

CANADA / JUDGMENT

Healey v. Healey

2022 BCSC 2072

COURT

Supreme Court of British Columbia

DECIDED

28 November 2022

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

2022 BCSC 2072 Healey v. Healey

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Healey v. Healey,

2022 BCSC 2072

Date: 20221128

Docket: E201448

Registry: Vancouver

Between:

Margery Michelle Healey

Claimant

And

Michael Alexander Healey

Respondent

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Claimant:

L. Ridgedale

M. Turcott

Counsel for the Respondent:

S. Silber

A. Winters

Place and Dates of Trial:

Vancouver, B.C.

September 20-23, 26-29,

October 3-7 and 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 28, 2022

Table of Contents

INTRODUCTION.. 4

BACKGROUND.. 4

WITNESSES.. 7

ISSUES.. 8

GUIDELINE INCOMES.. 9

Law Concerning Guideline Income. 9

Summary of the Parties' Positions on Guideline Income. 11

Mr. Healey's Guideline Income. 11

Commission Earnings as a Financial Advisor 12

Investment Income from Alco. 13

Ms. Healey's Position.. 13

Mr. Healey's Position.. 14

Finding on Investment Income from Alco. 16

Personal Benefits: s. 18(2) of the FCSG Adjustments. 19

Payments from KFD.. 20

Finding Concerning Payments from KFD.. 22

Decision on Mr. Healey's Guideline Income. 23

Ms. Healey's Guideline Income. 23

Ms. Healey's Position..	23
Mr. Healey's Position..	24
Law Concerning the Imputation of Income.	24
Is Ms. Healey Underemployed?.	25
Decision on Ms. Healey's Guideline Income.	27
Conclusion on Guideline Income.	28
SPOUSAL SUPPORT..	28
Ms. Healey's Position..	28
Mr. Healey's Position..	29
Form of Spousal Support	29
Law Concerning the Form of Spousal Support	29
Decision on the Form of Spousal Support	31
Entitlement, Duration, and Quantum..	32
Conclusion on Spousal Support	34
CHILD SUPPORT..	35
SPECIAL AND EXTRAORDINARY EXPENSES..	36
University Costs.	36
Arbutus Club Monthly Fees.	37
Other Special Expenses.	38
DIVISION AND MANAGEMENT OF PROPERTY..	39
Identifying Family Property and Excluded Property.	39
Excluded Property.	39
Agreed Upon Family Property.	40
Increase in Alco Value.	40
Division of Property.	42
The Parties' Positions on the Division of Property.	42
Is Division of Excluded Property Warranted?.	43
Is An Unequal Division of Family Property Warranted?.	45

Ms. Healey's Contributions Towards Mr. Healey's Career 45

Did Mr. Healey, without a good faith basis for doing so, dispose of family property thereby defeating or adversely impacting Ms. Healey's interest?. 47

Did Mr. Healey, after separation, cause a significant decrease or increase in the value of West Shore or Alco beyond market trends?. 50

Has Mr. Healey Been Unjustly Enriched?. 50

Conclusion on the Division of Property. 52

Division of Tax Liabilities. 52

What compensation payment is required to give effect to an equal division of family property? 55

Management of the Children's RESPs. 55

Conclusion on the Division and Management of Property. 56

PARENTING ARRANGEMENTS: CHRISTMAS DAY.. 57

DIVORCE.. 59

CONCLUSION.. 59

INTRODUCTION

[1] In this family case, the claimant, Margery Healey, seeks various relief against the respondent, Michael Healey, including payment of spousal and child support. In addition, both parties seek orders with respect to their children's special and extraordinary expenses, division of family property, apportionment of tax liabilities arising from the disposition of family property since separation, an order clarifying a previous consent order with respect to parenting time, and a divorce.

BACKGROUND

[2] Ms. Healey and Mr. Healey met in 1996 while attending at the University of Western Ontario. They moved to Vancouver together and began cohabitating on September 1, 1997. They were married on April 28, 2001 and separated on October 31, 2018.

[3] There are three children of the marriage. Two of the children are now 19 years old and attend university in Ontario (the "older children") and the third child is now 15 years old and is in private high school in Vancouver, BC (the "youngest child") (collectively, the "children").

[4] Ms. Healey was born and raised in Ontario and is now 47 years old. After she moved to Vancouver with Mr. Healey in 1997 and completed her Bachelors of Arts degree in 1999, she spent approximately four years working full-time in the advertising and media industry, earning no more than \$30,000 per year.

- [5] Before their children were born, the parties agreed that Ms. Healey would be the primary caregiver for their children and would manage the Healey household. She performed these roles throughout the parties' marriage. She withdrew from full-time work when the older children were born in 2003. She worked part-time at a pre-school when the children were young and later, after obtaining a diploma from the Parent Coaching Institute in Bellevue Washington in 2011, began working part-time as a parenting coach. She currently works approximately two hours per week as a parenting coach.
- [6] Mr. Healey grew up in Vancouver and is now 48 years old. He obtained a Bachelors of Arts degree in 1996 and in early 1998, began working as a financial advisor at ZLC Financial, where he continues to work today. Mr. Healey receives income from ZLC Financial in the form of dividends paid to him through a corporation, West Shore Insurance Services ("West Shore"). Mr. Healey and Ms. Healey are the shareholders of West Shore.
- [7] During the parties' marriage, in addition to dividend income from West Shore, Mr. Healey received dividend income from Alco Investments Ltd. ("Alco"). Alco is a holding company established by Mr. Healey's late father, who died when Mr. Healey was a young child. The income from Alco was used by Mr. Healey to pay for monthly family expenses. I will discuss the history of Mr. Healey's interest in Alco later in my reasons.
- [8] In addition to using dividend income from Alco to pay for monthly family expenses, Mr. Healey occasionally drew on the capital of this company to purchase property. In 1999, he withdrew approximately \$300,000 to purchase a two-bedroom condominium in Vancouver (the "Arbutus condo"), which was registered in both his and Ms. Healey's names. In 2004, Mr. Healey coordinated a share repurchase transaction, effectively reducing Alco's capital by a further \$1.4 million, to allow the parties to purchase their second home, a five-bedroom home in Vancouver (the "Dunbar home"), for \$1.7 million. The balance of the purchase price was funded from the proceeds of sale of the Arbutus condo.
- [9] Mr. Healey's third source of income came from KFD Investments Ltd. ("KFD"), a family holding company established by his step-father, Ken Downie. Ken Downie married Mr. Healey's mother Mary Downie in 1989. Starting in approximately May 2016, Mr. Healey began to receive monthly repayments of \$4,000, on a \$5.5 million shareholder loan, recorded as having been made by him to KFD. The funds received from KFD were also used to cover family expenses. Again, I will discuss Mr. Healey's interest in KFD later in my reasons.
- [10] Although the parties did not earn a high combined annual income, they enjoyed a relatively high standard of living throughout their marriage. They spent time during the summer at Mr. Healey's mother, Mary Downie's property at Buccanner Bay on the Sunshine Coast and at Ken Downie's vacation homes in Whistler and Arizona. All of the children attended private school and the family, or some of them, were members of clubs, including the Vancouver Club, Royal Vancouver Yacht Club, Arbutus Club, and Marine Drive Golf Club. The evidence at trial establishes that money was a source of stress between the parties and

Mr. Healey significantly increased the amount of dividend income he received from Alco in the latter years of the parties' marriage.

- [11] Ms. Healey gave evidence that over the course of their relationship, Mr. Healey's alcohol consumption increased and his resulting anger issues worsened. She testified that she worked to curb the impact of these issues on the family and, particularly, on the children. In 2017, following a particularly aggressive episode by Mr. Healey, she organized an intervention for him, with the help of Mary Downie, other family, friends, and his employer.
- [12] The intervention occurred in January 2017 and resulted in Mr. Healey immediately departing for what ended up being a sixty-day stay at a treatment facility in Nanaimo, BC. Mr. Healey testified at trial that he has not consumed substances since attending at the treatment facility and continues to attend alcoholics anonymous meetings.
- [13] Ultimately, Ms. Healey decided that she wished to separate from Mr. Healey. The parties did separate on October 31, 2018 but continued to reside together in the Dunbar home. In or about May 2019, with some involvement from Mr. Healey, Ms. Healey began looking for another home for her and the children. In June 2019, she made an offer to purchase a three-bedroom townhouse within a few blocks of the children's school at the time.
- [14] Mr. Healey liquidated investments held by West Shore to fund the \$85,000 deposit on the townhouse. In August 2019, the parties executed an agreement under which the parties agreed that Mr. Healey would purchase Ms. Healey's half-interest in the Dunbar home for \$2.25 million, having agreed to a value for the home of \$4.5 million. In addition to the \$85,000 already provided as a deposit on the townhouse, Mr. Healey obtained the balance of the \$2.25 million purchase price, \$2.165 million, by liquidating investments held by Alco. Mr. Healey did not tell Ms. Healey that he intended to liquidate Alco investments for this purpose and Ms. Healey had not formed any conclusions as to what source of funds Mr. Healey would use to make the payment before it was made.
- [15] Ms. Healey and the children moved into the townhouse in February 2020. The parties agreed that the children would primarily reside with Ms. Healey and spend every other weekend with Mr. Healey. This arrangement generally continued until the older children began university in Ontario in September 2021. The youngest child continues to follow this schedule.

WITNESSES

- [16] Ms. Healey and Mr. Healey both testified at trial. In addition, six other witnesses were called:
 - a) Both parties called Kiu Ghanavizchian as an expert witness at trial. Mr. Ghanavizchian was jointly retained to prepare a valuation of Mr. Healey's interest in KFD and Alco;
 - b) Ms. Healey called Patti Daum as an expert witness with respect to the calculation of Mr. Healey's Guideline income;

- c) Mr. Healey called Keith Jensen as an expert witness with respect to the calculation of Mr. Healey's Guideline income;
 - d) Mr. Healey called Daryl Johannesen as a witness. Mr. Johannesen is the accountant for Mr. Healey's step-father, Ken Downie, and the Downie family trusts and assisted Ken Downie with his personal and corporate financial matters. Mr. Johannesen gave evidence concerning, amongst other things, the creation, structure and functioning of KFD and other related Downie family companies;
 - e) Mr. Healey called his personal and corporate accountant Brian Dougherty as a witness;
 - f) Finally, Mr. Healey called his mother Mary Downie as a witness.
- [17] During closing arguments, counsel for both parties made submissions on the issue of credibility of witnesses. In particular, Ms. Healey's counsel asked the court to treat Mr. Healey's evidence regarding his interest in KFD and his Alco assets with caution. I will address these credibility issues later in my reasons.
- [18] In general, I consider that all of the witnesses who testified at trial were credible and reliable. I do not find that any witness sought to tailor their evidence or to withhold relevant testimony.

ISSUES

- [19] The issues to be decided in this case include the following:
- a) Guideline Incomes: What incomes should be imputed to each of the parties for the purposes of determining child and spousal support?
 - b) Spousal Support: What amount should be paid by Mr. Healey for spousal support and in what form--that is, periodic or lump sum?
 - c) Child Support: What amounts should be paid by Mr. Healey for child support?
 - d) Special and Extraordinary Expenses: What percentage of special and extraordinary expenses for the children should be paid by each parent? What, if any, retroactive adjustments are required in respect of such expenses and what should qualify as special and extraordinary expenses going forward?
 - e) Division and Management of Property and Debt:
 - i. What property is subject to division?
 - ii. What is the increase in value of Mr. Healey's excluded property?
 - iii. Is the division of excluded property warranted?
 - iv. Is an unequal division of family property warranted?
 - v. Has Mr. Healey been unjustly enriched?

- vi. How should tax consequences which arise from the division from family property, including advances of family property, be apportioned?
- vii. Who should administer the children's RESPs?
- f) Parenting Time: What order should be made with respect to Christmas day parenting time?
- g) Divorce: Are the requirements for a divorce satisfied?

GUIDELINE INCOMES

- [20] The first issue to be decided is the amount of Guideline income to be attributed to each of the parties for the purpose of determining child and spousal support. Each party seeks to impute income to the other.

Law Concerning Guideline Income

- [21] The party seeking to impute income on the opposing party has the burden of proof with respect to both the basis for imputation of income and quantum of imputed income. As stated by the Court of Appeal in *Marquez v. Zapiola*, 2013 BCCA 433:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [22] There is no statutory test for the imputation of income. As was stated in *T.N. v. J.C.N.*, 2015 BCSC 439:
- [103] There is no statutory framework setting out how to calculate income for spousal support purposes. However, the Spousal Support Advisory Guidelines, ("SSAG") which as the name indicates are advisory and not legislative, incorporate the methodology for defining income under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines") as a starting point.
- [23] The Spousal Support Advisory Guidelines [SSAG] provide some guidance to the court in determining Guideline income. Section 6.1 of the SSAG provides that the starting point for determination of income for spousal support purposes is the definition of income under the Federal Child Support Guidelines, SOR/97-175 [FCSG].
- [24] Section 15(1) of the FCSG provides that a spouse's annual income is determined in accordance with ss. 16-20. Section 16 provides that, subject to ss. 17-20, a spouse's income is determined based on the total income recorded in the spouse's T1 General form issued by the Canada Revenue Agency and adjusted in accordance with Schedule III of the FCSG.

- [25] Section 17(1) of the FCSG provides that where a spouse's income pursuant to s. 16 is not the fairest determination of income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income over those years.
- [26] Although s. 17 provides discretion to the court to apply an average of a spouse's income, the court must first determine whether an averaging is appropriate, considering the spouse's patterns of income, fluctuations in income and non-recurring gains: *Phillips v. Saunders*, 2020 BCCA 265 at paras. 23-25.
- [27] Section 18(1) of the FCSG provides that, where a spouse is a shareholder, officer, or director of a corporation, a court may include all or part of a spouse's pre-tax corporate income in determining income for support purposes. Section 18(2) provides, amongst other things, that payments for benefits should be added to pre-tax corporate income.
- [28] Section 19(1) of the FCSG lists circumstances in which the court may impute income to a spouse. In this case, Ms. Healey relies upon subsection 19(1)(h) which provides that income may be imputed where a "spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed a lower rate than employment or business income or that are exempt from tax".

Summary of the Parties' Positions on Guideline Income

- [29] Ms. Healey seeks an order setting Mr. Healey's Guideline income for support purposes at \$753,000, being the average of Mr. Healey's Guideline income in 2020 and 2021, as calculated by Ms. Daum. She seeks an order setting her Guideline income at \$14,700, being the amount of her reported gross income earned in 2021 working as a parenting coach.
- [30] Mr. Healey seeks an order setting his Guideline income at \$255,419. He relies in part upon the calculation of Guideline income completed by Mr. Jensen. In summary, Mr. Healey submits that his commission earnings earned as a financial advisor, paid to his company West Shore, and estimated investment income earned on the anticipated capital held by Alco as at November 30, 2022, should be utilized in determining his Guideline income for support purposes.
- [31] Mr. Healey seeks an order that Ms. Healey's Guideline income be set at \$90,000, the amount he says she could earn as a parenting coach, working 15 hours per week over a 40-week period, charging \$150 per hour.

Mr. Healey's Guideline Income

- [32] Determining Mr. Healey's Guideline income first requires the Court to decide whether or not to apply the methodology for determining Guideline income applied by Ms. Daum or Mr. Jensen, or neither of them.

- [33] The analysis with respect to Mr. Healey's Guideline income completed by Ms. Daum and Mr. Jensen include detailed and complex financial calculations. It is not practical or necessary to repeat the entire analysis completed by these experts in these reasons for judgment.
- [34] The income items which are not disputed include commission income earned by Mr. Healey as a financial advisor and, for the most part, personal benefits paid by Mr. Healey's company, West Shore, to be added back to income. The income items in dispute include investment income from Alco and amounts received by Mr. Healey from KFD as repayment of his shareholder loan.
- [35] I will address the principle similarities and differences between the experts' opinions in my analysis and conclusions below.

Commission Earnings as a Financial Advisor

- [36] There is no dispute between the parties and their respective experts that Mr. Healey's income as a financial advisor, which flows first to his company, West Shore, and is then paid out to him personally as dividends, constitutes income for support purposes.
- [37] The evidence at trial establishes that Mr. Healey's before tax commission earnings in 2021 was \$142,960. Mr. Healey estimates that his before tax commission earnings in 2022 will be \$149,000. Mr. Healey's evidence at trial was that he earns between \$12,000 and \$15,000 per month in commissions.
- [38] For the purposes of determining support, I am satisfied that it is appropriate to include \$149,000 in Mr. Healey's Guideline income, being the estimated pre-tax commission earnings of Mr. Healey for 2022 as a financial advisor, paid to West Shore.

Investment Income from Alco

- [39] Mr. Healey's holding company, Alco, generates investment income from its various investments. The parties have significantly different views with respect to the amount of income to be imputed to Mr. Healey from Alco's earnings.

Ms. Healey's Position

- [40] To determine the amount of income to be imputed to Mr. Healey from Alco, Ms. Healey submits that the Court should apply a two-year average of Alco's earnings for the years 2020 and 2021. She relies upon the calculation of Alco income completed by Ms. Daum for each of those years, which includes imputed amounts for capital gains and dividends. Ms. Daum's report indicates that she has included those amounts as a result of the tax preferential treatment of these earnings, which she considers is in accordance with Section 19(1)(h) of the FCSG.

- [41] Ms. Daum calculated an amount for income for each of 2020 and 2021 in respect of Alco's capital gains. Her calculation (\$156,843 = the average capital gains for 2020 and 2021) included capital gains reported by Mr. Healey personally in his tax returns and capital gains on investments held by Alco. Based on Ms. Daum's report, I estimate that the average income from capital gains attributable to Alco for 2020 and 2021 is \$125,000.
- [42] Ms. Daum also calculated an amount for imputed income for dividends arising from Mr. Healey's shares held in Wajax Corporation ("Wajax") and shares held by Alco. The dividend income from the Wajax shares is nominal (\$600 per year) and therefore I have assumed that all of the amount imputed for dividend income arises from Alco. The average of the dividend income for 2020 and 2021 is \$15,217.
- [43] In addition, Ms. Daum calculated corporate income for Alco, which Ms. Healey also seeks to include in the calculation of Mr. Healey's Guideline income, of \$254,625. This amount is an average of the corporate income for Alco for 2020 and 2021 calculated by Ms. Daum. Ms. Daum's calculation includes gains on disposal of investments, dividends, foreign investment, and interest income and adds back certain of Mr. Healey's personal expenses paid for by Alco.
- [44] Finally, Ms. Healey seeks to include as Guideline income \$55,262. This amount is the average of other dividend income for 2020 and 2021, calculated by Ms. Daum.
- [45] In summary, it is my understanding that Ms. Healey seeks to impute income to Mr. Healey, generated from Alco's investments, of approximately \$450,000 per year.

Mr. Healey's Position

- [46] Mr. Healey takes issue with the method applied by Ms. Daum for imputing income generated by Alco's investments.
- [47] The first reason is that, in his submission, using historical earnings data for Alco is inappropriate as going forward, the capital available to generate investment income will be dramatically reduced. In particular, it is Mr. Healey's evidence that he intends to declare a dividend from Alco before its 2022 year-end (by November 30, 2022) which he says is required to repay a shareholder loan to him from the company of approximately \$1.88 million, as at November 30, 2021 (and now higher with accrued interest).
- [48] With respect to the capital available in Alco to generate income, Mr. Healey's evidence, provided through testimony from his corporate accountant Mr. Dougherty, is that he will need to withdraw, from Alco, approximately the same amount as the outstanding balance on his shareholder loan to address his tax liability. Mr. Healey submits that, assuming that he will need to withdraw \$2 million, that based on the fair market value of Alco's investment portfolio as at May 31, 2022 of \$2.231 million,[1] only approximately \$200,000 to \$250,000 in Alco capital will be available on which investment income can be earned.

- [49] In addition, and in any case, Mr. Healey contends that Ms. Daum's method of calculating imputed income from Alco's investment returns over various years is flawed. He submits that her calculations of investment income included only realized gains and not, as Mr. Jensen included, unrealized gains and losses for each year. Further, Mr. Healey submits that Ms. Daum attributed 100% of Alco's income to Mr. Healey, which did not take into account legitimate reasons for retaining monies in Alco to maintain its income generating potential over the long term or the historical pattern of withdrawals from Alco made by the family prior to separation. Mr. Healey contends that Ms. Daum's methodology results in a calculation of earnings which is not reflective of the money available to him during the relevant years.
- [50] In particular, Mr. Healey contends that applying the average of Alco's earnings over 2020 and 2021 is unreasonable. He contends that the 24% rate of return on Alco's investments in 2021 is unprecedented and not likely to be repeated in the coming years. In this respect, Mr. Healey points to evidence from Mr. Jensen which demonstrates that, with the exception of 2021, Alco's investment returns had been trending downwards. He also points to the evidence of both Ms. Daum and Mr. Jensen that market returns have dropped in 2022.
- [51] Mr. Healey submits that the fairest way to impute income generated by Alco's investments is to apply an average rate of return calculated by Mr. Jensen for the past five years on the estimated fair market value of Alco's investments portfolio (being 8.4%) after the contemplated withdrawals to address Mr. Healey's tax liability. Mr. Jensen calculates, on the assumption that Mr. Healey will withdraw a further \$1 million from Alco by the end of 2022, that Alco will generate investment income of \$120,950 in 2022 and \$61,609 in 2023. As such, Mr. Healey seeks to have \$61,609 imputed to him as investment income earned by Alco for the purposes of determining his Guideline income.

Finding on Investment Income from Alco

- [52] For the reasons that follow, I prefer the methodology proposed by Mr. Healey for determining the amount of Guideline income to imputed to him from Alco's investment earnings.
- [53] In my view, it would be unreasonable to utilize Ms. Daum's calculation of Alco's earnings from 2020 and 2021 given the dramatic fluctuation in investment returns over those years. Mr. Jensen calculates that Alco earned 4.3% on its investments in 2020 and 24% in 2021. The average of those two percentages is approximately 14%--which is higher than the returns in any of the years prior to 2021. The inevitable conclusion is that the 24% return in 2021 was anomalous and applying the earnings figures from that year to calculate Guideline income going forward would therefore be unfair, in that it is unlikely such returns will be generated in the future.

- [54] With respect to the rate of return to be applied on Alco's investment assets for the purpose of calculating Guideline income, Mr. Healey proposes that the average rate of return on Alco's investments over a five-and-a-half-year period be applied--being the 8.4% estimated by Mr. Jensen for this period. He submits that given the historical fluctuation in Alco's investment earnings and market uncertainty going forward, that this is the fairest approach.
- [55] In other decisions, this Court has applied a historical rate of return on investments as a method of determining the amount of Guideline income to impute for investment earnings.
- [56] In *Stringer v. Stringer*, 2017 BCSC 1470, Justice Watchuk applied a "conservative rate of return" of 3% on investments worth approximately \$1.9 million based on the history of earnings set out in the payor's investment accounts: at para. 164.
- [57] In *N.P. v. M.C.P.*, 2012 BCSC 1843, Justice Fenlon, as she then was, considered the appropriate method of determining the income for a payor spouse whose primary source of income was investment returns on a \$6.2 million investment portfolio. Justice Fenlon decided that the best approximation of the income available to the payor from his investment portfolio was the expert evidence regarding the portfolio's rate of return over a seven-year period. Of note, as is an issue in the case at bar, Fenlon J. in *N.P.* considered as a factor the downturn in the global economy over the last three of the seven years of investment returns considered in that case: *N.P.* at paras. 55-60; referred to in *Stinger* at para. 82.
- [58] I find that it is appropriate to apply the average rate of return of 8.4% on Alco's investment portfolio for the purposes of determining the amount of Guideline income attributed to Mr. Healey from this source going forward. What needs to be decided next is what value should be used for Alco's investment portfolio to which this rate of return is applied.
- [59] Mr. Jensen has provided evidence concerning the current fair market value of Alco's investment portfolio, being \$2.231 million as at May 31, 2022. In a joint expert valuation report prepared by Mr. Ghanavizchian, he estimated the value of Mr. Healey's interest in Alco as at August 3, 2022 to be \$2.01 million.
- [60] As already stated, Mr. Healey's evidence at trial is that before November 30, 2022, he intends to liquidate the bulk of Alco's investments to deal with the tax liability which results from the sale of Alco assets completed in 2019 to pay for one-half of Ms. Healey's interest in the Dunbar home, and later, to provide a litigation cost advance to Ms. Healey.
- [61] Ms. Healey submits that this Court should not accept this evidence. She submits that if Mr. Healey actually wanted to resolve his tax liability by selling Alco investments, he could have done so in 2019, 2020 or 2021. Ms. Healey asks the Court to infer that Mr. Healey will not liquidate Alco investments, but rather that he intends to wait until after trial to obtain funds from some other source to deal with the tax liability, including potentially by obtaining repayment of all or a part of his shareholder loan to KFD or using other family money.

- [62] The inference sought by Ms. Healey is simply far too speculative. Mr. Healey's evidence that he intends to liquidate most of Alco's investments is supported by the evidence of his accountant Mr. Dougherty, who testified that Mr. Healey has a tax debt which will have to be paid. Mr. Healey admitted at trial that he has failed to deal with the tax liability since it arose in 2019, but denies that he has done so for an improper purpose. He submits that it would have been imprudent to liquidate Alco assets during the decline in financial markets in 2020 and he would have been criticized for any attempt to take money out of Alco while this family case was on-going. I accept this evidence.
- [63] In addition, there is insufficient evidence on which I am able to conclude that Mr. Healey's evidence, that he is not able to demand repayment of his shareholder loan to KFD or to redeem his shares in KFD, is not credible. I do not find a basis to disbelieve the evidence of Mr. Johannesen that Mr. Healey's shareholder loan would not be paid out. The following evidence supports this finding:
- a) KFD was set up as part of a tax and estate plan designed to gradually distribute funds to beneficiaries, one of whom was Mr. Healey, and to minimize the tax consequences experienced by beneficiaries as a result of the distribution of funds;
 - b) There is no intention for shareholder loans, including Mr. Healey's, to be paid out in full or on a lump sum basis because:
 - i. The shareholders agreement of Thomas Downie Holding Ltd. ("TDH"), the operating company upstream of KFD which actually holds assets which could be sold, requires unanimous consent of the TDH shareholders in order to advance funds to KFD; and
 - ii. Paying out Mr. Healey's shareholder loan would require payout of other shareholder loans and TDH does not at this time hold sufficient assets to do so and satisfy the resulting tax liability.
- [64] In conclusion, I accept Mr. Healey's testimony that by November 30, 2022, he intends to satisfy his tax liability by selling Alco investments, and in doing so will substantially reduce Alco's capital and therefore its investment earning potential going forward.
- [65] I adopt the prospective calculation of Alco's 2022 and 2023 investment income completed by Mr. Jensen, which assumes that Mr. Healey will withdraw a further \$1 million from Alco by the end of 2022. I find that Guideline income of \$120,950 should be imputed to Mr. Healey from earnings on Alco investments for 2022 and \$61,609 for 2023.

Personal Benefits: s. 18(2) of the FCSG Adjustments

- [66] Both parties agree that certain personal expenses of Mr. Healey that are paid through West Shore and Alco should be added back to Mr. Healey's income for support purposes. There is no dispute with respect to which personal expenses paid for by West Shore on Mr. Healey's behalf should be added back, in accordance with s. 18(2) of the FCSG. Those amounts total \$11,699.

- [67] The parties dispute whether the amounts paid by Alco for premiums on a policy for "life insurance on executives" (\$6,039 in 2020 and \$12,345 in 2021) should be included. Mr. Healey submits that this amount should not be included as this insurance expense does not benefit him personally. He says that proceeds from this "last to die" policy (which insures the lives of both him and Ms. Healey), which he estimates will be \$3 million, will be paid to the shareholders of Alco when the last of he or Ms. Healey die.
- [68] Mr. Healey testified, in summary, that he considers that Alco's assets are a legacy for the children and that his intention is to transfer the shares of Alco to them. As a result, he submits that his children, and not he, will benefit from the insurance policy by using insurance proceeds to pay taxes on Alco's capital gains. Mr. Healey was not cross-examined on the purposes for which this life insurance policy was obtained.
- [69] I do not find that the premiums paid by Alco on the policy for "life insurance on executives" constitutes a personal benefit to Mr. Healey, but rather will someday benefit the children by creating a fund to pay capital gains tax. As a result, I do not find that the premiums should be added back into the calculation of Mr. Healey's Guideline income.
- [70] There is no dispute that the cost of Mr. Healey's health care plan paid by Alco, in the amount of \$14,677 in 2021, should be included in the calculation of Mr. Healey's Guideline income.
- [71] In summary, I find, that \$26,376 for personal benefits (that is those paid for Mr. Healey's benefit by West Shore and Alco) and \$17,370 as the tax gross-up required in respect of this amount, should be included in Mr. Healey's Guideline income for support purposes.

Payments from KFD

- [72] Mr. Healey receives \$4,000 per month as repayment of a shareholder loan recorded as being made by him to KFD. Ms. Healey seeks to include \$96,000 per year as imputed income for Mr. Healey--as the grossed-up value of the \$48,000 he earns per year tax free.
- [73] No shareholder loan was ever actually made by Mr. Healey. What did occur was that between 2015 and 2017, a portion of Mr. Healey's shares in KFD were redeemed and dividends were recorded in his name for those years. Mr. Healey did not receive dividend income, but instead, Ken Downie, the sole director of KFD at the time, directed KFD to issue a shareholder loan to Mr. Healey as if Mr. Healey had loaned back the entire amount of the dividends recorded in his name to KFD. Starting in 2016, Mr. Healey has received the \$4,000 per month payment, which is received on a tax-free basis, as taxes were paid on Mr. Healey's behalf in the years the dividends were declared. Mr. Johannesen testified that he recommended that Ken Downie facilitate this monthly payment to Mr. Healey as Ken Downie had done for his nieces and nephews.
- [74] Mr. Healey contends that the \$4,000 monthly payments constitute the return of capital, rather than return on capital, and therefore should not be included in Mr. Healey's income.

- [75] Ms. Healey contends that the monthly amount received from KFD, grossed up, should be included in his Guideline income because these funds, which are expected to be received on an ongoing basis, were used to pay family expenses. She submits that this Court has held that income received from the investment of excluded property loses its excluded character where it is used to pay family expenses and where there is no evidence as to whether the investment would have increased in value if the income had been reinvested rather than paid out. In this respect, Ms. Healey relies upon decisions including *K.A.L. v. K.J.L.*, 2017 BCSC 651 at paras. 263, 272, 279.
- [76] Mr. Healey submits that the decision in *K.A.L.* is distinguishable in that the payor spouse in *K.A.L.* had received and invested an inheritance and used investment income for family purposes. In my view, the circumstances in *K.A.L.* are consistent with use of funds to generate, what can be described as a return on capital.
- [77] At para. 35 of *Brown v. Brown*, 2014 BCCA 152, the Court of Appeal stated that "[i]n order to give consistent treatment to spouses whose assets are held in corporations, returns of capital--not to be confused with returns on capita--will often be excluded from Guideline income, even if the return of capital is structured as a dividend. []".
- [78] Mr. Healey submits that applying the factors set out by the Alberta Court of Appeal in *Ewing v. Ewing*, 2009 ABCA 227 at para. 35, which have been considered and applied by the British Columbia Court of Appeal in decisions including *Brown and Dunnett v. Dunnett*, 2018 BCCA 262, that the payments received by Mr. Healey from KFD should be considered returns of capital. In particular, Mr. Healey submits as follows:
- a) The dividends giving rise to the shareholder loan is not equivalent to a bonus or other incentive payment for work done by Mr. Healey for KFD;
 - b) The dividends recorded to Mr. Healey had never actually been paid to Mr. Healey and did not form part of his income in the year they were recorded;
 - c) In respect of Mr. Healey's interest in KFD, Mr. Healey is not in the business of buying and selling capital assets year after year, such that the dividends from KFD, while arising from the redemption of some of Mr. Healey's shares in KFD, are not in the nature of income; and
 - d) The transactions giving rise to Mr. Healey's shareholder loan, and by extension the monthly \$4,000 payments received by him, were carried out by Ken Downie as part of his long-term estate planning and tax planning.

Finding Concerning Payments from KFD

- [79] I agree with the submissions of Mr. Healey that the Ewing factors referenced above suggest that the payments received by Mr. Healey, repayments of his notional shareholder loan, constitute a return of capital.

- [80] Decisions from other jurisdictions which were cited by Mr. Healey, support a finding that amounts paid as repayment of a shareholder loan are not income: *Rudachyk v. Rudachyk*, [1999] 10 W.W.R. 321 at 324, 1999 CanLII 12271 (Sask. C.A.); *Wilson v. Holmes*, 2022 ABQB 153 at para. 63.
- [81] There is no dispute that Mr. Healey's holdings in KFD are an excluded asset. The transaction at issue, which began with the redemption of some of his shares and ended with the recording of a shareholder loan from Mr. Healey to KFD and monthly payments notionally to repay this shareholder loan, does not result in what I would describe as income for Mr. Healey. I find that the \$4,000 amount per month that Mr. Healey receives from KFD is a return of capital, not a return on capital, and therefore does not constitute Guideline income.

Decision on Mr. Healey's Guideline Income

- [82] I find that Mr. Healey's Guideline income for support purposes should be set at \$314,771 annually for the period from the date of trial until December 31, 2022 comprised, of the following:

Employment Income:

\$1,075

Other non-taxable income (personal benefits):

\$26,376

Other non-taxable income (tax gross-up on personal benefits):

\$17,370

Corporate income from West Shore:

\$149,000

Corporate Income from Alco:

\$120,950

Total:

\$314,771

- [83] For the period commencing January 1, 2023, this imputed annual Guideline income is reduced to \$255,430 to reflect a reduction in corporate income from Alco to \$61,609.

Ms. Healey's Guideline Income

Ms. Healey's Position

- [84] Ms. Healey submits that her Guideline income should be \$14,700, as reflected in her 2021 tax return. She submits that the evidence establishes that she has been doing all the work that she is capable of, or has contemplated doing, as a parenting coach as a result of her continuing role as the primary caregiver for the children and her own physical and mental health needs following the breakdown of the parties' marriage.
- [85] Ms. Healey submits that if income is inputted to her, it should be between \$20,000 to \$30,000 as a baseline Guideline income. She submits that the following evidence weighs against imputing any amount beyond a baseline income to her:
- a) She is currently 47 years old;
 - b) She has never earned more than \$30,000 per year in her work history;
 - c) She has always been the primary caregiver for the children and continues to provide them support which takes up her time during the day and particularly during holiday breaks; and
 - d) She did not have an opportunity to expand her parenting coach business during the marriage and there are inherent limitations in her ability to expand this business.

Mr. Healey's Position

- [86] Mr. Healey submits that Ms. Healey's gross earnings as a parenting coach for 2021, \$14,700, is not the fairest assessment of her income earning potential. He contends that Ms. Healey is intentionally underemployed. His position is that she has an educational background, including a Bachelor of Arts degree obtained in 1999 and her certification as a parenting coach in 2011, which provides her with the ability to earn more than her reported income and justifies an imputation of income.
- [87] Mr. Healey argues that despite Ms. Healey's capacity and availability to work, she has not taken steps to expand her business as a parenting coach or to obtain other work. He suggests this Court impute an annual income to Ms. Healey as a parenting coach of \$90,000, based on her billing rate of \$150 per hour and a proposed 15-hour work week for 40 weeks per year.

Law Concerning the Imputation of Income

- [88] Ms. Healey has an obligation to work towards self-sufficiency insofar as practicable within a reasonable period of time after separation: *K.D.G. v. S.R.G.*, 2018 BCSC 1232, at para. 68; *K.D. v. N.D.*, 2014 BCCA 70 at para. 24; s. 15.2(6)(d) of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [Divorce Act].

- [89] Section 19(1)(a) of the FCSG provides this Court with the discretion to impute income if the Court finds that a spouse is intentionally underemployed or unemployed, unless this situation results from the needs of a child of the marriage or any minor child or because of the reasonable educational or health needs of the spouse. Intentional underemployment or unemployment does not require a finding of bad faith, only that a party is not earning to their capacity: *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 153.
- [90] Though the legal foundations of spousal support and child support are different, the test for imputing income is similar in both cases, and the court has broad discretion when imputing income: *Marquez* at paras. 36, 38. As stated above, the party seeking to impute income bears the burden of establishing an evidentiary basis for the imputation of income: *Marquez* at para. 36. The test is one of reasonableness, having regard for the party's capacity to work, in light of their age, education, health, work history, work availability, and ability to work or be trained to work: *Marquez* at para. 37.
- [91] A payor party is not required to bear the burden of a payee party's employment choices that are unreasonable in these circumstances, including foregoing employment as a matter of preference: *Jendruck v. Jendruck*, 2014 BCCA 320 at paras. 22-23.
- [92] Once the court determines that a party is able to work more, the court must decide what amount of income to impute. Imputing income must not be based on speculation, but requires a rational and evidentiary basis that a spouse is capable of earning the proposed imputed amount: *Windle v. Windle*, 2010 BCSC 18 at para. 88; *M.C.V.* at para. 157.

Is Ms. Healey Underemployed?

- [93] Ms. Healey has testified that she has no plans to expand the number of hours she works as a parenting coach. She has not updated her parenting coach website or otherwise marketed this business. In addition, she has not made any inquiries regarding working as she once did at a pre-school at the Arbutus Club, or applied for any other employment. Ms. Healey testified that she considers her full-time job to be taking care of the children. In addition, she testified that she requires time to recover from the stress of this trial.
- [94] I do not accept Ms. Healey's evidence at trial that she is unable to work more than 100 hours per year because of care requirements for the children. In *McCaffrey v. Paleolog*, 2011 BCCA 378 at para. 49, the Court of Appeal confirmed that "a desire simply to stay home with children is not sufficient to invoke the exception in s. 19(1)(a). There must be evidence of needs of a child which require the parent to remain home and unavailable for employment. []".
- [95] The older children are both 19 years old and enrolled in full-time post-secondary studies in Ontario. The younger child is 15 years old and in Grade 10 at a private school in Vancouver.
- [96] Ms. Healey testified that she performs tasks for the older children including, for example, helping them track their school finances, scheduling travel, reviewing their Individual Education Plans, and generally providing support. For the younger child, Ms. Healey

testified that the tasks performed include meeting with him once a week to review his schedule, getting him to and from hockey practice twice a week, and performing household chores like taking care of shopping, cooking and laundry. In my view, these tasks are not so onerous that they prevent Ms. Healey from working significantly more than approximately two hours per week.

- [97] The evidence does not suggest that the children require constant care or attention from Ms. Healey. For example, Ms. Healey confirmed in her testimony that all three children were employed during the summer of 2022. The older children worked full-time during the summer and the younger child works part-time as a cashier at a local supermarket. In addition, Ms. Healey confirmed that she has left the children during trips away with friends.
- [98] The evidence establishes that Ms. Healey spends significant time on her own personal activities throughout the week or on the weekend. She testified that she typically takes tennis lessons, pickleball lessons, and a pilates class at the Arbutus Club, each once per week. In addition to taking lessons, she plays tennis and pickleball once per week. Ms. Healey also testified that in the summer of 2022, she attended fitness classes at least once a week, went for foot massages, and had regular anti-aging, nail, and spa treatments. I am not satisfied that any of these activities are required as a result of reasonable health needs of Ms. Healey.
- [99] Further, there is no objective evidence, as Ms. Healey suggested in her testimony at trial, that she requires additional time to recover from the impact of a difficult marriage with Mr. Healey or time to recover from the stress of trial. I note that it has been over four years since the parties separated. To the extent that Ms. Healey required time to transition back into the workforce working closer to full-time hours, I consider that sufficient time has passed.
- [100] I find that Ms. Healey is intentionally underemployed without adequate justification. The next issue to be decided is, pursuant to s. 19(1)(a) of the FCGS, what Guideline income should be imputed to Ms. Healey.

Decision on Ms. Healey's Guideline Income

- [101] I do not find that there is evidence to support an imputed income for Ms. Healey of \$90,000 per year, as suggested by Mr. Healey. There was no evidence called at trial by Mr. Healey regarding the possible earning potential of a parenting coach with Ms. Healey's experience. In my view, imputing an income based on 15 hours per week as a parenting coach over a 40-week period would be speculative.

- [102] Ms. Healey's average hours worked as a parenting coach for the years 2019 to 2021 (approximately 100 hours per year) provide a starting point for an assessment of imputed income. Assuming that these hours are worked over a 40-week period (allowing for holiday time and times during the summer when the children are not in school), Ms. Healey has typically worked 2.5 hours per week during this period. I am satisfied that Ms. Healey is capable of working more than this amount.
- [103] I estimate that Ms. Healey is underemployed by approximately five hours per day over a 40-week period. In my view, this is a reasonable approximation of the additional hours that Ms. Healey could work, taking into consideration her parenting obligations for the children, both during the school year and during summer breaks. I consider it reasonable that in addition to \$15,000 per year earned as a parenting coach, that an additional \$15,650 in income be imputed to Ms. Healey ($\$15.65$ (minimum wage) $\times$ 5 hours $\times$ 5 days $\times$ 40 weeks) for a total imputed Guideline income of \$30,650.

Conclusion on Guideline Income

- [104] I find that Mr. Healey's Guideline income for purposes of determining spousal support for the period from the date of trial to December 31, 2022 is \$314,771 and thereafter is \$255,430. I find that Ms. Healey's Guideline income is \$30,650.

SPOUSAL SUPPORT

Ms. Healey's Position

- [105] Ms. Healey submits that she should be paid spousal support on a lump sum basis in the amount of \$5,271,138 or, in the alternative, paid monthly spousal support of \$24,642 on an indeterminate basis. These amounts are based on the income she sought to impute to herself and Mr. Healey, and pursuant to calculations completed using Divorcemate software. As well, Ms. Healey seeks an order that the parties exchange records concerning all sources of income on June 30 of every year and that spousal support may be reviewed and varied, subject to a material change in circumstances.
- [106] Ms. Healey submits that a lump sum payment of spousal support is appropriate and advantageous in the circumstances because it would relieve her of financial hardship, contribute to her self-sufficiency, support her ability to plan for the future, and provide both parties with finality. The financial hardship that Ms. Healey refers to is a \$350,000 mortgage/line of credit she obtained to fund this litigation and the possible requirement to pay a portion of the tax liability resulting from Mr. Healey's sale of Alco assets. (I will address the issue of who is responsible for payment of Alco's tax liability later in my reasons). Ms. Healey submits that this Court should not accept Mr. Healey's evidence that he does not have sufficient assets to satisfy a lump sum support payment.

Mr. Healey's Position

[107] Mr. Healey submits that he should pay monthly spousal support in the amount of \$4,000. This amount is based on the income he sought to impute to himself and Ms. Healey, and pursuant to his own Divorcemate calculations. He agrees that the parties exchange records concerning income annually and seeks an order that either party have the right to seek a review of spousal support on or after June 1, 2025.

[108] Mr. Healey is opposed to payment of lump sum spousal support. He submits that Ms. Healey has not tendered evidence to support the legal basis for an award of lump sum spousal support. Further, he claims to have insufficient liquid assets to make such a payment.

Form of Spousal Support

Law Concerning the Form of Spousal Support

[109] Section 15.2(1) of the Divorce Act permits an order for spousal support in the form of a lump sum or periodic payments, as the court thinks reasonable.

[110] In *Parton v. Parton*, 2018 BCCA 273, at para. 48, the Court of Appeal stated that the factors discussed in *Davis v. Crawford*, 2011 ONCA 294 at paras. 60-69, apply in British Columbia when considering whether to order lump sum spousal support. Determining whether to order spousal support in the form of a lump sum payment requires weighing the "highly variable and case-specific" advantages and disadvantages, including:

a) Advantages:

- i. terminating ongoing contact or ties between the spouses;
- ii. relieving against financial hardship;
- iii. providing capital to meet an immediate need on the part of a dependant spouse;
- iv. ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure, or where the payor has the ability to pay lump sum but not periodic support; and
- v. immediately satisfying an award of retroactive spousal support.

b) Disadvantages:

- i. the real possibility that the means and needs of the parties will change over time, leading to the need for a variation;
- ii. the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award;

- iii. the payors ability to make a lump sum payment, possibly undermining their future self-sufficiency; and
- iv. the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.

(Davis at paras. 67-68; Parton at paras. 47-48)

- [111] The court may also consider self-sufficiency and assisting a payee spouse to achieve an appropriate standard of living: *Robinson v. Robinson*, 2011 BCSC 1489 at para. 103, aff'd 2012 BCCA 497.
- [112] An order for a lump sum payment should not be used for the purpose of redistributing assets; however, it may have this effect: Davis at paras. 60, 62. The character of the assets from which the payor spouse may use to pay a lump sum spousal support order, being family, excluded or other property, is irrelevant: Parton at para. 78. The focus of the analysis is the purpose of spousal support, along with its advantages and disadvantages of the order.

Decision on the Form of Spousal Support

- [113] I find that an order of lump sum spousal support is not appropriate. The disadvantages of a lump sum spousal support payment outweigh the possible advantages.
- [114] With respect to the presence of advantages from the payment of lump sum spousal support, the evidence does not establish that the relationship between Mr. Healey and Ms. Healey is so toxic that it is necessary to separate their financial interaction through a lump sum award. In any case, I note that both parties seek a review of spousal support going forward-which if ordered, will require them to continue to engage with each other. As well, they both continue to share parenting rights and responsibilities in respect of the children.
- [115] In addition, I am not satisfied that Ms. Healey's financial situation qualifies as one of financial hardship requiring relief by payment of lump sum spousal support. Other than the requirement to repay a \$350,000 mortgage/line of credit taken to fund this litigation, Ms. Healey does not have significant debts or other impending significant financial obligations.
- [116] Finally, I am not satisfied there is a real risk of non-payment of periodic support by Mr. Healey or a lack of proper financial disclosure. The evidence indicates that he has been paying both spousal and child support on a consistent basis since December 2020. In addition, I am not convinced that Mr. Healey has withheld relevant financial records.
- [117] In this case, I consider that lump sum spousal support will result in an unfair disadvantage as there is a real possibility that the means and needs of the parties will change. For example, Mr. Healey may not sustain the same income earned as a financial advisor as he has over the past few years. In addition, Ms. Healey's income may increase as the children get older and she has more time to grow her business.

- [118] I accept Mr. Healey's submissions that he does not have access to funds necessary to pay a lump sum spousal support award. As set out above, I have accepted his evidence that he plans to liquidate Alco's capital in order to pay his outstanding tax liabilities. In addition, I am not satisfied that Mr. Healey has the ability to call in the shareholder loan he has made to KFD, or to redeem his shares.
- [119] Further, I do not consider it reasonable for Mr. Healey to be required to sell or borrow against his Dunbar home to pay a lump sum spousal award, as Ms. Healey suggest he could. Mr. Healey has testified that he wishes to retain the Dunbar home because it is the home the children grew up in. Ms. Healey contends that the children spend a relatively small amount of time in the Dunbar home at this time. I do not find that Ms. Healey's submission has merit. In my view, Mr. Healey's desire to retain the Dunbar home is reasonable and he should not be required to borrow against the equity.

Entitlement, Duration, and Quantum

- [120] In my view, Ms. Healey is entitled to spousal support on both compensatory and non-compensatory grounds. The former to reflect the parties' lifestyle and decisions during the marriage with respect to childcare responsibilities, and the latter to reflect Ms. Healey's needs and Mr. Healey's ability to pay support.
- [121] With respect to the range provided for spousal support, Ms. Healey submits that spousal support should fall on the high-end of the range to address the disparity in the parties' financial circumstances on leaving the marriage. Mr. Healey submits that spousal support should fall on the low to medium end of the range.
- [122] Under s. 15.2(6) of the Divorce Act, an order for spousal support should:
- (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 period of time
- [123] Under s. 15.2(4) of the Divorce Act, in determining the quantum and nature of spousal support, the court must consider the condition, means and needs of each spouse, including considering the following factors:
- (a) the length of time the spouses cohabited;

- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[124] Chapter 9 of the SSAG provides a helpful overview of these and other factors which may be considered in determining where spousal support should fall within the applicable range. As noted in the SSAG, no single factor is determinative and several factors may be at play in any given case. I consider the following factors to be significant in this case:

- a) Section 9.1: A strong compensatory claim is a factor that favours a support award at the higher end of the ranges for amount and duration; and.
- b) Section 9.2: When a recipient has limited income and/or earning capacity their needs may push an award to higher end of the range for spousal support.

[125] In this case, I have little difficulty concluding that Ms. Healey has a strong claim for compensatory support given the length of the marriage, the role she played as primary caregiver for the children and the corresponding loss of income earning potential she will experience going forward.

[126] In addition, Ms. Healey has limited income and significant monthly expenses at this time. With respect to her needs, Mr. Healey submits that Ms. Healey's August 2022 Form F8 Financial Statement includes inflated expenses, some of which may not be incurred going forward, such as legal expenses, and other questionable expenses. I agree with the submission that legal expense for this litigation of approximately \$22,000 per month will likely not be incurred going forward. In addition, some expenses, such as vehicle maintenance, personal training and COVID testing costs will likely not be incurred. The \$585 monthly expense for life coaching is in my view questionable in that this expense was not incurred during the marriage. Nonetheless, I consider that Ms. Healey's anticipated needs favours a support at the higher end of the range.

[127] I find that it is fair and reasonable that Ms. Healey receive spousal support at the high end of the range.

Conclusion on Spousal Support

[128] Based on the foregoing, and pursuant to s. 15.2(1) of the Divorce Act, I order that Ms. Healey receive spousal support in the amount of \$8,827 per month on November 1, and December 1, 2022 and \$7,011 on the first day of each month thereafter.

[129] With respect to the duration of support as is set out at s. 8.5.4 of the SSAG, in general, the "length-of-the-marriage" test applies for longer marriages--that is, those of ten years or more. For marriages of 20 years or longer, as is the case here, support is generally awarded for an indefinite duration. Therefore, I order that monthly spousal support be paid for indefinite duration, but subject to review.

- [130] I do not consider that a review of spousal support after just one year, as sought by Ms. Healey, would be appropriate. I order that spousal support be reviewed no earlier than June 1, 2025, for two reasons. First, by this time the older children should have graduated from university and the youngest child will have almost completed high school. In addition, the intervening two-year period will provide Ms. Healey with an opportunity to expand her work hours and move towards self-sufficiency.
- [131] Both parties agree that they should exchange financial information necessary for the purposes of determining Guideline income by June 1, 2023, and each year thereafter. I so order.

CHILD SUPPORT

- [132] Ms. Healey seeks child support for the three children of the marriage, paid in accordance with the FCSG, to reflect the fact that the youngest child resides primarily with her all year and, in her submission, that the two older children reside with her for five months each year when they are not at university.
- [133] Mr. Healey concedes that child support is payable in respect of all three children, however, he takes the position that child support payable for the two older children should be calculated in accordance with the FCSG based on them spending only four months with Ms. Healey when they are not at university.
- [134] Ms. Healey gave evidence that in 2022, the older children returned home for the summer on April 11, 2022, and returned to school "near" the end of August. That is, they spent approximately four-and-a-half months at home. In addition, she testified that they returned home for winter holidays for approximately one month and in the future, may return home for Thanksgiving or other holidays.
- [135] In my view, it is not possible to confirm precisely how long in upcoming years the older children will remain at home, primarily with Ms. Healey, during the summer or during other vacations. For example, I expect that the length of their summer break will depend on factors including when they finish their exams. In addition, the evidence at trial suggests that although the older children worked during most of 2022, that in the past they spent a significant amount of time during the summer (up to three weeks) at Mr. Healey's mother's vacation home. They also spend a portion of their Christmas vacation with Mr. Healey.
- [136] In *Mohamed v. Martone*, 2019 BCSC 38, Justice Ball reduced the period for which child support was payable for a 19-year-old child attending university from twelve months to four. I find it appropriate to do the same here.
- [137] Pursuant to s. 15.1(1) of the Divorce Act, I order that child support be paid based on the imputed incomes set out earlier in my reasons, based on the younger child remaining primarily in Ms. Healey's care year-round and the older children remaining primarily in her

care for four months of the year. As a result, I order that Mr. Healey pay monthly child support, so long as the children remain eligible for support under the Divorce Act, of \$3,551 per month on November 1 and December 1, 2022, and \$2,934 on the first day of each month thereafter.

SPECIAL AND EXTRAORDINARY EXPENSES

- [138] Under s. 7 of the FCSG, this Court may order that amounts be paid by parents to cover special and extraordinary expenses ("special expenses") including for example, for extracurricular activities and post-secondary education. The first issue to be decided is what expenses constitute a special expense.
- [139] Justice Crossin made an order, entered February 2, 2021, concerning special expenses, which went by consent (the "Crossin order"). The parties dispute whether certain expenses covered in the Crossin order should be considered special expenses including the following:
- a) Fees and expenses relating to the older children's post secondary education;
 - b) Arbutus Club monthly "family" membership fees, which Ms. Healey contends are incurred in part to allow the youngest child to continue to play hockey at the Arbutus Club; and
 - c) Legal fees arising from settlement of a claim that the older children vandalized a neighbouring home by "egging" it.

University Costs

- [140] The Crossin order specified that private school fees and expenses are a special expense. Ms. Healey contends that this includes university expenses. I note that at the time of the Crossin order, the older children had not commenced university but were still in private high school. I do not consider that Crossin J. made any orders with respect to university fees and expenses.
- [141] Pursuant to s. 7(1)(e) of the FCSG, university expenses are a special expense. The parties agree that university fees and expenses (including tuition, housing and travel) are special expenses. The evidence establishes that to date Ms. Healey's uncle, Terry Sullivan, has paid a portion of the older children's university costs. The parties generally agree that university fees will be paid using funds from Mr. Sullivan, then available RESP funds and then paid by the parties as a special expense.

Arbutus Club Monthly Fees

- [142] Ms. Healey submits that since the Crossin order included hockey as an enumerated special expense, some or a portion of the monthly membership fees she pays to the Arbutus Club should fall within this expense as the youngest child is only able to play hockey at the Arbutus Club if such membership fees are paid. The evidence at trial establishes that Ms.

Healey is a frequent user of Arbutus Club programs and activities and the older children infrequently use the club's facilities. Accordingly, in my view, it would not be fair for Mr. Healey to pay a proportionate share of all of the monthly membership fee as a special expense.

[143] Although the Crossin order was silent on the issue of the monthly membership fees for the Arbutus Club, I find that implicit in his order was an expectation that the children would continue to play hockey at that club--as had been the case up to the time the order was made. As a result, a portion of the membership fees for the Arbutus Club should be considered a necessary expense required to allow the children to participate in the club hockey program.

[144] In respect of fees incurred to date, I order that the monthly Arbutus Club membership fees be allocated such that three-quarter of the monthly expense (for all three children), and any other amounts paid for hockey, constitute a special expense until the older boys started at university. Afterwards, one-quarter of the monthly expense (for the youngest child only), and any other amounts paid for hockey constitute a special expense. I leave it to the parties to calculate the specific amount.

Other Special Expenses

[145] In addition to the above special expenses, including those set out in the Crossin order, the parties agree that the following should be included as a special expense under s. 7 of the FCSG:

- a) Dues at the Marine Drive Golf Club for the older children;
- b) Sporting equipment for the children (Mr. Healey proposes that absent agreement between the parties, such costs be capped at \$1,500 per year per child); and
- c) Baseball fees for the youngest child.

[146] I order that these expenses constitute special expenses, with a cap on sporting equipment set at \$1,500 per child per year, as proposed by Mr. Healey.

[147] Mr. Healey seeks an order that Ms. Healey contribute one-half of the \$12,000 cost of legal fees resulting from an action brought against the older children for having egged a neighbour's home. At trial, Ms. Healey agreed to contribute to this cost so long as it is apportioned according to the parties' incomes. I find that this cost constitutes a special expense to be apportioned as proposed by Ms. Healey.

- [148] With respect to allocation of special costs, both past and prospective, I find that such costs are to be apportioned between the parties with Mr. Healey paying 60% and Ms. Healey paying 40%, so long as the children remain eligible for support under the Divorce Act. The parent incurring a special expense will provide copies of relevant invoices or receipts on a monthly basis and the receiving parent will pay their proportionate share of such expense within 30 days of receipt.
- [149] Mr. Healey seeks an order that he be able to set off any amounts owing by Ms. Healey to him for special expenses against spousal support payable to Ms. Healey. He submits that such a mechanism will avoid conflicts between him and Ms. Healey concerning special expenses. In my view, an automatic right to set off special expenses against spousal support will create more harm than good. It will allow Mr. Healey to make a deduction from payment of spousal support, required to address Ms. Healey's needs, for special expenses which are potentially not on the list of accepted special expenses or not otherwise agreed to between the parties. I decline to make an order allowing special expenses to be set off against spousal or child support payable to Ms. Healey.

DIVISION AND MANAGEMENT OF PROPERTY

- [150] Pursuant to s. 81(b) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], each party has a right to an undivided half interest in family property as a tenant in common. Section 85(1) provides that various classes of property are not considered family property, but are excluded property. Excluded property includes inheritances, gifts from a third party and property held in trust for the benefit of a spouse.
- [151] I will first deal with the issue of what property is family property and what is excluded property.

Identifying Family Property and Excluded Property

Excluded Property

- [152] Section 85(2) of the FLA provides that the onus is on the party claiming that property is excluded property to prove a basis for the exclusion. Pursuant to s. 84(2)(g), even where property is determined to be excluded property, the increase in the value of such property during the course of the marriage is considered family property and subject to division.
- [153] Mr. Healey submits, and Ms. Healey concedes, that Mr. Healey's interest in Alco and KFD, including the shareholder loan owed to him by KFD, and Mr. Healey's shares in Wajax, are excluded property.
- [154] I find that Mr. Healey's interest in Alco and his Wajax shares are excluded property pursuant to ss. 85(1)(a)-(b) of the FLA as Mr. Healey received those shares as an inheritance from the estate of his late father.

[155] I find that Mr. Healey's interest in KFD is excluded, as at the time of the parties' marriage, this property was held in a discretionary trust (and therefore excluded property under s. 85(1)(f)). This property continued to be excluded after the discretionary trust was wound up and Mr. Healey was granted shares in KFD as the shares were property derived from his interest in the discretionary trust: FLA ss. 83(3), 85(1)(g).

Agreed Upon Family Property

[156] The parties agree that the division of the Dunbar home was settled by way of an agreement between the parties dated August 21, 2019, under which Mr. Healey purchased Ms. Healey's one-half interest in this property, and Ms. Healey purchased her townhouse.

[157] There does not appear to be any dispute that property, including the parties' RRSPs, personal investment and other accounts, the children's RESPs, life insurance policies held in Mr. Healey's name, and a small number of personal items, is family property which is subject to division.

[158] In addition, the parties agree that any increase in value of Alco during their marriage is family property subject to division, but disagree as to the dates between which any increase in value should be calculated.

Increase in Alco Value

[159] Section 84(2)(g) of the FLA provides that the increase in the value of an excluded asset during the course of a marriage is considered family property subject to division. The onus is on the party seeking to have such an increase in value included in family property to establish the increase: *Chapman v. Chapman*, 2020 BCSC 1029 at para. 141.

[160] Mr. Healey submits that the increase in value of Alco should be determined based on its value as at the date of cohabitation, which he submits was \$3,954,116,[2] and the value prior to the disposition of some of Alco's assets by Mr. Healey to purchase Ms. Healey's 50% interest in the Dunbar home, which he submits was \$4,557,872[3]--resulting in an increase in value of \$603,756.

[161] Ms. Healey submits that the first valuation date should be November 12, 2009, the date that Mr. Healey received a second tranche of Alco shares and became the 100% owner of Alco shares. She submits that this was the date both parties provided to Mr. Ghanavizchian for the joint valuation report. She submits that the starting value of Alco should be approximately \$3,853,444.[4]

[162] Ms. Healey agrees that the second valuation date should be when Mr. Healey liquidated Alco assets to purchase her 50% interest in the Dunbar home. However, with respect to the ending value of Alco, Ms. Healey submits that the amount of \$5,860,310[5] should be applied. In the result, Ms. Healey submits that Alco has increased in value by \$2,006,866 during the relevant period.

- [163] Although the presumptive date for valuation of family property is the date of trial, there are circumstances in which it is necessary to set an earlier date because family property has been sold: *Blair v. Johnson*, 2015 BCSC 761 at para. 69. I agree with the parties that the end date for the valuation of Alco should be the time that Mr. Healey substantially diminished its assets to purchase Ms. Healey's interest in the family home. With respect to the value of Alco at that time, I prefer the estimated end date valuation of \$4,557,872 submitted by Mr. Healey as it relies upon the average of the valuation of an expert, Mr. Jensen, (for 2018) and Mr. Healey's sworn evidence as set out in his Form F8 Financial Statement (for 2020).
- [164] With respect to the starting date for valuation the evidence establishes that Mr. Healey's interest in Alco had crystalized prior to the parties' marriage. At the time of Mr. Healey's father's death in 1976, a testamentary trust was created for Mr. Healey's benefit with his mother as the sole trustee. Pursuant to the order of Justice Aikens made in January 1978, the bequest to Mr. Healey in his father's will took effect as of the date of his father's death.
- [165] The testamentary trust received shares in Alco from Mr. Healey's father's estate. His father's will required that a portion of the Alco shares be transferred to Mr. Healey on certain milestone dates. Pursuant to this arrangement, in November 2004, Mr. Healey received a first tranche of shares from Alco and the remaining shares and shareholder loan owing to him were transferred to him on November 12, 2009, and the trust was wound up.
- [166] In accordance with ss. 84(2)(g)(i) and (iii) of the FLA, I find that the increase in value of Alco should be calculated from the date of cohabitation of the parties. With respect to what value should be applied, I again prefer the estimated start date valuation of \$3,954,116 submitted by Mr. Healey as this relies on the average of portfolio valuations received by the manager of Alco's investments, Leith Wheeler, closest to the date of cohabitation.
- [167] I conclude that the increase in value of Alco subject to division as family property is \$603,756.

Division of Property

The Parties' Positions on the Division of Property

- [168] In her written submissions, relying on s. 96 of the FLA which deals with division of excluded property, Ms. Healey submitted that it would be significantly unfair not to divide the value of Alco. She also seeks an unequal division of family property pursuant to s. 95 of the FLA, on the basis that it would be significantly unfair not to do so. Finally, and in the alternative to her statutory remedies under the FLA, Ms. Healey submits that Mr. Healey has been unjustly enriched by her contributions and sacrifices and in particular, by the increase in value of Alco, which provides a basis for compensation.
- [169] Ultimately, Ms. Healey seeks a compensation payment of \$2,114,141 to reflect what she contends is a fair, unequal division of family property.

[170] Mr. Healey submits that Ms. Healey did not plead s. 95 of the FLA in her notice of family claim, but only mentioned s. 96. He contends that Ms. Healey only raised the issue of unequal division of family property pursuant to s. 95 in closing submissions. He submits that even if this Court was to entertain a new pleading under s. 95, Ms. Healey has not demonstrated that an equal division of family property meets the required threshold of significant unfairness. He also contends that Ms. Healey has not proven that the division of excluded property under s. 96, is justified on the basis that not doing so would be significantly unfair. Finally, Mr. Healey submits that an unjust enrichment claim is not made out.

[171] Mr. Healey submits that a compensation payment to Ms. Healey of \$60,024.33 is required, which reflects an equal division of family property.

Is Division of Excluded Property Warranted?

[172] Section 96(b) of the FLA provides this Court with the jurisdiction to make an order for division of excluded property only where it would be significantly unfair not to do so and in consideration of the duration of the marriage and a spouse's direct contribution towards the preservation, maintenance, improvement, operation or management of excluded property.

[173] Ms. Healey's closing submissions were somewhat unclear as to whether she was seeking division of the assets of Alco pursuant to s. 96. Based on her submissions on the orders she seeks, it is not my understanding that Ms. Healey seeks a division of the assets of Alco, pursuant to s. 96, but rather Ms. Healey seeks the unequal division of family property in her favour, pursuant to s. 95 of the FLA. In case I am wrong on this point, I will address the issue of whether the requirements of s. 96 are made out in this case.

[174] There is no question that the parties were married for a significant period of time. Ms. Healey does not contend, and the evidence does not establish, that she was directly involved in the operation or management of Alco. Rather, Ms. Healey contends that she directly contributed to the preservation and maintenance of Alco by caring for Mr. Healey and the children. She submits that this contribution allowed Mr. Healey to keep earning an income as a financial advisor such that he did not have to rely on Alco funds.

[175] In my view, the evidence indicates that Ms. Healey made an indirect, rather than direct, contribution to Alco. Alco was at all times an investment company, managed by Mr. Healey with the assistance of his financial advisors Leith Wheeler. There is no evidence that the care Ms. Healey provided to Mr. Healey and the children enabled and therefore constituted a direct contribution to Mr. Healey's management of Alco and its investments.

[176] Even if I was to find that Ms. Healey made the requisite direct contribution, I would not find that a division of Alco's assets is necessary to remedy a significant unfairness. Mr. Healey submits that Ms. Healey has already benefited from the use of Alco's assets including the use of funds from Alco to purchase the Arbutus condo and the Dunbar home--totalling approximately \$1.7 million. Mr. Healey submits that, although it is open to him to argue

that the use of these funds to purchase these homes gives rise to an excluded property claim over part of the value of the Dunbar home, he has not done so.

[177] Mr. Healey submits that Ms. Healey was paid \$2.25 million for her 50% interest in the Dunbar home, which the parties valued at \$4.5 million, which she used to purchase her townhouse. He says that he could have claimed that the \$1.7 million contribution from Alco constitutes excluded value, and therefore the value of the Dunbar home available for division would have been only \$2.8 million, of which Ms. Healey would be entitled to \$1.4 million. That is, Ms. Healey has already obtained approximately \$825,000 more from the division of the Dunbar home than she was arguably entitled to.

[178] In my view, the circumstances of this case do not justify an unequal division of the residual value of Alco to remedy substantial unfairness.

Is An Unequal Division of Family Property Warranted?

[179] Under s. 95(1) of the FLA, this Court has the jurisdiction to order an unequal division of family property or debt if it would be significantly unfair not to do so. Section 95(2) prescribes a list of factors which the Court may consider in determining fairness. In my view, the relevant considerations which arise in this case include the extent and value of Ms. Healey's contribution towards Mr. Healey's employment and investment earnings (s. 95(2)(c)), whether after separation Mr. Healey caused a significant decrease in the value of family property beyond market trends (s. 95(2)(f)), or whether Mr. Healey, absent acting in good faith, substantially reduced the value of family property or disposed of property that would have been family property adversely impacting Ms. Healey's interest (s. 95(2)(g)).

[180] Despite the fact that Ms. Healey did not specifically plead s. 95 in her notice of family claim, I consider it appropriate to consider this provision in determining the issue of division of family property. Relevant evidence for and against the unequal division of family property was extensively canvassed at trial and the parties had opportunity to make extensive submissions on this point at the end of trial. As well, Ms. Healey's pleadings are sufficiently broad to encompass a claim under s. 65: see *Venables v. Venables*, 2019 BCCA 281 at paras. 48, 62-63.

[181] I will address the relevant considerations below.

Ms. Healey's Contributions Towards Mr. Healey's Career

[182] There is no dispute in this case that the parties' marriage was one which can be described as "traditional", although in my view this term should probably be relegated to history. What is clear from the evidence is that the parties decided early in their relationship that Ms. Healey would be the primary caregiver for the children and Mr. Healey would be the primary income earner. They maintained these roles throughout their marriage.

- [183] The question of whether Ms. Healey was required to care for Mr. Healey or the children in a manner beyond what would normally occur in a spousal relationship of this sort is less clear. In summary, Ms. Healey contends that because of Mr. Healey's use of substances, including alcohol and anger management issues, she was required to provide extraordinary care to him and a disproportionate share of care for the children. She contends that as a result of this work, Mr. Healey had more time to advance his career as a financial advisor or for the management of investments held in Alco.
- [184] Mr. Healey testified that he drank alcohol during the marriage but he denies that he was an alcoholic, despite his voluntary participation in a sixty-day alcohol treatment program in January 2017, near the end of the parties' marriage, and his ongoing participation in alcoholics anonymous. In my view, Mr. Healey sought to downplay the extent of his use of alcohol and its impact on his relationship with Ms. Healey and the children during the marriage. Mr. Healey acknowledged that during the marriage he experienced anger management issues.
- [185] What I have some difficulty with is the extent to which Mr. Healey's alleged alcoholism and anger issues would have impacted his earnings as a financial advisor or his investment earnings, absent Ms. Healey's role as a caregiver for him and the children. In my view, such evidence is necessary in order to ground a claim for unequal division of family property as it goes to the issue of fairness.
- [186] Ms. Healey testified that at the beginning of the marriage, Mr. Healey contributed to household duties and childcare but when the older children were between three- and five-years old Mr. Healey's behaviour became worse. She testified that after this time, he spent more time away on the weekend with friends, did not take part in routine activities, drank excessively on weekday evenings and on vacations, and was often hung over. Ms. Healey referred to two significant incidents where Mr. Healey was intoxicated while they were away on vacation, one in 2015 or 2016 when he insisted on driving a boat with the family from his mother's cabin at Buccaneer Bay and the second in 2017 when he lost his temper after a karaoke party when the family was at his step-father's cabin at Whistler. In my view, Ms. Healey's evidence does not provide a clear connection between Mr. Healey's behaviour, and her management of it, to Mr. Healey's ability to advance his career as a financial advisor.
- [187] Mr. Healey testified that any substance abuse issues did not result in a decline in his income as a financial advisor. In my view, this evidence is not challenged. Mr. Healey also testified that he contributed to the care of the children including acting as a hockey coach for their teams over a period of several years. Although the latter evidence is contested by Ms. Healey, it is not necessary for me to decide this point, as in my view the issue is not sufficient linked to the fairness of an equal division of family property.

[188] Based on the evidence adduced at trial, I am not satisfied that Ms. Healey has shown that if she had not provided care to Mr. Healey and the children to the extent she did, that Mr. Healey would have made less as a financial advisor or through his investments held by Alco.

Did Mr. Healey, without a good faith basis for doing so, dispose of family property thereby defeating or adversely impacting Ms. Healey's interest?

[189] Ms. Healey submits that her interest in the increase in value of Alco during marriage was deliberately defeated by Mr. Healey such that equal division of family property would be significantly unfair. In particular, Ms. Healey submits that Mr. Healey's decision to liquidate \$2.165 million in Alco investments to fund his purchase of Ms. Healey's interest in the Dunbar home (and thereby provide Ms. Healey with funds to purchase a townhouse) effectively reduced the availability of what, if he had not done so, would have been her share of the increase in Alco's value.

[190] As I have previously found, Alco's value increase during the marriage, over which Ms. Healey had a presumptive 50% interest, was \$603,756.

[191] The evidence establishes that Ms. Healey asked Mr. Healey to provide her with funds for the purchase of a townhouse, which she eventually did purchase in June 2019. Mr. Healey's evidence is that he agreed to provide purchase funds to Ms. Healey on condition that his contribution be applied against his purchase of Ms. Healey's interest in the Dunbar home and that he notified Ms. Healey that if there were tax consequences arising from the transaction, he expected those to be to Ms. Healey's expense. Ultimately, the parties signed an agreement with respect to this transaction in August 2019. The agreement was silent on the issue of tax.

[192] Both parties made submissions with respect to whether or not Ms. Healey should have known that Mr. Healey intended to liquidate Alco assets in order to provide Ms. Healey with \$2.165 million. In my view, it is not necessary to decide whether Ms. Healey knew or should have known that Mr. Healey intended to dispose of Alco assets.

[193] I accept that by selling Alco assets to obtain funds to pay \$2.165 million to Ms. Healey, Mr. Healey disposed of family property (the \$603,756 increase in Alco's value) causing Ms. Healey's interest in this property to be defeated or adversely affected. The question is whether Mr. Healey did so in the absence of acting in good faith.

[194] Ms. Healey disputes Mr. Healey's evidence at trial that it was necessary for him to deplete Alco's investment portfolio in 2019. She contends that he could have taken other steps, such as taking a mortgage on, or selling the Dunbar home, redeeming his shares in KFD, or calling in his shareholder loan to KFD.

[195] Mr. Healey's evidence was that he made inquiries in relation to obtaining a mortgage on the Dunbar home, but those options were not advisable due to the complexity of the transaction, the time involved and because he would have to use the Dunbar home and Alco

as collateral. He testified that there was limited time to obtain the required funds to allow Ms. Healey to purchase her townhouse. In addition, he testified that he received advice from a colleague with BMO lending that he did not have sufficient regular income to qualify for a mortgage. Mr. Healey's evidence in this respect has not been challenged.

[196] With respect to whether Mr. Healey should have considered selling the Dunbar home to pay Ms. Healey, rather than liquidating Alco investments, Mr. Healey's evidence at trial was that he wished to retain this home as it had always been the home of the children. I do not find this position to be unreasonable or taken in bad faith.

[197] As set out at para. 63 of these reasons, there is insufficient evidence on which I am able to conclude that Mr. Healey was able to demand repayment of his shareholder loan to KFD or to redeem his shares in KFD. I note that if Mr. Healey was able to demand repayment of his shareholder loan from KFD, he would have received the funds on a tax-free basis. I find it unlikely that Mr. Healey would have purposefully avoided calling in his shareholder loan and receiving funds on a tax-free basis, and instead elected to extract the necessary funds from Alco with the resulting significant tax consequences.

[198] In conclusion, I do not find that Ms. Healey has satisfied her onus to show that Mr. Healey, without a good faith basis for doing so, substantially reduced the value of family property or disposed of family property, being the increase in value of Alco, thereby defeating or adversely impacting Ms. Healey's interest, justifying an unequal division of family property. There was a good faith basis for selling Alco assets to enable Ms. Healey's purchase of a townhouse, which has been used by her and the children since its purchase. The fact that Mr. Healey has also benefited by retaining the Dunbar home does not make his decision to sell Alco assets one taken in the absence of good faith.

Did Mr. Healey, after separation, cause a significant decrease or increase in the value of West Shore or Alco beyond market trends?

[199] Ms. Healey submits that in selling investments held by West Shore, which were family property, to obtain \$85,000 towards the down payment for Ms. Healey's townhouse, Mr. Healey decreased Ms. Healey's interest in this property beyond market trends. Mr. Healey acknowledges that 50% of the \$85,000 liquidated for this purpose belongs to Ms. Healey and therefore an adjustment to equal division of the remaining family property to be divided is required.

[200] Ms. Healey also submits that selling investments held by Alco, a portion of which were family property, to pay the balance of the purchase price for Ms. Healey's townhouse, was wasteful and will draw tax consequences, thereby decreasing her interest in this property beyond market trends.

[201] Mr. Healey acknowledges that 50% of the increase in value of Alco assets (that is 50% of \$603,756) belongs to Ms. Healey and therefore an adjustment to equal division of the remaining family property to be divided is required.

Has Mr. Healey Been Unjustly Enriched?

[202] Ms. Healey contends that she is entitled to monetary compensation from Mr. Healey in respect of his excluded property interests in Alco based on the principle of unjust enrichment.

[203] An unjust enrichment claim is made out where a party can establish an enrichment of or benefit to a defendant, a corresponding deprivation to a plaintiff and the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10, at para. 32. Such claims are based on the retention of an inappropriately disproportionate amount of wealth by one party despite both parties having engaged in a joint family venture, and a clear link between those contributions towards the joint venture and the accumulation of wealth: *Kerr* at paras. 81, 87.

[204] Ms. Healey relies upon the decision of this Court in *Chapman v. Chapman*, 2020 BCSC 1029. In that case, the Court found that there was a constructive trust over one half of the shares of a corporation, which were registered in the name of the husband alone. In my view, the facts of the case at bar are distinguishable from those in *Chapman*.

[205] In *Chapman*, the court found that both parties contributed by working full-time with a subject company and money earned was put towards preserving the assets of family business corporations, and both assumed financial risk in doing so: *Chapman* at para. 271. The claimant's equal participation was established through evidence of extensive involvement with the subject company, which included, among other things, attending at the business daily, taking the lead in some business activities, and developing relationships with stakeholders: *Chapman* at para. 270.

[206] I am not satisfied on the evidence that the parties jointly engaged in efforts to increase the value of Alco, constituting a joint family venture, or that Ms. Healey has clearly demonstrated a contribution towards such an endeavour. I find the following relevant:

- a) Alco has not increased in value but in fact has declined in value over the course of the parties' marriage;
- b) This decrease in value results from the use of Mr. Healey to pay for family expenses and to purchase family homes, first the Arbutus condo and later the Dunbar Home, which constitutes a benefit rather than a deprivation to Ms. Healey;
- c) Mr. Healey received Alco in the form of an inheritance and he did not build it up himself, rather sought to maintain its assets, during the course of the relationship;
- d) Neither party took part in the business of Alco, which was not an operating company but rather an investment vehicle; and

- e) To the extent that Ms. Healey's contributions towards the care of Mr. Healey and the children can be said to have "freed-up" Mr. Healey to make decisions on the management of Alco, those contributions were indirect. The impact of such contributions to the value of Alco is uncertain.

[207] Further, even if a joint family venture was made out in respect of Alco, I am not satisfied that Ms. Healey has demonstrated a significant deprivation which attracts equitable intervention. As previously stated the value of Alco has decreased over the relationship in large part as a result of the use of Alco assets to purchase family homes and to pay for various expenses.

Conclusion on the Division of Property

[208] In summary, I find as follows:

- a) Mr. Healey's interests in KFD, Alco, and Wajax are excluded property;
- b) The increase in the value of Alco during the course of the marriage, being \$603,756, is family property;
- c) Ms. Healey has not satisfied her onus to show that it would be significantly unfair not to divide Mr. Healey's excluded property interest in Alco, pursuant to s. 96(b) of the FLA;
- d) Ms. Healey has not satisfied her onus to show that it would be significantly unfair not to unequally divide family property in her favour, pursuant to s. 95(2) of the FLA; and
- e) Ms. Healey has not demonstrated that Mr. Healey has been unjustly enriched as a result of her contributions towards the value of Mr. Healey's excluded property interests in Alco.

Division of Tax Liabilities

[209] Mr. Healey seeks orders pertaining to the sharing of certain tax liabilities incurred as a result of the disposition of assets of Alco, West Shore, and Mr. Healey's shares in a company called Good Natured Products. \$2.25 million of the funds obtained from the disposition of assets of Alco and West Shore were used to pay Ms. Healey for her 50% interest in the Dunbar home and the balance, \$150,000, obtained from the sale of Alco assets and Mr. Healey's shares in Good Natured Products, were used to provide interim distributions of family property to Ms. Healey.[6]

[210] During submissions, Mr. Healey initially argued that Ms. Healey should be responsible for payment of all taxes resulting from his liquidation of Alco and West Shore assets to fund his purchase of Ms. Healey's interest in the Dunbar home. After questions from the Court, Mr. Healey modified his submissions to be that Ms. Healey should only be responsible for payment of taxes resulting from the disposition of her 50% share of the \$603,756 increase in value of Alco, plus one-half of the taxes arising from the sale of \$85,000 in West Shore assets. As well, he seeks payment of one-half of the capital gains taxes he will be required to pay as a result of the sale of shares in Good Natured Products to provide a \$75,000

interim distribution to Ms. Healey. He does not seek payment of taxes in respect of the disposition of Alco assets to pay the other \$75,000 interim distribution as no tax was payable on this disposition.

- [211] With respect to the taxes on Ms. Healey's 50% share of the increase in Alco's value, Mr. Healey submits that those should be calculated based on the 2022 non-eligible dividend rate for income over \$227,091. He calculates that at this rate the total taxes payable on \$603,756 would be \$295,176.54, to be shared equally.
- [212] With respect to the taxes payable on the sale of West Shore assets, Mr. Healey submits that those should be calculated based on the 2019 marginal dividend rate (48.89%) resulting in a tax liability of \$41,556.50, to be shared equally. With respect to taxes payable on the sale of the Good Natured Products shares, he submits that those taxes should be based on the capital gain tax applicable on the disposition of these shares, \$16,995.67, again to be shared equally.
- [213] I have considered and applied the factors in determining how parties should share the tax consequences arising from the sale and distribution of family property as set out in *McKenzie v. McKenzie*, 2015 BCSC 241 at para. 8. First, I am satisfied that Mr. Healey has provided the necessary evidence of tax consequences resulting from the division and distribution of family property. Next, I am satisfied that Mr. Healey's proposal with respect to both the rate of tax to be applied and the allocation of the tax consequences, with the parties sharing the tax cost equally, is fair.
- [214] I make the following additional comments on the issue of fairness. Mr. Healey has, in my view, rightly conceded that Ms. Healey should not be responsible for paying for all of the tax consequences of his decision to liquidate Alco assets. His submission that Ms. Healey pay her share of the tax on her 50% share of the increase in Alco's value and tax resulting from share of West Shore assets is reasonable as in my view, even if Mr. Healey had not liquidated these assets to provide him with funds to purchase Ms. Healey's interest in the Dunbar home, Ms. Healey would have been responsible for paying a share of the tax upon the division of this property. The same applies in respect of the tax arising from the sale of Good Natured Products shares to provide Ms. Healey with a litigation advance.
- [215] In summary, I find Ms. Healey is responsible for \$176,869.35 of the tax liabilities incurred when Mr. Healey sold assets to provide her with certain funds. This amount is based upon the following:
- a) \$20,783.25, being 50% of the tax liabilities resulting from the sale of West Shore assets;
 - b) \$8,497.83, being 50% of the tax liabilities resulting for the sale of Good Natured Product shares; and
 - c) \$147,588.27, being 50% of the tax liabilities resulting from the disposition of her 50% share of Alco investments.

What compensation payment is required to give effect to an equal division of family property?

[216] Given my reasons set out above, it is necessary to determine the amount of a compensation payment required to be paid from Mr. Healey to Ms. Healey to reflect an equal division of family property, taking into consideration the amount of family property currently held by each of them and any advances on family property made to the date of trial along with a division of the applicable tax liabilities on such advances.

[217] Mr. Healey prepared a Scott Schedule setting out family property held by each party. I accept the calculations included within Mr. Healey's Scott Schedule, which show that Mr. Healey currently holds \$413,092.68 of family property and Ms. Healey holds \$153,071.79 of such property (not including RRSPs). Further, Mr. Healey has prepared a separate document showing a calculation of the necessary compensation payment to Ms. Healey. This calculation includes the family property currently held by the parties and takes into account the following: the increase in value of Alco and the value of West Shore investments sold and the associated tax liabilities resulting from a disposition of this family property; and, the \$275,000 in advances on family property made to Ms. Healey, including the capital gain tax resulting from sale of Good Natured Products shares.

[218] In total, Mr. Healey calculates that a compensation payment of \$60,024.33 is required, to give effect to an equal division of family property. I accept this calculation.

Management of the Children's RESPs

[219] The parties established two RESP accounts for the children which Mr. Healey contributed to until approximately 2012, valued at approximately \$135,000. Mr. Healey is currently the subscriber for both RESP accounts meaning that he has the sole authority to make investment decisions and withdrawals. Mr. Healey wishes to continue to manage the RESPs because of his knowledge of these plans arising from his experience as a financial advisor. Ms. Healey does not object to Mr. Healey continuing to manage the children's RESPs.

[220] To resolve an outstanding dispute between the parties, Mr. Healey seeks, in effect, a declaration that he is able to utilize these RESP to pay travel expense for the older children to travel to and from university incurred in April and June of 2022 and for such expenses incurred for all of the children going forward. I make this declaration.

Conclusion on the Division and Management of Property

[221] In summary, I make the following orders with respect to division and management of family property:

- a) Ms. Healey shall retain the townhouse as her sole and separate property with no further amounts owing by either party;
- b) Mr. Healey shall retain the Dunbar home as his sole and separate property with no further amounts owing by either party;

- c) Mr. Healey will pay Ms. Healey the sum of \$60,024.33 to compensate her for her share of the value of family property to effect an equal division;
- d) Mr. Healey shall retain the following financial assets in trust for the children:
 - i. Any RESP accounts for the children; and
 - ii. Any life or critical illness insurance policy insuring the children;
- e) Mr. Healey will transfer from his RRSP account(s) to Ms. Healey's RRSP account(s) the amount necessary to equalize the parties' RRSPs;
- f) The parties' unadjusted pensionable earnings under the Canada Pension Plan will be divided in accordance with the Canada Pension Plan Act, R.S.C. 1985, c. C-8, upon application by either party. For the purposes of this division, the parties began cohabitating on September 1, 1997 and separated on October 31, 2018.
- g) Ms. Healey shall sign all documents provided to her by Mr. Healey as are required to transfer her shares in West Shore to Mr. Healey--which transfer will be by way of spousal rollover;
- h) The parties shall transfer the RBC joint savings account held in their joint names together with the children to the children at the earliest date agreed to by the parties;^[7]
- i) Unless otherwise provided in these reasons all other assets in a parties' possession will be their sole property;
- j) Each party will be responsible for any debts in his or her sole name.

^[222] In addition, presumably to avoid any confusion with respect to the ownership of Mr. Healey's shares in KFD, Alco and Wajax going forward, Mr. Healey seeks a declaration that these shares are excluded property. Ms. Healey concedes and I have found that this is excluded property and accordingly, I make this declaration.

PARENTING ARRANGEMENTS: CHRISTMAS DAY

^[223] Mr. Healey seeks an order confirming how the parties will share parenting time with the youngest child on December 25, Christmas Day. In the Crossin order, which was by consent, Crossin J. ordered that "the parties will share all school holidays [], statutory holidays and special occasions [] on an equal basis".

^[224] Unfortunately, the parties have been unable to agree on how parenting time on December 25 shall be shared. Since the Crossin order was made, the children have spent this day exclusively with Ms. Healey, although Mr. Healey requested that he be able to spend the day with them in 2021. Both parties acknowledge that the older children can decide for themselves where they would like to spend December 25, and that an order dividing parenting time on this day would pertain solely to the youngest child.

- [225] Mr. Healey seeks an order that the parties alternate parenting time with the youngest child on December 25, with Mr. Healey having parenting time on this day in 2022. He highlights that the Crossin order speaks to an "equal" division of time, and that he has not spent Christmas day with the children in two years.
- [226] Ms. Healey contends that rather than one parent having exclusive parenting time on December 25, that the parties could share parenting time on this day. She submits that this will ensure that neither parent is deprived of an opportunity to spend time with the children on this day. Mr. Healey does not agree that this suggestion is appropriate as it will prevent him from, for example, spending December 25 with the children at Whistler.
- [227] In my view, the order sought by Mr. Healey does not seek to vary the Crossin order, which would require him to establish a material change of circumstances, but rather to clarify the terms of the order with respect to division of parenting time on holidays. In my view, it is implicit in the Crossin order that holiday periods would be split. If Crossin J. was surgically dividing individual holiday days, his order would have said so.
- [228] Again, it is unfortunate that the parties have been unable to set aside their differences to come to a reasonable compromise on this point. Although I tend to agree with Ms. Healey's submissions that the youngest child, now 15 years old, will be able to decide where he spends Christmas "with his feet", as his older siblings are able to do, it appears that an order is necessary.
- [229] The best interests of the child is the only thing a court should consider when making a parenting order: Divorce Act, s.16(1). Subsection 16(3) of the Divorce Act sets out factors that the court shall consider in determining the best interests of the child. In my view, ss. 16(3)(b), which requires the Court to consider the nature and strength of the child's relationship with each spouse, is the most relevant. As well, pursuant to s. 16(6), the court is to give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.
- [230] There are also numerous decisions that alternate Christmas Day parenting time annually: see, for example Scott v. Scott, 2006 BCSC 1128 at para. 26; P.M. v. S.C., 2022 BCSC 1030 at para. 67; G.W. v. S.H., 2016 BCPC 266 at para. 45.
- [231] In my view, it is in the best interests of the youngest child to have the opportunity to fully engage in Christmas day traditions with both parents for a full day. To avoid conflict going forward, I order that Mr. Healey will have parenting time commencing from 4 p.m. on December 24, 2022 to 10 a.m. on December 26, 2022, and alternating between the parties in subsequent years. In all other respects, the Crossin order remains in place.

DIVORCE

- [232] The evidence establishes that the parties are entitled to a divorce.

CONCLUSION

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

- a) Annual Guideline income for Mr. Healey for the period from the date of trial to December 31, 2022 is imputed to be \$314,771 and thereafter \$255,430.
- b) Annual Guideline income for Ms. Healey is imputed to be \$30,650.
- c) Mr. Healey shall pay monthly child support of \$3,551 per month on November 1 and December 1, 2022, and \$2,934 on the first day of each month thereafter.
- d) Mr. Healey shall pay monthly spousal support of \$8,827 per month on November 1, and December 1, 2022 and \$7,011 on the first day of each month thereafter.
- e) The parties shall exchange financial information necessary for the purposes of determining Guideline income by June 1, 2023, and each year thereafter. Either party is at liberty to seek a review of spousal support no earlier than June 1, 2025.
- f) Special and extraordinary expenses are those set out in the Crossin order entered February 2, 2021, as modified by these reasons. Mr. Healey will pay 60% and Ms. Healey will pay 40% of such expenses.
- g) Family property shall be divided and, where not divided, managed by the parties in accordance with para. 221 of these reasons. This includes the requirement that Mr. Healey pay Ms. Healey \$60,024.33 in order to equalize the division of family property between the parties;
- h) The Crossin order, entered February 2, 2021, is clarified such that Mr. Healey will have parenting time with the youngest child commencing from 4 p.m. on December 24, 2022 to 10 a.m. on December 26, 2022, and alternating between the parties in subsequent years. In all other respects, the parenting time orders of the Crossin order remain in place.
- i) Subject to s. 12 of the Divorce Act, the parties, who were married at Ontario on April 28, 2001, are divorced from each other with the divorce to take effect on the 31st day after the date of this order.

[234] With respect to the issue of costs, Mr. Healey has been substantially successful in this trial and therefore is presumptively entitled to his costs in this proceeding. If there are matters related to quantum of, or entitlement to costs, which require further submissions the parties are at liberty to seek a further hearing date before me.

"Mayer J."

- [1] Mr. Jensen's evidence at trial was that this value had likely decreased by the time of trial, given the current state of world financial markets.

- [2] The parties did not provide a valuation of Mr. Healey's interest in Alco at the date of cohabitation. Mr. Healey submits that this value can be determined by averaging valuations completed by Leith Wheeler for August and September of 1997 (\$4,054,116) and subtracting the estimated amount of Alco's liabilities at any given time, provided by Mr. Healey's accountant Brian Dougherty (\$100,000)--resulting in an estimated value of \$3,954,116.
- [3] The parties did not provide a valuation of Mr. Healey's interest in Alco at this time. Mr. Healey submits that this value, \$4,557,872, can be estimated by averaging valuations from November of 2018 and October of 2020.
- [4] This includes the estimated value of Alco's investments at this time set out in a letter from counsel for Mr. Healey, \$2,825,641, plus the amount of a shareholder loan owing from Alco to Mr. Healey of \$1,027,803.
- [5] This includes the estimated value of Alco's investments at this time, \$4,697,365, provided by counsel for Mr. Healey, plus the amount of a shareholder loan owing from Alco to Mr. Healey, of \$1,162,948.
- [6] In total Ms. Healey received \$275,000 in interim distributions. Of this amount \$125,000 was borrowed by Mr. Healey from his mother, Mary Downie. Only \$150,000 is subject to tax.
- [7] Ms. Healey sought this order which in my view is more appropriate, given the ages of the children and the difficulty the parents have in cooperating on financial matters involving the children, than Mr. Healey's proposal that the parties continue to manage this account.

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/20/2022BCSC2072.htm>

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

Prepared on 29 October 2026 · Esheria