

CANADA / JUDGMENT

Kargl-Fluckiger v. Fluckiger

2022 BCSC 1609

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1609 Kargl-Fluckiger v. Fluckiger

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kargl-Fluckiger v. Fluckiger,

2022 BCSC 1609

Date: 20220913

Docket: E56209

Registry: New Westminster

Between:

Shelby Fraser Kargl-Fluckiger aka Shelby Fraser Kargl

aka Shelby Fraser Fluckiger

Claimant

And

Agosttino Paul Fluckiger aka Agostino Paul Fluckiger

Respondent

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Claimant:

L.S. Dattilo

Counsel for the Respondent:

F. Lamer

Place and Dates of Trial:

New Westminster, B.C.

April 19-22, 25-29, 2022

June 24, 2022

July 25 and 27, 2022

Place and Date of Judgment:

New Westminster, B.C.

September 13, 2022

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I. INTRODUCTION

- [1] The remaining issues in this family law case concern child and spousal support, and property division. Neither party seeks any parenting orders at this time.
- [2] Ms. Shelby Fraser Kargl and Agostino Paul Fluckiger lived together for just under 20 years. They were married in 2004. They have two children. They separated in 2018.
- [3] Mr. Fluckiger owns a mobile document shredding company. The company operates vehicles known as shred trucks, which are basically shredding machines housed in the back of a truck and powered by the truck engine. Shred trucks are unique and expensive vehicles that depreciate in active use and must be replaced at regular intervals.
- [4] The company has accumulated a significant amount of cash for the purpose of purchasing a new shred truck. The primary issues in dispute are whether this cash is available to be distributed to Mr. Fluckiger to be included in his income with which to pay support, and how the cash should be accounted for in a fair market valuation of the company.
- [5] A secondary issue concerns whether to impute income to Ms. Kargl on the basis she is intentionally under-employed.

II. BACKGROUND

- [6] Ms. Kargl and Mr. Fluckiger met shortly after Ms. Kargl graduated from high school. Ms. Kargl was an aspiring dance teacher, working toward credentials from the Royal Academy of Dance. Mr. Fluckiger was an ambitious salesperson, working for an office supply company.

- [7] In August 1999, the couple purchased a small condominium in Coquitlam and began living together in a marriage-like relationship. They each contributed \$10,000 toward the down payment for this first home.
- [8] Although their initial incomes were modest, Ms. Kargl and Mr. Fluckiger both possessed evident entrepreneurial skills. Ms. Kargl started a dance school called the Westwood Academy of Dance. Mr. Fluckiger created Apex Office Systems, a company that sold filing materials to doctors' offices.
- [9] They married on August 7, 2004.
- [10] Early in the marriage, Mr. Fluckiger's parents helped the couple to acquire a beautiful new home close to the beach in White Rock. The home was built by Mr. Fluckiger's parents. The parents transferred title to Ms. Kargl and Mr. Fluckiger, subject to a mortgage securing the cost to purchase the property and build the house. The parents did not require mortgage payments; but the terms of the loan provided that, if the couple were to separate, they would be entitled to repayment of the principal and interest.
- [11] Ms. Kargl and Mr. Fluckiger sold the condominium in Coquitlam and moved to White Rock. They used the net proceeds from the sale of the condominium to upgrade their new home and purchase an undeveloped parcel of land on Pender Island.
- [12] Their first child, N., was born on September 16, 2006.
- [13] For a while, Ms. Kargl commuted from White Rock to Coquitlam to operate her dance studio. After N. was born, Ms. Kargl and Mr. Fluckiger agreed that Ms. Kargl should sell the business and become a stay-at-home parent.
- [14] In about 2006, Mr. Fluckiger identified a new opportunity based on demand for a service that could shred confidential documents on location for various businesses. Mr. Fluckiger incorporated YVR Enviroshred Inc. and Shelnick Holdings Ltd. Shelnick is a holding company which owns the equipment used by YVR. At trial, the parties and their joint expert treated YVR and Shelnick as a single entity, because they are operationally the same business (collectively "YVR").
- [15] The parties' second child, L., was born on December 18, 2008.
- [16] Mr. Fluckiger worked hard to grow the business of YVR. Ms. Kargl contributed to his success by taking care of the home and the children.
- [17] As is often the case with private companies, Mr. Fluckiger charged a number of personal and family expenses through YVR. He also split his income by paying Ms. Kargl a modest salary from the company.

- [18] Mr. Fluckiger and Ms. Kargl enjoyed a lifestyle that they now both acknowledge exceeded their means. Without regular mortgage payments to make, they spent freely on vacations, new cars, clothing and fitness activities. The children attended private school at the White Rock Christian Academy and participated in many extracurricular activities. It was, in Ms. Kargl's words, a "blessed life"; the family "lacked for nothing".
- [19] In 2015, Ms. Kargl started Wee Dance Inc., a dance school focussed on early learning for children in music and dance. Her objective was to earn some money of her own, but also keep her children as her first priority. Working during school hours allowed Ms. Kargl to be home for the children. She did not foresee Wee Dance supporting the family. It was, in her words, a "hobby business".
- [20] Mr. Fluckiger left the family home and the marriage on February 24, 2018. The separation came as a surprise and a shock to Ms. Kargl. The timing was particularly difficult for her because she had recently lost her brother in a tragic accident.
- [21] Ms. Kargl and the children remained in the family home. Ms. Kargl was financially dependent on Mr. Fluckiger and the salary she she received from YVR. Wee Dance did not generate enough revenue to provide her with an independent income.
- [22] At Mr. Fluckiger's request, his parents did not immediately seek to enforce their mortgage security. They allowed Ms. Kargl and the children to remain in the family home without mortgage payments or rent for approximately two years.
- [23] Initially, Mr. Fluckiger did not pay formal child or spousal support. Instead, he continued to cover a number of expenses related to the family home. He also paid the bills on a credit card for Ms. Kargl with a \$3,500 monthly credit limit and contributed \$600 toward a second credit card in her name. YVR also continued to pay Ms. Kargl approximately \$1,400 per month until some point in 2019.
- [24] Ms. Kargl became primarily responsible for the children's health and well-being. She withdrew the children from the private school, in part because she could not afford to pay an outstanding invoice for their tuition (Mr. Fluckiger testified that he was unaware of the unpaid invoice).
- [25] In March 2019, Mr. Fluckiger suffered a business setback after a disgruntled employee alleged that YVR was storing unshredded confidential documents. The allegations were later shown to be unfounded; however, the "scandal", as Mr. Fluckiger referred to it, had a significant negative impact on the company's cash flow. YVR lost a number of large accounts and some customers refused to pay their bills. Gross revenues fell by approximately 15%.
- [26] Mr. Fluckiger took steps to address the crisis by cutting costs, restructuring the company's cash management and finding efficiencies in its operations. He terminated the lease on the company's office space and moved its administration into a home office. He reduced the staff and took on most of the administrative duties himself.

- [27] By October 2020, YVR had largely recovered from the scandal. The financial statements show that the company accumulated a significant amount of cash over a two-year period, from \$79,773 as at October 31, 2019, to \$460,068 as at October 31, 2021, an increase of \$380,295.
- [28] Akram Saberrezghabad ("Ms. Saber") started work for YVR as its bookkeeper in July 2019. Ms. Saber helped Mr. Fluckiger identify opportunities for YVR to cut costs and save money. Mr. Fluckiger and Ms. Saber became romantically involved. They eventually moved in together. Ms. Saber left YVR in 2021.
- [29] Despite a decline in some aspects of the mobile document shredding business, YVR remains a profitable and successful business. Mr. Fluckiger continues to enjoy a comfortable and active lifestyle, funded in part through his shareholder loan account with the company. I will return to the issues around Mr. Fluckiger's income and YVR's value below.
- [30] Following the separation and a period of time to regain her bearings and support the children emotionally, Ms. Kargl began to work on growing Wee Dance "into a real business". She was only just starting to re-establish the business when the COVID-19 pandemic struck and effectively put the business on hold. Now that schools have opened up again, Ms. Kargl is once again hopeful that she can earn an income out of Wee Dance.
- [31] Apart from covering a number of her personal expenses, however, Wee Dance has yet to generate an income for Ms. Kargl. I will return to the issues around Ms. Kargl's income below.
- [32] The children appear to be happy in public school and adjusting to their parents' separation as well as can be expected. N. has developed a passion for playing basketball. L. has taken up horseback riding. Ms. Kargl organizes and pays for these activities.
- [33] Ms. Kargl and Mr. Fluckiger have resolved the parenting issues. L. spends parenting time with Mr. Fluckiger two evenings a week and every other weekend. N. does not currently spend parenting time with Mr. Fluckiger.
- [34] On November 7, 2019, following a mediation, the parties entered into a consent order. Amongst other things, the consent order provided that:
- a) Mr. Fluckiger would pay to Ms. Kargl "interim interim" spousal support of \$2,221 and interim child support of \$2,312 per month;
 - b) Ms. Kargl would be solely responsible for all of the children's expenses on an interim basis pending receipt of an expert income report;
 - c) The parties would list the former family home in White Rock for sale.
- [35] The parties sold the White Rock home in the Fall of 2020. They also sold the Pender Island property. The net proceeds from the sale of these properties were \$1,135,352.31, which were deposited in a lawyer's trust account.

[36] On June 26, 2022, I made an order by consent for \$700,000 to be released from trust as an interim distribution of family property to Ms. Kargl. The balance remains in trust to be distributed between the parties in accordance with these reasons for judgment.

III. ISSUES

[37] Ms. Kargl claims retroactive and ongoing child and spousal support. She limits the retroactive aspect of the support claims to the period of time following the consent order in November 2019, and any difference between the interim amount of support and the final amount.

[38] There is no dispute concerning Ms. Kargl's entitlement to spousal support. At issue are the amount of support and the duration of spousal support.

[39] The amount of child and spousal support depends on the incomes of the parties calculated in accordance with the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines"):

- a) Ms. Kargl seeks to have all or part of the pre-tax income of YVR included in Mr. Fluckiger's income pursuant to s. 18 of the Guidelines; and
- b) Mr. Fluckiger seeks to have income imputed to Ms. Kargl pursuant to s. 19 of the Guidelines on the basis she is intentionally under-employed.

[40] Ms. Kargl seeks an order requiring Mr. Fluckiger to contribute toward various expenses for the children under s. 7 of the Guidelines. Mr. Fluckiger agrees that the tuition owing to White Rock Christian Academy and orthodontic expenses for the children are qualifying extraordinary expenses. The only specific expense still at issue at the conclusion of the trial was the cost of private tutoring for L.

[41] The remaining family property to be divided is:

- a) A motor home on which approximately \$94,000 is owing: on June 26, 2022, I made an order by consent for the motor home to be sold and any deficiency assumed equally.
- b) Bank accounts, TFSA and RRSP investments: subject to some minor issues, the parties agree on the division of these financial assets.
- c) Wee Dance: the parties agree that Wee Dance has a fair market value of \$5,000.
- d) Apex and YVR (including Shelnick): the parties agree that Apex has no value; they disagree on the value of YVR.

[42] The issues I must decide are:

- a) Mr. Fluckiger's Guideline income;
- b) Ms. Kargl's Guideline Income;
- c) The duration of spousal support;

- d) The value of the parties' interests in YVR;
- e) Whether private tutoring for L. is a qualifying s. 7 expense; and
- f) Miscellaneous property issues.

[43] The most contentious issues concern Mr. Fluckiger's Guideline income and the fair market value of YVR.

IV. ANALYSIS

A. Ms. Daum's Expert Report

- [44] The parties retained Patti Daum to prepare a guideline income and valuation report based on a joint set of instructions dated November 7, 2019. Ms. Daum reviewed the available financial records of YVR, Apex and Wee Dance. She requested further documents and information, particularly from YVR. She produced a series of draft reports on which counsel provided comments. Ms. Daum adjusted some of her assumptions and conclusions in response to these comments, but she did not fully accept some of the input from Mr. Fluckiger's counsel.
- [45] On February 23, 2022, Mr. Fluckiger obtained an order from Master Robertson approving a further joint letter of instructions to Ms. Daum that included a set of directed assumptions (the "Instructed Assumptions").
- [46] The most consequential aspect of the Instructed Assumptions relates to the cash on YVR's balance sheet. Essentially, Ms. Daum was directed to assume that all of the cash was required by YVR to purchase a new shred truck and other capital expenditures.
- [47] In the final draft of her report dated April 15, 2022, Ms. Daum provided two sets of calculations: the first reflecting her opinion based the initial joint instructions, document review, input from counsel and some of the Instructed Assumptions, and a second set of calculations more fully incorporating adjustments based on the Instructed Assumptions.
- [48] Ms. Daum was cross-examined by Mr. Fluckiger's counsel on many of the facts, assumptions and calculations underlying her opinions. During the cross-examination, Ms. Duam acknowledged a relatively minor error in her report and corrected that error; however, she stuck by her most important conclusions.

B. Mr. Fluckiger's Guideline Income

- [49] Ms. Daum presented two sets of tables setting out her calculations of Mr. Fluckiger's Guideline income:
- a) In the first set of tables, after certain uncontroversial adjustments, Ms. Daum included virtually all of the undistributed pre-tax income of YVR in Mr. Fluckiger's income. These calculations yielded a Guideline income in 2021 of \$386,000.

- b) In the second set of tables, and in accordance with the Instructed Assumptions, Ms. Daum reduced the available pre-tax income of the company by the cash YVR has saved to purchase a new shred truck and other capital expenditures. These calculations yielded a Guideline income in 2021 of \$196,000.

[50] The difference in Ms. Daum's two sets of income calculations turns largely on a decision by Mr. Fluckiger to use cash to purchase the new shred truck. Mr. Fluckiger argues that this was a legitimate business decision the court should not second guess.

i. Governing Law on Available Income

[51] Section 18(1) of the Guidelines authorizes the court to include as income for support purposes all or part of the pre-tax income of a corporation of which a spouse is a 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.

[52] The Court of Appeal explained the reason for considering corporate income, when it is available in *Namdarpour v. Vahman*, 2019 BCCA 153, at para. 121 [*Namdarpour*]:

Where a person owns or controls a corporation, the income actually paid by the corporation may not represent the total income available to be paid. By underpaying him or herself, an owner could artificially reduce the income available to pay support unnecessarily or arbitrarily--i.e., reduce income by choice. A corporation could be used as a vehicle to accumulate savings, which would depress support payments. Section 18 allows the court to "lift the corporate veil" to ensure that money received as income by the payor spouse fairly reflects all the money available for payment of support.

[53] While the Guidelines allow a court to include all of the pre-tax income of a corporation in the payor's income, they do not require it. Put another way, the Guidelines do not make the inclusion of all pre-tax income a default rule: *Kowalewich v. Kowalewich*, 2001 BCCA 450, at para. 54 [*Kowalewich*].

[54] Whether to use any, part or all of a corporation's pre-tax earnings depends on the circumstances of each case. The case law provides the following principles to guide the assessment:

- a) It is not necessary for the claimant to show bad faith or an intent by the payor spouse to defeat the Guidelines to demonstrate that all or part of the corporation's pre-tax income is available for distribution: Kowalewich, at para. 40;
 - b) The onus is on the payor spouse to "present clear evidence showing that part of the pre-tax income is not available": Namdarpour, para. 124; Quinton v. Kehler, 2020 BCCA 254, at para. 83-84;
 - c) However, there is no requirement for the payor spouse to demonstrate "that the business could not be run in a fashion that generates more available income": McKenzie v. McKenzie, 2014 BCCA 381, at para. 102 [McKenzie];
 - d) In assessing whether to include corporate income in Guideline income, the court is not required to "second guess business decisions"; nor is it required to "place the largest available shovel in the company store": Kowalewich, at para. 44;
 - e) Instead, the court must assess "a spouse's allocation of pre-tax income between business and family purposes for fairness on priorities as [parents] would in an intact family": Kowalewich, at para. 44.
 - f) In doing so, the court "must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income": Kowalewich, at para. 58-59;
- [55] In the end, the quantification of a payor's income for support purposes is a question of common sense in which "a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business ... having regard to the objectives of [the Guidelines and] the underlying parental obligation to support children": McKenzie, at para. 102, quoting Kowalewich, at para. 45.
- i. Is the Pre-Tax Income of YVR Available to Mr. Fluckiger?
 - (a) The Shred Truck Decision
- [56] An important aspect of YVR's business is that it requires regular capital investment to remain profitable. Its largest capital expense is the shred trucks that are essential to the mobile shredding business.
- [57] YVR operates a fleet of two active shred trucks and one backup shred truck. YVR uses the back up truck when one of the active trucks is unavailable because of repairs or maintenance. The service life of a shred truck in active use is eight years, after which it must be rotated to back up status or else retired.
- [58] YVR's current fleet is comprised of:
- a) A 2014 Shred Tech truck (known as Truck #4), which will be removed from active service this year to become the back up truck.

- b) A 2016 Shred Tech truck (Truck #6), which will be retired in 2024.
 - c) A 2005 Sterling truck (Truck #7), which was acquired used by YVR in 2019 to serve as a backup truck. Truck #7 is too old to be reliable even as a back up truck. Once Truck #4 is moved from active service to back up this year, Truck #7 will be relegated to a limited role as the back up to the back up truck.
- [59] Mr. Fluckiger intends to purchase a new shred truck (which will be known as Truck #8) this year to replace Truck #4 in active service. He intends to purchase an additional new truck (which will be known as Truck #9) in 2024 to replace Truck # 6.
- [60] In the past, YVR leased its new shred trucks and then financed the depreciated value to acquire the truck at the end of the lease. The company's previous practice was for YVR to make lease payments to the end of the lease, whereupon Shelnick would acquire the vehicle with funds loaned by YVR.
- [61] In 2019, Mr. Fluckiger caused YVR to purchase Truck #7 with cash. Notably, however, Truck # 7 was a used 2005 truck. As leasing was likely not an option for a used truck, the acquisition of Truck #7 did not mark a dramatic departure from the company's previous practice.
- [62] On April 8, 2022, Mr. Fluckiger caused YVR to enter into an agreement to purchase a new Shred Tech truck (Truck #8) for \$283,142. The anticipated delivery date of Truck #8 is October 14, 2022. It is still possible for YVR to lease or finance the new truck; however, Mr. Fluckiger has decided to purchase it with cash. This would be a departure from the company's previous practice.
- [63] There is no suggestion Mr. Fluckiger seeks to damage YVR financially with this decision. Mr. Fluckiger's dedication to the business is undeniable. He worked hard to bring the company back from the crisis in 2019 and return it to profitability. He wants to retain the company and earn his living from it.
- [64] There is also no dispute YVR must replace its shred trucks on a regular basis. Mobile shredding is hard on the drive trains of the trucks and the moving parts of the shredding mechanisms. As the trucks approach the end of their active service lives, the shredding mechanisms become less efficient, more expensive to maintain and even potentially dangerous. Rotating and replacing the trucks as they age are legitimate business decisions.
- [65] The issue essentially comes down to one of cash management: Mr. Fluckiger intends to purchase the new trucks with cash accumulated over just two years, as opposed to leasing or financing the vehicles, which would spread their cost over the life of the trucks. Paying cash means the income of the company saved for that purpose cannot be used for other purposes, such as distribution to Mr. Fluckiger as income from which he could pay child support. Leasing or financing, on the other hand, would involve an additional cost to the company in the form of interest or financing charges.

- [66] Ms. Daum testified that business owners frequently finance asset acquisitions because it frees up cash for other purposes. On the other hand, Ms. Daum testified that a small business owner will not want to become "overlevered". However, Ms. Daum did not consider overleveraging to be a concern in the case of YVR leasing a shred truck. Still, she acknowledged that Mr. Fluckiger will save money on the interest expense if he pays for the truck in cash. Ultimately, she conceded that the decision to use cash was "not an unsound decision".
- [67] The upshot of Ms. Daum's testimony is that leasing or purchasing a truck with cash are both legitimate business decisions. There are pros and cons of both approaches from a business point of view.
- [68] The analysis under s. 18(1) of the Guidelines does not stop with the recognition that paying cash was one of two legitimate business options. The ultimate question is whether an objective, well-informed parent would make the cash that YVR has saved available as income in the circumstances of this particular business, having regard to the needs of the company, but also the objectives of the Guidelines and the obligation to pay child support (Kowalewich, at para. 45). The decision to pay cash for the truck, therefore, while legitimate in the abstract, must be considered in context.
- [69] Mr. Fluckiger testified that he decided to purchase the new shred trucks with cash following the scandal in 2019. He described the cashflow crisis that followed the scandal as a "wake up call", alerting him to the need to cut costs. One of the costs Mr. Fluckiger said he and Ms. Saber identified was the leasing or financing costs associated with acquiring the new trucks. Once cashflow stabilized following other cost-saving measures he implemented, Mr. Fluckiger began to save money to buy the next new truck with cash.
- [70] Apart from his general statement that leasing costs money, Mr. Fluckiger did not provide any evidence of the anticipated cost to lease a new shred truck.
- [71] It is important to recognize that what is relevant in terms of cost-saving was the interest component of the lease payments and any financing fees, not the "burden of monthly payments", as counsel put it. One way or another, YVR would need to pay for the depreciating value of the trucks and the sales tax which make up the balance of the monthly lease payments.
- [72] It is common knowledge that interest rates have risen recently and may rise again in the future. But there is no evidence that leasing was "much more expensive" at the time Mr. Fluckiger made the decision to purchase Truck #8 with cash. Indeed, it is common knowledge that interest rates were historically low in the period of time in which he made the decision.
- [73] There is also no evidence that leasing a shred truck is "much riskier" than investing a significant share of the company's cash flow into a depreciating asset like a shred truck with a limited resale market.

- [74] I accept Mr. Fluckiger's evidence about the need to cut costs in 2019. There can be no doubt Mr. Fluckiger's cost-cutting decisions in 2019 improved YVR's cash flow. However, the decision to purchase the new truck with cash must be assessed from the vantage point of when the final decision was made, in April 2022, not March 2019, when the company was in crisis.
- [75] By October 2021, the date of the most recent financial statements, YVR had returned to relative profitability. There is no better indication of its ability to make lease payments than the fact that YVR saved sufficient cash in just two years to buy a new truck.
- [76] This is not to say that cost was no longer a factor, but rather that the circumstances had changed between the crisis in 2019 and the final decision to purchase the truck with cash.
- [77] By April 2022, the decision to pay cash and avoid monthly lease payments (or more accurately, the interest component of the lease payments) was, in my view, a matter of choice, and not meaningful cost-cutting.
- [78] This is demonstrated by the evidence of Mr. Fluckiger's personal spending over the same period of time. At the time he says he sought to avoid the cost of leasing the truck, Mr. Fluckiger paid for vacations, restaurant meals, local hotel stays, leisure clothing, cycling gear, jewellery and other discretionary personal items using corporate credit cards. (This list may not be complete: Mr. Fluckiger did not produce statements for an Amex credit card, paid by YVR, for the period August, 2019 to August, 2021.) One notable example is a three-day trip to a fishing lodge in July 2021 that cost approximately \$12,000.
- [79] Mr. Fluckiger testified that the personal expenses on the credit cards were charged to his shareholder account. Nonetheless, these discretionary expenses represented funds taken out of the company at a time when Mr. Fluckiger testified it was necessary for YVR to cut down on expenses.
- [80] Another example of a significant new personal expense was a life insurance policy Mr. Fluckiger took out in May 2021. The policy provides "last to die" insurance on Mr. Fluckiger's life and the life of Ms. Saber. The only beneficiary is Mr. Fluckiger's mother. The policy has a guaranteed cash value, meaning that it can be used by Mr. Fluckiger as a savings vehicle. The monthly premium is \$4,500, which is paid by YVR and presumably charged to Mr. Fluckiger's shareholder account.
- [81] There is nothing wrong with Mr. Fluckiger receiving compensation in the form of personal expenses paid by the company. However, there is a fundamental disconnect between the evidence of his personal spending, which increased from 2019 through 2021 (and likely continued into 2022), and the asserted need for the company to eliminate lease payments as a cost-saving measure.
- [82] The most striking illustration of this disconnect relates to a Porsche sports car.

- [83] On February 8, 2021, Mr. Fluckiger caused YVR to lease a new Porsche Taycan for his use. The price of the car was \$243,394, which is almost as much as a new shred truck. Mr. Fluckiger did not provide any down payment or cash contribution toward the cost of the new car. The lease payments are \$3,918.72 per month. Only 35% is charged to Mr. Fluckiger's shareholder account. In other words, YVR pays \$2,547 per month for Mr. Fluckiger to drive a Porsche.
- [84] Mr. Fluckiger acknowledges that he does not require a Porsche sportscar to operate a mobile shredding business. Although he does a lot of driving for work, there is no legitimate business reason for him to drive a \$240,000 car.
- [85] Previously, YVR leased a Toyota Tundra and a Ford Mustang at a cost of \$406 and \$789 per month, respectively. The Porsche, being fully eclectic, will save the company money on fuel costs. Nonetheless, Mr. Fluckiger's willingness to take on a much higher lease payment for a personal luxury vehicle is striking given his evidence about the need for the company to save money by eliminating leasing costs on essential business vehicles.
- [86] Mr. Fluckiger works hard. He is entitled to be compensated with a car he enjoys to drive. However, his decision to lease a very expensive car and charge 65% of the leasing cost to the company casts doubt on his explanation for the decision to pay cash for a similarly priced shred truck.
- [87] In my view, Mr. Fluckiger has not shown that the cash he saved to purchase a new shred truck is unavailable for distribution and inclusion in his Guideline income for support purposes.
- [88] In my view, a reasonable parent in Mr. Fluckiger's circumstances would allocate corporate income differently between business, family and personal purposes. A reasonable parent in Mr. Fluckiger's circumstances would ensure that the company is able to meet its capital reinvestment needs, but also more fully recognize the obligation to support his children. The way to do that in this particular company is to lease the shred trucks.
- [89] This is not a matter of "second guessing" Mr. Fluckiger's business decision, but rather of assessing the fairness of the decision on all of the evidence to avoid an unjustified imbalance between business and family interests.
- [90] Having said this, not all of the company's pre-tax income is available for distribution to Mr. Fluckiger. Beginning this year, sufficient income must be retained by YVR to lease the new shred trucks.

(b) Other Capital Needs

- [91] Mr. Fluckiger also testified that YVR will need to replace the cutting knives in the shredding machines on the trucks. This has not been an expense for YVR in the past. Mr. Fluckiger testified that he decided to replace the knives after he heard from his drivers that the machines were becoming less efficient. He subsequently learned that the knives should be replaced every second year.
- [92] The cost of replacing the knives is \$9,750 in parts and \$1,500 installation for each truck, for a total cost of \$33,750.
- [93] In addition, Mr. Fluckiger testified that YVR will need to replace the bins that it provides to its customers free of charge to collect documents for shredding. The bins have not been replaced for some time.
- [94] The cost of new bins is \$21,000.
- [95] These are legitimate capital needs of the business. Sufficient income must be retained by YVR to replace the cutting knives and bins.
- [96] However, I am not persuaded that a reasonable parent in Mr. Fluckiger's position would replace all of the cutting knives and all of the bins at one time. Rather, a reasonable parent would budget to replace these items over time, thereby balancing the capital needs of the company with the obligation to support his children.
- (c) Sustaining Capital Reinvestment
- [97] As part of her assessment of the fair market value of the company, Ms. Daum calculated what she called the "sustaining capital reinvestment," or the amount of money YVR needs to spend annually on assets.
- [98] To obtain this number, Ms. Daum calculated the replacement cost of the shred truck fleet, cutting knives and bins.
- [99] Ms. Daum used the cost of the new truck selected by Mr. Fluckiger to purchase this year. She multiplied that cost by the number of trucks in regular operation (excluding backup trucks) to obtain the total replacement cost of active trucks. She then divided the total cost by eight, representing the expected useful life of the trucks, to obtain an annual cost.
- [100] Ms. Daum added the cost of replacing the cutting knives on the active trucks every two years, assuming that one truck will replace its cutting knives each year. She also added the estimated annual cost of replacing the bins over time.
- [101] These calculations produced an estimate of the total annual expenditures on assets, from which Ms. Daum deducted the associated tax shield. In the final draft of her report, after input from Mr. Fluckiger, Ms. Daum came up with a sustaining capital reinvestment of \$84,000.

[102] Ms. Daum did not specifically calculate the cost to lease a shred truck. However, in my view, the sustaining capital reinvestment includes sufficient provision to ensure the company is able to lease the new trucks. (The annual cost to lease the comparably priced Porsche is just under \$48,000; even assuming a higher interest rate to lease a shred truck in 2022, there is sufficient provision in \$84,000 for the lease payments on the truck.)

[103] Ms. Daum used the sustaining capital reinvestment in her calculation of the fair market value of YVR, as discussed below. She did not factor it in her calculation of Mr. Fluckiger's Guideline income. Instead, she assumed that all of YVR's pre-tax income is available to Mr. Fluckiger to be included in his income for support purposes.

[104] Mr. Fluckiger has shown that \$84,000 is not available from the company's pre-tax income beginning this year, when he intends to acquire the first new shred truck and start replacing the cutting knives and bins.

(d) Conclusion

[105] I would adopt Ms. Daum's Table 1 income calculations. I would deduct \$84,000 in 2022 and going forward. In my view, this result fairly reflects the money that is available to Mr. Fluckiger with which to pay support.

[106] In addition, I would add N.'s "income" to Mr. Fluckiger's income in 2018 and 2019, and take the average of scenarios 1 and 2 from Ms. Daum's Table 1 for those two years.

[107] This analysis yields Guideline income for Mr. Fluckiger as follows:

2018

2019

2020

2021

2022

\$218,842

\$185,562

\$348,000

\$386,000

\$302,000

C. Ms. Kargl's Guideline Income

[108] Ms. Kargl's sole source of independent employment income is Wee Dance. To date, Wee Dance has not been a reliable source of income. In 2021, Ms. Kargl reported zero employment income.

[109] For various reasons, Ms. Kargl was unable to devote her full attention to Wee Dance following the separation. With the family law case now behind her, she hopes to grow the business, within realistic expectations. She argues that an imputed income of \$30,000 beginning in 2020 and going forward would fairly reflect the amount that she is capable of earning.

[110] Mr. Fluckiger argues that Ms. Kargl has been intentionally under-employed since the separation and the court should impute to her an income of \$70,000.

i. Governing Law on Imputing Income - Under-employment

[111] Section 19(1)(a) of the Guidelines authorizes the court to impute income to a spouse who is intentionally unemployed or under-employed:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[112] Imputing income is the way in which the court gives effect to the legal requirement that a parent must earn what the parent is capable of earning. The court must consider not only the amount of income a spouse actually earns, but "the amount of income a spouse could earn if working to capacity." *Hanson v Hanson*, [1999] B.C.J. No 2532, 92, at para. 9 [Hanson], citing *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528, at para. 28.

[113] Bad faith or a specific intent to evade child support obligations is not required to find that a spouse is intentionally under-employed. A spouse is intentionally under-employed if that person chooses to earn less than what he or she is capable of earning. *Hanson*, at para. 10-13.

[114] Justice Martinson adopted the following general principles for determining a person's capacity to earn an income in *Hanson*, at para. 14:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (*Van Gool* at para 30.)

2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

[115] Although the legal foundation for awarding spousal support is different from that of child support, the test for imputing income for the purpose of fixing the amount of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered when imputing income for child support, although the concept of spousal support also includes a consideration of the marital standard of living. *Marquez v. Zapiola*, 2013 BCCA 433, at para. 37-38.

[116] It is no answer for a spouse to say that he or she has started a business where that chosen path is unreasonable in the circumstances. In *Jennens v. Jennens*, 2014 BCSC 2014, for example, Master Muir imputed income to a spouse who sought to build a business around a former hobby as a marine seamstress that had only ever provided unreliable seasonal income:

46 The claimant has an obligation to earn to her capacity to assist in supporting her children. She cannot persist in pursuing a vocation that in her own words is not a reliable source of income. The meagre income in the two years since separation is ample evidence that this career aspiration is unproductive. She is obliged to do better.

47 I do not expect that the claimant would have been able to accomplish the income levels suggested by the respondent of \$30,000 - 40,000 in the two years since separation. I note that a full-time minimum wage position would garner the claimant \$21,320 per annum.

48 In the circumstances I agree that an income should be imputed to the claimant. I will set her guideline income at \$22,000.

[117] On the other hand, the court will not conscript a person into a specific line of work where his or her choice of career remains reasonable, commensurate with the above-listed principles: *B.K.W. v S.J.H.*, 2022 BCSC 1445, at para. 28; *Jendruck v. Jendruck*, 2014 BCCA 320 at para. 16.

[118] To assess the reasonableness of a spouse's efforts to earn an income, it is necessary to consider the context in which that person found himself or herself following the separation, in light of the circumstances of the marriage and its breakdown: *K.S.H. v S.F.F.*, 2022 BCSC 661, at para. 167-171.

ii. Is Ms. Kargl Intentionally Under-Employed?

(a) Initial Context - 2018 to 2020

[119] At the time she and Mr. Fluckiger began living together, Ms. Kargl was running a successful dance school, Westwood Academy. Ms. Kargl continued operating Westwood after the parties moved to White Rock. However, the commute to Coquitlam with a baby proved challenging. The parties agreed Ms. Kargl would give up the business and become a stay-at-home parent.

[120] When Ms. Kargl started Wee Dance in 2005, she had been out of the workforce for some time. She did not have a client base or a reputation in the dance school business. She was still the primary caregiver for two of her own children. Neither party expected Wee Dance to provide an income to help support the family. These modest expectations benefitted Mr. Fluckiger, because Ms. Kargl continued to fulfill the primary caregiving responsibilities while Mr. Fluckiger continued to advance his own business.

[121] When they separated, Ms. Kargl was left without any immediate realistic source of independent income. She was dealing with the tragic loss of her brother, the abrupt end of her marriage and helping her children to adjust to the separation. It would not have been reasonable to expect her to reopen a dance school like Westwood in White Rock, where she says the market is saturated. Nor would it have been reasonable to expect her to expand Wee Dance into an income-generating business overnight.

[122] As for other potential sources of income, Ms. Kargl was not readily employable except at minimum wage. She had no advanced education or job experience. She had been out of the competitive workforce for a long time. Wee Dance was where her interests, experience and skills lay.

[123] It was reasonable, therefore, for Ms. Kargl to require some time to establish Wee Dance as an income-generating business. Then, in March 2020, the COVID-19 pandemic struck and essentially brought the business to a halt. This was unforeseeable, and not evidence of under-employment.

[124] Ms. Kargl testified that she is optimistic Wee Dance can provide her with an income to contribute toward the support of her children and self-sufficiency. The issue is whether that expectation is reasonable in the circumstances.

(b) Is Continuing to Rely on Wee Dance Reasonable?

- [125] The gross revenue of Wee Dance in the year before the pandemic was approximately \$38,000. For the most recent year ended January 31, 2022, the gross revenue was approximately \$45,000.
- [126] Although Wee Dance does not pay Ms. Kargl a salary, it pays a number of her expenses including car loan payments, vehicle operating expenses and cell phone bills. It is fair to say that Wee Dance paid about \$18,000 of personal expenses in 2021. These funds, at least, are available to Ms. Kargl as income.
- [127] Wee Dance currently operates seven classes at two locations with a total of 50 registrants. Ms. Kargl runs all of the classes. She is currently unable to hire dance instructors because of the lack of available work. Allowing time for class preparation and administration, it appears to me that Ms. Kargl currently works no more than 20 hours per week on Wee Dance.
- [128] Ms. Kargl was cross-examined extensively on whether or not Wee Dance is capable of generating more revenue and personal income. When she was asked what she would be doing to grow the business, Ms. Kargl testified that she was planning on expanding to other locations and offering additional programs. When she was pressed on the details of these plans, Ms. Kargl was somewhat vague. I don't think she can be faulted for failing to provide the specifics sought during the cross-examination; however, the evidence demonstrates that it will be a challenge for Ms. Kargl to expand the business or increase its profitability significantly.
- [129] The question, then, is whether it is reasonable for Ms. Kargl to continue relying on Wee Dance as her only source of income when she currently earns less than minimum wage and does not have enough business to fill a regular work week.
- [130] In my view, Ms. Kargl is capable of earning a modest income through Wee Dance. Ms. Kargl impressed me as a capable, intelligent and well-organized woman. She has developed an intriguing concept of teaching children through music and dance which appears to be an untapped market in her community. I expect that she will be able to expand the business to more locations and more students. Allowing her an opportunity to turn a business that she founded within the limits of her role in the marriage into an income-generating career post-separation is consistent with the objectives of spousal support.
- [131] However, I think Ms. Kargl will need to spend more time on marketing and developing a meaningful business plan. Her children are old enough for her to make Wee Dance a full-time job. Also, I think she could have put more effort into rebuilding the business in 2021 following the COVID shutdowns in 2020.

[132] It is difficult to assess the reasonable prospects of Wee Dance as a full-time endeavour by Ms. Kargl. The business is currently operating well below capacity. On the other hand, Ms. Kargl's aspirational plan to expand to all 13 locations advertised on her website is unrealistic. I think it is more realistic to say Ms. Kargl is capable of roughly doubling the current business.

[133] Operating just seven classes in two locations, Ms. Kargl has been able to cover personal expenses reflecting a pre-tax income of approximately \$20,000. She should be able to double that income.

(c) Conclusion

[134] For these reasons, an imputed income of \$40,000 beginning in 2022 and going forward would fairly reflect the amount Ms. Kargl is capable of earning through Wee Dance.

[135] I would not impute income to Ms. Kargl based on the earnings of a full-time dance instructor, as suggested by Mr. Fluckiger. There is no evidence that any dance instructor positions are available to Ms. Kargl. She did not keep up her training as a ballet instructor during the marriage. Her uncontradicted evidence is that full-time hours are not the norm in dance instruction.

[136] Nor would I impute income to Ms. Kargl working as a business manager or administrative assistant, also as suggested by Mr. Fluckiger. There is no evidence that this work is available to a woman of Ms. Kargl's qualifications and skills.

[137] More importantly, I am not persuaded that Ms. Kargl is guilty of persisting in unremunerative employment or forsaking her child support obligations for an unrealistic or unproductive career aspiration. In my view, Wee Dance is a reasonable business venture for Ms. Kargl to pursue and establish as a reliable source of income, although, as stated, she will need to spend more time and effort on the business.

[138] If Ms. Kargl is unable to grow Wee Dance sufficiently to earn \$40,000 in pre-tax income, then it is reasonable to expect that she will supplement her income from other sources.

[139] This analysis yields imputed income for Ms. Kargl as follows:

2018

2019

2020

2021

2022

\$0

\$0

\$20,000

\$30,000

\$40,000

D. Duration of Spousal Support

- [140] Mr. Fluckiger argues that there should be a fixed term of spousal support at the lower end of the Guidelines, beginning with the consent order in November 2019 and ending in June 2029, which is to say 9.5 years.
- [141] Ms. Kargl argues that spousal support should be indefinite, in other words, the duration should not be specified in the order.
- [142] The Guidelines provide two possible tests for duration: the "length of marriage" test, and the "age of children" test. The former test would be the applicable measure here because the youngest child will complete high school in less time than the parties were married. The Guidelines provide that the length of marriage will typically be applicable for longer marriages, marriage of ten years or more.
- [143] The upper end under the length of marriage test is one year for each year of marriage. The lower end is one-half year for each year of marriage. If the children are already in school at the time of separation (as they were in this case), then the Guidelines state that the lower end should be used.
- [144] The parties lived in a marriage like relationship and a marriage of a total length of almost 19 years. The lower end of the Guidelines duration would suggest 9.5 years of spousal support, as proposed by Mr. Fluckiger.
- [145] However, in most circumstances, the courts do not establish a fixed duration of spousal support in an initial order: *J.A.F. v. J.J.F.*, 2019 BCSC 507, at para. 84.
- [146] Indeed, the Guidelines recommend that, for marriages with dependent children, initial orders be indefinite, subject to the usual process of review or variation. The Guidelines provide two reasons for this recommendation. First, the tests for duration are not intended to impose time limits on initial orders, but rather structure for an on-going process of review and variation. Second, duration in cases with dependent children is fact-specific and should vary based on the education, skills and work experience of the recipient spouse.
- [147] In this case, I have found that Ms. Kargl is capable of earning a modest income though Wee Dance. I have imputed income to her based on a modest expansion of the business. However, the long-term prospects of Wee Dance remain uncertain. Ms. Kargl will need to put in the time and effort to grow the business. While she is entitled to spousal support, Ms. Kargl must recognize the support will end at some point and she will need to earn more money.

- [148] On the other side of the equation, Mr. Fluckiger is 53 years old and hopes to retire in about 12 years. He says mobile shredding is a mature industry with an uncertain future.
- [149] In my view, it is premature to determine the duration of spousal support. The lower end of the suggested duration may be too short to satisfy the objectives of spousal support. But that determination is better made with more information about the hoped-for expansion of Wee Dance. A review order would provide a valuable means of addressing the issues of self-sufficiency and duration of spousal support that Mr. Fluckiger has properly raised.
- [150] Accordingly, I would make the order of spousal support indefinite, but order a review no later than the end of June, 2029.

E. Valuation of YVR

- [151] As with Mr. Fluckiger's income, Ms. Daum presented two sets of valuation calculations for YVR, one reflecting her opinion (as set out in sch. 4.6 of the report), and the second incorporating adjustments based on the Instructed Assumptions (as set out in sch. 4.9).
- [152] Ms. Daum used an earnings-based approach to calculate the fair market value of YVR. In simplified terms, Ms. Daum multiplied the company's discretionary cash flow by a multiplier to derive the highest price a hypothetical arms-length buyer would pay for all of the shares of YVR. She then added the value of the company's "redundant assets", as discussed below, to obtain a final valuation of the parties' interests in YVR.
- [153] The mid-point of Ms. Daum's sch. 4.6 valuation (as modified during cross-examination) is \$981,000. The mid-point of her adjusted sch. 4.9 valuation based in the Instructed Assumptions is \$812,000.
- [154] The difference lies primarily in Ms. Daum's treatment of redundant assets and the multiplier of earnings.

i. Recent Financial Results

- [155] Notably, the most recent financial statements provided to Ms. Daum were for October 31, 2021, approximately six months before the trial date, which Ms. Daum used as the valuation date.
- [156] This lack of current financial information required Ms. Daum to make some assumptions about the company's recent performance.
- [157] As at October 31, 2021, YVR reported cash on hand of \$460,068. Ms. Daum added an estimate of the net income earned from October 2021 to the valuation date. Ms. Daum estimated the additional income to be \$127,000, for cash on the valuation date of \$591,663. To do so, Ms. Daum assumed that the results year-to-date in 2022 were similar to 2021.

- [158] Mr. Fluckiger challenged this assumption. By way of a letter dated April 12, 2022, his counsel provided Ms. Daum with a bank machine transaction slip showing an account balance of \$409,258. This balance was \$182,405 lower than one would expect based on Ms. Daum's extrapolation from October 31, 2021.
- [159] Ms. Daum requested a complete balance sheet and income statement in order to account accurately for the changes between October 2021 and April 2022. These were not provided by Mr. Fluckiger.
- [160] Mr. Fluckiger testified instead that there were no unusual transactions between October 2021 and April 2022. He offered two general explanations for why earnings may have declined.
- [161] First, Cascade Paper Inc. stopped buying shredded paper from YVR in November 2021, and then resumed buying shredded paper at a lower price in January 2022. This may have caused some reduction in earnings; however, it is unlikely the reduction was material given the fact that shredded paper sales constituted just 4.1% of YVR's income in the year ended October 31, 2021.
- [162] Second, Mr. Fluckiger testified that YVR saw a surge in 2021 in what he described as "purge" shredding jobs, which he testified may have been related to the COVID pandemic and may not continue in 2022.
- [163] Business valuation should be based on verifiable financial documents, not speculation. Other than the bank machine slip, Mr. Fluckiger did not produce any documentation of a material change in YVR's financial results.
- [164] A bank account balance does not necessarily demonstrate a decline in profitability since October 2021. It is possible the bank balance was lower than expected for reasons other than lower earnings. As noted by Ms. Daum in her report and her testimony, there is insufficient information to understand the nature of the change.
- [165] Mr. Fluckiger argues that the burden was on Ms. Kargl to prove the assumption that YVR accumulated an additional \$127,000 of earnings. I do not agree. As a joint expert, Ms. Daum required full disclosure from both parties. Given his lack of recent financial disclosure, Mr. Fluckiger cannot cast the blame for any inaccuracy onto Ms. Daum and Ms. Kargl.
- [166] In my view, Ms. Daum's methodology of calculating the additional profits of YVR between October 31, 2021, and April 2022 was reasonable in the circumstances.
- [167] However, I would make a change to sch. 4.6 to reflect recent expenses.

- [168] Mr. Flickinger gave evidence of two new operating expenses YVR assumed after October 31, 2021: the company hired a new part-time bookkeeper at a cost of \$1,200 per month; and YVR rented an office space at a cost of \$1,274.50 so that Mr. Fluckiger could move the administration out of the home office he had been using since 2019. These expenses total approximately \$10,000 per year.
- [169] Ms. Daum did not include these expenses in sch. 4.6 of her report. As directed by the Instructed Assumptions, she included them in sch. 4.9. As a result, the "Maintainable cash flow from operations" is \$10,000 lower in sch. 4.9.
- [170] In my view, these are both legitimate and appropriate business expenses. Accordingly, the cash flow from operations should be the same in both schedules. This change requires a number of adjustments to sch. 4.6. As a result, the mid-point valuation in sch. 4.6 must be adjusted downward to \$911,000.

ii. The Redundant Assets Issue

- [171] A more consequential issue concerns the treatment of redundant assets.
- [172] In her report, Ms. Daum defined redundant assets as "those assets that are superfluous to the company's core operations and form an add-on to value". In simpler terms, redundant assets are assets that are owned by the company that do not contribute to the revenue-generating activities of the business.
- [173] Examples of redundant assets may include real estate that is not used for operations, recreational vehicles, private airplanes and excess inventory.
- [174] In this case, the primary redundant asset identified by Ms. Daum was cash. Ms. Daum noted that the current ratio (current assets divided by current liabilities) was high for a business such as YVR. She assumed that a current ratio of 2.0 was appropriate for this business. As such, she classified the cash over and above the "sustaining capital investment" as a redundant asset.
- [175] Ms. Daum removed the redundant assets from the hypothetical sale of YVR, and then added their after-tax value back as add-on value to the shareholder. The assumption underlying this exercise is that an arms-length purchaser will not want to purchase the redundant assets. Instead, these assets will be retained by the seller, who would receive their value after paying personal distributive taxes.
- [176] In other words, Ms. Daum assumed that, in a hypothetical sale, Mr. Fluckiger would retain most of the cash on hand, which would increase the "money in his jeans" at the end of the day.

- [177] Ms. Daum also included in her calculation of redundant assets \$105,487 "due from related parties" (a shareholder loan). During cross-examination, she acknowledged this amount did not represent any add on value because it was offset by a debt owed by Mr. Fluckiger himself. During a break, Ms. Daum corrected the error and revised sch. 4.6 as noted above.
- [178] Following these revisions, the value of the redundant assets in sch. 4.6 was \$298,000.
- [179] The central issue in dispute is whether the cash that Mr. Fluckiger testified YVR had accumulated for the purpose of capital expenditures (primarily the new shred truck) should be considered "redundant" in the first place.
- [180] Mr. Fluckiger argues that cash earmarked for capital expenditures is not superfluous to the company's core operations and therefore should not be treated as a redundant asset for business valuation purposes.
- [181] By way of the Instructed Assumptions, Ms. Daum was directed to assume that all of the cash required to purchase the new shred truck, cutting knives and new bins was not a redundant asset.
- [182] In accordance with these instructions, Ms. Daum reduced the cash balance and increased the tangible asset base in sch. 4.9 to reflect the assumed purchase of this equipment.
- [183] In cross-examination, Ms. Daum confirmed that the value of redundant assets under the Instructed Assumptions in sch. 4.9 is reduced to \$45,000 before taxes and \$34,000 after distributive taxes. Put another way, Ms. Daum agreed that, if the cash earmarked to purchase a new truck and related equipment is excluded, the after-tax value of the redundant assets and add-on value to Mr. Fluckiger declines from \$298,000 to \$34,000.
- [184] I have found that a reasonable parent in Mr. Fluckiger's position would lease the new shred trucks and replace the other equipment over time. I have also found that the sustaining capital reinvestment calculated by Ms. Daum provides adequate provision for these capital requirements.
- [185] Accordingly, I would agree with Ms. Daum that the cash accumulated to purchase a new shred truck and related equipment, over and above the sustaining capital reinvestment, is a redundant asset.
- [186] This raises the separate question - not addressed by Ms. Daum - whether the valuation of YVR should exclude redundant assets that are to be made available to Mr. Fluckiger to pay support (i.e. cash yet to be distributed to him).

iii. The Double Dipping Issue

- [187] In *Sanai v. Mahmoud*, 2017 BCCA 155, the Court of Appeal cautioned against the "double dipping" that would result if the same corporate earnings are included in both income and the valuation of the company. The Court held that the family share of the company in that case was overvalued by the amount that the trial judge added to the owner's earnings:

22 The judge referred to the instruction in *Boston v. Boston*, 2001 SCC 43 to avoid double dipping and then held that double dipping was not engaged in this case. The respondent reiterates this conclusion and says she is entitled to an equal share of the value of GES as of the date of trial, and that this cash in hand, as retained earnings, is part of the value she is entitled to share.

23 In my view, the judge has erred in his treatment of this sum. He both included it expressly in the valuation of GES, and in the appellant's income when averaging income for Guidelines purposes. It is undisputed that GES's revenue is derived from the appellant's professional services, and GES is simply the corporate vehicle whereby the appellant received income from his work. It appears that the court orders prevented the appellant from receiving all of that income, or the IPP as a commensurate asset. Thus this money sitting in the accounts of GES, in corporate accounting terms described as retained earnings, in practical terms is akin to unpaid untaxed income of the appellant, rather like forced savings. As income after the triggering event, it was precluded from allocation as a family asset: *Halpin v. Halpin* (1966), 27 B.C.L.R. (3d) 305 (C.A.) at para. 19.

24 In other words, accepting the judge's conclusion that the sum of \$250,000 formed part of the appellant's earnings for the period 2011, 2012 and 2013, I conclude that the family share of GES was overvalued by the amount of \$250,000, and the compensation order must be adjusted accordingly. (emphasis added)

[188] In sch. 4.6, Ms. Daum calculated redundant assets (cash) of \$383,000 and added its after-tax value of \$298,000 to the "cash in the jeans" valuation of YVR.

[189] I have found that the pre-tax income of YVR in 2021 and 2022 (less the \$84,000 sustaining capital reinvestment) should be included in Mr. Fluckiger's income for support purposes. It follows that the cash on YVR's balance sheet earmarked to purchase the shred truck and related equipment should not be added to the value of the company for property division purposes. Instead, these funds will be distributed to Mr. Fluckiger to pay support.

[190] For these reasons, I would adopt the lower calculation of redundant assets in sch. 9 of Ms. Daum's report, which is \$34,000 after distributive taxes.

[191] Accordingly, sch. 4.6 of Ms. Daum's report overstates the parties' family law interests in YVR by \$264,000 (\$298,000 - \$34,000). The mid-point valuation in sch. 4.6 must therefore be further adjusted downward to \$647,000.

iv. The Multiplier Issue

[192] Putting aside the redundant assets issue, the valuation method used by Ms. Daum in both schedules produced a hypothetical share price (the enterprise value) that corresponds to a multiple of cash flow after deducting for income taxes and sustaining capital reinvestment.

- [193] Ms. Daum defined this multiplier as "the inverse of a capitalization rate based on the weighted average cost of capital". In simpler terms, the "implied multiple of earnings" is a measure of risk reflecting a purchaser's required rate of return on capital. All other things being equal, a purchaser will be prepared to pay more (higher multiples) for a business that has low risk, and less (lower multiples) for a business that carries higher risk.
- [194] In schedule 4.6, Ms. Daum used a multiple of 4 times the discretionary after-tax cash flow of YVR. She tested this multiple by calculating the resulting implied value of the goodwill of YVR (the portion of the purchase price that is higher than the tangible asset base). She then divided the goodwill by the company's earnings to conclude that it would take approximately 2.4 years for a purchaser to recover what they paid for YVR. Ms. Daum considered this result reasonable and confirmatory of the multiple she used to derive the value.
- [195] Initially, following the Instructed Assumptions, Ms. Daum used the same multiple of 4 times earnings in sch. 4.9. Had she maintained this multiple, it would have resulted in a lower valuation based on the Implied Assumptions.
- [196] However, in the final draft of her report, Ms. Daum changed the multiple in sch. 4.9, from 4 times earnings to 5 times earnings, resulting in a higher valuation. Ms. Daum explained the change:

The cash flow multiples used in sch. 4.6 were 4X (with resultant EDITDA multiples of 2.4 to 2.5X). In our view, these are reasonable cash flows/EBITA multiples for this operation. However, once we increase tangible asset backing (TAB) by \$339,000 (increases from \$318,000 at sch. 4.6, line 17 to \$657,000 above, at line 17), the inherent riskiness of the company is lower.

- [197] As I understand from this explanation, Ms. Daum is saying that a business with more tangible assets is generally considered less risky. Because she was instructed to assume that YVR had purchased a new shred truck, Ms. Daum concluded that a higher multiple of earnings was appropriate in sch. 4.9.
- [198] Ms. Daum further explained that a change in the multiple was required because using the 4X multiple resulted in very low or negative goodwill, which made no sense to her:

If we continue to use the same cash flow multiples of 4X as used in sch. 4.6, the conclusion would suggest negative goodwill at the low end and much lower goodwill at high end as follows

[she then set out her calculations, and continued:]

As such, we conclude that using the same multiples as those used in sch. 4.6 are too low. On the basis of the investment in the company being inherently less risky due to the additional TAB in the operations, we have increased the multiples accordingly.

- [199] Mr. Fluckiger challenged Ms. Daum's multiples. First, he argued that Ms. Daum failed to fully appreciate the risk associated with a mobile shredding business in a mature industry with a high sustaining capital reinvestment relative to its cash flow. He suggests the multiple in sch. 4.6 should be reduced to 3 or 3.5 to reflect the higher economic risks and lower goodwill associated with YVR.
- [200] I would not change the multiple in sch. 4.6. Ms. Daum explained her choice of multiple based on her experience and familiarity with closely held companies. Mr. Fluckiger did not offer any contrary expert opinion. He did not offer any compelling evidence of a higher risk or lower goodwill associated with YVR.
- [201] Second, Mr. Fluckiger argued that Ms. Daum's decision to increase the multiple in sch. 4.9 from 4X to 5X was "results driven" - that is, intended to bolster and support an inflated opinion of the value of YVR.
- [202] I do not need to resolve the dispute over the multiple in sch. 4.9. I have found that a reasonable parent in Mr. Fluckiger's position would lease the new shred trucks and replace the other equipment over time. Accordingly, sch. 4.6 (and the multiple of 4X) represents the appropriate valuation scenario (with the necessary modification to adopt the lower amount of redundant assets to avoid "double dipping").

v. Conclusion

- [203] I do not accept Mr. Fluckiger's challenge to the credibility of Ms. Daum's valuation. Ms. Daum is a highly experienced business valuator. Her opinion in this case evolved over time; however, this is understandable for a joint opinion that required something of an iterative process as the facts around YVR were clarified by counsel. Ultimately, Ms. Daum did the best she could with incomplete financial information to provide the parties and the court with an objective valuation.
- [204] Although she made some errors in her early drafts, Ms. Daum corrected those errors when they were pointed out to her. She answered the questions put to her in cross-examination thoughtfully, and changed the final calculations where appropriate. Fundamentally, Ms. Daum stood behind her report and explained her reasons for doing so.
- [205] I do not agree that her valuation (reflected in sch. 4.6 as modified) is deeply flawed or materially based on assumptions that have not been proven.
- [206] For these reasons, I find that the value of the parties' interest in YVR as of the trial date was \$647,000.

F. Section 7 Extraordinary Expenses

- [207] As stated, the only s. 7 expense in issue at the conclusion of the trial was private tutoring for L.

[208] Recently, Ms. Kargl obtained testing for L.'s math skills. L. scored poorly. Accordingly, Ms. Kargl enrolled her in professional tutoring. L. will receive tutoring twice a week during the school year. Ms. Kargl intends to have L. take advantage of the tutoring over the school break.

[209] The cost is approximately \$540 per week.

[210] Mr. Fluckiger does not agree to contribute toward the cost of the tutoring. He argues that his mother, a retired teacher, is able to assist L. with her math at no cost. Mr. Fluckiger says he is also willing to work with L. on her math, although he concedes he is "not a numbers guy".

[211] The Guidelines state:

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

...

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

...

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or ...

[212] In order for school tutoring to fall within s. 7 and the definition of an extraordinary expense, it must not only meet a child's particular needs, but also exceed the amount the spouse requesting a contribution "can reasonably cover" taking into account the spouse's income and support. In effect, the Guidelines require the court to take into consideration child and spousal support in order to determine whether an expense is extraordinary.

[213] I am satisfied that math tutoring meets L.'s particular needs (although no case was made for N. having any particular need of tutoring). However, the cost of the tutoring does not qualify as an extraordinary expense because, in my view, it can reasonably be covered by Ms. Kargl at the level of support she will receive from Mr. Fluckiger.

G. RRSPs and Excluded Assets

- [214] Mr. Fluckiger seeks an order that he be entitled to retain \$175,000 of his RRSPs and the remainder of the parties' RRSPs be equalized.
- [215] Mr. Fluckiger testified that he owned RRSPs before the parties began living together in August 1999. He also testified that all of his RRSPs were purchased with money from his parents. He could not recall the value of the RRSPs he owned in August 1999. The earliest statement he was able to produce is a CIBC Wood Gundy statement as of April 29, 2005, which shows an RRSP balance of \$176,122.12.
- [216] Section 85(1)(a) of the Family Law Act excludes property acquired by a spouse before the relationship between the spouses began. The burden of proving the continued existence of excluded property and its value at the beginning of the relationship rests on the spouse asserting the claim. The burden must be met with "clear and cogent evidence." When documentary evidence is not available, "the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties": *Shih v. Shih*, 2017 BCCA 37, at para. 42-44.
- [217] Here, there is no dispute Mr. Fluckiger owned RRSPs at the beginning of the relationship and at the separation. But there is no evidence of the value of his RRSPs between 1999 and 2005. I doubt the investments appreciated by just \$1,000 over the six years. I take judicial notice of the fact that the average stock market return is about 10% per year for nearly the last century.
- [218] Considering the limited available evidence, I would assign a value of \$125,000 to Mr. Fluckiger's excluded RRSP claim.

H. Bank Accounts and Line of Credit

- [219] Ms. Kargl seeks an order that Mr. Fluckiger make a payment of \$10,539.04 to equalize the balance in the parties' bank accounts on the date of separation.
- [220] The funds in the bank accounts existing on the date of separation were spent in the years following the separation. There is no evidence the funds were wasted or spent by Mr. Fluckiger exclusively on himself. On the evidence, the funds were most likely spent for various family purposes and benefitted both parties.
- [221] I agree with Mr. Fluckiger that, as a matter of general policy, it would be unwise to require a full accounting of personal bank accounts in circumstances such as these. Requiring an equalization as of the date of separation would encourage analysis of every transaction by the parties after they separated and increase the cost of family law litigation. I will make no order with respect to equalizing the bank account balances.

- [222] In October 2018, Ms. Kargl drew \$43,500 against the parties' joint line of credit at the Bank of Montreal. She later paid down that line of credit leaving an outstanding balance of \$10,000. I find that Ms. Kargl used these funds (the remaining balance of \$10,000) to pay down another line of credit in her name that she had used prior to the separation for family purposes. Essentially, she transformed a personal debt into a joint debt that I regard as family debt. Accordingly, the balance on the line of credit should be divided equally.
- [223] Mr. Fluckiger quite properly does not seek compensation for the minor additional interest expense the family incurred as a result of Ms. Kargl's transactions on the line of credit.

IV. CONCLUSION

- [224] Mr. Flickinger's current Guideline income is \$302,000 per year. Ms. Kargl's current Guideline income before child support is \$40,000 per year. The parties' incomes since separation are set out in the tables above.
- [225] I will ask counsel to calculate the the child and spousal support payments and retroactive support owing by Mr. Fluckiger. I will also ask counsel to calculate the percentage split of s. 7 expenses between the parties. If counsel cannot agree on these calculations, they may ask to appear before me at 9:00 am by teleconference.
- [226] The funds held in trust from the sale of the family home and the Pender Island property are to be divided on the basis Mr. Fluckiger will remain the owner of YVR (including Shelnick) and Ms. Kargl will remain the owner of Wee Dance. This leads to the following division:

Mr. Fluckiger

Ms. Kargl

Equal Division of net proceeds in trust (\$1,134,469.11 / 2)

\$567,234.55

\$567,234.55

Adjustment for Ms. Kargl's 50% interest in YVR (\$647,000 / 2)

(\$323,500)

\$323,500

Adjustment for Mr. Fluckiger's 50% interest in Wee Dance (\$5,000 / 2)

\$2,500

(\$2,500)

Distribution required

\$246,234.55

\$888,234.55

Interim advance to Ms. Kargl by consent order June 26, 2022

(\$700,000)

Final Distribution

\$246,234.55

\$188,234.55

[227] I would make the following order:

- a) Subject to s. 12 of the Divorce Act (Canada), Shelby Fraser Kargl and Agostino Paul Fluckiger, who were married on August 7, 2004, are divorced from each other. The divorce will take effect on the 31st day after the date of this order.
- b) The parties will remain joint guardians of the children.
- c) The remaining trust funds held by respondent's counsel will be disbursed as follows:
 - i. \$246,234.55 to Mr. Fluckiger; and
 - ii. \$188,234.55 to Ms. Kargl.
- d) Mr. Fluckiger is entitled to retain \$125,000 of his RRSPs. The remainder of the parties' RRSPs will be equalized as of the date of division.
- e) The parties' TFSAs will be equalized as of the date of division.
- f) The parties will each be responsible for 50% of the debt owing under the Bank of Montreal line of credit 2203-3361-096; otherwise, each party will be responsible for the debt in his or her name.
- g) Mr. Fluckiger will pay child support calculated based on the Guideline incomes in these reasons for judgment.
- h) Mr. Fluckiger will pay spousal support calculated based on the Guideline incomes in these reasons for judgment for an indefinite duration. There will be a review of spousal support no later than the end of June, 2029.
- i) Mr. Fluckiger will pay retroactive child support from November 7, 2019, based on the difference between the interim amount and the final amount in this order.
- j) Mr. Fluckiger will pay retroactive spousal support from November 7, 2019, based on the difference between the interim amount and the final amount in this order.
- k) Mr. Fluckiger will contribute to the children's orthodontic expenses and the amount owing to White Rock Christian Academy in accordance with s. 7 of the Guidelines.

- l) No other expenses will be considered special or extraordinary under s. 7 of the Guidelines unless agreed to by the parties in advance or by further Court order.
- m) The party incurring a special or extraordinary expense shall provide the other party with a receipt for reimbursement.
- n) Should Ms. Kargl wish to obtain life insurance on Mr. Fluckiger's life, Mr. Fluckiger will take all necessary steps and provide any information sought by the insurance provider, for so long as he is required to pay support to Ms. Kargl.
- o) Each party will be responsible for his or her own personal and business taxes and liabilities and will forever save the other party harmless.
- p) Except as provided in this order, the parties will retain the assets in his or her name, possession or control, without further claim by either party.
- q) Except for matters relating to the children, all other family law claims between the parties are dismissed.
- r) The parties may speak to costs of this action.

[228] I must thank the parties and their counsel for the manner in which this case was tried. Ms. Kargl and Mr. Fluckiger resolved the issues that could be resolved, and litigated those that could not with respect and civility in difficult circumstances. The case was argued by both counsel with skill and efficiency.

"Elwood J."

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