
CANADA / JUDGMENT

J.W.L.P. v. A.J.P.

2017 BCSC 1898

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Supreme Court of British Columbia

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2017 BCSC 1898 J.W.L.P. v. A.J.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.W.L.P. v. A.J.P.,

2017 BCSC 1898

Date: 20171024

Docket: E170036

Registry: Vancouver

Between:

J.W.L.P.

Claimant

And

A.J.P.

also known as A.J.S.

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Claimant:

P.M. Daykin Q.C.

Counsel for the Respondent:

L.N. MacLean Q.C.

J. Sangra

Place and Date of Trial/Hearing:

Vancouver, B.C.

September 18 and 19, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 24, 2017

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I. Introduction

- [1] Both parties in this family proceeding bring applications for interim relief pending the anticipated trial, which is currently scheduled to commence just over a year from now, in November 2018.

Claimant's application

- [2] The claimant, Mr. P., seeks an order formalising his parenting time with the parties' three children and to have a report prepared pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The respondent, Ms. P., is not opposed to that application in principle, but she takes issue with certain of his proposed terms and proposes different terms of her own.
- [3] First, she wants to see any provision for parenting time made conditional on the reasonable wishes of the two older children. Mr. P. acknowledges that the wishes of the oldest child, AP (aged 17), must govern in her case. With respect to the second child, MP (aged 14), however, he says that parenting time should be ordered on a mandatory basis, irrespective of MP's wishes.
- [4] Second, Ms. P. raises some additional issues with Mr. P.'s proposed parenting schedule, which I will deal with in settling the terms of that order.

Respondent's application

- [5] Ms. P. applies for a number of items of relief, as follows:
- (a) an order under s. 91 of the FLA restraining Mr. P. from disposing of the family property;
 - (b) an interim advance on her share in anticipation of the division of the family property;
 - (c) the appointment of an expert to conduct a valuation of the family business;
 - (d) an order for an interim distribution of the income from the family business or, in the alternative, interim child and spousal support;
 - (e) an order directing the parties and the children to attend "reunification therapy" to assist them in rekindling the relationship between Mr. P. and the two older children;
 - (f) interim exclusive occupancy of the matrimonial home and the recreational property in Parksville; and
 - (g) additional financial disclosure from Mr. P.
- [6] Mr. P. consents to the relief sought in item (a), provided the order is made on a reciprocal basis. He also raises certain issues with her proposed form of order which I will deal with in settling the terms of that order.

- [7] Mr. P. also consents to the relief sought in items (c) and (e). With respect to item (f), he is prepared to allow Ms. P. to have exclusive occupancy of the family home provided certain of his personal effects are returned, but not of the Parksville property.
- [8] Mr. P. opposes the balance of the relief sought. While he recognises his obligation to pay child and spousal support at an appropriate level, he disputes Ms. P.'s assertion that the assets and income of the family business are family property that can or should be distributed to the parties at this stage, or that the entire gross income of the business should be treated as his personal income for purposes of calculating his support obligations. He does not agree that any further financial disclosure should be ordered.

II. General Background

- [9] The parties were married on September 5, 1998 and separated on or about May 28, 2016. Ms. P. claims that the parties commenced living in a "marriage-like relationship" in 1992. They are both currently 45 years of age.
- [10] They have three children: AP (17), MP (14), and EP (7).
- [11] Mr. P. has spent his entire career working in the family business, which today consists primarily of a holding company, 761335 B.C. Ltd. ("Holdco") and an operating company, B-H Woodturning Ltd. ("BHWL"). In addition to its controlling stake in BHWL, Holdco holds a portfolio of securities that is said to be worth approximately \$8.6 million and had, until recently, also owned the land and facility from which BHWL operates. Those premises were recently sold but have been leased back from the purchaser pending the purchase of a replacement property and construction of a new facility there.
- [12] BHWL is a manufacturer and distributor of stair parts and millwork accessories for the home construction industry. The business appears to be very successful, with its collective net income after tax for the last two years having been in the neighbourhood of \$2 million per year and cumulative retained earnings said to be in the neighbourhood of \$15 million. The actual value of the business itself is one of the principal issues to be addressed at trial.
- [13] Ms. P. is a homemaker, as she was throughout the period of the marriage.
- [14] Since the parties separated, the children have been living with Ms. P. in the former family home in Delta, which the parties purchased in 2015 for \$2.75 million. It is now said to be worth approximately \$4 million. Mr. P. has been living since the separation in a rented, four-bedroom townhouse in nearby Ladner.
- [15] In addition to the family residence, the following properties were acquired during the marriage:
- (a) a rental property in Richmond, owned by Mr. P., and

(b) an undivided quarter interest in a recreational property in Parksville owned by the parties as joint tenants.

[16] Mr. P. owns and continues to have the exclusive use of a \$200,000 sailboat.

[17] These proceedings were commenced in January 2017.

III. The Parenting issues

The Facts

[18] The parties agree that during the marriage, they assumed traditional roles, whereby Mr. P. worked at building and running the family business while Ms. P. stayed at home caring for the children. Mr. P. has always worked long hours and as a result of that and other factors, his relationship with the children has suffered.

[19] There is a dispute between the parties about the extent to which Mr. P. tried to maintain contact with the children immediately following the separation. Ms. P. asserts he made no real effort between the date of separation (May 2016) and August 2016. She says he made only two requests to see the children in that period and it was mainly she who tried to encourage him to participate more in their lives.

[20] Mr. P. says that between January 2016 and the end of May 2016, he was living in the pool house on the same lot as the family home. During that time, he saw the children regularly, drove them to and from school and attended their extra-curricular activities. In May 2016, however, Ms. P. and the children collectively asked him to move out, so he did.

[21] The entire family flew to Australia in July 2016. The main purpose of the trip was to scatter the ashes of Mr. P.'s recently-deceased mother. Mr. P. believes that during that trip, the oldest child, AP sought to prevent the other children from spending time alone with him. His relationship with AP has been particularly strained for many years, for reasons that are in dispute between the parties and need not be addressed in these reasons. One can only hope that those issues will be addressed in the context of the family reunification counselling that the parties have agreed to engage in.

[22] Following their return from Australia, Mr. P. says he has tried to make contact with the children by telephone, email and text messaging, but those attempts were rebuffed by the children.

[23] In the summer of 2016, however, he began seeing the youngest child, EP, on a regular basis. Beginning in November 2016, he began seeing the two younger children on parts of each alternate Saturday and Sunday (although not overnight) and Tuesday afternoons. He found he had no difficulty seeing EP, some difficulty seeing MP, and had no contact at all with AP.

- [24] Although Ms. P. claims she encouraged the children to see their father during his allotted times, he says she made his parenting efforts more difficult by preventing overnight stays and requiring the children to be back home with her by 3:00 p.m. on Sundays.
- [25] As of January 2017, Mr. P. began having both EP and MP in his care on Tuesday afternoons from approximately 3:00 p.m. to 6:30 p.m. and on alternate weekends from Saturday morning until Sunday afternoon. Since June 3, 2017, however, MP has refused to see his father at all and has ceased all contact. AP too continues to refuse to have any contact with him.
- [26] Mr. P. attributes MP's refusal to see him to the influence of Ms. P. and AP. He says that when he is alone with MP, however, MP is "relaxed and happy and is open in his communication."
- [27] Mr. P. professes to be unaware of why MP refuses to see him. He states in his affidavit that he is "aware of no single incident occurring between [MP] and me that would have caused him to suddenly and dramatically cut me out of his life."
- [28] In fact, MP's refusal to see his father appears to have been triggered by an incident, or perhaps two, that occurred in June 2017 when the parties had an argument at the family home and Mr. P. refused to leave. On June 26, 2017, following the second of those two incidents, MP sent his father the following email:

You can come here to get [EP] tommorrow [sic] but I will not be going with you. The fact that you showed up to my house and wouldn't leave after you were told and tried to intimidate my mom and demand to talk to me is not ok you need to relize [sic] and respect that I love mom and [AP] and u don't get to demand me to talk to you whenever this isn't your house anymore so if you are asked to leave you need to leave. So I won't be seeing u this weekend.

Conclusions on Parenting Issues

- [29] The parties have had a number of disagreements over the parenting schedule, which led Mr. P. to bring his application to formalise the parties' rights in that regard.
- [30] The most significant issue between the parties is whether Mr. P.'s parenting time should be subject to MP's wishes. I have concluded that it should.
- [31] Mr. P. argues that because there has been no s. 211 report prepared yet, it is impossible to discern MP's true views with any confidence. The only evidence before the court as to MP's views, apart from Ms. P.'s account, is reflected in the one email following the incident that apparently led MP to cut his ties. I agree that MP may change his mind about seeing his father and that he should be encouraged to do so. MP may, as Mr. P. argues, feel conflicted by virtue of the attitude of his mother and older sister. Nevertheless, I am not persuaded that an order directing MP to attend parenting time with his father would be in MP's best interests if he does not wish to do so.
- [32] Subsection 37(1) of the FLA states as follows:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
 - (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

- [33] Our courts have in the past treated the views of a 14-year old child on a proposed parenting schedule to be determinative or at least entitled to significant weight, even when conveyed second hand through an affidavit of one parent: *McGowan v. McGowan*, 2001 BCSC 1070; *SMM v. JPH*, 2016 BCCA 284 at para. 22. In *McGowan*, Tysoe J. (as he then was) referred to the two decisions of the Court of Appeal in *Alexander v. Alexander*, as follows (at paras. 20-21):
- [20] The two appellate decisions in the case of *Alexander v. Alexander* are illustrative of the factor encompassed in s. 24(1)(b) [the predecessor to s. 37(2)(b)]. On the first occasion [(1986), 3 R.F.L. (3d) 408], the Court of Appeal refused to interfere with the decision of the trial judge that the child, then aged 11, would be in the custody of his father despite his preference to remain with his mother. The Court stated that the boy's preference was a factor to be taken into account but the child was not yet of the age that it was a decisive factor. On the second occasion before the Court of Appeal [(1988), 15 R.F.L. (3d) 363], the boy, then aged 14, was granted his wish to live with his mother. The Court held that the point had come where the child, being near adult years and capable of responsible thought, should be able to settle his own future.
- [21] In the present case, I am satisfied that Peter, who is almost 13 and entering high school, is sufficiently mature that his desire to live with his mother should be the decisive factor. He wishes to live with his mother irrespective of whether his brother lives with them or his father. Accordingly, I award custody of Peter to Mrs. McGowan.
- [34] Having weighed the factors set out in s. 37(2), including MP's views and the history of the parties' relationships with MP and the other children as canvassed above, I have concluded that MP should not be directed to spend time with Mr. P. if he is not willing to do so.
- [35] There are several other issues dividing the parties on the proposed parenting schedule.
- [36] The first is whether Mr. P.'s parenting time should occur on Tuesday or Thursday evenings. Ms. P. says Tuesday is the only day that EP has no activities scheduled and so Mr. P.'s parenting time should continue to occur then. Mr. P. says Tuesday is not a good time for him because MP has hockey practice then, and he expects that EP will not want to attend the hockey practice, which will mean that Mr. P. will never be able to do so. I am told that MP has hockey games on Friday nights and that Mr. P. can attend those. I find that it is in the best interests of the children for Mr. P. to continue to have his mid-week parenting time on Tuesday evenings rather than switching to Thursdays.
- [37] Second, Mr. P. seeks to have overnight stays on the mid-week visit, so that he can bring the children to school himself in the morning. I am not prepared to make that change at this stage, but I agree with Mr. P. that he should have as much time as possible with the children on his allotted weekends, so I will set the return time on Sundays at 6:00 p.m., as he asks.

[38] Finally, Ms. P. sought to add a term prohibiting Mr. P. from consuming alcohol within 24 hours of any parenting time. I am not persuaded that a sufficient evidentiary basis exists to justify including such a term in the order, but I will grant leave to Ms. P. to apply to have such a term added in the future if an incident occurs that suggests that it has become necessary.

[39] I therefore make the following orders:

- (a) Mr. P. shall have specified parenting time with the children as follows, taking AP and MP's reasonable wishes into consideration:
 - i. Every Tuesday after school until 6:30 p.m., with the drop-off time being 7:30 p.m. during the summer;
 - ii. Commencing as of the date of this order, Mr. P. shall have alternate weekends from Friday at 5:30 p.m. until 6:00 p.m. on Sunday evening (7:30 during the summer), and to that end, Ms. P. shall drop the children off at Mr. P.'s home on Friday and Mr. P. shall return the children to Ms. P.'s home on Sunday;
 - iii. In the event Mr. P.'s alternate weekend falls on a long weekend, the weekend shall be extended to include Monday with drop-off at 6:00 p.m. and 7:30 p.m. in the summer;
 - iv. the school winter holiday period, commencing at dismissal on the final day of school prior to the break and ending at 9:00 a.m. when school reconvenes following the new year's holiday, shall be shared equally by the parties, and the parties shall divide the period falling between 9:00 a.m. on Christmas eve and boxing day at 6:00 p.m. equally each year;
 - v. the parties shall have parenting time during alternate years for spring break, beginning in 2018 with Ms. P.;
 - vi. Mr. P. will have one week with the children in each of July and August each year, with the dates to be determined and agreed to by the parties in writing prior to April 1 each year;
 - vii. Mr. P. will have unlimited access to the children by telephone, text and email; and
 - viii. both parents may attend at school or recreational activities of the children regardless of the parenting schedule.
- (b) If either party seeks a one-time change to the parenting schedule, he or she shall advise the other party of the proposed scheduling change not less than 7 days in advance. Provided both parties agree to the proposed change, the parties shall schedule substitute parenting time at a mutually agreed time, so that neither party is deprived of parenting time;
- (c) both parties shall take all reasonable steps to encourage the children to participate in parenting time with Mr. P. as contemplated by this order;

- (d) the parties and the children shall attend reunification therapy with Robert Finlay (or such other qualified therapist as the parties may agree upon), as and when directed by the therapist after the first session, to help improve Mr. P.'s relationship with all of the children, taking [AP]'s and [MP]'s wishes into consideration;
- (e) the parties shall attend at parenting counselling, with a counsellor to be agreed by both parties, to allow the parties to improve their communication regarding the children and to improve their abilities to co-parent; and
- (f) an expert acceptable to both parties shall be appointed to conduct an investigation and prepare a report pursuant to s. 211 of the FLA.

IV. The Financial issues

The Facts

- [40] Much of the dispute between the parties centres on the proper characterization of the assets and earnings of the family business.
- [41] Ms. P. says the business effectively belongs to and is controlled by Mr. P., which makes it family property. She seeks to have at least some of the value in the business advanced to her now in order to alleviate the financial disparity between the parties.
- [42] Mr. P. says that the only family assets she can properly claim are his shares, not the companies' assets. In any event, he says that the identification of family property, as opposed to excluded property, and the valuation of the business are issues for trial and ought not to be resolved in the context of this interlocutory application.
- [43] Mr. P. says that BHWL is co-owned with his father, IP, with whom he shares control and management of the business. It was IP who purchased BHWL in 1972. He remains its president and sole director.
- [44] Formally speaking, BHWL is jointly owned by Mr. P., via Holdco, and IP, via his Alter Ego trust.
- [45] The preferred shares held by the IP Alter Ego Trust carry no voting rights, however.
- [46] Holdco's shares in BHWL are owned exclusively by Mr. P., or his family trust and they carry all of the voting rights. Mr. P. has acquired his controlling stake in BHWL from IP over the years in stages, as part of a tax-driven succession plan.
- [47] Mr. P. says the income generated by the business is not solely his either. He is paid a salary of approximately \$110,000 per year. In addition, he draws funds from the business to pay family expenses which are then characterized as dividends in his hands and those of Ms. P. In general, the salary and dividends he has drawn have totalled between \$250,000 and \$300,000 per year.

[48] Ms. P. notes that the family income drawn in that way from the business over the last four years was as follows:

2013

\$1,080,153

2014

\$637,763

2015

\$281,127

2016

\$280,712

[49] She alleges that the steep drop in the last two years was prompted by her refusal to sign a prenuptial agreement that Mr. P. put to her in 2013. There is no reason, she argues, that the family income from the business cannot return to historical levels today.

[50] Mr. P. says that unusually large dividends were drawn in 2013/14 to allow the parties to purchase the family home, and those draws were therefore an anomaly. 2015 and 2016 are more representative of the historical pattern, he says.

[51] Ms. P. says that between 2007 and 2016, approximately \$5.5 million has been taken out of the business to pay dividends, shareholder loans and directors fees - a yearly average of about \$550,000. I note that of that amount, about 57%, or \$3,123,470 was paid to IP. In the last two years, since Mr. P. acquired voting control, he has withdrawn \$457,939 in salary and dividends while IP has taken out \$1,173,519 in repayment of his shareholder loans.

[52] Ms. P. says that in the year between October 2015 and September 2016 approximately \$610,000 came into the parties' joint bank account for the use of the family, presumably from the business, while the parties incurred expenses totalling approximately \$512,000 in 2016.

[53] Mr. P. says that there were unusual family expenses in that year, including renovations to the driveway and the laundry room at the family home (most of which were paid for with the proceeds of sale from a family boat) and the family trip to Australia. He notes that Ms. P. spent approximately \$90,000 to purchase a new vehicle (\$65,000 in cash plus the trade-in on her previous vehicle).

- [54] Mr. P. says that he and his father have traditionally left most of the profits in business for the purpose of growth, innovation, to provide for inevitable down-cycles in the economy and to improve production and quality in order to meet competition. Although IP stopped drawing a formal salary in 2011, he has since then extracted over \$1.1 million in repayment of his outstanding shareholder loans.
- [55] Recent capital expenditures have included:
- (a) a comprehensive reorganization of BHWL's operations, bringing all manufacturing and production to 810 Derwent Way, Delta;
 - (b) opening a distribution centre at 746 Chester Place, Delta;
 - (c) improving its retail presentation in new racking system;
 - (d) introducing a new floor moulding programme;
 - (e) acquiring assets of Nose Creek Forest Products; and
 - (f) acquiring Accra Wood Products, a moulding manufacturer.
- [56] Holdco used to own the facility on Derwent Way, which was sold in the fall of 2016 for \$6.9 million. There is \$1.3 million in capital gains tax payable on that sale. The property is currently being leased back from the purchaser. Holdco has entered into an agreement to purchase bare land in Surrey for \$6 million, which is intended to serve as the location of the new plant when the lease expires on Derwent Way.
- [57] Ms. P.'s application for a restraining order was precipitated by that sale, which she complains occurred without any notice to her.
- [58] Ms. P. says that based on the family cash flows over the previous year or two, she needs approximately \$27,000 per month to meet her own and the children's expenses, and will need another \$5,000 per month on top of that if she now must also assume the mortgage payments on the family home.
- [59] Ms. P. asserts that the business is earning between \$2 million and \$2.5 million in gross profits per year and that all of that income is available to Mr. P. to satisfy her claims for an interim distribution of earnings or, alternatively, child and spousal support.
- [60] Since the separation, she has been receiving \$6,200 per month from Mr. P., which is the amount he has decided unilaterally to pay her. She says that amount has been insufficient for her needs and those of the children. She has been unable to make ends meet. She has had to cash in her TFSA to meet expenses and has been unable to pay off her credit cards and has gone into debt.
- [61] She says she also needs \$462,000 for legal fees to take this case to trial.

[62] Mr. P. says he has been drawing salary and dividends from the business totalling approximately \$300,000 per year since the separation, subject to taxes of \$77,000, leaving a net family income of approximately \$223,000 or \$18,000 per month.

[63] From that amount, Mr. P. has been paying the following expenses:

(a)

Mortgage on family home

\$3,150

(b)

Mortgage on Parksville property

\$560

(c)

Interest on joint line of credit

\$500

(d)

Property taxes on all three properties

\$1,350

(e)

Property insurance

\$420

(f)

Children's extra-curricular activities

\$833

(g)

Private school tuition for AP

\$1,350

Monthly Total

\$8,163

- [64] This leaves him with \$9,000 per month, from which he has been paying Ms. P. \$6,200. Insofar as the balance left available to him (\$2,600 per month) has not been adequate to meet his needs, he has not drawn additional funds from the business but rather from the inheritance he received from his mother in 2016, thereby depleting that inheritance from \$120,000 to \$35,000.
- [65] He says he has no funds left in his own name from which to pay more, other than that remaining \$35,000 from his mother's inheritance. While he acknowledges that there is significant cash left in BHWL and valuable assets in Holdco, drawing upon those funds to satisfy Ms. P.'s claims would be harmful to the business and improvident from a tax perspective. His shareholder loan account with BHWL is in a deficit position of approximately \$595,000.
- [66] With respect to the potential tax exposure, I have been advised since the hearing of these applications that the companies' accountants expect approximately \$2.5 million to be added to Holdco's capital dividend account ("CDA") as a result of the recent sale of the Derwent Way property. Those funds, assuming they become available in that amount, should be available for distribution to the owners on a tax-free basis. The companies' practice in the past has been to distribute the funds held in a CDA to the owners forthwith after the amount is verified. The amount of the CDA available at that time will also depend on the consequences of unrelated trading in the securities that Holdco has disposed of. The accountants cannot verify the amount that will be in the CDA and available for tax-free distribution until they have received the assessment of the 2017 tax return reporting the sale, which is not expected until March or April 2018.

Issues for Determination

i. The section 91 restraining order

- [67] Ms. P. seeks an order restraining Mr. P. "both personally and in his capacity as a director or shareholder" of the companies comprising the family business from disposing of, encumbering, assigning or in any similar manner dealing with family property in which Ms. P. might have an interest. Those entities are alleged to include BHWL, Holdco, the JP Family trust, the IP Alter Ego Trust, 447966 B.C. Ltd. (a company that was amalgamated with Holdco in 2016), Source Building Products Inc. (Canada) and Source Building Products Inc. (USA).
- [68] Mr. P. is not opposed to a reciprocal order restraining him from dealing with his interests in BHWL and Holdco. He opposes any order purporting to restrain the businesses themselves, on the basis that he does not control them himself and neither they nor IP were given notice of the application.

- [69] Mr. P. cites *Aquilini v. Aquilini*, 2013 BCSC 217, in which the wife sought to enjoin disposition of all corporate assets in which the husband held a "direct or indirect interest." N. Smith J. refused to grant that relief on the basis that the husband was only one of five owners in the family business - the others were his brothers and parents. He stated as follows at paras. 28-34:
- [28] The real difficulty with the proposed expanded order is that it would give the claimant no real protection and would be unenforceable. The evidence is that the respondent is one of a group of five that makes decisions for AIGLP--the others being his brothers and his parents. Decisions are made by a majority vote.
- [29] Section 67(1) does not give the court a general power to restrain disposition of property. It only allows for an order restraining a party to the proceeding from disposing of family assets or other property at issue: *Miklosko v Miklosko*, 2007 BCSC 524 at para 10. Neither the other members of the Aquilini family nor their corporate entities are parties to this proceeding and no order made under s. 67(1) would be binding on them.
- [30] The court may restrain a party, in his capacity as a director of a corporation, from causing the corporation to dispose of or deal with property, but such an order can be effective only where the party is the sole or majority shareholder or the directing mind of the corporation. That was apparently the case in *Simpson v Simpson*, 2009 BCSC 527, on which the claimant relies.
- [31] In this case, the order would, at most, prevent the respondent from participating in corporate decisions. It would not prevent the other partners from causing the companies or partnerships to do anything.
- [32] I see no prejudice to the claimant if the order is not made. By now the holdings of AIGLP should be well known to the joint valuation expert, who I understand has nearly completed his report. There is no evidence of any real possibility that AIGLP could dispose of assets in a way that would put them or the proceeds of their disposition beyond reach of the claimant if she establishes a claim to those assets at trial.
- [33] Having said that, I agree that complexity and extent of the business interests at issue are such that the claimant is entitled to be kept informed of any significant changes that may occur between now and the date of trial. I therefore order that the respondent provide her with a monthly list of all significant transactions made by or within AIGLP. That is essentially a continuation of an interim order that I made on October 24, 2012.
- [34] The documents evidencing any such transactions may be documents of AIGLP and as such may or may not be producible by the respondent. That is one of issues to be argued on the adjourned application for corporate documents. But the general information about transactions that take place is certainly within the respondent's means of knowledge and disclosure of that information is consistent with the ongoing duty of disclosure in the Family Rules, R. 5-1(15).

[Emphasis added.]

- [70] Aquilini involved a minority shareholder without de facto control of the company. In this case, however, I am satisfied that Mr. P. effectively controls Holdco and through its voting shares in BHWL, BHWL as well.
- [71] I appreciate that IP is the sole director of BHWL and also, through his trust, a shareholder. I also appreciate that father and son may in the past have operated the businesses effectively as partners with equal say and that the transfer of voting control to Mr. P. was a formality for the purpose of succession planning and was not carried out with a view to ceding complete control of the business to Mr. P. during IP's lifetime.
- [72] Nevertheless, that is what they have done in formal legal terms. I am also satisfied that that is what now occurs in practice. As Ms. P. argues, Mr. P. now appears to make the significant decisions for the business himself, including the sale of the plant and the purchase of the lot in Surrey to replace it. When there was a difference of opinion between father and son about expanding the business, the views of Mr. P. carried the day. When Mr. P. needs money, such as when he purchased the family home, he takes it out of the business without having to obtain permission from his father. In summary, there is no basis in the evidence to support the contention that IP has the power today to prevent Mr. P. from taking money out of the business whenever he wishes to.
- [73] As in Aquilini, Ms. P. is entitled to monitor what goes on in the companies that are the subject of her claim. As a putative co-owner of the business, moreover, no major decisions, such as the Derwent Way sale, should be carried out without her knowledge and approval, until the trial is concluded.
- [74] I agree with Mr. P. that Ms. P.'s right to oversight and approval should not interfere with day to day operation of the business, however. I will therefore restrict the need for her approval to expenditures exceeding \$25,000.
- [75] I am granting the order as sought in Ms. P.'s notice of application, with the following changes:
- (a) The "Family Businesses" will be defined to include only Holdco, BHWL and the JP Family Trust;
 - (b) Mr. P. will produce to Ms. P. copies of monthly statements from all bank and other financial institution accounts of each of the Family Businesses;
 - (c) Permitted ordinary course payments will include all payments currently shown on the business' financial statements, trading in the securities held by Holdco and completion of the purchase of the Surrey property;

- (d) No individual expenditures of \$25,000 or more, including inter-company transfers, will be made by any of the Family Businesses outside the ordinary course without Ms. P's or her counsel's prior written approval, which must be sought one week in advance and not unreasonably withheld;
- (e) Mr. P. will not withdraw any funds from the Family Businesses for his personal benefit, whether as salary, dividends, director's fees or other benefits, other than his guideline income as fixed by these reasons, amounts he is required to pay under this order for retroactive child and spousal support and the amount set by these reasons as an advance for payment of Ms. P's legal fees and an equivalent amount for his own; and
- (f) Mr. P. will draw from the Family Businesses, in addition, the amounts necessary to pay for the parenting and reunification counselling, the s. 211 report and the business valuator as contemplated by these reasons, with the final allocation of those costs as between the parties to be determined at trial.

ii. Allocation of corporate income

- [76] Ms. P. seeks an order directing the companies to pay her \$100,000 per month, as an interim distribution of what she claims as her one-half share of their income available for distribution. She relies primarily on Rule 12-1(3) of the Supreme Court Family Rules and ss. 81 and 91 of the FLA. Rule 12-1(3) states as follows:

Allowance of income from property

- (3) If property is the subject matter of a family law case and the court is satisfied that the property will be more than sufficient to answer all claims on it, the court at any time
 - (a) may allow the whole or part of the income of the property to be paid, during such period as the court may direct, to a party who has an interest in it, or
 - (b) in the case of personal property, may order that part of the personal property be delivered or transferred to a party.

- [77] Section 81 of the FLA states as follows:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

- [78] Section 91 states as follows:

Temporary orders respecting protection of property

91 (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [Pension Division] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

(2) The Supreme Court may make one or more of the following orders:

- (a) for the possession, delivery, safekeeping and preservation of property;
 - (b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,
 - (i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or
 - (ii) vesting all or a portion of property in, or in trust for, the applicant.
- (3) The Supreme Court may make an order under this section before notice of the application is served on the other spouse, or may order that notice of the application be served on the other spouse.
- (4) Despite section 215 (2) [changing, suspending or terminating orders generally], the Supreme Court may change, suspend or terminate an order made under this section.

[79] In addition, she cites the following cases as support for the jurisdiction of the court to make the order sought: *Blockberger v. Blockberger*, 1981 Can LII 773 (B.C.S.C.); *Craik v. Craik* (1979), 12 B.C.L.R. 226 (S.C.); *Gillespie v. Gillespie* (1997), 52 B.C.L.R. (3d) 230 (S.C.); *Vance v. Vance* (1981), 23 R.F.L. (2d) 397 (B.C.S.C.) and *Vincenti v. Vincenti*, 2010 BCSC 1283.

[80] Mr. P. argues that none of the authorities cited actually supports the proposition that the income of a company whose shares are owned by one spouse is available for distribution to the recipient spouse on an interim basis. He cites *Kirk v. Kirk*, 2006 BCSC 277; *Rohani v. Rohani*, 2004 BCCA 605; and *Jeerh v. Jeerh*, 2015 BCSC 1614, for the proposition that it is Mr. P.'s shares that are the family property to be divided under the FLA, not the income of the companies.

[81] All the court can and should do at this stage, he argues, is order interim child and spousal support. Even if the court had such a jurisdiction, it should not exercise it in the manner sought because that would not serve to preserve the status quo but would rather constitute a marked departure from past corporate practice, in that the entire available income has never been distributed in any given year. He also argues that such a distribution would have unnecessarily burdensome tax consequences for both parties. Finally, he suggests that such an order should not be made on an interim basis because it would unduly constrain the trial judge.

- [82] I am not persuaded that it would be appropriate to make the order sought by Ms. P. at this stage. In Jeerh, N. Brown J. stated as follows (at paras. 108-112):
- [108] Generally, as is the case here, it is the shares themselves, not their value, or that of the corporate assets, that will be construed as family assets, *Newson v. Newson*, 1993 CanLII 316 (BCCA) [Newson]. Before shares or their value can be treated as family assets, usually the court must find a link between the shares and the family: for example, a finding that the corporate asset is used for a family purpose *Volken v. Volken*, 2002 BCSC 426 [Volken], or that the non-shareholding spouse made a direct or indirect contribution to the company: *Newson*.
- [109] In the present case, the husband's interest lay in the shares he owned. It appears the claimant effectively seeks an interest in the assets: for example, the dividends, or possibly the value of the shares (i.e. the proceeds of the sale of the shares). But the link between the claimant and 074 is even more tenuous than the facts we see in *Newson* and *Volken*.
- [110] Generally, the court is reluctant to pierce the corporate veil, as the court did in *Volken*. But as *Kirk v. Kirk*, 2006 BCSC 277 [Kirk] points out, *Newson* is an exception to the general rule because the husband was the sole shareholder and operating mind of a company whose shares were a family asset. To defeat his wife's interest in the shares, the husband stripped the company of its assets in violation of a court order. The company truly was the "alter ego" of the husband. Most of the time, when a company is legitimately created and operated, and even when benefits accrue via the company to the family during the marriage, the non-shareholding spouse can't "escape the burden of [the company's] existence" as the Court of Appeal put it at para. 20 of *Rohani v. Rohani*, 2004 BCCA 605:
- [20] Serious and far reaching implications could result from piercing the separate corporate existence of a company created and operated for legitimate business and tax planning purposes simply on the ground of irregular use of corporate funds for personal expenses of its principals.
- [111] Another reason not to pierce the veil for family property division purposes is the prejudice it could effect on other stakeholders in the corporation. At para. 29 of *Newson*, Hinds J.A. stated:
- [29] If there is a power under the Family Relations Act to segregate assets out of a company into the hands of a shareholder it is a power to be exercised sparingly. There may be adverse tax implications; the security available to suppliers and lenders not before the court may be put at risk; the value of the shares to a committed purchaser will be impaired; other unknown obligees may be prejudiced. It would not be just or prudent to segregate out corporate assets without evidence as to the potentially adverse consequences to the company and without hearing from unrepresented third parties who may be prejudiced. There is no such body of evidence here.

- [112] This is not a situation where the claimant just seeks documents or information in the possession of a company. Much more, the claimant effectively seeks a reversal of a sale and a reconstitution of the corporate share structure of 074 and a potential disgorgement of income by existing shareholders. There is always a theoretical possibility that a shareholder could hold shares in a corrupt trust for a defalcating spouse; and here the claimant seeks to cast a net wide enough to implicate all the shareholders of 074, particularly those with familial relationships with Paul Jeerh. This has nothing to do with 074, however, which is an entity that operates as a corporate body, separate from its constituent shareholders.
- [83] So too here, the companies are separate enterprises with their own stakeholders and if it turns out to be necessary to pierce the corporate veil in order to satisfy Ms. P.'s claims in whole or in part, the question of whether that should occur to the extent sought by Ms. P. is one that is best left for trial. I find that the more appropriate relief at this stage is that sought by Ms. P. in the alternative, i.e., an order for payment of interim child and spousal support, to which I turn next.

iii. Fixing the parties' Guidelines incomes

- [84] Ms. P. argues that in fixing Mr. P.'s income for purposes of support, the entire gross profit of the companies available for distribution to him should be taken into account. On that basis, she claims that his Guidelines income is effectively \$2.5 million.
- [85] The starting point in the analysis is ss. 16-20 of the Guidelines. They are summarized in *Kopp v. Kopp*, 2012 BCCA 140, where Levine J.A., writing for the majority of the Court, described the correct approach as follows (at paras. 63-64):
- [63] the task for the court is to determine whether the payor's "total income" reflects money available for child support. The determination of "total income" starts with s. 16 of the Guidelines. Fluctuations in income and receipt of non-recurring amounts are dealt with in s. 17. Section 18 provides for the inclusion in the income of a shareholder of a corporation all or part of the corporate pre-tax income as money available for the payment of child support.

Calculation of annual income

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

Pattern of income

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

...

Shareholder, director or officer

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

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

[64] Section 16 provides that the sources of a spouse's annual income included in "total income" on the spouse's tax return are the basis for determining his income, subject to ss. 17-20 and Schedule III.

[86] Ms. P. relies on s. 18 and seeks to allocate BHWL's income entirely to Mr. P. She relies on, inter alia, *Kowalewich v. Kowalewich*, 2001 BCCA 450; *Hausmann v. Klukas*, 2009 BCCA 32, supplementary reasons at 2009 BCCA 320, leave to appeal refused [2009] S.C.C.A. No. 135; and *Williams v. Williams*, 2015 BCSC 112.

[87] In *Kowalewich*, Huddart J.A. held as follows (at paras. 43-50):

[43] In this regard, I find helpful the view Justice Martinson expressed in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 at para. 28:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 [of the Guidelines] is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No. 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) (B.C.S.C.) and *McCrea v. McCrea*.

[44] A court's effort to ensure fairness does not require a court to second-guess business decisions nor, as Justice Pitfield so colourfully noted in *Stamoulos*, supra, at para. 44, to "place the largest available shovel in the company store." What it does require is that a spouse's allocation of pre-tax corporate income between business and family purposes be assessed for fairness by an impartial tribunal when parents cannot reach agreement on priorities as they would in an intact family and may upon separation under s. 15(2).

- [45] To determine whether "Total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the Guidelines, the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.
- [46] It is common ground that Total income on Mr. Kowalewich's 1997 T1 General form did not fairly reflect the amount of money available to him for the payment of child support in 1998. So the first issue for this Court is whether the trial judge erred in selecting s. 18(1)(a) rather than s. 18(1)(b) after forming that opinion.
- [47] The Guidelines give no explicit guidance as to how a parent or a court might go about choosing whether to use the corporate income method or the personal services method in determining annual income. However, s. 18 suggests two considerations in the preconditions for its application: (1) which method produces an annual income that more fairly reflects "all the money available to the spouse for the payment of child support;" and (2) which method does the nature of the spouse's relationship with the corporation support. Section 18 also permits reference to the "situations described in s. 17," and thus to the spouse's income pattern over the previous three years.
- [48] In some cases, the nature of the spouse's relationship with the corporation will be decisive. Section 18 applies to a spouse who wholly controls a corporation, but it also applies to one who shares ownership and control with others. In the former case, the corporate income method is likely to be the fairer method of determining income. This is because it allows a court to include not only reasonable payment for personal services but also a reasonable return on the owner's entrepreneurial capacity and investment. These are sources of income available for child support an intact family would utilize. Moreover, it not only permits but requires the inclusion of the income of companies related within the meaning of the Income Tax Act, and of non-arms length payments made without value for the company.
- [49] There may be factors in particular cases that will recommend the personal services method to a court for a one-person company, as Baum, supra, illustrates. In that case, the company's only business was the provision of the personal services of its owner. There may also be cases where Mr. Kowalewich's submission about stability of income will persuade a trial judge to choose the personal services method, having regard to s. 17 situations. But this is not one of them.
- [50] In light of the corporate structure Mr. Kowalewich put in place for his business, the corporate income method was the fairest way of determining what money was available to Mr. Kowalewich for the payment of child support. It follows I find no error in Justice Dorgan's choice of that method in determining Mr. Kowalewich's annual income for 1998 and thus 1999.

- [88] In light of my findings about Mr. P.'s effective control of this business, the "corporate income" method alluded to by Huddart J.A. is the more appropriate one in this case. Thus the court must determine "what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control."
- [89] The Court of Appeal in Hausmann has more recently clarified that the onus is on the paying spouse to justify retaining earnings in the company rather than drawing them out to pay support. There, Kirkpatrick J.A., writing for the Court, stated as follows (at paras. 51-52 and 61):
- [51] While the purpose and application of s. 18 were outlined in Kowalewich, this Court has not heretofore established an onus test. Some post Kowalewich authorities from this province, however, have concluded that there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor. As discussed in Jeffery v. Motherwell, 2006 BCSC 140, 36 R.F.L. (6th) 377, at para. 13:

Kowalewich has been applied on other occasions by judges of this court and is binding authority. One of those cases Bartkowski v. Bartkowski (2003), 37 R.F.L. (5th) 242 (B.C.S.C. [In Chambers]), albeit dealing with very different factual circumstances in that the payor contended that his line 150 income was inflated to take advantage of tax benefits, the court said this about the authorities post Kowalewich:

I am of the view that these cases reveal an emerging presumption that the corporation's pre-tax income will be assumed to be available to the shareholder payor for the payment of child support unless compelling evidence is led by the payor spouse to support the conclusion that re-investment is necessary to sustain the company as a viable enterprise. ... (para. 51)

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While Bartkowski says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by Kowalewich.

[52] I respectfully agree with the above comments in Jeffery v. Motherwell.

[61] As I have noted, the evidence tendered by Mr. Klukas as to the needs of the company is unclear and unsubstantiated. At the hearing of the appeal we asked counsel for Mr. Klukas on at least two occasions to identify the legitimate calls on Pioneer's pre-tax corporate income, with no satisfactory answer. In these circumstances, the court is left with essentially two options: attribute all of the pre-tax corporate income to Mr. Klukas in keeping with the onus developed in the cases referred to above, or refer the matter back to the Supreme Court for a re-hearing.

- [90] Likewise, in *Chapman v. Summer*, 2010 BCCA 237, Chiasson J.A., writing for the Court, held as follows:
- [33] I do not think the husband's income should be limited to his drawings. His income, for the purpose of calculating support, must recognize the money that is available to him from the companies' income. There is no persuasive evidence to support the contention that the companies were required to retain a portion of their current earnings during the material period, but, in view of the volatility of the companies' earnings, I do not think it would be appropriate to fix the husband's income on the basis that his share of every dollar earned by the companies is available to him.
- [91] In *Kopp*, Levine J.A., writing for the majority, presented the other side of the *Chapman* coin (at paras. 57-62):
- [57] In *Chapman*, the husband's evidence was that there were significant corporate funds available to the shareholders (at para. 31), the husband's counsel conceded that the money in issue was not required by the corporations for their business (at para. 29), and there was no evidence the husband borrowed to pay the amounts owing to his wife (at para. 30).
- [58] The Court concluded that in those circumstances the chambers judge erred in deducting the amounts drawn from the companies to pay the wife's share of family assets. The "unchallenged evidence [was] that a great deal more was available to the husband as income than he acknowledged being paid by the companies" (at para. 35).
- [59] In this case, by contrast, the evidence, which is supported by the corporation's financial statements, is that there is not a great deal more available to the appellant than he acknowledged being paid. There are not significant corporate funds available to the appellant in addition to his draw and the amounts paid to him to make payments to the respondent. The pre-tax income of the corporation (which s. 18(1)(a) of the Guidelines directs the court may consider in determining the money available to a shareholder) for 2009 and 2010 were \$24,358 and \$45,766, significantly lower than the 2008 pre-tax income of \$138,860. It was not disputed that the appellant borrowed funds personally and the corporation borrowed funds to finance the appellant's payments to the respondent.
- [60] The chambers judge also focused on the corporation's cash reserves (at para. 73). The appellant provided evidence, perhaps not as detailed as the chambers judge and the respondent would have liked, that the cash reserves of the corporation were necessary to support its ongoing business and loan commitments. The chambers judge also noted that the corporation's retained earnings were reduced from \$232,234 in 2007 to \$91,511 in 2008 (at para. 44). They were reduced further to \$61,694 in 2010.
- [61] These circumstances are fundamentally different from *Chapman*, and care must be taken in applying what appear to be statements of general principle to different factual contexts. In the circumstances in *Chapman*, it was an error for the trial judge to deduct in determining the husband's income for child support purposes the amounts he received from the

corporation and paid to his wife for her share of the assets. Both parties' calculations of the amounts available to him from the corporations showed significantly more than he had accounted for. The Court held, nonetheless, that "it would [not] be appropriate to fix the husband's income on the basis that his share of every dollar earned by the companies is available to him" (at para. 33).

- [62] In this case, from the corporation's 2009 and 2010 financial statements, there is little if anything more that is available to the appellant from the corporation than his regular draw, bonuses used to pay taxes, and the dividends used to fund the monthly payments under the Share Purchase Agreement. The appellant maintains that the dividends and bonuses should not be included in his income for child support purposes, because they reflect non-recurring draws used to pay the respondent the amounts he owes her. Chapman did not set a generally applicable rule for these kinds of cases; rather, each case must be examined on its particular facts.
- [92] Mr. P. urges me to fix his annual income on the basis of the amount that he has traditionally drawn from the companies, i.e., \$300,000 per year. He urges me to maintain the status quo by allowing the company to retain its earnings for its own business purposes as it always has.
- [93] Ms. P. responds that the appropriate level of support should not be based just on her current needs but should, insofar as possible, maintain the family's standard of living before separation, to the extent Mr. P. can afford it. Also, he ought not to be permitted to hoard his income in the business and thereby shelter it from her. Considering the onus he bears, it is argued, his evidence as to the companies' cash needs is totally inadequate.
- [94] I generally agree with Ms. P. about the quality of Mr. P.'s evidence on that point. In *Vincent v. Vincent*, 2012 BCCA 166, Huddart J.A., writing for the Court, upheld a decision of the chambers judge who appears to have rejected evidence that was similar to that adduced by Mr. P. in favour of preserving high retained earnings in a family business (at para. 84):
- [84] Nevertheless, I am not persuaded the chambers judge erred in including all the Robannah pre-tax profit in 2007. The father's evidence of Robannah's need is unpersuasive. Robannah was doing well without any additional investment. Retained earnings increased to \$196,631 from \$72,367 in 2006; the father had chosen to invest in it all the monies he received on the winding-up of 557571. It is important to note that annual income is a measuring rod for child support. Inclusion in a measuring rod does not mean most of the money is not available for investment purposes. The corporate profit was available for child support, just as it was for investment.
- [95] Similarly, in *Soucie v. Soucie*, 2010 BCSC 1783, Fenlon J. rejected, in part, the payor spouse's bald assertions as to the need to retain earnings where they were vague and unsupported by specifics (at para. 23):

- [23] With the exception of 2010, the company's retained earnings have grown steadily. Mr. Soucie argues that the company needs to retain all of its pre-tax income because of bonding requirements, repairs, maintenance, amortization and the loss experienced in 2010. No evidence was provided on the amount needed for bonding. Repairs and maintenance are built into the annual expenses of the company: \$255,373 in 2008; \$306,838 in 2009; and \$327,000 in 2010. Amortization of \$116,465 was included in 2008; \$157,227 in 2009; and \$191,480 in 2010. The company suffered a loss in 2010, but it continues to have significant retained earnings. While there is no persuasive evidence that the company needs all of its pre-tax income, the economic downturn in Stewart and losses in 2010 support retention of some earnings. I therefore find that most, but not all, of Mr. Soucie's share of the pre-tax income of the company should be attributed to him and I set that sum at 17%, reflecting a notional retention of 1/3 of the company's pre-tax income for corporate objectives.
- [96] Having regard to the evidence adduced in this case in light of these authorities, it is fair to say that, as in Kopp, Vincent, and Soucie, Mr. P's evidence as to the need to retain earnings in the company is thin. I am not prepared to conclude, however, that no earnings whatsoever should be retained in the business for this interim period.
- [97] This is not a case where the company is just a hollow vehicle for tax planning. It is an active business with 70 employees and real capital needs. It just sold its plant and needs to lease it back from the purchaser, which is a new expense. It must close on the land purchase in Surrey and build a new plant there. While I accept that the proceeds of sale from the Derwent Way property may be available to satisfy those needs in whole or in part, it would be inappropriate on this interlocutory application to embark upon a detailed analysis of the capital needs of the business. It is sufficient for present purposes to conclude that they are real and substantial.
- [98] I am also mindful that this is an interlocutory application in which I can only do rough justice. If the balance I strike turns out after the trial to be unfair to either party, there appears to be ample value in the assets to be divided at trial that can serve to address any unfairness arising from the level of support to be paid over the year remaining between now and the trial.
- [99] I am satisfied that the business should be permitted to continue to retain a significant portion of its income, but the evidence adduced by Mr. P. as to the business' needs does not justify retaining this year's earnings for this interim period at the levels at which they have been retained historically. I make no finding as to Mr. P's actual income, which can be left for trial, except that it is at least sufficient to allow him to provide child and spousal support at a level sufficient to maintain the family's pre-separation income between now and the trial. For that purpose alone, I fix his guideline income at \$650,000.
- [100] Both parties agree that Ms. P's income should be fixed at zero.

iv. Child support

[101] Mr. P.'s Guidelines income, as I have found it to be, exceeds the ceiling of \$150,000. It has been held that in such circumstances, the payor must adduce "clear and compelling evidence" to justify departing from the Guidelines: *Devathasan v. Devathasan*, 2017 BCSC 1010 at paras. 112-113.

[102] No such evidence was adduced here. I therefore order child support payable at the table amount of \$10,628.

[103] Ms. P. has included in her monthly expense budget s. 7 expenses such as AP's private school tuition and various activities and lessons, at least some of which Mr. P. has been paying for until now but she will now be assuming.

v. Spousal support

[104] The factors to be considered in setting interim spousal support are summarized in *Robles v. Kuhn*, 2009 BCSC 1163:

[12] On interim support applications, the application of these provisions must be qualified by certain established considerations:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
4. The courts should not unduly emphasise any one of the statutory considerations above others;
5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
7. Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);

8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: L.G.B.

[105] After citing those considerations, Fitzpatrick J. in Devathasan stated (at paras. 140-141):

[140] I am aware of the principles applicable to determining interim spousal support above the "ceiling" of \$350,000, as set out in the Spousal Support Advisory Guidelines ("SSAG"); the matter is highly discretionary; the SSAG formulas are not to be automatically applied where the income levels are above that figure; the ceiling is not a hard "cap"; and, what is required is to apply an individualized, fact-specific analysis.

[141] The authors of the Spousal Support Advisory Guidelines: The Revised User's Guide (April 2016), in Chapter 11(b), describe the outcomes in cases involving high earners as "divergent and unpredictable". That certainly appears to be the case .

[106] In Williams, Master Caldwell stated as follows (at paras. 18-20):

[18] Both counsel addressed the issue of the applicability of both the Child Support Guidelines and the Spousal Support Advisory Guidelines in cases such as this where income exceeds \$350,000 and shared parenting regimes are in place. Argument was also presented regarding the issue of retained earnings and their place in dealing with assessment of Guidelines income.

[19] The case before me is, as with most matrimonial cases, different from all of the above cases as regards to basic facts and the stage of the litigation. It involves a long marriage, beginning while the claimant was still a teenager, a traditional marriage, a dedicated, hardworking breadwinner who was ultimately extremely successful, four children in a particular residential arrangement; it also arises as an interim application seeking relief to see the parties through to trial where a more fulsome review of the evidence of the parties may be undertaken.

[20] Of the cases cited above, I find some of them to be of assistance in this case. I am satisfied from Chapman [Chapman v. Summer, 2010 BCCA 237] that I am not limited to what the respondent claims as his draw or salary but rather that I am able to consider as well the money available to him from the businesses. I am satisfied from Hathaway [Hathaway v. Hathaway, 2014 BCCA 310] that, while there may be consideration of a \$350,000 ceiling, the court need not depart from the Child Support Guidelines or the Spousal Support Advisory Guidelines. In that regard I am respectfully of the view that where the parties have the type and length of relationship as is present in this case the interim support relief should seek to provide a realistic sharing of the available income or cash flow so that they may move forward in their dealings and the litigation on a somewhat equal footing. Failure to provide such equitable sharing unfairly slants the overall playing field and places one party at a distinct disadvantage in terms of their ability to pursue an appropriate outcome; on the other hand, if the interim order turns out, in the fullness of time and evidence at trial, to

have been inappropriate, there are ample assets and sources of income which may serve to remedy that temporary situation and put matters right.

- [107] Many of the same consideration apply here. This was a long marriage in which the parties assumed traditional roles. Here too, it is appropriate to ensure that the parties "move forward in their dealings and the litigation on a somewhat equal footing."
- [108] Ms. P. says she needs \$27,000 per month, before tax, plus another \$3,100 (or \$5,000 grossed up if she must pay tax) to pay the mortgage.
- [109] Mr. P. argues that her actual monthly needs do not exceed \$12,236 after deducting out income taxes (\$5,400), s. 7 expenses that he has agreed to bear (\$1,475 for AP's private school tuition and \$1,782 for other activities and lessons) and several of the expenses incurred by the family in the year prior to the separation which were unusual, such as the Australia trip (\$2,035), a driveway renovation (\$2,084), house repairs (\$1,350) and other "furnishings and equipment" (\$1,000).
- [110] While I must adjust for Ms. P.'s actual tax burden and the allocation of the s. 7 expenses, I am not persuaded that the unusual expenses incurred in the previous year will not recur in another guise in the coming year - every year tends to bring its own "unusual" expenses.
- [111] Ms. P. must now pay the mortgage, property taxes, utilities and ordinary maintenance. Mr. P. will continue to pay all expenses for the Richmond property and the Parksville property.
- [112] I find that in order to preserve Ms. P.'s and the children's pre-separation standard of living in light of Mr. P.'s ability to pay, and given the wide discretion I have when dealing with a payor's income that is well above the ceiling, I am setting the interim monthly spousal support figure at the mid-range figure of \$13,505.
- [113] This will yield Ms. P. a total net disposable monthly income of approximately \$20,356, which should be sufficient to maintain her and the children's pre-separation standard of living until the trial.

vi. Retroactive support

- [114] Ms. P. seeks to have the child and spousal support I have ordered made retroactive to December 1, 2016.
- [115] Mr. P. opposes such relief on the basis that any support arrears should be addressed at the trial.
- [116] In *Devathanan*, Fitzpatrick J. summarised the test to be applied in determining whether a support award should be made on a retroactive basis (at paras. 117-119):

[117] The circumstances in which retroactive child support may be awarded were addressed in *D.B.S. v. S.R.G.*, 2006 SCC 37. The Supreme Court of Canada directed trial judges to adopt a broad and holistic approach in the application of four factors, summarized at para. 133, none of which are determinative on their own:

- a) Is there a reasonable excuse for why support was not sought earlier?
- b) Was there any blameworthy conduct on the part of the payor parent?
- c) Is a retroactive award appropriate in light of the child's past and present circumstances?
- d) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[118] At paras. 120-125 of *D.B.S.*, the Court stated that the commencement date for an award of retroactive child support should not be restricted to the date an application to a court or formal notice is given. Rather, the Court should look to the date of effective notice by the recipient parent to the payor parent. Effective notice was defined as "any indication by the recipient parent that child support should be paid ": para. 121. The Court suggested that this is generally when the topic of child support is broached.

[119] There are circumstances where it is reasonable to infer that effective notice has been given to a payor parent, even in the absence of a specific request. This is founded in the principle that both parents have a legal obligation to contribute to the support of their child after separation.

[117] In this case I find that a sound case for arrears has been made out. The subject of arrears was broached at the time of separation. At that time, Mr. P. unilaterally set the "stipend" for Ms. P. at \$6,200. He unilaterally terminated her use of the RBC account, the RBC Visa and other accounts in November 2016. When she sought to pay a neighbour for her share of the cost of a boundary fence, Mr. P. unilaterally deducted the amount from the stipend for that month. He unilaterally removed a data package from the children's cell phone plan without consulting her. She also complains about late production of financial information in this law suit.

[118] It was not seriously suggested that the obligation to pay such arrears would cause hardship to Mr. P. as long as he can draw them from the business, as I have found he can. I am also satisfied that he can do so without the onerous tax consequences that Mr. P. postulates, or in such a way as to minimise them within tolerable limits. If the CDA were insufficient to meet these obligations, it would have been incumbent on Mr. P. to demonstrate as much and he has not.

[119] In light of these circumstances, I order arrears of child and spousal support payable from December 1, 2016, net of amounts that Mr. P. has paid to date.

vii. Advance on capital for legal fees

[120] Ms. P. seeks an advance of \$500,000 to fund her litigation costs.

[121] In *Devathanan*, Fitzpatrick J. ordered a \$400,000 advance for litigation costs. She stated as follows (at paras. 150-151 and 156):

[150] The Claimant is seeking an interim advance of \$400,000 in order to fund this litigation. She has already expended more than \$125,000 in this litigation. She has presented a draft bill of costs for a 30 day trial which references a total of \$412,385 plus taxes (approximately \$50,000).

[151] The FLA provides:

Orders for interim distribution of property

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[156] In *I.R., [I.F. v. R.J.R., 2015 BCSC 793]* Ballance J. stated:

[192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.

See also *M.A.L. v. N.A.L., 2014 BCSC 203* at para. 15.

[122] In *McKenny v. McKenny* 2015 BCSC 1345, Fitch J. (as he then was), stated as follows (at paras. 56-59):

[56] With respect to the claim for an interim distribution of family property, the authority for such an order may be found in s. 89 of the FLA. This section provides that a court may make an order for an interim distribution of family property if satisfied that it would not be harmful to the interests of the spouse and is necessary to provide money to fund family dispute resolution, all or part of a proceeding under the Act, or to obtain information or evidence in support of a family dispute, resolution or application to a court.

[57] The claimant correctly notes that the order sought by the respondent is extraordinary in nature and must be assessed carefully. The test governing interim distribution of family property has two components:

- 1) The applicant must show an advance is required to mount a challenge to the other spouse's position at trial; and
- 2) The applicant must show that the advance or payment on an interim distribution basis will not jeopardize the other spouse's position at trial.

[59] I am satisfied that it is appropriate to make an interim distribution of family property in this case. The action is complex, particularly now since leave has been granted to file the second amended counterclaim. The distribution is necessary to permit the parties to advance their respective cases on a relatively level playing field.

[123] Mr. P. says the amount she seeks is excessive. He also argues that to provide her with such lavish funding will discourage Ms. P. from settling the case on reasonable terms.

[124] I am satisfied that an interim advance is appropriate here. Ms. P. should not be constrained to settle for want of funds when Mr. P. has no such constraint.

[125] I agree with Mr. P., however, that the \$500,000 litigation budget that Ms. P. seeks is excessive for that purpose, as it contemplates:

- a) Four days of chamber applications;
- b) 24 hours of document review at \$600 per hour;
- c) Three days of discovery;
- d) \$50,000 for business valuations;
- e) \$4,800 for a trial management conference; and
- f) Preparation for and conduct of a 30-day trial (ten days are currently set).

[126] I will order an advance of \$350,000 for each party, to be paid from the Family Businesses.

viii. Exclusive occupancy

[127] I agree with Mr. P. that Ms. P. does not need to have exclusive use of the Parksville property.

[128] I will therefore grant the order for exclusive use by Ms. P. of the family home on an interim basis until trial, provided however that on arrangement between the parties, Mr. P. may attend to retrieve what is left of his personal belongings at that location.

[129] I order that either party may use the Parksville property for vacations with the children, on two weeks' notice to the other party. When it is not in use by the parties it will remain in the rental pool.

ix. Further document production

- [130] Ms. P. seeks production of records pertaining to Source Building Products Inc. (Canada) and Source Building Products Inc. (USA) ("Source"). She also seeks financial statements and tax returns of the two trusts in the corporate group (the JP Family Trust and the IP Alter Ego Trust).
- [131] Mr. P. says all Source documents have already been produced and those that have not are irrelevant. Source is said to be an inactive holding company with a 5% interest in Source Building Products USA Inc. ("Source USA"). Mr. P. says he has no control or influence over Source USA. Source Canada has no income or assets and it has no equity, he says.
- [132] The JP Trust owns shares in Source. Regardless of the value of those shares, Ms. P. is entitled to see financial documents in Mr. P.'s possession or control relating to all assets of the JP Family Trust, including documents pertaining to Source.
- [133] I am satisfied that Ms. P. is entitled to production of financial information from the JP Trust Family Trust but not the IP Alter Ego Trust.
- [134] I will therefore order, to the extent they are in his possession or control, production by Mr. P. of each of the following within 30 days of this order:
- a. financial statements for the taxation years ending September 30, 2013-2016 of Source (Canada);
 - b. financial statements for the taxation years ending September 30, 2013-2016 of Source (USA);
 - c. financial statements for the taxation years ending September 30, 2013-2016 of the JP Family Trust; and
 - d. 2013-2016 T3 Trust Tax Returns of the JP Family Trust.

Summary of Interim Financial Orders

[135] I am making the following orders:

- a. a restraining order against both parties on the terms set out above;
- b. that Mr. P. pay interim child support prospectively until trial and retroactive to December 2016 in the amount of \$10,628 per month;
- c. that Mr. P. pay interim spousal support prospectively until trial and retroactive to December 2016 in the amount of \$13,505 per month;
- d. the parties will jointly appoint Donald Spence CBV or such other qualified person as the parties may agree upon, to provide an opinion on the fair market value of Mr. P.'s interest in the Family Businesses;
- e. Ms. P. is to have exclusive occupancy of the family home in Delta; and

f. Mr. P. to produce to Ms. P. within one month of this order the Source documents and JP Family Trust documents referred to in these reasons.

[136] These orders are made on an interim basis only. Nothing I have said herein is intended to prejudice the position of either party at trial.

"Milman J."

The Honourable Mr. Justice Milman

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