)(b.1) of the FLA. The respondent's evidence is consistent with this assertion. The respondent testified that the shares were gifted to the claimant. They are therefore excluded property.

[99] Any increase in value in the claimant's interest in Bon Voyage during the parties' marriage would be family property, subject to equal division. However, there is no evidence that the claimant's interest in Bon Voyage has increased in value since the shares were gifted to her in 2010. As such, there is no family property to divide in relation to Bon Voyage.

(f) Otters Close House

- [100] The respondent purchased the Otters Close House in April 2021 for a purchase price of approximately \$850,000. He jointly owns the property with his new partner. They made a down payment of 20 percent, with the remainder of the purchase price financed through a mortgage. The respondent says he financed his portion of the down payment (approximately \$85,000) through money in his 118 account and a personal line of credit.
- [101] The claimant seeks a one-quarter interest in the Otters Close House, on the theory that the respondent was only able to use his own resources for the down payment by underpaying the claimant spousal and child support, as well as retaining funds he removed from the Island Savings Line of Credit to cover personal expenses. In these circumstances, the claimant says that the Otters Close House was derived, at least indirectly, from family property within the meaning of s. 84(1)(b) of the FLA. The claimant relies on the Court of Appeal's decision in *K.P.B. v. K.E.*, 2019 BCCA 152 [K.P.B.].
- [102] I do not agree with the claimant's argument. This is not a situation, as in *K.P.B.*, where one party has used funds unilaterally withdrawn from a joint line of credit in order to purchase new property. The funds the respondent withdrew from the Island Savings Line of Credit remained in his personal bank account, and then in his lawyer's trust account, minus the funds that the respondent believed he was justified in spending on family expenses. The money he used as a down payment on the Otters Close House was not derived from family property. The appropriate remedy for the respondent's underpayment of spousal and child support is an order for retroactive support. The claimant cites no authority for the proposition that an underpayment of support by a payor spouse supports the treatment of the payor spouse's post-separation property as family property.
- [103] This is not to condone the respondent's actions in removing the \$520,000 from the Island Savings Line of Credit. It was wrong for the respondent to have removed the funds for the reasons I have already stated. However, the fact that the respondent's conduct is deserving of condemnation does not, in my view, entitle the claimant to an interest in property acquired after separation when it is not derived from family property.
- [104] I therefore conclude that the Otters Close House is not family property under the FLA.
- (g) Spending from the Next Stage account in 2018
- [105] The respondent claims entitlement to reimbursement from the claimant for her disproportionate spending from the Next Stage account, and disproportionate use of VISA points, between May and December 2018. As I understand the respondent's argument, he says the claimant depleted family property at a greater rate than he did between May 2018 and December 2018--specifically, the claimant spent \$103,348 and 27,000 VISA points more than he did--and this must be accounted for in the division of family property. He claims entitlement to \$51,674, and the cash equivalent of 13,500 VISA points.
- [106] I do not accept the respondent's argument for two primary reasons.

- [107] First, as noted, the parties' finances remained entangled throughout 2018. Family expenses, and the claimant's personal expenses, continued to be paid out of the Next Stage account. The respondent acquiesced in this arrangement. It was an arrangement that allowed the respondent to avoid making monthly child and spousal support payments in 2018 by providing the claimant with access to funds that she needed to cover the living expenses of herself and the children. At no time did the respondent advise the claimant that he would eventually insist on dollar-for-dollar reconciliation of the amounts each party spent from the Next Stage funds.
- [108] Second, and relatedly, because of the fact that the parties' finances remained intermingled, the claimant does not seek retroactive child or spousal support in 2018. If the claimant is now required to reimburse the respondent for the amounts she withdrew from the Next Stage account, it would be necessary to also determine the quantum of the respondent's child and spousal support obligations for 2018 so that they could be deducted from any reimbursement. No party has argued that I should undertake such an analysis. The parties' submissions on retroactive child and spousal support are limited to the amount owing for 2019, 2020, and 2021.
- [109] In sum, the respondent's argument at trial that the claimant should reimburse him for her 2018 spending is entirely inconsistent with the manner in which the parties have conducted their financial affairs. If the respondent wished to have the type of precision in accounting that he now insists on, he could have pursued an agreement with the claimant at the time of separation, or applied for an interim court order. Instead, he told the claimant that she should continue to use the Next Stage account as she had during the marriage, and assured her that their financial affairs would eventually be sorted out. The claimant cannot be faulted for acting on these assurances.
- [110] Finally, the respondent emphasizes the claimant's actions in 2018 in removing large sums from the Island Savings Line of Credit and Next Stage account without notice to him--\$200,000 in May 2018 and \$150,000 in July 2018. I do not see the relevance of these withdrawals to the respondent's claim for a reconciliation of spending from the Next Stage account in 2018. In both instances, the claimant returned the money to the account within days. While there is no question that the claimant ought not to have removed these sums, her actions were reflective of the vulnerable position the claimant found herself in after the parties' separation in 2018. The claimant was anxious about her financial future, and unsure how to protect herself. While the unilateral withdrawal of large sums of money from the Island Savings Line of Credit and the Next Stage account was not a productive means of addressing the claimant's anxiety, all of the funds were ultimately returned within days. I cannot see how the claimant's actions in 2018 give rise to an entitlement on the part of the respondent to any reimbursement order.
- [111] For these reasons, I decline to make an order that the claimant reimburse the respondent for her allegedly disproportionate post-separation spending in 2018.

(h) The value of the Ranger Tug

[112] The parties agree that the Ranger Tug that was moored at the Swordfern House is family property as it was acquired during the parties' marriage. They disagree on the value of the Tug. The Steeves Order contains the following term, by consent:

1. Each party will retain an appraiser to conduct a valuation of the 2016 Ranger Tug, its add-ons and accessories, and the 2017 Tuff Trailer as well as recording any recent improvements and an estimate of their costs.

[113] The add-ons and accessories included an outboard motor, and a dinghy and dinghy outboard motor. There are two kayaks stored on the Ranger Tug, but the parties agree that the kayaks are not family property because they were purchased by the respondent after separation. The parties agree that the 2017 Tuff Trailer is family property. Pursuant to the Steeves Order, each party tendered expert valuation evidence.

The expert evidence

[114] The respondent tendered a report from Don Kimura, who has 30 years of experience carrying out marine surveys. The claimant tendered a report from Dale Loveday, the president of a company that specializes in marine surveying. There were no objections to the admissibility of the reports prepared by these experts.

[115] Mr. Loveday performed an in-water survey of the Ranger Tug on June 30, 2021, while it was docked in a marina in Port Alberni. Mr. Loveday observed the overall cosmetic condition and appearance of the Ranger Tug to be below average for a vessel of its model and year. He noted a number of deficiencies in maintenance, including a crack in the bilge pump filter that was causing water to leak into the vessel. Mr. Loveday says he requested maintenance records at the time he performed the survey, but that the respondent did not provide them. Mr. Loveday did not renew his request for the maintenance records before finalizing his report. He says that as an expert, he was able to assess that no maintenance had been done.

[116] Mr. Loveday estimates the fair market value of the Ranger Tug and accessories as follows:

Ranger Tug

\$300,000

Tuff Trailer

\$11,500

Outboard

\$4,500

Inflatable Dinghy

\$3,000

Dinghy Outboard

\$2,000

Total

\$321,000

[117] Mr. Loveday opines that the cosmetic and maintenance issues have reduced the market value of the Ranger Tug by \$30,000 to \$40,000.

[118] Mr. Kimura prepared two reports valuing the Ranger Tug: the first was done for insurance purposes in January 2021, and the second was prepared in January 2022 pursuant to the Steeves Order. In both reports, the market value of the Ranger Tug is indicated as \$265,000. Mr. Kimura appears to have derived this figure by viewing advertised sale prices of comparable Ranger Tugs on publicly accessible websites, and speaking to a salesperson. Mr. Kimura's estimate does not include the value of the Tuff Trailer. Mr. Kimura apparently deducted a 14% brokerage fee from his estimate, which represents the expense that would be incurred in sales commission if the boat is sold.

[119] In contrast to Mr. Loveday, Mr. Kimura opined that the Ranger Tug was in good condition and well maintained at the time of his appraisal. The respondent provided Mr. Kimura with maintenance records from 2019 and 2020 indicating that the respondent incurred the following maintenance costs:

- 1) in January 2019, the respondent paid \$15,402 for the purchase and installation of a "kicker" motor;
- 2) in November 2019, the respondent paid \$3,608 for maintenance, including an inspection of pumps, winterizing the engine, and an engine oil and filter change; and
- 3) in August 2020, the respondent paid \$14,714 to install a "sea wise system", in addition to other maintenance such as a pressure wash and wax.

[120] The respondent denies that he refused to provide the maintenance records to Mr. Loveday. The respondent says he recalls Mr. Loveday asking him for maintenance records at the time of Mr. Loveday's appraisal, but that it slipped the respondent's mind to provide them. He says he would have provided the records if Mr. Loveday had followed up with him.

Discussion

[121] The claimant says that \$40,000 should be added to Mr. Loveday's estimate of \$321,000 to account for the respondent's post-separation "wasting" of the asset through the failure to maintain the vessel in a proper state. I do not accept the claimant's submission on this point. I am persuaded by the respondent's evidence that he did maintain the Ranger Tug in the post-separation period. It is not necessary for me to address the question of whose fault it was that Mr. Loveday did not receive the maintenance records. The point is that they

exist, and they undermine the claimant's position that the Ranger Tug was not properly maintained.

- [122] The respondent, for his part, says that he should receive credit for the \$20,000 he spent on maintenance in the post-separation period before the value of the Ranger Tug is equally divided. I do not agree with the respondent's proposed approach. The Ranger Tug is family property that is, in accordance with the FLA, presumptively subject to equal division regardless of the parties' respective use or contribution: *Jaszczywska v. Kostanski*, 2016 BCCA 286 at para. 38. The respondent does not argue that equal division would be significantly unfair in light of his post-separation contributions.
- [123] Accordingly, I do not accept either party's submission that the value of the Ranger Tug should be adjusted--either upward or downward--to account for the respondent's contribution, or lack of contribution, to the maintenance of the vessel.
- [124] I turn then, to the valuation opinions of Mr. Kimura and Mr. Loveday. The difference between the experts' opinions on value is almost eliminated if one makes two adjustments to Mr. Kimura's estimate: (1) adding \$11,500, which is the value of the Tuff trailer that Mr. Kimura has excluded, and (2) adding back the 14% brokerage fee that Mr. Kimura deducted from his estimate. I agree with the claimant that the deduction of a brokerage fee from the estimate of value is not appropriate. The Ranger Tug is not being sold, rather it is being valued as an asset for the purpose of the division of family property. If those two adjustments are made, Mr. Kimura's estimate of value is \$319,640.
- [125] I am not persuaded that there is anything in the evidence to suggest that Mr. Kimura's estimate of value of \$319,640 is to be preferred to Mr. Loveday's estimate of \$321,000, or vice versa. Given the minor discrepancy between the estimates, I will simply adopt the mid-point and value the Ranger Tug at \$320,320.
- (i) Remaining items in dispute
- [126] The respondent's critique of the claimant's Scott Schedule highlights certain other relatively more minor issues in dispute in relation to the division of assets. In relation to these remaining issues, I find as follows:
- The RBC Direct Investment Account: I accept the respondent's evidence that this account no longer exists, and therefore there is nothing to divide;
 - The Mazda 2013: The respondent does not agree with the claimant's proposal that this vehicle be transferred to Johanna, and there is no legal basis to compel him to agree. As the vehicle is family property, it is subject to equal division;

- The 2018 tax refunds: I agree with the claimant's submission that the parties' 2018 tax refunds (\$6,000 to the claimant and \$1,973 to the respondent) are family property and subject to equal division. I have found that the claimant's 2019 tax debt was a latent liability that related to a time that the parties' financial arrangements remained interrelated. For the same reason, the tax refunds for 2018 should be divided as family property;
 - The camera equipment: The parties agreed to a consent order on December 8, 2020 that, within seven days of the order, the camera equipment was to be sold and the proceeds equally divided. The camera equipment is in the claimant's possession. She has only recently listed it for sale. The respondent says that in light of the claimant's delay, I should order the claimant to pay the respondent \$1,925 for his half-interest in the equipment (which is valued at \$3,850), and allow the claimant to either retain the equipment or sell it, as she chooses. In the interests of finality, and in light of the claimant's lengthy delay in listing the equipment for sale, I agree that the respondent's proposed order is appropriate.
- [127] I will also give both parties leave to request a further hearing before me to address any issues of family property and debt that remain in dispute and are not addressed in this judgment.

Issue 2: Determination of income

Legal framework

- [128] The starting point for the determination of income under the Spousal Support Advisory Guidelines (Department of Justice Canada, July 2008) [SSAG] is the definition of income under the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. With some exceptions, the approach to determining income is the same for spousal support as for child support: Spousal Support Advisory Guidelines: The Revised User's Guide (Department of Justice Canada, April 2016) [SSAG User's Guide] at 18.
- [129] Section 16 of the Guidelines establishes the general rule that a spouse's income for support purposes is determined "using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III".
- [130] Section 17(1) of the Guidelines provides that if the court is of the opinion that the determination of a spouse's annual income under s. 16 would not be the fairest determination of income, the court may have regard to the spouse's income over the last three years and may determine an amount that is fair and reasonable in light of any pattern of income or fluctuation in income.

- [131] Under s. 18 of the Guidelines, where a spouse is a shareholder, director, or officer of a corporation, and the court is of the opinion that the determination of the spouse's annual income under s. 16 of the Guidelines does not fairly reflect all the money available to the spouse for the payment of child support, the court may determine the spouse's income to include all or part of the corporation's pre-tax income.
- [132] Section 19(1) of the Guidelines sets out a non-exhaustive list of circumstances in which the court may impute income. These factors include:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [133] Imputing income for intentional unemployment or under-employment does not require a finding of bad faith on the part of the spouse in respect of whom the imputation is sought; it only requires a finding that they are not earning to capacity: *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 153.
- [134] The imputation of income should not be the product of speculation or guess-work. The court must find that the parent is realistically capable of earning the income that is sought to be imputed and determine whether they have taken reasonable steps to obtain employment commensurate with factors such as age, health, education, skill and work history: *Bourque v. Gerlach*, 2006 BCCA 157 at para. 63; *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37 [*Marquez*]; *Shen v. Tong*, 2013 BCCA 519 at paras. 81-82.
- [135] Although the legal foundation for awarding spousal support is different from that of child support, the test for imputing income for the purpose of fixing the quantum of support is similar. The test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support: *Marquez* at para. 38.

Discussion

Summary of issues

- [136] It is necessary to determine the parties' incomes in 2019, 2020, and 2021 for the purpose of determining retroactive support, as well as their current incomes for the purpose of determining ongoing support. For a number of reasons, the determination of income in this case is challenging.
- [137] Following separation, and until he accepted employment with Livongo in July 2020, the respondent earned income on contracts entered into through his personal consulting company, 118. There is a dispute between the parties as to whether the income reported by the respondent on his tax returns in the years 2019 and 2020 fairly reflects all income available to him for support purposes. The primary issue is over the retained earnings of 118. The claimant says s. 18 of the Guidelines applies, and that the retained earnings of 118

should be included as income available to the respondent. The respondent objects to the inclusion of the retained earnings of 118 in the determination of his income.

- [138] In 2021, the respondent earned a high income from his employment at Teladoc. His 2021 T4 reported earnings of \$739,541. The respondent's base salary was \$250,000. The rest of his earnings in 2021 were comprised of bonus and stock compensation. The respondent says his non-base salary earnings in 2021 were of a non-recurring nature, and should not be included in his income for the purpose of on-going child and spousal support. It is difficult to assess the legitimacy of the respondent's submission on this issue given that there is no employment history to draw on to establish a pattern of earnings. At the time of trial, the respondent was not even certain that his employment would continue.
- [139] There is a further complicating feature arising from the respondent's high income in 2021, in that it is substantially higher than the "ceiling" of \$350,000 under the SSAG. The court has greater discretion in these circumstances to order support in a lower amount than would otherwise be indicated by the SSAG: *S.R.M. v. N.G.T.M.*, 2014 BCSC 442 at para. 146. The respondent says this discretion should be exercised in this case in the event the Court finds that the respondent's income exceeds \$350,000.
- [140] In relation to the claimant's income, the primary dispute is over whether income ought to be imputed to her pursuant to s. 19(1)(a) of the Guidelines on the basis that she is under-employed. The respondent accepts that it was reasonable for the claimant to remain unemployed for a period of time after separation while she took steps towards financial self-sufficiency. However, the respondent says that it is not reasonable for the claimant to remain unemployed three years after separation. As of 2021, he seeks to impute income of \$40,000 to her, which roughly equates to full-time earnings at a minimum wage job plus the annual dividends the claimant receives from Bon Voyage.

The parties' incomes in 2019 and 2020

The claimant's income

- [141] The determination of income for the claimant in the years 2019 and 2020 is straightforward. The respondent agrees that no income should be imputed to the claimant prior to 2021. The claimant's line 150 income in 2019 and 2020 was:

2019 \$9,516

2020 \$12,001

- [142] The respondent does not seek to impute income to the claimant in these years. He agrees that the claimant's line 150 income is her income for support purposes in 2019 and 2020.

The respondent's income

- [143] The respondent's line 150 income in 2019 was \$209,144. This consisted of taxable dividends from Next Stage and 118, as well as some limited investment income. The respondent's line 150 income in 2020 was \$196,577. This consisted of the respondent's employment income from Livongo/Teledoc, as well as dividends from 118 and some investment income. The respondent says that his Line 150 income should be used to determine his income for support purposes.
- [144] The claimant agrees that the respondent's Line 150 income should be used as the starting point for the determination of the respondent's income. However, she says that the respondent's income should be determined to include two additional amounts: (1) his \$14,855 employment bonus for the year 2020, and (2) the retained earnings of 118 in 2019 (\$110,386), and the additional retained earnings above that amount in 2020 (\$166,996).
- [145] Starting with the bonus payment, the respondent says that he actually received the 2020 bonus in 2021, and therefore it should not be included in his 2020 income. The respondent's bonus payment, whenever it was received, would have been included in the T4 slip from his employer, and therefore is either captured by his reported income for 2020 or 2021. In other words, adding the bonus payment onto the respondent's line 150 income would lead to double counting. For this reason, I do not agree with the claimant that the bonus amount should be added to the respondent's line 150 income for support purposes.
- [146] Turning to the issue of the retained earnings of 118, the claimant relies on s. 18 of the Guidelines. Section 18 provides that where a spouse is a shareholder, director, or officer of a corporation, the court may determine the spouse's income to include all or part of the corporation's pre-tax income. Where the corporation is wholly owned by the payor spouse, the onus is on the payor spouse to establish that the corporation's pre-tax income is not available income for child support purposes: *Quinton v. Kehler*, 2020 BCCA 254 at para. 85.
- [147] The claimant acknowledges that where s. 18 applies, it is generally appropriate to use pre-tax corporate earnings, not retained earnings or earnings after payment of taxes, as the starting point for an assessment of Guidelines income: *Quinton* at para. 85. She says the fact that she seeks the addition of only a portion of the pre-tax income of 118--the newly retained earnings in the relevant years--rather than the entire pre-tax income is ultimately to the benefit of the respondent when it comes to determining the amount of retroactive support. At the very least, the claimant says, the onus must be on the respondent to explain why 118's retained earnings are unavailable as income.
- [148] The respondent says that it is not appropriate to apply s. 18 of the Guidelines and add 118's retained earnings to his income for support purposes because the retained earnings are not available to him as income. In final submissions, the respondent argued that the retained earnings were used to pay a tax debt that arose as a result of the claimant's excessive spending from the Next Stage account in 2018. However, there is no documentary record of this. There is no correspondence or documents from CRA confirming the existence of such

a debt, no evidence that any such debt was paid using the retained earnings of 118, and no evidence that the retained earnings were used for any other corporate purpose.

[149] In light of the evidentiary record, I conclude that the respondent has not discharged his onus to show that the retained earnings of 118 were not available for support purposes in the years 2019 and 2020. The retained earnings should be added to the respondent's line 150 income in those years, so that his income for support purposes is as follows:

2019 \$319,530

2020 \$363,573

The parties' incomes in 2021

The claimant's income

[150] There is no filed 2021 income tax return in evidence for the claimant. She says her income in 2021 should be determined to be \$12,000, which is the income reported in her 2020 tax return.

[151] The issue of contention with the claimant's income is whether income should be imputed to her starting in 2021 due to under-employment. The respondent says that it is reasonable to have expected the claimant to take steps to generate an income to support herself and the children within three years of the parties' separation. The respondent points out that the claimant is relatively young, industrious, has no health conditions that prevent her from working, and has retail and management work experience that would qualify her to perform any number of jobs in the retail sector. The respondent notes that there is no evidence that the claimant has attempted any job searches after separation, and that she does not even have a current resume prepared.

[152] The claimant says that her plan is to open a brewery business in Cumberland. She says she will require time to build her business and generate revenue, and that it is premature to expect her to be self-sufficient at this stage. She argues that the law does not demand that a party who was primarily responsible for child and home care immediately take a low-paying job to maximize their earning capacity upon dissolution of a long-term marriage.

[153] I accept that in assessing the claimant's plans to earn an income, I must consider the context in which she found herself following separation at the end of a long-term marriage. I also accept that it was reasonable in the circumstances for the claimant to take time to consider career options, rather than immediately take a low-paying job. The respondent does not argue otherwise--he acknowledges that income should not be imputed to the claimant for the years 2019 and 2020. However, the claimant does have an obligation to earn to capacity to assist in supporting Joshua, who remains a child of the marriage.

- [154] In my view, the claimant has had a reasonable time to take at least initial steps towards self-sufficiency in the four years since the parties separated. The claimant was 47 years old at the time of separation, and is now 51. She has a number of years remaining in her working life. The claimant is clearly an intelligent and capable individual. She has experience working in retail and retail management. There is no evidence that the claimant has undertaken any type of job search. There are no health issues that prevent her from working. While I appreciate that the claimant wishes to pursue her idea of opening a business in Cumberland, she has taken limited steps to implement that plan in the past four years. Further, there is nothing to prevent the claimant from earning employment income at the same time that she pursues her goal of starting a business.
- [155] In my view, it is appropriate in these circumstances to impute income of \$40,000 to the claimant for the year 2021, as the respondent has proposed. This roughly equates to the income the claimant would have received from a full-time minimum wage job (\$30,000), plus a sum to reflect amounts she typically receives in director's fees from Matte Investments and income from Bon Voyage.

The respondent's income

- [156] The respondent's employment earnings are reflected in his 2021 T4 slip, which is what the claimant says should be used as the basis for determining his 2021 Guidelines income in the absence of a filed tax return from the respondent. The respondent's earnings in 2021 include \$250,000 in base salary and a bonus of \$57,750. Over half of the respondent's 2021 T4 earnings--approximately \$430,000--consists of compensation in the form of restricted stock units (the "RSUs") that vested in 2021. The respondent says the RSUs have dropped significantly in value since the date they vested, although I note there is no independent corroborating evidence of this assertion.
- [157] The respondent's position is that, due to their fluctuating value, the RSUs should be considered assets rather than income, and valued at the time they are sold. As I understand the respondent's position, he says that the claimant is not entitled to any share in the value of the RSUs. This is because the RSUs are assets acquired by the respondent after separation. The respondent argues that the RSUs should be subtracted from the earnings reported on his 2021 T4 slip, and that his Guidelines income for 2021 should be set at \$307,000. He similarly proposes to deduct RSUs that will vest after trial from any ongoing support obligation.
- [158] It is true that vested stock entitlements existing at the date of separation may be divided as assets. In that event, they may not be treated as income for spousal support purposes to the extent necessary to avoid double dipping. However, the weight of case authority suggests that employment compensation in the form of stock benefits should be treated as income for child support purposes in the year the entitlement to the stocks vest, and also for spousal support purposes if the stocks have not already been divided as family property: *Sarro v. Sarro*, 2011 BCSC 1010 at para. 14; *Crossley v. Vorell*, 2021 BCSC 2484 at paras. 67-73

[Crossley]; A.E. v. A.E., 2021 ONSC 8189 at paras. 157-158 [A.E.]. As summarized in A.E.:

- [157] The cases establish that once RSAs [Restricted Stock Awards] and similar types of assets vest, the resulting benefit that accrues to the recipient party should generally be included in the party's income in the year of vesting for the purposes of calculating child and spousal support (Roberts v. Roberts, 1999 CarswellAlta 1175 (Q.B.); Patterson v. Patterson, 2007 CarswellOnt 2383 (S.C.J.); Gibson v. Gibson, 2011 ONSC 4406 (S.C.J.), at para. 88; Brennan v. Lander, 2020 ONSC 1696 (S.C.J.), at paras. 121-122). This approach has been taken regardless of whether the party chooses to redeem the awards in that year or whether they appear on the party's Income Tax Return that year. . The rationale for this approach is that it is within the spouse's control to take the shares when vested, and it would generally be inappropriate to exclude the amount of money that could accumulate for support purposes if the employee chooses to defer the exercise of their shares (Patterson, at paras. 102, 104 and 105; Gibson, at para. 96)).
- [159] The respondent cites no authority in support of his position on the treatment of the RSUs in the determination of income. As the cases establish, stock benefits are generally considered to be income for support purposes once they vest, provided they have not already been divided as assets. The fact that the respondent chose to keep his RSUs rather than sell them is not, in my view, relevant. As explained in A.E., it is within the payor spouse's control to take the shares when vested, and therefore it is at that point that the stocks become available as income. The respondent agreed in his evidence that it was his decision to sell the RSUs or keep them. Even assuming that the value of the RSUs decreased significantly after the vesting date, and I only have the respondent's evidence on this issue, the point is that the respondent had the opportunity to sell the RSUs once they vested.
- [160] For these reasons, in my view, the respondent's 2021 Guidelines income must include the RSUs. Therefore his 2021 T4 earnings of \$739,541 reflects his income for child and spousal support purposes.

The parties' incomes for ongoing support

The respondent's income

- [161] The issue as it relates to ongoing support is whether the respondent's 2021 income is a proper basis for determining income on an ongoing basis. The respondent says that the bonus he received in 2021 is of a non-recurring nature, and therefore his earnings in 2021 are not reflective of what he may earn in future years. He also says that although he is scheduled to receive further RSUs from his employer in the years 2022, 2023, and 2024, he does not expect the shares to have the same value at vesting as the 2021 RSUs due to the decline in value of the shares.

- [162] The respondent also points out that, as of the time of trial, there was uncertainty as to whether his employment contract would even continue in 2022. The respondent further says that he has retirement plans that should be accounted for in any future support order. He says that, due to health issues, he plans to reduce his workload at the age of 55, and fully retire at the age of 60. The respondent says that his income starting in 2027 should be set at \$100,000 in recognition of his intention to reduce his work hours.
- [163] The question of the respondent's income for the purpose of ongoing support is a difficult one. While the respondent argues that his bonus is a non-recurring benefit, there is no pattern of historical earnings to draw on. This means the approach of considering the average of the last three years of income is unavailable. The same is true of the RSUs that the respondent will receive in the future. While the respondent expects to continue to receive RSUs as part of his employment compensation from Teledoc in the years 2022, 2023, and 2024, the value of the RSUs is presently uncertain. It will depend on the value of the stock at the time of vesting. The respondent emphasizes that there has been a significant decline in the value of the Teledoc stock since 2021. The respondent says if that trend continues but his income is set at the same level as in 2021 for support purposes, he would be significantly overpaying support in the future.
- [164] Despite the respondent's concerns, his income in 2021 is the best evidence before the Court as to his anticipated income in 2022. Using any other income figure would amount to guesswork. It is true that the respondent may earn less in the future than he did in 2021. However, it is also true that he may earn more. The risk of overpayment or underpayment of spousal support may be mitigated by including terms in the order that: (1) require the parties to exchange annual income information, and (2) permit either party to seek a review of the quantum of spousal support within a relatively short time period. While I appreciate the desire of both parties for stability and finality, in my view the significant uncertainty around the future income of both parties warrants a short review term. The claimant has not worked at all since separation, but says it is her intention to start a business in the near term that she anticipates will be profitable. The respondent is only recently employed by Teledoc, and there is uncertainty about whether his employment will continue and on what compensation terms.
- [165] For these reasons, I determine the respondent's income for the purposes of ongoing support to be \$739,541, as reflected in his 2021 T4 slip. The trial order will also include a term that either party may seek a review of the quantum of spousal support after March 31, 2024. In the interests of clarity, I emphasize that the provision for a review does not include the question of entitlement. Absent some presently unanticipated material change in circumstance, the compensatory basis for spousal support will endure for much longer than the next two years. The claimant is entitled to be compensated for the economic consequences of the parties' marriage, and the economic advantage that the respondent received as a result of the claimant's contributions. I deliberately refrain from making any comment on the respondent's stated plans to retire early, as that is not an issue that arises

for determination at this stage. My point is simply that the purpose of the review provision is to recognize the present uncertainty in the parties' future incomes, and provide for the possibility of a review on the basis of a more established income pattern. The purpose of the review provision is not to reopen the question of entitlement absent a material change in circumstances.

The claimant's income

[166] The respondent seeks to impute an income of \$55,000 to the claimant for the purpose of ongoing support. The respondent's theory, as I understand it, is that the claimant's hourly wage will be expected to rise from \$15.10 (the minimum wage in B.C. in 2021), to \$24.00 in 2022. I do not agree that there is a basis in the evidence to impute income of \$55,000 to the claimant. I have accepted the respondent's submission that the claimant should be imputed an income of \$40,000 for 2021, because that level of income reflects what the claimant would earn at a full-time minimum wage job, in addition to her other earnings from Matte Investments and Bon Voyage. There is otherwise no evidence before me to establish a salary range for the type of jobs the claimant would likely qualify for--particularly in the retail and retail management sector.

[167] Accordingly, I impute income of \$40,000 to the claimant for support purposes in 2022, and ongoing.

Summary of determination of the parties' income

[168] In summary, my determination of the parties' income for support purposes is as follows:

Claimant

Respondent

2019

\$9,516

\$319,530

2020

\$12,001

\$363,573

2021

\$40,000

\$739,541

2022 (ongoing)

\$40,000

\$739,541

Issue 3: Child support

[169] The claimant seeks retroactive support for Johanna and Joshua for the years 2019, 2020, and 2021 to the extent that the respondent underpaid child support in those years. The parties agree that Johanna ceased to be a child of the marriage when she graduated from university in October 2021. They also agree that the respondent was not required to pay monthly table support for Joshua once he attended boarding school in September 2020.

[170] As of the date of trial, only Joshua remains a child of the marriage. As such, the respondent is only required to pay ongoing child support for Joshua.

Ongoing child support for Joshua

[171] Section 3(1) of the Guidelines establishes the presumptive rule that the amount of support for a child under the age of majority is the amount determined in the applicable table based on the income of the payor spouse. Section 3(2) of the Guidelines provides that where a child 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.

[172] The underlying assumptions that typically apply to a child under the age of majority include: the child resides with one or both parents, the child is not earning income, and the child is dependent on his or her parents. The more closely the circumstances of an adult child resemble those of a minor child living at home, the less likely it is that the approach in s. 3(2)(a) will be found to be inappropriate: *Tome v. Furtado*, 2018 BCSC 2280 at para. 65.

[173] In this case, the parties agree that support for Joshua should be determined under s. 3(2)(b) of the Guidelines. As noted, Joshua is presently enrolled in a full-time undergraduate university program. He lives away from home in residence during the school year. As I understand the evidence, he does not live continuously with either party, even during the summer months.

[174] Neither party provided a detailed monthly budget for Joshua, although they did provide their respective estimates of his reasonable annual expenses. The claimant suggests that Joshua's annual expenses are roughly \$20,000, while the respondent suggests they are more in the range of \$25-30,000. Although s.15.3(1) of the Divorce Act requires the court to give priority to a child support order where child and spousal support are both sought, neither party seeks an order that quantifies Joshua's reasonable expenses before spousal support is

determined.

- [175] The claimant proposes that I make an order specifying the categories of reasonable expenses Joshua will incur that should be paid by both parties, and then order that these expenses be paid by the parties according to their proportionate gross incomes after the respondent has paid the claimant spousal support. As I understand the claimant's proposed approach, the respondent's spousal support obligation would then be determined using the "without child" formula under the SSAG, reflecting the fact that Joshua does not live with the claimant. The claimant says that in the circumstances of this case, the proposed method of addressing child support does not undermine the primacy accorded to child support orders under s. 15.3 of the Divorce Act: see SSAG Guidelines at p. 41. This is because there is no concern with the parties' ability to pay both child and spousal support at appropriate levels: *Thompson v. Thompson*, 2013 ONSC 5500 at para. 45. The claimant says her proposed method has the additional advantages of providing flexibility, and avoiding the risk of over or under-payment in any particular year if their estimates of Joshua's reasonable costs turn out to be inaccurate.
- [176] The respondent proposes that I order that Joshua's expenses be paid out of the Island Savings Line of Credit funds that remain in his lawyer's trust account, with the respondent monitoring such expenses to ensure they reasonably relate to Joshua's actual needs. The respondent says his proposal is consistent with the manner in which the parties have historically covered Joshua's expenses. He notes there are sufficient funds remaining in the Island Savings Line of Credit to cover Joshua's expenses for the remainder of his undergraduate degree. If I do not accept the respondent's proposed method for covering Joshua's university costs, then the respondent agrees with the claimant's proposed approach.
- [177] I do not agree with the respondent's proposed approach. On this approach, Joshua's reasonable expenses would be covered by the money remaining in the Island Savings Line of Credit, which is family property and presumptively subject to equal division between the parties. The respondent cites no authority for the proposition that a spouse may be permitted to use family property to reduce their future child support obligation.
- [178] In the absence of any submissions or evidence from the parties that would permit me to determine a precise annual budget for Joshua, and in light of the respondent's endorsement of the claimant's approach, I will adopt that approach and order that the parties shall pay Joshua's reasonable expenses in proportion to their after-spousal support incomes. Such expenses shall include:
- (a) tuition and books;
 - (b) residence and/or rent;
 - (c) food;

- (d) travel to and from school, including at least two return trips annually between Halifax and Vancouver;
- (e) health and dental expenses not covered by insurance; and
- (f) any other expenses agreed to by the parties.

[179] This order will continue in effect as long as Joshua remains a child of the marriage.

Retroactive child support

[180] The determination of what the respondent ought to have paid in child support prior to trial is complicated by two features: (1) there are disagreements between the parties as to whether and when Johanna resided with the claimant in the pre-trial period, and (2) between February 1, 2019 and February 1, 2021, the respondent paid the claimant a lump sum amount of child and spousal support, without allocating an amount between the two.

[181] I will first address the dispute relating to child support for Johanna. Johanna graduated from Brentwood College in the spring of 2018. In the fall of 2018, she enrolled in an undergraduate program at the University of Western Ontario. I take it to be common ground that Johanna did not live with the claimant for any extended period of time in 2019. The claimant only seeks table support for Joshua in 2019. The claimant says that Johanna did live with her for a period of time in 2020 and early 2021 when she was not at school. However, the respondent disputes this, and says that Johanna split her time between the parties when she was not attending university.

[182] I conclude on the evidence that the respondent does not owe any child support for Johanna in the pre-trial period. Throughout the relevant time, Johanna was attending a full-time university program in Ontario. She did not reside for a continuous period of time with either party. The parties jointly covered her tuition and living expenses, and travel to and from B.C. It appears that both were also sending her e-transfers to cover additional expenses. These arrangements met Johanna's reasonable needs in the pre-trial period.

[183] In order to address the second area of difficulty--accounting for the lump sum child and spousal support payments that the respondent did make--I will first determine the amount of child support that the respondent ought to have paid in the period prior to trial in relation to Joshua. Given the priority accorded to child support under s. 15.3(1) of the Divorce Act, I will assume that the payments the respondent made went first to paying child support, with any excess (depending on the amount) allocated to spousal support. I will then address any shortfall in resolving the claimant's claim for retroactive spousal support.

How much child support was owed in the pre-trial period?

[184] The parties agree that the respondent owed monthly table support for Joshua in the year 2019 and the first eight months of 2020. During this period, he lived with the claimant while attending high school. It is also common ground that once Joshua was attending boarding

school, table support was no longer appropriate. Instead, they agree that child support for Joshua as of September 2020 should be determined under s. 3(2)(b) rather than s. 3(2)(a) of the Guidelines. Joshua's tuition and living expenses were paid out of the Island Savings Line of Credit funds. The directions I have given regarding how those funds are to be accounted for will ensure that each party's contribution to Joshua's expenses in this period is proportionate with their income.

[185] The respondent's income for support purposes in 2019 was \$319,530. The respondent owed the claimant \$2,678 in monthly table child support for Joshua in 2019, for a total amount of \$32,136.

[186] The respondent's income for support purposes in 2020 was \$363,573. The respondent owed the claimant \$3,021 in monthly table child support for Joshua for the first eight months of 2020, for a total amount of \$24,168.

Issue 4: Spousal support

Legal principles

[187] Pursuant to s. 15.2(6) of the Divorce Act spousal support is intended to:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time period.

[188] These objectives are mirrored in s. 161 of the FLA.

[189] Pursuant to s. 15.2(4) of the Divorce Act, in making a spousal support award the court must consider "the condition, means, needs and other circumstances of each spouse", including "the length of time the spouses cohabited", "the functions performed by each spouse during cohabitation", and "any order, agreement or arrangement relating to support of either spouse".

[190] There are two grounds for entitlement to spousal support that apply in this case-- compensatory support, which primarily relates to the first two objectives listed in s. 15.2(6) of the Divorce Act, and non-compensatory support, which primarily relates to the last two objectives: *Chutter v. Chutter*, 2008 BCCA 507 at para. 47 [Chutter], citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 [Bracklow]. The court is called upon to apply the relevant factors and strike the balance between the various grounds for

entitlement in a way that best achieves justice in the circumstances of a case. The doctrine of equitable sharing is the overarching principle that must guide the process: Chutter at para. 49.

- [191] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of economic advantage on the other spouse: Chutter at para. 50. The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming childcare and household responsibilities may impact their future financial prospects: Chutter at para. 50. There may be a corresponding advantage to the payor spouse in the ability to pursue career opportunities free of such responsibilities.
- [192] Non-compensatory support is "grounded in the 'social obligation model' of marriage in which marriage is seen as an inter-dependent union". Upon marriage dissolution, it falls on the former partner, and not the state, to meet the needs of a disadvantaged spouse: Chutter at para. 54. In Bracklow, the Supreme Court of Canada held that need alone may be sufficient to ground a claim for spousal support: at para. 43.
- [193] "Need" in this context refers to something more than the basic necessities of life. The concept of need may vary depending on the circumstances of the parties. In longer marriages, courts may measure need against the marital standard of living: Chutter at para. 90. The flip side to this justification for needs-based support is that the payor spouse must have the financial means to provide such assistance.
- [194] Once entitlement to support is established, the issue becomes the appropriate amount and duration of support. The SSAG has been endorsed in British Columbia as a useful tool in determining the quantum of support: Chutter at para. 100. Quantum refers to both the amount and the duration of spousal support.

Entitlement

- [195] There is no question that the claimant has a strong claim to spousal support on the compensatory and, at least at the time of separation, also on the non-compensatory ground. The division of responsibilities between the parties during their long-term marriage provided economic advantage to the respondent, at the same time that it disadvantaged the claimant. The claimant sacrificed opportunities for career and employment advancement for a period of 24 years while assuming primary responsibility for the child and home care that was essential to the respondent's career advancement. The respondent's current ability to earn a high income is the result of their joint effort. The claimant is entitled to be compensated for the impact the marriage had on her future financial prospects, as well as for the financial advantages enjoyed by the respondent as a result of the claimant's contributions.

[196] The claimant's standard of living clearly fell after the parties' separation, particularly once the respondent cut off her access to parties' financial resources, including the Island Savings Line of Credit. The claimant was able to continue to live in the former family home, at least until it was sold in 2021. However, she was required to get by on the budget that the respondent unilaterally set for her. Once the family home was sold, the claimant temporarily moved into a trailer until she found rental accommodation. Until the Steeves Order was issued, the claimant was entirely reliant on the receipt of whatever amount of monthly support the respondent decided he was willing to provide.

Quantum

[197] The dispute between the parties focusses on the quantum of spousal support, particularly if the Court concludes (as I have) that the respondent's current income exceeds the "ceiling" of \$350,000 under Chapter 11 of the SSAG. The respondent says that if his income is found to exceed \$350,000, then the Court should exercise discretion to depart from the formulas and an award an amount that is below the low end of the SSAG range.

[198] Different considerations apply to the determination of the quantum of retroactive and ongoing spousal support. I will begin by quantifying the spousal support that the respondent ought to have paid in the pre-trial period. I note that in final argument, counsel for the respondent agreed that to the extent the respondent "overpaid" spousal support in 2019 and 2020 due to the fact that his support payments were not tax deductible, this would adequately be addressed by the fact that the support payments he made would be accounted for in the determination of any outstanding liability for spousal support.

Retroactive spousal support

2019

[199] I have determined that the respondent's income for support purposes in 2019 was \$319,530, while the claimant's income was \$9,516. The DivorceMate calculations that the claimant has prepared based on these incomes indicate a range of monthly spousal support from \$7,838 (low) to \$8,789 (mid) to \$9,663 (high). In my view, the claimant was entitled to support in the mid- to high-range in 2019. The claimant had (and has) a strong claim to support on the compensatory ground, and also on the non-compensatory ground. The claimant had limited resources, and no job. Joshua continued to reside with her full-time. I conclude that a monthly amount of \$9,000 constitutes fair and reasonable spousal support in 2019, which is \$108,000 for the year.

[200] For 10 months of 2019 (excluding January and May), the respondent paid the claimant a monthly lump sum amount of \$5,446. In May, he paid the claimant \$5,103. In January, he made no payment. Accordingly, the total amount the respondent paid to the claimant towards support in 2019 was \$59,563. Of this amount, I have determined that \$32,136 should be allocated to child support, which leaves a payment of \$27,427 towards spousal support. Therefore, the respondent owes the claimant \$80,573 in retroactive spousal

support for 2019.

2020

[201] I have determined that the respondent's income for support purposes in 2020 was \$363,573, while the claimant's income was \$12,001. The DivorceMate calculations that the claimant has prepared based on these incomes indicate a range of monthly spousal support from \$9,090 (low) to \$10,140 (mid) to \$11,204 (high). For many of the same reasons I have given in respect of spousal support in 2019, I consider that the claimant was entitled in 2020 to spousal support at the mid- to high end of the range. In my view, \$10,500 per month was fair and reasonable spousal support in 2020, which is \$126,000 for the year.

[202] In 2020, the respondent's monthly lump sum support payments to the claimant fluctuated. For six months of the year, the respondent continued to pay the \$5,446 that he determined was an appropriate amount to pay for support. In the remaining months, he unilaterally reduced this amount. The parties agree that \$57,558 is the total amount the respondent paid towards child and spousal support in 2020. Of this amount, I have determined that \$24,168 should be allocated to child support, which leaves a payment of \$33,390 towards spousal support. Therefore, the respondent owes the claimant \$92,610 in retroactive spousal support for 2020.

2021

[203] I have determined that the respondent's income for support purposes in 2021 was \$739,541, while the claimant has an imputed income of \$40,000. However, the determination of an appropriate quantum of spousal support in 2021 depends on the implications of the fact that the respondent's income in 2021 significantly exceeds the ceiling under the SSAG.

[204] In *M.A.T v. K.P.T.*, 2017 BCSC 1603 [M.A.T.], Justice Fleming summarized the methods available to determine spousal support in such circumstances:

[222] Sections 11 and 11.1 of the SSAG identify a gross annual income of \$350,000 as the ceiling or the upper limit for generating "acceptable results" using the formulas in a typical case. The upper limit is, however, not an absolute cap or ceiling: *Smith v. Smith*, 2008 BCCA 245, at para. 31. In *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version*, (Ottawa: Department of Justice, March 2010), the authors comment that "[t]he formulas are not to be applied automatically above the ceiling, although the formulas may provide an appropriate method of determining spousal support in an individual case, depending on the facts" (emphasis in original). They also state that "[a]bove the ceiling, spousal support cases require an individualized, fact-specific analysis" (emphasis in original). Section 11.3 of the SSAG suggests two approaches where the payor earns more than the ceiling and is also paying child support (which is not the case here). The first is the "minimum plus" approach, which calculates the amount of spousal support owed at \$350,000 and then adjusts or adds a further amount after taking into account the actual amount of child support paid. The second approach identified as more important if the

payor's income is well above the ceiling, is one of pure discretion.

- [205] As noted by Justice Fleming at para. 225 of M.A.T., the authors of the SSAG User's Guide observe (at pp. 57-58) that where the income of the payor spouse is not too far above \$350,000, spousal support will frequently be ordered at the low end of the SSAG range. If the income of the payor spouse is well above \$350,000, the amount ordered is often below the low end of the SSAG range. However, each case requires the "individualized, fact-specific analysis" described in the SSAG User's Guide. Depending on the facts, a spousal support award within the range fixed by the SSAG formulas may be justified even where the income of the payor spouse significantly exceeds the ceiling: *Hathaway v. Hathaway*, 2014 BCCA 310, leave to appeal ref'd [2014] S.C.C.A. No. 412.
- [206] Based on the incomes that I have determined for the parties in 2021, the claimant's DivorceMate calculations suggest a range under the SSAG formulas from \$22,288 (low) to \$26,002 (mid) to \$29,717 (high). The claimant seeks an award of spousal support in the high end of the range, primarily based on her strong claim to compensatory support. The respondent argues that I should exercise discretion to depart from the range, although he has not proposed a specific monthly amount of spousal support.
- [207] There is no doubt that, for the reasons I have stated, the claimant has a strong claim to compensatory support. I accept that this is one factor that might support an award of spousal support within the range fixed by the SSAGs. However, there are other factors that point away from an award of support within the fixed range. As of 2021, none of the children remained living at home. I have found that the claimant was, as of 2021, capable of working at a full-time job, and also of taking steps to enhance her own income-earning capacity. Among the objectives of spousal support is to encourage self-sufficiency on the part of the recipient spouse.
- [208] Having regard to the circumstances of this case, I consider an award of monthly spousal support in the amount of \$20,000 to be fair and reasonable for the year 2021, which totals \$240,000 for the year. As of February 1, 2021, the respondent paid monthly spousal support of \$9,552 pursuant to the Steeves Order. In January 2021, he paid \$4,348. Accordingly, the respondent's total payment towards spousal support in 2021 was \$109,420. Therefore, the respondent owes the claimant \$130,580 in retroactive spousal support for 2021.

2022 - Ongoing support

- [209] For many of the same reasons, I also conclude that \$20,000 is a fair and reasonable amount of monthly spousal support in 2022, and going forward. In terms of ongoing support, there is the additional consideration of the claimant's improved financial situation as a result of the division of family property, which includes the \$500,000 interim distribution. The compelling financial need that the claimant experienced in the two years following separation has significantly lessened.

Duration

[210] It is common ground between the parties that the spousal support order in this case should be indefinite, subject to future variation and review, given the length of the marriage and the claimant's age on separation: SSAG, Ch. 7.5. For the reasons I have explained, I order that either party can seek a review of the quantum of spousal support after March 31, 2024. The spousal support order is also, of course, subject to variation in the event of a material change in circumstances that affects quantum or entitlement.

Issue 5: Should the claimant pay a fine for non-disclosure?

[211] Section 213 of the FLA provides enforcement mechanisms against late or non-disclosure of financial statements and information. Under this provision, the court may, among other things, make an order requiring the non-disclosing party to pay a fine not exceeding \$5,000.

[212] The respondent says that the claimant's refusal to provide relevant credit card disclosure from 2021 because she was "tired" of the respondent "prying" into her life, as well as her failure to provide information regarding the 2020-21 corporate reorganization of Matte Investments warrants a fine of \$5,000.

[213] I am not persuaded that a fine is appropriate in these circumstances. In relation to the Matte Investment documents, the claimant did not refuse to produce documents but rather indicated that she could not recall ever receiving documents about the restructuring, other than some emails that circulated at the time. In relation to the credit card disclosure, there is no question that the claimant ought to have produced the credit card records. However, it is worthy of note that the problems with disclosure are not one-sided. The respondent failed to produce his 2021 T4 slip or his employment letter from Livongo until shortly before trial. In the meantime, the Steeves Order based interim spousal support on the respondent's inaccurate self-reported income of \$250,000.

[214] Without intending to condone the conduct of either party in failing to disclose, or delaying disclosure, of relevant documents, in the circumstances of this case I do not believe that a fine is justified.

ORDERS

[215] For the foregoing reasons, I make the following orders and declarations:

Final order for divorce

- (1) Pursuant to the Divorce Act, the claimant and the respondent are divorced, with the divorce to take effect on the 31st day after the date of this judgment;

Property and debt division

- (2) In relation to the Island Savings Line of Credit funds:

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- (a) The following categories of expenses claimed by the respondent shall be shared equally by the parties where supported by an invoice:
- (i) repairs and renovations of the Swordfern House;
 - (ii) insurance and property tax for the Swordfern House;
 - (iii) repairs and renovation of the Ranger Tug;
 - (iv) insurance for the Ranger Tug; and
 - (v) vehicle repair costs, where the vehicle is family property.
- (b) The following categories of expenses are s. 7 expenses that shall be shared by the parties in proportion to their income:
- (i) tuition and school fees for Johanna and Joshua;
 - (ii) orthodontic costs for Johanna and Joshua;
- (c) The claimant is not responsible for any portion of the following expenses:
- (i) legal fees, including fees related to the valuation of the Swordfern House;
 - (ii) Joshua's ski trip and new computer;
 - (iii) accounting fees paid in relation to Next Stage or 118 in 2019;
 - (iv) any increased interest payments accruing from the respondent's unilateral decision to withdraw the Island Savings Line of Credit Funds.
- (3) The parties are at liberty to seek a further hearing in the event they cannot agree on a final reconciliation of the Island Savings Line of Credit funds;
- (4) The claimant's 2019 tax debt of \$37,722 is family debt, subject to equal division;
- (5) The Prince George House is not the excluded property of the claimant;
- (6) The claimant's shares in Matte Investments did not increase in value after the parties' marriage, and therefore there is no family property to divide;
- (7) The claimant's interest in Bon Voyage is excluded property;
- (8) The respondent's interest in the Otters Close House is not family property;
- (9) The claimant is not required to reimburse the respondent in relation to post-separation spending from the Next Stage account;
- (10) The value of the Ranger Tug is \$320,320;
- (11) There are no funds remaining in the respondent's RBC Direct Investment Account, and therefore no family property to divide;

- (12) The Mazda 2013 is family property, and subject to equal division;
- (13) The parties' 2018 tax refunds are family property and subject to equal division;
- (14) The claimant shall pay the respondent \$1,925 for his half-interest in the camera equipment;
- (15) The parties are at liberty to request a further hearing to address any issue of family property or debt that was raised in this proceeding, but which is not addressed in this judgment;

Child support

- (16) Pursuant to the Divorce Act, the parties shall pay Joshua's reasonable expenses in proportion to their gross incomes after payment/receipt of spousal support;
- (17) Joshua's reasonable expenses include:
 - (a) tuition and books;
 - (b) residence and/or rent;
 - (c) food;
 - (d) travel to and from school, including at least two return trips annually between Halifax and Vancouver;
 - (e) health and dental expenses not covered by insurance; and any other expenses agreed to by the parties;
- (18) The child support order shall remain in effect as long as Joshua remains a child of the marriage;
- (19) The parties shall exchange:
 - (a) by March 31st of each year, copies of their respective income tax returns for the previous year, including all attachments;
 - (b) copies of any Notice of Assessment or Reassessment provided to them by the Canadian Revenue Agency, immediately on receipt;

Spousal support

- (20) The respondent owes the claimant the following amounts for retroactive spousal support:
 - (a) For 2019, \$80,573,
 - (b) For 2020, \$92,610,
 - (c) For 2021, \$130,580,
- (21) Pursuant to the Divorce Act, as of January 1, 2022, the respondent shall pay the claimant monthly spousal support in the amount of \$20,000, for an indefinite period of time;

(22) Either party may request a review of the quantum of spousal support after March 31, 2024;

Other orders

(23) The respondent's request for the imposition of a fine on the claimant pursuant to s. 213 of the FLA is dismissed;

(24) If the parties cannot agree on an appropriate costs order, they have liberty to provide further brief written submissions on costs within 30 days of the date of this judgment.

"Horsman J."

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