

CANADA / JUDGMENT

L.M. v. S.M.

2022 BCSC 477

COURT

Supreme Court of British Columbia

DECIDED

24 March 2022

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

2022 BCSC 477 L.M. v. S.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.M. v. S.M.

2022 BCSC 477

Date: 20220324

Docket: E181345

Registry: Vancouver

Between:

L.M. also known as L.P.

Claimant

And

S.M. and 782 BC Ltd.

Respondents

Before: The Honourable Justice D. MacDonald

Reasons for Judgment

The Claimant, appearing in person:

L.M.

The Respondent S.M., appearing in person and on behalf of the Respondent 782 BC Ltd.:

S.M.

Place and Dates of Trial:

Vancouver, B.C.

November 29-30,

December 1-3, 6-7, 2021 and January 14, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 24, 2022

TABLE OF CONTENTS

Overview.. 4

Background Facts and Chronology. 5

Credibility. 20

Legal Principles. 20

Analysis. 21

Financial Disclosure. 23

Legal Principles. 23

The Parties' Positions. 26

Analysis. 27

Imputation of Income. 29

Legal Principles. 29

The Parties' Positions. 32

Analysis. 32

Income Imputation for Under-Employment 32

Income Imputation on the Basis of Non-Disclosure. 34

Conclusion on S.M.'s Income. 36

Child support. 38

Legal Principles. 38

The Parties' Positions. 38

Analysis. 38

Special and Extraordinary Expenses. 39

Legal Principles. 39

Analysis. 40

Spousal support. 42

Legal Principles. 42

The Parties' Positions. 43

Analysis. 43

Retroactive Child Support, Spousal Support, and Section 7 Expenses. 44

Parenting Time. 45

Contempt. 45

Legal Principles. 45

The Parties' Positions. 47

Analysis. 47

Special Costs. 48

Legal Principles. 48

The Parties' Positions. 50

Analysis. 50

Communication App. 50

Legal Principles. 50

The Parties' Positions. 51

Analysis. 51

Divorce. 51

Summary of Orders. 51

Overview

[1] This is a high-conflict family law dispute between L.M., the claimant, and S.M., the respondent. I have anonymized the names in the style of cause and in the body of these Reasons because the parties have minor children. This anonymization is to protect the privacy of the children.

- [2] This is an extremely sad case. It speaks to why courts are often not the best place to resolve family issues. Both parties would have benefited from an early comprehensive settlement of their matters outside of court. Although the parties were able to settle a few issues before resorting to the courts, most attempts at mediation were unsuccessful.
- [3] The outstanding issues are:
- S.M.'s Guidelines income for support purposes;
 - prospective child support, spousal support, and s. 7 expenses;
 - retroactive child support, spousal support, and s. 7 expenses;
 - whether S.M. should pay a \$5,000 fine for non-disclosure of financial information;
 - whether S.M. should pay a \$5,000 fine for contempt of court;
 - whether S.M. should pay \$177,268 in special costs for full indemnity of L.M.'s legal fees; and
 - whether the parties should use the parenting application "Our Family Wizard" for their communications.
- [4] There were approximately 30 applications and court orders preceding this trial, all but one brought by L.M. This significant number of applications served to entrench the parties in their positions and exhausted their modest resources. The parties had very different versions of how things went wrong and there were numerous conflicts in the evidence. In addition, L.M. seeks orders that S.M. pay a \$5,000 fine for non-disclosure, a \$5,000 fine for contempt of court, and full indemnity costs to her. As such, an assessment of the parties' credibility is of the utmost importance in this case.
- [5] I note that throughout the process S.M. has been self-represented. L.M. was represented throughout the process involving the numerous applications, but she was self-represented at trial.

Background Facts and Chronology

- [6] The parties were married for approximately 18 years. There are two children of the marriage: a daughter born in 2006 and a son born in 2009. During the parties' marriage, L.M. was the primary caregiver for the children.
- [7] S.M. left school at the age of 12 and has been in the commercial fishing business since he was a teenager. He started his own fishing business when he was 17 years old, approximately 37 years ago.
- [8] The parties separated in February 2018, but continued to live in the same household until September 2018. Unfortunately, the situation deteriorated almost immediately. In May 2018, L.M. filed a without notice application alleging that S.M. was transferring funds and assets out of her reach. At trial, L.M. alleged that S.M. took \$40,000 out of the parties' joint bank account and put it into his business account. S.M. argued that the money was to pay for the

rental of a prawn license. He stated that he had explained this in detail to L.M. and her lawyer but that they would not accept his explanation. When it was put to L.M. in cross-examination that S.M. had told her that he had taken the money to pay a legitimate bill and was willing to show her the contract, L.M. testified that she did not recall.

- [9] On May 16, 2018, L.M. obtained a without notice court order restraining the disposition of family assets (the "Financial Restraining Order"). This resulted in S.M.'s bank accounts being frozen so that he was unable to access his funds. There was no provision in the order to allow S.M. to apply to set aside the order. In addition to having S.M.'s bank accounts frozen, L.M. took her 50% share of the money she alleged had been taken by S.M. (\$20,000) from cash that was in the parties' home.
- [10] L.M. conceded in cross-examination that S.M.'s withdrawal of \$40,000 from their joint bank account was why she took court action. She also conceded that her assertion that he was financially controlling was based on S.M.'s withdrawal of that \$40,000 and him reducing the limit on her credit card post-separation. However, the withdrawal of \$40,000 occurred at a time when L.M. asserts that S.M. had hundreds of thousands of dollars at his disposal. In my view, a withdrawal of \$40,000 in that context could not be viewed as the respondent transferring funds and assets out of L.M.'s reach as she suggested in testimony and argued in final submissions.
- [11] At a Judicial Case Conference ("JCC") in July 2018, L.M. took the position that S.M. was refusing to provide her with financial disclosure. S.M. did not appear at the JCC. L.M. testified that S.M. deliberately failed to attend the July 17, 2018 JCC. L.M. testified that S.M. was provided with the notice to appear and did not advise her or her counsel that he was unavailable. S.M. did not deny having received the notice to appear. However, S.M. testified that he wrote numerous emails to L.M. and her counsel advising them that he would be working in a remote location and would not be flying out until 2:00 pm on July 17, 2018. As a result, he could not attend a JCC on July 17. When this version of events was put to L.M. in cross-examination, she could not recall. Unfortunately, S.M. did not enter those emails into evidence. S.M. was self-represented at trial and he produced very few documents into evidence.
- [12] At this JCC, L.M. obtained an order stating that S.M. was to provide "complete financial disclosure from January 1, 2016 to present, to [L.M.] by 4pm on August 17, 2018 " (the "JCC Disclosure Order"). S.M. was to provide copies of each and every document he was ordered to disclose to L.M.'s legal counsel via email or delivery to the office of L.M.'s counsel.
- [13] Importantly, this JCC occurred at a time when the parties, although separated, continued to live together. L.M. agreed in cross-examination that she filed and organized S.M.'s business documents during their relationship. L.M. agreed that while the parties continued to live together, she had access to all the financial documents, which were in the filing cabinet in the parties' home office.

[14] In response to the JCC Disclosure Order, S.M. took the position that L.M. had full access to his financial documents as they were in the filing cabinets in the home they still shared. As a result, he did not photocopy, scan, and email the documents to L.M.'s lawyer, nor did he drop off photocopies to her office. Rather, S.M. advised L.M.'s lawyer that L.M. had access to the filing cabinet and the financial documents. For example, on June 19, 2018, S.M. wrote an email to L.M.'s counsel stating:

As I've stated many times, I will state again for the last time. All my financial records are in your client's office, 100% of them. There is nothing missing. I repeat, nothing. There is thousands of pages. I can't email them.

I will not let our family's modest resources get wasted on such a pointless cause. Your terrible advice to your client to have your staff scan all her documents was an unforgivable waste of money. She could have done it herself or she could've just handed them to me.

[15] S.M. testified that he is not comfortable with technology. He uses email but he does not engage in social media or conduct his business electronically. He does not scan documents. That said, it was inappropriate for S.M. to attack L.M.'s counsel; he should have applied to court to vary the order rather than simply writing emails to L.M. and her counsel. This did not assist in resolving issues.

[16] In September 2018, L.M. alleged that S.M. had threatened her. She obtained a without notice protection order (the "Protection Order") and S.M. was ordered to move out of the family home. As evidence of these threats at trial, I was provided only with L.M.'s word against S.M.'s and a picture of some tools that she testified he had waived around that evening. S.M. vehemently denies that he was violent or threatening. He argued and put to L.M. in cross-examination that he had tools out that evening to change the license plate on the vehicle he was transferring to L.M. He had already transferred the paperwork and needed to put new license plates on the vehicle.

[17] In cross-examination, S.M. put to L.M. that on the evening she alleges he was violent, she opened the windows and started screaming. He argued that she manipulated the situation to ensure that he had to leave the family home. While I need not resolve the issue as it is not before me, it provides some context to the relationship between the parties. Here is an exchange in the cross-examination of L.M.:

Q. Is it true that you actually opened all the doors and windows in our house, and started screaming at the top of your lungs, at me, and in actual fact, it was not me screaming? It was me sitting at the kitchen table, mystified of what exactly was happening? Is that-- is that exactly what happened, yes or no?

A. No.

Q. Why did you open all the doors and windows?

A. I possibly -- I don't remember opening doors and windows, and if I maybe opened the door or window, it was probably because I was scared and I wanted somebody else to hear.

[18] Opening the door or window because she was scared and wanted somebody else to hear strikes me as an odd response to the situation L.M. described.

[19] L.M. reported the matter to the police and the next day L.M. obtained the without notice Protection Order. S.M. had to leave the home immediately and was to have no contact with L.M. There were no allegations or evidence at trial of any physical violence before that date or after that date, although the Protection Order was extended the following year. However, there were a number of inappropriate emails and texts messages by S.M. to L.M. and her lawyer.

[20] After an application on October 11, 2018, L.M. obtained a further order for financial disclosure. This order stated that S.M. shall provide to L.M. by November 9, 2018:

- (a) a List of Documents as required by paragraph 6 of the July 17, 2018, JCC Disclosure Order; and
- (b) full financial disclosure as required by paragraph 7 of the JCC Disclosure Order, including all bank accounts, credit cards, loans, investments, and personal and corporate income tax returns held by S.M. or through his fishing business.

[21] The parties had another JCC on November 22, 2018. S.M. attended but was again not represented by counsel. At the JCC, S.M. consented to pay L.M. \$3,500 per month in child support and \$3,500 per month to L.M. for spousal support, both commencing on December 1, 2018. In return, L.M. agreed that the Financial Restraining Order freezing S.M.'s bank accounts would be "modified to unfreeze certain bank accounts to be agreed upon by the parties so as to provide for the Respondent and the Respondent's business to each conduct transactions through an operating bank account" (the "November 2018 JCC Order").

[22] Unfortunately, L.M. did not agree to unfreeze any bank accounts. S.M. testified that, as a result, he was unable to make the child support and spousal support payments to which he had agreed because he had no access to his bank accounts.

[23] There was lengthy testimony regarding why L.M. did not take steps to unfreeze S.M.'s bank accounts. First, L.M. testified that the TD Bank account was never frozen. S.M. agreed that his TD account was never frozen. However, the evidence established that the majority of S.M.'s savings were in his RBC accounts.

[24] L.M. testified that the RBC bank accounts were eventually unfrozen but it took "several months". When pressed in cross-examination, she stated that this was because she was concerned that the money was going to disappear. She again referred to the \$40,000 that S.M. took from the parties' joint account in or around May 2018.

- [25] When L.M. was asked why she did not follow the November 2018 JCC Order, to which she had agreed, and why the bank accounts remained frozen, L.M. stated that the Financial Restraining Order stated the parties had to agree on which accounts to unfreeze and they did not agree. She emphasized that the Order stated "agreed upon". L.M. also gave other reasons, unrelated to her agreement at the JCC, as to why she did not unfreeze the bank accounts. She stated that she eventually agreed to unfreeze the accounts, but she could not say when.
- [26] S.M. emphasized through his cross-examination of L.M., as well as his subsequent testimony, that he could not pay the \$7,000 per month in support to which he had agreed at the November 2018 JCC because he did not have access to his bank accounts. When this was put to L.M., her response was that S.M. was still making money and was not complying with the court order by failing to pay the \$7,000 per month.
- [27] On February 8, 2019, L.M. reported S.M. to the Family Maintenance Enforcement Program ("FMEP") for breaching his support obligations. In cross-examination, S.M. asked L.M. whether she believed it was fair to ignore a court order and subsequently accuse somebody of failing to pay child support even though they had no access to their bank accounts and no access to funds. L.M. responded that she did not know all S.M.'s accounts because he did not provide financial disclosure. Given that L.M. filed and organized S.M.'s business records during their relationship, I find it surprising that she would be unaware of his financial situation at least in a general sense.
- [28] L.M. agreed that she filed S.M.'s business documents in the filing cabinet but testified it was not her job to complete S.M.'s financial disclosure. She mentioned that she was unaware that S.M. had a Bank of Montréal account but that she found a chequebook from the Bank of Montréal in their home. I come back to that point later. L.M. also testified that there was \$20,000 in the TD bank account and S.M. had access to those funds in order to pay monthly support. I note that \$20,000 would not pay for three months of support at \$7,000 per month.
- [29] On October 18, 2019, long past the November 2018 JCC Order where L.M. agreed to unfreeze S.M.'s bank accounts, L.M. sought an order varying the May 2018 Financial Restraining Order. It is clear that almost a year later, the Financial Restraining Order was still intact and S.M. did not have access to his frozen bank accounts.
- [30] When L.M. was again pressed in cross-examination as to how much later S.M.'s bank accounts were unfrozen, L.M. testified that she did not know but that it was a "long time" later. This is in contradiction to her earlier statement in testimony that it took "several months". S.M. asked L.M. if she agreed that it was after February 8, 2019, and L.M. responded "I would say probably". The February 8, 2019 date is important because that is when L.M. reported S.M. to FMEP.
- [31] In cross-examination, L.M. was asked whether she remembered a long conversation between S.M. and L.M.'s lawyer where S.M. told counsel that all his money was in the frozen RBC accounts and he needed access to that money in order to pay the \$7,000 per month in

support. L.M.'s response was that she did not remember and "it was a long time ago". She stated that S.M. still was earning an income. L.M. further added that her law firm did not send her all the correspondence between S.M. and the law firm. Being unaware of what her lawyer was doing became a theme throughout L.M.'s testimony as to why she was unaware of certain issues.

- [32] I note that this time period was during the winter when S.M. testified there was not much fishing work. S.M. testified that he goes "months and months with no income".
- [33] In cross-examination, L.M. was asked if she agreed that at the time S.M.'s RBC bank accounts were ultimately unfrozen the balances were zero. L.M. responded that she did not have that information, she could not answer that question. L.M. would not agree that S.M. received none of the money from the RBC accounts. She stated that she did not know if there was any money left over because she did not remember that far back. She further stated that the money went to child support, spousal support, and counselling for the children.
- [34] I find that L.M. was evasive in her testimony as to when the bank accounts were unfrozen and why they were not unfrozen sooner. She was not forthcoming and had numerous memory lapses regarding this issue. She also would not admit that S.M. received none of the funds that had been seized, contrary to the evidence before me.
- [35] In February 2019, S.M. persuaded Justice Gomery to allow him to provide his financial documents in bulk to L.M.'s counsel. Although S.M. testified that he provided the documents in bulk to L.M.'s counsel, L.M. did not admit that she or her lawyers received the bulk documents. As I discuss later, I accept S.M.'s testimony that the documents were provided to L.M.'s lawyer in bulk.
- [36] Following the bulk delivery of documents, L.M. took the position that S.M. had hidden bank accounts that he was not disclosing. On July 9, 2019, L.M. applied for third-party disclosure.
- [37] L.M. testified that she did not trust that S.M. had provided her with all his financial information when he said everything was in the filing cabinet because of the Bank of Montréal cheque she found. She testified she was unaware of an account with the Bank of Montréal. She also thought S.M. had a secret CIBC account. She included G&F Financial in the request for third party disclosure because she saw a card for it in the family home. In cross-examination, S.M. put to L.M. that he did charity work with associations which had accounts at G&F Financial. He therefore had signing authority. L.M. agreed that she was aware of his charity work but she refused to agree that he had signing authority with G&F Financial. She stated she would "have to see the document". This was a standard response during L.M.'s cross-examination.
- [38] L.M. testified that she was only aware of the RBC bank account statements. Those were the accounts that were frozen. From earlier comments, she was also aware of the TD account which had \$20,000 in it.

- [39] L.M. agreed in cross-examination that at no time during the parties' relationship did S.M. instruct her to leave any documents out of the filing cabinet. S.M. questioned whether she remembered binders that were specifically labelled CIBC and Bank of Montréal. L.M. did not recall. L.M. was asked whether she recalled that during the parties' relationship S.M. possessed a CIBC Visa and a Bank of Montréal MasterCard. She did remember some credit cards but she did not remember bank accounts. She stated a cheque is a bank account, not a credit card. When questioned further, L.M. recalled CIBC Visa statements and Bank of Montréal MasterCard statements being mailed to their home address.
- [40] It took many questions for L.M. to concede that she was aware of these credit card statements and that she filed them in the filing cabinet. When asked to explain to the Court why she believed S.M. was hiding information about CIBC, G&F Financial, and the Bank of Montréal, L.M. answered that it was because S.M. had a balance of \$65,000 in a personal account that he opened just prior to leaving the home. When asked what bank account that was, L.M. stated it was an RBC account. The RBC accounts were frozen in May 2018. L.M. insisted that S.M. was hiding Bank of Montréal information. L.M. was asked what address was on the Bank of Montréal cheque and she admitted that it was the address of the family home. When S.M. questioned her as to why he would maintain a secret bank account yet have the statements sent to their home address, L.M. was unable to answer the question.
- [41] On July 9, 2019, L.M. obtained a broad order for third-party disclosure from four banks, a credit union, an investment company, and from S.M.'s business associates (the "Third-Party Disclosure Order"). The order included the Royal Bank of Canada, the Canadian Imperial Bank of Commerce, the Toronto Dominion Bank, the Bank of Montréal, G&F Financial Group, Interdium Investments Corp., John Skapski, Chris Thurgood, the Department of Fisheries and Oceans, and the Pacific Boat Brokers.
- [42] L.M. received little new information from the third-party disclosure. However, she continued to insist that S.M. was hiding money.
- [43] At trial, L.M. provided some of the records produced by the banks following the Third-Party Disclosure Order. L.M. testified that CIBC, the Bank of Montréal, and G&F Financial did not provide S.M.'s bank account statements. However, she admitted that CIBC and the Bank of Montréal produced S.M.'s credit card statements. She did not include those in her documents because she did not consider them relevant. L.M. maintained that these bank accounts existed and went so far as to suggest that two reputable banks and a credit union ignored court orders. In the context of being questioned about the Bank of Montréal, L.M. testified that the bank's failure to disclose S.M.'s bank account statements violated the Third-Party Disclosure Order. L.M. did not explain why she did not go back to court to enforce the order if it had been ignored.
- [44] S.M. testified that he received hundreds of emails from L.M.'s lawyers. He testified that the parties did not have a huge amount of money and he just wanted to sit down and negotiate a settlement and then move on. S.M. testified that no matter what he tried, L.M. and her

lawyers refused to negotiate. They sent him rambling emails that did not address the substantive issues. S.M. advised L.M.'s lawyers that he was incapable of negotiating over email because he was unrepresented, he was not educated, and he stopped attending school when he was 12. He could not discuss these complicated matters on paper. He said he was capable of negotiating in person if allowed to do so and he would accept the consequences. Unfortunately, apart from the November 2018 JCC, there were no in-person negotiations until August 2019 when there was an attempt at mediation before Peter Leask, Q.C.

- [45] At the August 2019 mediation, the parties came to a tentative settlement. The tentative agreement was not signed because S.M. was, by agreement, to first obtain legal advice. S.M. took the position that the mediation was based on a "fraud". As a result, the agreement was never signed.[1]
- [46] On September 19, 2019, L.M. made another without notice application. The Protection Order was renewed. I am unaware of why the order was extended as there was no evidence before me regarding this extension.
- [47] In December 2019 the parties again engaged in settlement discussions. S.M. negotiated directly with a different lawyer at the law firm that had been retained by L.M. rather than the lawyer who had previously been representing L.M. S.M. testified that he found this lawyer easier to deal with and they negotiated a settlement agreement (the "Settlement Agreement"). The parties agreed, *inter alia*:
- The family home would be sold. L.M. would receive the net proceeds, after various debts were paid.
 - S.M. would sell his primary fishing vessel. L.M. would keep the proceeds, after paying the loan owing to Interdium Corporation secured against the vessel.
 - S.M. would keep his two smaller boats and retain his fishing licenses.
 - S.M. would pay L.M. \$2,500 per month in child support.
 - Spousal support was temporarily suspended.
 - The FMEP arrears were to be cancelled.
 - L.M. agreed to vacate the Financial Restraining Order (which she had agreed to modify by unfreezing certain bank accounts in November 2018) using the forms required by the Court.
 - L.M. agreed to vacate the Protection Order using the forms required by the Court.
 - The parties were to review S.M.'s income in one year and decide what numbers would be used to determine spousal support and child support going forward.

- [48] S.M. testified that L.M.'s lawyer promised him that they were "done". S.M. therefore understood that the parties had resolved their issues. However, S.M. testified that the Protection Order was not rescinded. At trial, L.M. had no explanation for this. Further, the Financial Restraining Order was not vacated until another court order was issued on June 25, 2020.
- [49] S.M. did not immediately sell his primary fishing vessel. He testified that the Settlement Agreement did not specify a timeframe in which it was to be sold. He is technically correct that there was no specific date by which time the boat was to be sold. S.M. also testified that the COVID-19 pandemic prevented him from selling the fishing vessel. S.M. had a letter from his broker at Pacific Brokerages, Mr. Begman, saying it was unwise to sell the boat at that time due to COVID-19. S.M. explained that this was because Americans could not come across the border to view the vessel and therefore the market in which to sell the vessel was limited. S.M. advised L.M. and her lawyer that to get a proper price they should wait for the border to open.
- [50] L.M. took the position that American fishers could still cross the border. She testified that she had done a Google search that established that fishing was an essential service. In cross-examination, it was put to L.M. that even if fishing was an essential service, crossing the border to view a fishing vessel was not an essential service. L.M. did not accept this proposition and maintained that American fishers could cross the border at the time. There was no evidence before me to suggest that crossing the border to view a fishing vessel was considered an essential service for the purposes of COVID-19 restrictions.
- [51] L.M. argued that S.M. did not comply with L.M.'s attempts to list the family home. S.M. refused to sign the listing agreement and would not communicate with the realtor. L.M. testified that S.M.'s refusal to cooperate with listing the family home for sale forced her to apply to court to get an order for sole conduct of sale.
- [52] S.M. testified that he refused to sign the listing agreement and otherwise cooperate with the sale of the home because L.M. had failed to fulfill the promises she made in the December 2019 Settlement Agreement. He emphasized that L.M. had not vacated the Protection Order and she had not vacated the Financial Restraining Order.
- [53] S.M. testified that he and the second lawyer from L.M.'s lawyer's firm had some telephone calls after the December 2019 Settlement Agreement. During one of these phone calls, S.M. was advised that L.M. was going to go back to court to change the terms of the Settlement Agreement. S.M. viewed this as a betrayal.
- [54] The parties ended up back in court on August 27, 2020. It appears that L.M. was trying to get an order for sole conduct of the sale of the house. At the 2020 hearing S.M. advised he had not sold his fishing vessel. S.M. explained that there was a problem selling the fishing boat due to the COVID-19 pandemic and the closure of the American/Canadian border. At trial, S.M. argued that he could have gotten \$100,000 more for the sale of the fishing vessel if they had waited a few more months for the COVID protocols to be lifted. In August 2020 S.M. also

made the argument that L.M. had not rescinded the Protection Order as required by the Settlement Agreement. At trial, L.M. offered little in the way of an explanation as to why the Protection Order had not been rescinded despite agreeing to do so in December 2019. L.M. testified that she was uncomfortable seeing S.M. in person because of the "things that have happened with us". She also testified that she preferred it that way, which I assume meant she preferred the Protection Order in place.

- [55] S.M. testified about how difficult it was for him to have the Protection Order registered against him. Throughout his testimony, he maintained that he had not engaged in family violence.
- [56] The August 27, 2020 Order provided L.M. with conduct of sale of the family home. S.M. was ordered to immediately list his primary fishing vessel for sale for a price of no less than \$200,000 and not to sell it for under \$200,000 without the consent of L.M. The Protection Order was finally vacated, by court order, effective May 20, 2020.
- [57] L.M. listed the family home but S.M. did not sell his primary fishing vessel. At trial S.M. argued that due to COVID-19 restrictions he was having difficulties selling the vessel.
- [58] At some point, S.M. alleged that L.M.'s lawyers sent a package to his clients and business associates in which he was referred to as a "deadbeat dad". This version of events was denied by L.M. and it was not proven at trial. S.M. did not put the package into evidence and he did not have a witness testify that such a package was received.
- [59] The parties returned to court on January 21 and 22, 2021 before Justice Fitzpatrick. S.M.'s fishing vessel had not yet been sold. S.M. advised the Court that he had received an offer to purchase the boat for \$175,000 from Mr. Duncan Cameron. S.M. testified that at this hearing before Justice Fitzpatrick L.M. took the position that Mr. Cameron was a former deckhand employee of S.M.'s and suggested that there was a conspiracy between S.M. and Mr. Cameron to sell the fishing boat for less than it was worth.
- [60] S.M. put to L.M. in cross-examination that she had taken such a position in January 2021, i.e. that she had suggested a conspiracy. L.M. could not recall. When asked if S.M.'s relationship with Mr. Cameron was extensively discussed at that hearing before Justice Fitzpatrick, L.M. stated that she did not recall. L.M. was unable to articulate how she knew Mr. Cameron was S.M.'s former employee. She testified that she recognized Mr. Cameron and remembered meeting him many years ago. L.M. testified that she still believes the information to be true and did not believe she was perjuring herself. When L.M. was asked why she testified that Mr. Cameron was S.M.'s former employee if she was not sure, L.M. responded that she believed Mr. Cameron fished on S.M.'s boat and that she met him several times when the parties' son was young. L.M. stated that if she was mistaken, she "retracts her evidence".
- [61] Unfortunately, the transcripts of the hearing before Justice Fitzpatrick were not before me. However, I find that it is likely that L.M. alleged such a conspiracy because L.M. continued to allege wrong-doing in her final arguments at trial. As she stated:

Rather than allow the [fishing vessel] to be exposed to the market and sell for its fair market value, the Respondent unilaterally sold the [fishing vessel] in a hand-shake deal for \$175,000. This was in violation of the court order made on August 27, 2020, which required the boat to be sold for no less than \$200,000. Even though the Respondent had no claim in the [fishing vessel] under our Agreement, he was clearly attempting to sell the vessel without my knowledge, likely in an attempt to retain the profits for himself. The result was at least a \$25,000 loss for me.

- [62] L.M. had no proof that Mr. Cameron was S.M.'s former deckhand. Further, L.M. was unable to provide any foundation for her allegation that S.M. and Mr. Cameron were attempting to sell his primary fishing vessel for less than \$200,000 or less than it was worth.
- [63] S.M. argued there was no conspiracy and stated that Mr. Cameron's offer was the only offer that came forward. He acknowledged that the offer was for less than \$200,000 but stated that he was unable to access the American market and that made it difficult to find a buyer. S.M. did not sell the vessel for less than \$200,000; he simply informed the court he had an offer for \$175,000 from Mr. Cameron.
- [64] Justice Fitzpatrick ordered that L.M. was to have conduct of sale of S.M.'s fishing vessel. L.M. ultimately sold the vessel to Mr. Cameron for \$175,000 so I assume she also could not find another buyer. Justice Fitzpatrick ordered that S.M. pay \$2,500 in child support and \$2,500 in spousal support. She ordered arrears in s. 7 expenses of \$6,334.22. Going forward, s. 7 expenses were to be shared equally.
- [65] Following Justice Fitzpatrick's order, S.M. paid child support but he did not pay spousal support. He testified that he did not pay the ordered spousal support because he had recently paid \$20,000 on L.M.'s behalf for the mortgage payment arrears on the family home. He put to L.M. in cross-examination that she had not made mortgage payments and the mortgage was in default. She agreed. S.M. also questioned L.M. about her refusal to sign mortgage renewal papers resulting in an increase in the interest rate from approximately three percent to seven and-a-half percent. S.M. put to L.M. that this increased the monthly payment by over \$1,000 per month. L.M. agreed.
- [66] S.M. testified that the \$20,000 he paid in mortgage arrears was worth more than the spousal support payments. S.M. also stated in argument that he received no benefit from the mortgage payments because the proceeds from the sale of the family home went entirely to L.M.
- [67] The evidence established that L.M. would receive the proceeds once the home sold. There was no benefit to S.M. to pay the \$20,000 except to help his family. L.M. agreed that S.M. paid the \$20,000 toward the mortgage, but viewed it as a separate issue from spousal support. Instead of giving S.M. any credit for this payment, L.M. again reported him to FMEP.

Credibility

Legal Principles

[68] The assessment of a witness's credibility involves a consideration of the trustworthiness of the witness's testimony based on their sincerity and the accuracy of their evidence. Ultimately, the validity of the evidence depends on whether it is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.

[69] In *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, *aff'd* 2014 BCCA 414, Justice Adair helpfully articulated a number of factors that affect the assessment of credibility. These factors include:

- the witness's ability and opportunity to observe events;
- the firmness of the witness's memory;
- the witness's ability to resist the influence of interest to modify his or her recollection;
- whether the witness's evidence harmonizes with independent evidence that has been accepted;
- whether the witness changes his or her testimony during direct and cross-examination;
- whether the witness's testimony seems unreasonable, impossible, or unlikely;
- whether a witness has a motive to lie; and
- the demeanour of a witness generally.

[70] As stated in the leading case *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, [1952] 4 W.W.R. 171 (B.C.C.A.), the test of the truth of a party's testimony is its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the circumstances.

Analysis

[71] L.M. was visibly stressed when she testified. She indicated that coming to court makes her nervous and she mentioned that being cross-examined by S.M. made her uncomfortable. That was not surprising. Litigation is stressful, particularly when a party is self-represented.

[72] Even accounting for these factors, I had some trouble with the claimant's testimony. I have made a number of comments about L.M.'s conduct throughout this litigation. I found she had a particular narrative to which she clung. At times L.M. could not remember details that appeared to be against her interests. L.M. also had great difficulty admitting any error in judgment.

- [73] There was a notable difference between her evidence in direct-examination and her evidence in cross-examination. L.M.'s examination-in-chief had a rehearsed quality to it. My impression was that she was well prepared. However, in cross-examination L.M. often became evasive and often lacked memory. Rather than answer the questions put to her, L.M. often gave lengthy answers that did not respond to the question. At times she had to be asked by the Court to answer the question put to her.
- [74] I find that L.M.'s testimony on some critical points was influenced by self-interest. It serves no purpose to cite every inconsistency or difficulty with memory but I do provide illustrative examples. I will address other areas of evidence where I found the claimant's answers to be problematic in my analysis.
- [75] The respondent, by contrast, was largely consistent between his direct examination and his cross-examination. Nevertheless, S.M.'s behaviour throughout this litigation has also been less than ideal. For example, S.M. sent multiple emails to L.M. and to her lawyers using highly inappropriate language. The emails were volatile at times. During the trial, S.M. was emotional and angry at times. He often raised his voice when cross-examining L.M. It was clear that he was frustrated by the legal process and distraught by the fact that his family had been torn apart, his reputation had been undermined, and he and his family were, by the end of the process, financially destitute. He blamed L.M. and her lawyers for the parties' current predicament. That said, S.M. was willing to admit where he had made mistakes and he was willing to point out some of L.M.'s strengths.
- [76] S.M. largely ignored the court process. He used self-help tactics rather than coming to court to enforce his rights. For example, early on, he did not apply to court to vary the financial disclosure orders. He simply took the position that L.M. had access to all the documents. He did not facilitate the sale of the family home, forcing L.M. to go to court to get conduct of sale. He also did not initiate a court proceeding to explain why he could not sell the fishing vessel during COVID.
- [77] S.M.'s evidence was not significantly undermined in cross-examination. He admitted to using colourful language in his email correspondence with L.M. and her lawyers. However, he denied that he engaged in harassment.
- [78] I found S.M. to be a credible witness. On a number of points his evidence was borne out by other evidence. However, his actions in ignoring the legal process, combined with his inappropriate communication style, did not assist the parties in resolving their issues.
- [79] In the approximately 30 applications prior to trial, L.M. was largely successful. These applications presented a particular narrative of the parties' family dispute through affidavit evidence without the benefit of cross-examination. In addition, S.M. often did not participate. At trial, the robust cross-examination of L.M. largely painted a different picture than the narrative provided by L.M. and her counsel in the years leading up to trial. In my view, this speaks to the truth-seeking function of cross-examination.

[80] With these background facts and findings of credibility, I turn to the analysis.

Financial Disclosure

Legal Principles

[81] The Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] require full disclosure from parties in a family law dispute. Rule 5-1 requires that any person who is claiming child support and/or spousal support under the Family Law Act, S.B.C. 2011, c. 25 [FLA], or against whom child support and/or spousal support is claimed, must complete financial disclosure by filing a sworn Form F8 financial statement.

[82] Rule 9-1 governs each party's obligation to list and produce documents. It requires the parties to prepare a list of documents that includes all documents that could be used by any party at trial to prove or disprove a material fact and which are or have been in the party's possession or control. The parties must also list any documents they intend to refer to at trial.

[83] Section 21(1) of the Federal Child Support Guidelines, SOR 97/175 [Guidelines], outlines the disclosure requirements in child support matters. This section specifies that a spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order, must disclose the following:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (f) where the spouse controls a corporation, for its three most recent taxation years
- (i) the financial statements of the corporation and its subsidiaries, and
- (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

[84] Section 21(2) of the Guidelines requires a person who is served with an application for a child support order to provide these documents within 30 days.

[85] Where a party to a family dispute fails to comply with financial disclosure obligations, the FLA and the Rules provide certain mechanisms to the court. Rule 5-1(28) provides that if a party fails to comply with a requirement to file a Form F8 financial statement, or any applicable income document, the court may:

- (a) order that the Form F8 financial statement, applicable income document or particulars, as the case may be, be filed or served or both on terms the court considers appropriate;
- (b) dismiss all or part of that party's claim or application;
- (c) strike out all or part of that party's response to family claim or response to counterclaim;

- (d) proceed under Rule 21-7 to punish the party for contempt of court;
- (e) impose a fine under section 213(2)(d)(iii) of the Family Law Act;
- (f) draw an adverse inference against the party;
- (g) attribute income to that party in an amount the court considers appropriate;
- (h) make an order as to costs.

[86] Section 213 of the FLA further provides that if a person fails to comply with an order for disclosure or a requirement to disclose information under the Rules, the court may do one or more of the following:

- (b) draw an inference that is adverse to the person, including attributing income to that person in an amount that the court considers appropriate, and make an order based on the inference;
- (d) make an order requiring the person described in subsection (1) to pay
 - (i) a party for all or part of the expenses reasonably and necessarily incurred as a result of the non-disclosure of information or the incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5000 to or for the benefit of a party, or a spouse or child whose interests were affected by the non-disclosure of information or the incomplete, false or misleading disclosure, or
 - (iii) a fine not exceeding \$5000;
- (e) make any other order the court considers appropriate.

[87] There has been strong judicial commentary regarding financial non-disclosure in family litigation. In *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 at para. 9, 1994 CanLII 3195 (S.C.), Justice Fraser called the non-disclosure of assets "the cancer of matrimonial property litigation". He noted that non-disclosure "discourages settlement, increases the time and expense of litigation [and] has a tendency to deprive children of proper support": at para. 9. These statements by Fraser J. have been cited with approval by the Supreme Court of Canada in *Leskun v. Leskun*, 2006 SCC 25 at para. 34, and, more recently, in *Michel v. Graydon*, 2020 SCC 24 at para. 33.

[88] In *J.D.G. v. J.J.V.*, 2013 BCSC 1274, Justice Punnett reviewed the jurisprudence where fines were sought under s. 92(1) of the Family Relations Act, R.S.B.C. 1996, c. 128, the predecessor to s. 213 of the FLA:

[14] A review of those reported decisions where s. 92 orders have been made reveals the following:

- a) where the defaulting party on an interim application provides an explanation that is accepted by the court, such as their belief that they had met their obligation when they authorized the release of information by their accountant, an order may not be made (*Sathanielle v. Sathanielle*, 2010 BCSC 815);
 - b) where the defaulting party has been emotionally incapacitated an order may not be made (*Sathanielle*);
 - c) if the defaulting party is shown to be well aware of the required disclosure and has failed to comply or simply ignored the requests for information a s. 92 penalty may be ordered (*Sexsmith v. Sexsmith*, 2001 BCSC 606 -- a penalty of \$500.00 imposed);
 - d) where an order for production has been made and ignored a s. 92 payment will be ordered (*C.W. v. J.T.S.*, 2003 BCPC 366 -- disclosure ordered over three times -- fine of \$2,000);
 - e) where there has been a "flagrant disregard" of the court process a s. 92 penalty will be imposed (*P.V. v. D.B.*, 2007 BCSC 237 -- fine of \$5,000);
 - f) where there has been an unexplained failure to disclose coupled with a delay in production of incomplete materials a s. 92 order will be made (*S.B.C. v. M.A.C.*, 2004 BCSC 1558 -- fine of \$5,000);
 - g) where disclosure is deficient such as inadequate disclosure of assets on a form 89 financial statement and a failure to provide updated RRSP and investment account statements there should be rebuke by the court (*T.D.B. v. L.B.*, 2004 BCSC 605 -- fine of \$3,000);
 - h) an order may not be made where despite a failure to disclose, the court had sufficient information to, for example, determine income without the information sought (*L.B. v. B.C.B.*, 2003 BCSC 1564).
- [89] In *J.D.G.*, the claimant made financial disclosure before the hearing, but 124 days after the date required by the Rules. Justice Punnett imposed a fine of \$500 payable to the respondent.

The Parties' Positions

- [90] L.M. argued that I should fine S.M. \$5,000 for non-disclosure since he has been in violation of court orders for financial disclosure. L.M. argued that S.M. never provided any financial disclosure until he provided an incomplete Form F8 financial statement in September 2021.
- [91] S.M. takes the position that L.M. had access to all his financial records while the parties continued to live together, that he provided financial disclosure when he provided the bulk documents in February 2019, and that he also filed his Form F8 financial statement on September 20, 2021. He argues he provided financial disclosure.

Analysis

- [92] For the reasons that follow, I find that there is no evidence to support a fine against S.M. for non-disclosure of his financial records.
- [93] As I already stated in a procedural oral ruling during trial, there were approximately 30 orders, mostly against S.M., prior to trial. I reviewed over 25 substantive orders. The number of orders for financial disclosure at the beginning of this litigation were as follows:
- a) An order following a JCC on July 17, 2018 (Justice Gropper);
 - b) An order following an application on October 11, 2018 (Master Muir);
 - c) An order following a JCC on November 22, 2018 (Justice Burke); and
 - d) An order following an application on February 8, 2019 (Justice Gomery).
- [94] There were also two additional orders in July 2019 which were for third-party disclosure, not disclosure from S.M.
- [95] Prior to any of the above orders, on May 16, 2018 L.M. obtained the Financial Restraining Order. This Order prohibited S.M. from disposing of, transferring, dissipating, converting, or exchanging into another form any property at issue in the proceeding including, but not limited to, bank accounts, investment accounts, vehicles, RRSPs, and his fishing business. The parties had separated shortly before this Order but were still living in the same household.
- [96] L.M. admitted that during the parties' relationship she was responsible for filing and organizing S.M.'s financial records and documents for his fishing business. As such, L.M. not only knew what S.M.'s financial picture was at the time of separation, she had access to all his files as they were stored in the family home where both parties were living at the time.
- [97] When they were still residing in the same home, S.M. told L.M. and her lawyers that L.M. had full access to his financial records. They were in the filing cabinets of the family home office.
- [98] L.M. emphasized that S.M. took all the records when he left the home. S.M. left the home after L.M. obtained the Protection Order on September 18, 2018 which restrained S.M. from attending at, nearing, or entering the property where the parties lived. I assume he was allowed to enter the premises to remove his possessions and he took his business and financial records with him.

- [199] L.M. had full access to the financial records before September 18, 2018. Yet she obtained a without notice Financial Restraining Order and an order for financial disclosure in July 2018. She testified she did so because she believed S.M. was hiding money. There was nothing in the evidence to indicate that S.M. was ever hiding financial information from L.M. The third-party financial disclosure ordered by Master Harper in July 2019 produced no evidence that S.M. was hiding bank accounts or assets.
- [100] In the February 8, 2019 Order, Justice Gomery ordered "documents from the respondent to be provided in bulk by delivery to the office of counsel for the claimant by February 15, 2019". S.M. testified that he did so; he dropped boxes of his financial documents off at L.M.'s lawyer's office. S.M. testified that the law firm much later asked him to pick up the boxes which he did.
- [101] In cross-examination L.M. stated that she did not believe that S.M. delivered the documents to her lawyer's office in legal boxes. When further pushed, L.M. testified that she did not know if S.M. had delivered his financial documents to her lawyer's office. She stated the only financial disclosure of which she was aware were three sheets of bank statements. She again stated she did not know if the documents were delivered.
- [102] From the evidence, I accept that S.M. delivered the boxes of financial records to comply with the order for financial disclosure in bulk. I base this finding on L.M. saying she did not know, my findings regarding credibility, and the fact that there were no further applications for financial disclosure, except the application for third-party disclosure, until September 13, 2021. The September 2021 application was at a Trial Management Conference. It was not the result of a formal application.
- [103] At the Trial Management Conference on September 13, 2021, both parties were ordered to file a completed Form F8 financial statement by September 22, 2021. S.M. filed his Form F8 financial statement on September 20, 2021, although it did not include the underlying source documents. S.M. should have attached supporting financial documents to his F8. However, no application was made by L.M. pursuant to Rule 5-1 for further particulars.
- [104] Despite inadequate disclosure of his financial records in September 2021, I do not find that S.M. engaged in the type of behaviour requiring a fine pursuant to s. 213(2)(d)(iii) of the FLA. As in J.D.G., I accept that S.M. believed he had satisfied his obligation to disclose financial information when he provided his documents in bulk to L.M.'s counsel and when he filed his F8 in September 2021. Based on these facts, there was no "flagrant disregard" of the court process by S.M.: J.D.G. The facts do not support S.M. being penalized for his conduct.

Imputation of Income

Legal Principles

- [105] It is well established that the most current information regarding a party's income should be used when calculating support: *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263, CanLII 4073 (S.C.). Parties have a statutory obligation to provide disclosure: FLA, s. 5(1).
- [106] As stated above, the Guidelines set out what financial information is required and what the legal consequences are if the financial information is not provided. Section 21(1) and (2) of the Guidelines provide disclosure obligations for spouses who are applying for child support orders and who are served with an application for child support.
- [107] In *Vincent v. Vincent*, 2012 BCCA 186, the Court of Appeal outlined the steps to be taken when considering the exceptions set out in ss. 17-20 of the Guidelines and how they apply to determine Guidelines income:
- [35] All determinations of child support begin with finding the spouse's Line 150 income, a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions apply, and, if so, what effect they should be given on the facts of the case.
- [36] Section 17 gives the court discretion to deal with the problem of an income which fluctuates from year to year and with non-recurring income or losses such that the determination of a spouse's income under s. 16 is not the fairest determination of that income.
- [37] Section 18 provides discretion to deal with the situation where a spouse is in a position to manipulate income in his or her capacity as shareholder, director or officer of a corporation, such that a person's income under s. 16 does not fairly reflect all the money available to that spouse for the payment of child support. It permits the inclusion of pre-tax corporate income and benefits paid to non-arm's length persons.
- [38] Section 19 addresses situations where the spouse's disclosed income does not fairly reflect what should be paid in child support by permitting imputation of income. It permits the imputation of income in a variety of situations, including income which is tax exempt, under-utilized capital investments, and when there is a failure to provide income information.
- [108] This Court is not bound to accept a party's declared income for income tax purposes as the income on which to determine support obligations. The "task of the court is to determine what money is fairly available to support the children of the marriage": *Younger v. Younger*, 2017 BCSC 363 at para. 25.
- [109] Parents are obligated by statute to provide for their children to the extent that they are capable of doing so: Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], s. 26.1(2). Where the court finds that a spouse is intentionally under-employed or unemployed, s. 19(1)(a) of the Guidelines provides that the court may impute an amount of income to a spouse that it

considers appropriate in the circumstances. Rule 5-1(28) of the Rules also allows the court to draw an adverse inference or impute income to a party who has failed to provide a Form F8 financial statement and required attachments in the amount the court considers appropriate.

- [110] These statutory authorities allow the court to use all available evidence, including circumstantial evidence, to determine the income of a non-disclosing party at an amount it considers appropriate. The court may do so even where there is little evidence from which to make a determination. This principle was set out by the Court of Appeal in *Poursadeghian v. Hashemi-Dahaj*, 2010 BCCA 453:
- [23] In the absence of complete income tax returns and other financial information of a spouse the court must look to other evidence, including circumstantial evidence, for the purpose of imputing income, *A.G. v. B.R.*, 2005 BCSC 96 at para. 57.
- [24] The judge relied on the little evidence available concerning the defendant's ability to obtain a mortgage and his shareholding in Lucky 9, to impute an income of \$75,000. She did not accept the explanation offered for the defendant's shareholding in Lucky 9 or for the basis on which he obtained a mortgage on his home.
- [25] There was some evidence to support that conclusion and the judge was permitted to draw an adverse inference against the defendant because of his inadequate disclosure. The defendant cannot be heard to dispute the level of income attributed to him, nor permitted to escape his support obligations because of his failure [to] adequately disclose income information.
- [111] *Drygala v. Pauli* (2002), 61 O.R. (3d) 711, 219 D.L.R. (4th) 319 (O.N.C.A.) is a leading case addressing income imputation under s. 19(1)(a) of the Guidelines. It sets out three questions that the court should consider when deciding whether to impute income to a spouse:
- a) Is the spouse intentionally under-employed or unemployed?
 - b) If so, is the spouse's intentional under-employment or unemployment required by virtue of the spouse's reasonable educational or health needs or the needs of a child of the marriage?
 - c) If not, what income is appropriately imputed in the circumstances?
- [112] A spouse is intentionally under-employed where they choose to earn less than what they are capable of earning: *Drygala* at para. 28. It is not necessary that the spouse be under-employed with the intent of avoiding support obligations.
- [113] Where a party's income is difficult to determine due to inadequate disclosure, they must bear the consequences. As found in *S.K.R. v. K.S.R.*, 2015 BCSC 914, it is not the court's role to "ferret out" the necessary information in the face of inadequate and confusing disclosure.

The Parties' Positions

- [114] L.M. argues I should impute an annual income of \$350,000 to S.M. based on the fact that he has not disclosed his current income. L.M. bases this figure on S.M.'s income when they were married. L.M. states that S.M. had a gross income of \$787,512 in 2015 and a net income of \$425,068. L.M. estimates such a high income based in part on her assertion that S.M. works largely for cash which he does not report to the Canada Revenue Agency (the "CRA").
- [115] S.M. denied that he does not report his cash income. While he made decent money when the parties were together, S.M. argues that L.M.'s tactics, especially her reporting him repeatedly to FMEP, has destroyed his credit rating and has undermined his business. He argued that when his fishing vessel was sold, he lost his main source of income. He depended on that boat for his livelihood. S.M. also testified and put in documentary evidence showing that his prawn license was suspended for a year which means that this short, but lucrative, season will not be available to him in the spring of 2022.
- [116] Given the loss of his prawn licence for the upcoming year, the sale of his primary fishing vessel, his destroyed credit rating, and the decreased opportunities to fish, S.M. argues he has an income of only \$70,000.

Analysis

Income Imputation for Under-Employment

- [117] The courts have held that a spouse is intentionally under-employed where they choose to earn less than what they are capable of earning: *Drygala* at para. 28.
- [118] I accept that when S.M.'s fishing vessel was sold he lost his main source of income. He depended on that boat for his livelihood. I further accept that S.M.'s income for the upcoming year will be lower than usual given the loss of his prawn license and his inability to partake in the lucrative prawn season. Lastly, I accept that as a result of his bank accounts being frozen and S.M. being reported to FMEP, S.M.'s credit rating is poor which has undermined his business.
- [119] L.M. argues that S.M.'s loss of his prawn license was due to his own actions. She argues I should impute income to S.M. on the grounds that he is intentionally under-employed. L.M. relies on *Rogers v. Rogers*, 2013 ONSC 1997. In *Rogers*, Justice Pazaratz found that the payor's loss of employment and resulting reduction in income was a function of his own intentional conduct. He repeatedly broke the law when he knew this could result in him losing his job and undermining his earning potential. As Justice Pazaratz explained:

[51] [I]n the Applicant's case, there is no uncertainty as to cause and effect. He may not have quit his job. But he created and controlled the circumstances under which his job was terminated. He made conscious decisions to do things - illegal things - with the full knowledge that his reckless and anti-social behaviour would make him unavailable (let alone, unacceptable) for employment. The net result is the same as if he'd handed in his resignation.

[emphasis in original.]

[120] I find that the case at hand can be distinguished from the circumstances of Rogers. In Rogers, the applicant had "lived an irresponsible life for many years", flouted the law, and had accumulated a number of convictions under the Criminal Code, R.S.C. 1985, c. C-46: at para. 10. There was a repeated pattern of illegal activity leading up to the applicant's loss of employment.

[121] No such pattern exists here. The evidence established one single criminal conviction leading to the loss of S.M.'s prawn licence. Moreover, the conduct which led to the conviction occurred while the parties were still together. I do not find that S.M. "created and controlled the circumstances" under which his prawn fishing licence was removed as was the case in Rogers. There was no evidence before me that S.M. is intentionally under-employed. Given the timing, there is no evidence that S.M. was attempting to avoid his child support or spousal support obligations.

[122] I decline to impute income on this basis.

Income Imputation on the Basis of Non-Disclosure

[123] It is S.M.'s failure to provide full financial disclosure that provides a basis to impute income to him. The onus was on S.M. to provide his financial documents. Although S.M. filed his Form F8 financial statement on September 20, 2021, it was incomplete given that he did not include any attachments to show the sources of his income. While I did not find that his non-disclosure rose to the level that I should impose a fine on S.M., he has not filed tax returns since 2014, making it extremely difficult to determine his annual income. Since I do not have sufficient financial disclosure, I must determine S.M.'s income based on the documents entered into evidence and the testimony of S.M. and L.M.

[124] L.M. submits that S.M.'s historical income level warrants imputing an income of \$350,000 to the respondent.

[125] In order to prove S.M.'s income at trial, L.M. relied on S.M.'s incomplete tax statements between 2013 and 2015. S.M.'s Income Tax Return Information Sheet for 2013 shows gross fishing income of \$454,886 as well as \$9,619 in employment insurance. However, on this 2013 statement S.M.'s Line 150 income is listed as being only \$160. S.M.'s Income Tax Return Information Sheet for 2014 shows gross fishing income of \$472,032. However, after expenses and other deductions, S.M.'s Line 150 income on this 2014 tax statement is listed

as \$-519.

- [126] L.M. argues that in the past S.M. had a much higher income than what is reflected in his financial statements. The claimant argues that the respondent has historically worked for cash which he did not report to the CRA. She claims S.M. had a gross income of \$400,000 in 2015, which did not account for the respondent's approximately \$128,000 in annual undeclared cash sales. L.M. also submitted into evidence a GST/HST Net File confirmation from the CRA for the reporting period of January 1, 2015 to December 31, 2015, which states that S.M. had an income of \$408,350. No income tax returns are attached but this is largely consistent with S.M.'s bookkeeper's findings regarding 2015 as set out in an email to S.M. and L.M. dated May 25, 2018.
- [127] Given the incomplete documents and the significant discrepancies between S.M.'s gross and Line 150 incomes in the adduced tax documents, it is virtually impossible to determine what S.M.'s Guidelines income was from 2013 to 2015.
- [128] L.M. submitted photocopies of cash sales for 2017 and 2018 which she contends did not include any sales collected by S.M.'s Square Credit Card reader. I am unaware of how common Square Credit Card sales were in 2017 and 2018 and there was no evidence regarding this before me. L.M. also adduced into evidence numerous Excel spreadsheets she made estimating S.M.'s income in 2017 and 2018.[2] These spreadsheets were created based on amounts L.M. found in S.M.'s business cash record book and other cash slips L.M. found in the parties' home. L.M. contends that S.M. has failed to report these cash sales to the CRA.
- [129] I must determine if the annual income a party reports on their T1 tax return fairly reflects all the money available to them for payment of child support. Where a party retains cash earnings without reporting them to the CRA, the party's Line 150 income may not be an accurate representation of the income they have available to them for child support. Further, where a party owns a business, as is the case here, the court must examine whether the party unreasonably deducts expenses from income.
- [130] The reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). Where there is a lack of evidence disclosed about a party's finances for the purposes of determining their income, such as a lack of explanation of the reasonableness of expenses, the court must employ common sense in analyzing the financial information: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 150.
- [131] I find that the documents upon which L.M. relies are an unreliable means by which to determine S.M.'s income. Without the benefit of S.M.'s complete tax returns and assessments, these cash slips are taken out of context and do not give the full picture of S.M.'s business income. Although S.M. may have received these amounts in cash, there is no evidence about the business expenses incurred in doing so. I accept that S.M. is wholly behind in filing his tax returns. However, I cannot say he would not declare the cash sales

since he reports a high income in his earlier tax returns that likely included his cash sales. I find that this claim is not proven on the evidence.

[132] Further, despite L.M.'s allegations of such, I have found no evidence that S.M. was trying to avoid paying child support by diverting income or failing to disclose financial information: *Murphy v. Murphy*, 2000 BCSC 974 at para. 11. Despite third-party disclosure, there was no evidence that S.M. was hiding bank accounts or investments.

[133] Given that S.M. did not provide sufficient financial disclosure, I do not have reliable information regarding S.M.'s income over the last three years. L.M.'s estimates are overstated, especially when viewed in light of S.M.'s current circumstances.

Conclusion on S.M.'s Income

[134] I accept that S.M. was making a decent income before separation although it was not necessarily reflected in his Line 150 income. However, the evidence at trial established that S.M.'s earnings have declined due to:

- the loss of his prawn licence;
- the sale of his primary fishing vessel;
- his destroyed credit rating; and
- the downturn in the fishing industry.

[135] Based on these circumstances, it is not reasonable to impute an income of \$350,000 to him. Nonetheless, S.M.'s lack of financial disclosure makes it impossible for me to accept that he only makes \$70,000. Instead, based on L.M.'s evidence, as well as the evidence that S.M.'s earnings have declined, I impute income between January 1, 2021 and December 31, 2023 of \$150,000 to S.M.

[136] S.M. testified that he is hardworking and resourceful. This is apparent in the fact that he built a successful business despite his limited education and resources. S.M. testified that due to his new circumstances he will need to find another source of income and he intends to do so. As a result, I find that it is reasonable that S.M.'s income will somewhat recover after his year without a prawn licence. I conclude that it is reasonable to impute income to S.M. from January 1, 2024 going forward in the amount of \$250,000. This provides S.M. with some time to find other employment opportunities to earn more income.

[137] If S.M. disputes his prospective imputed income of \$250,000 he may apply for a review prior to January 1, 2024. If S.M. applies for a review, I expect proper financial disclosure including complete tax returns for him personally and for his business or businesses. If S.M. intends to review his prospective imputed income, he must complete his tax filing from 2015 to the date of review. If S.M. applies to undertake this review without having made the appropriate tax filings, I will be unable to adjust his income.

[138] L.M. may also apply for a review at this time if she believes the income of \$250,000 is too low. She will also need to disclose her current financial records.

[139] Subject to Scheduling, I will remain seized of an application filed by either party to adjust their Guidelines income.

Child support

Legal Principles

[140] The parties agree that child support should be paid in accordance with the Guidelines. As such, there is no need for me to set out the legal principles in detail.

[141] Briefly, child support orders are made under either s. 149 of the FLA or s. 15.1 of the DA. Both the DA and the FLA provide that child support must be calculated in accordance with the Guidelines unless an exception applies: s. 150(1) of the FLA and s. 15.1(3) of the DA. Under the Guidelines, the presumptive rule requires payment of the "table" amount of child support based on the parties' annual income.

The Parties' Positions

[142] L.M. argues that S.M. should pay \$4,519 per month in child support from January 1, 2021 moving forward. She contends that S.M. owes \$24,709 in child support arrears.

[143] S.M. acknowledges that he is obligated to pay child support and he is willing to do so. However, he disputes the monthly amount and the amount of arrears claimed by L.M. S.M. argues that he has an agreement with FMEP to pay his arrears on a monthly basis.

Analysis

[144] L.M. has parenting time more than 60% of the time. As a result, her income is irrelevant for the purposes of child support.

[145] I have found that S.M. earned \$150,000 per annum from January 1, 2021 to December 31, 2023. From January 1, 2024 I impute an income to S.M. of \$250,000 per annum unless he applies for a review as set out above.

[146] Based on the parties' incomes for Guidelines support purposes, S.M. is to pay monthly child support of \$2,159 for January 1, 2021 to December 31, 2023.

[147] S.M. is to pay \$3,339 per month in prospective child support from January 1, 2024 onwards.

[148] I trust the parties to agree upon the calculation of whether there are any outstanding arrears of child support, bearing in mind S.M.'s payment of child support through FMEP. If the parties are unable to agree, they may bring the matter, with proper documentation, before me to decide.

Special and Extraordinary Expenses

Legal Principles

[149] S.M. and L.M. both agree that they should pay s. 7 expenses. As a result, I need not provide a detailed analysis of the law. S.M. agrees to pay any outstanding s. 7 expenses.

[150] Section 7 of the Guidelines provides that the court may order a spouse to pay an amount to cover all or any portion of a child's special and extraordinary expenses. The court should consider the necessity of the expense in relation to the child's best interests, the reasonableness of the expense in relation to the means of the spouses, and the family's spending pattern prior to separation. These expenses may include:

- a) child care expenses incurred as a result of the employment, illness, disability, or education or training for employment of the spouse who has the majority of parenting time;
- b) that portion of the medical and dental insurance premiums attributable to the child;
- c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses, and contact lenses;
- d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- e) expenses for post-secondary education; and
- f) extraordinary expenses for extracurricular activities.

[151] These special and extraordinary expenses are to be shared by the spouses in proportion to their respective incomes.

Analysis

[152] L.M.'s income is relevant to s. 7 expenses as these expenses are paid in proportion to the parties' incomes. After separation, L.M. returned to school to become a student support worker. She testified that she relied on student loans to pay for her education and had to use savings for her expenses.

[153] L.M.'s Line 150 income was as follows:

2018: \$285

2019: \$7,997 (excluding \$34,462 in spousal support and \$28,571 in non-recurring RRSP income)

2020: \$26,002 (excluding \$34,000 in non-recurring RRSP income)

- [154] L.M. provided evidence that she currently makes \$27.93 per hour as a student support worker. She submits that her total taxable income in 2021 is expected to be \$55,753, however, this value includes \$15,000 in anticipated spousal support and \$9,174 in non-taxable Universal Child Care Benefits. After the appropriate deductions based on Schedule III of the Guidelines, L.M. submits that her Guidelines income for 2021 is \$40,400.
- [155] Section 3 of Schedule III of the Guidelines provides that, in calculating income for the purposes of determining child support, the court should deduct any spousal support received from the other spouse as well as Universal Child Care Benefits. Further, s. 17 of the Guidelines provides that the court may consider fluctuations in a spouse's income, such as receipt of non-recurring payments.
- [156] Given L.M.'s receipt of spousal support and non-recurring RRSP income and the evidence adduced regarding her wage as a student support worker, I accept that L.M.'s Guidelines income for 2021 is \$40,400.
- [157] L.M. helpfully provided a table with the s. 7 expenses she has incurred since January 1, 2021 to the date of trial. Based on this document, the children's s. 7 expenses from January 1, 2021 to the date of trial total \$9,619. Based on the parties' respective incomes of \$40,400 and \$150,000, S.M. is responsible for 79% of these retroactive s. 7 expenses, which is \$7,599. By L.M.'s account, S.M. has already contributed \$2,730 toward these expenses. As such, S.M. owes \$4,829 to L.M. for past s. 7 expenses.
- [158] I order S.M. to pay \$4,829 in arrears owing for s. 7 expenses.
- [159] Going forward, the children's s. 7 expenses will be paid in proportion to the parties' incomes as determined above, such that from January 1, 2021 to December 31, 2023, S.M. will pay 79% and L.M. will pay 21%.
- [160] From January 1, 2024 going forward L.M. should provide her income information to S.M. to determine the parties' respective proportions of the s. 7 expenses. Before January 1, 2024, L.M. should provide S.M. with an updated Form F8 financial statement, with appropriate attachments to update her income. Adjustments to the parties' respective proportions of the children's s. 7 expenses can be made at that time. Unless S.M. seeks a review of his income, his proportion will be based on an income of \$250,000.

Spousal support

Legal Principles

- [161] Marriage is regarded as a "joint endeavour". The "longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution": *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870, 99 D.L.R. (4th) 456.

- [162] Compensatory spousal support addresses the economic advantages enjoyed by one partner as a result of the other partner's efforts during the marriage. It also addresses the contributions of a spouse to the marriage and their losses upon its breakdown. A long marriage does not, in and of itself, support an award of compensatory support. A long marriage supports an order for compensatory spousal support if the court concludes that such an order is necessary to achieve parity of living standards: *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 48.
- [163] Compensatory spousal support is based on the principle that spouses must share the economic consequences of marriage breakdown. This includes recognizing that one spouse may have foregone employment opportunities to care for the children. In such circumstances, an order for compensatory spousal support will generally be appropriate so that a spouse may be adequately compensated for the value they brought to the relationship, as well as the economic loss they suffered as a result of the relationship. Spousal support awarded on compensatory grounds continues for a specified period of time whether or not the payee spouse has reached a degree of self-sufficiency: *Tedham v. Tedham*, 2005 BCCA 502 at paras. 33-38.
- [164] Non-compensatory support is needs-based. It recognizes the economic hardship and loss of the marital standard of living that arises as a result of economic interdependency during the marriage. Non-compensatory support is based on the economic disadvantages generated by the dissolution of the marriage, not contributions made during the marriage. The degree to which non-compensatory principles apply will depend on a close examination of the means and needs of the parties. It also depends on the nature of the marital relationship: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 53, 63 B.C.L.R. (3d) 77.

The Parties' Positions

- [165] Both parties agree spousal support should be paid but they disagree on the amount.
- [166] Based on an imputed income to S.M. of \$350,000, L.M. argues that he has only paid \$3,500 per month in spousal support which was almost \$2,000 short of the low-end of the SSAG range. She argues that, as compensation for his underpayment of support to date, based on an income of \$350,000, S.M. should now be required to pay spousal support at the high end of the SSAG range. L.M. submits that this amounts to \$7,412 per month for spousal support.
- [167] S.M. argues that he simply cannot afford \$7,412 per month in spousal support based on his current income. Again, he argues his livelihood and reputation have suffered as a result of L.M.'s legal actions against him and his business. Moreover, their savings were depleted as a result of this litigation. He argues that, due to L.M.'s actions, he is in a very different financial situation than he was prior to the parties' separation.

Analysis

- [168] L.M. was not working outside of the home when the parties separated. She was the primary caregiver of the children and continues to be so. I accept that she is entitled to spousal support on a compensatory basis.
- [169] Given the parties' Guidelines incomes for support purposes as determined above, between January 1, 2021 and December 31, 2023, I order that S.M. pay spousal support in the mid-range at an amount of \$1,549 per month to L.M. From January 1, 2024 onwards, I order that S.M. pay spousal support in the mid-range at an amount of \$4,053 per month to L.M. Based on the length of the parties' relationship, spousal support payments should continue for 13 years, subject to either party applying for a review.
- [170] S.M. has an arrangement with FMEP to pay an additional \$2,500 per month to address the arrears in child and spousal support. I trust the parties to agree upon the calculation of whether there are any outstanding arrears of spousal support, bearing in mind these payments through FMEP. If the parties are unable to agree, they may bring the matter, with proper documentation, before me to decide.

Retroactive Child Support, Spousal Support, and Section 7 Expenses

- [171] Between November 22, 2018 and January 1, 2021 there was either a court order or agreement regarding child support and spousal support. L.M. seeks retroactive child and spousal support from January 1, 2021. Though the claimant argues the respondent has never paid child and spousal support in proportion to his income, she is not seeking retroactive child and spousal support between November 22, 2018, and December 31, 2020. However, L.M. again seeks spousal support at the high end of the range back to January 1, 2021.
- [172] Given the imputation of income findings I have made, I do not accept L.M.'s argument. While S.M. may have made closer to \$350,000 when the parties separated, the sale of his vessel, the decline in the fishing industry to which he testified, and the impact the legal process has had on his credit rating and, in turn, his business, have impacted S.M.'s income. I have found that as time went on S.M. did not continue to earn income at his former level.
- [173] L.M. has not attempted to seek support before January 1, 2021 and S.M. did not take issue with the date on which she claims retroactive support. As a result, I will not disturb the payments made between November 22, 2018, and January 1, 2021 for either child support or spousal support. I have already determined the amount of child support owing since January 1, 2021 based on S.M.'s imputed income of \$150,000 per annum. I have also determined the amount of retroactive spousal support and s. 7 expenses owing based on S.M.'s imputed income and L.M.'s income of \$40,400.

Parenting Time

[174] The issue of parenting time is not before me. However, I would be remiss not to comment on this issue because there was some evidence before me that S.M. has at times been denied the parenting time to which he is entitled under the parties' agreement.

[175] Section 37(1) of the FLA requires this Court to consider only the best interests of the children in making orders regarding parenting arrangements. Apart from specific reasons indicating otherwise, it is in the best interests of the children to have parenting time with both their parents.

[176] There was no evidence before me that there are any concerns with S.M.'s parenting. L.M. must comply with parenting time as set out in the parties' agreement, including facilitating additional time when possible. I also encourage both parties to be flexible when there are legitimate reasons to change the parenting schedule. Parenting time is for the benefit of the children. It is not to be determined based on the preferences of a particular parent.

Contempt

Legal Principles

[177] Under Rule 21-7(1) this Court may punish a party for contempt of court by way of the imposition of a fine. The elements required to establish contempt were recently clearly laid out by Justice Gropper in *Falkener v. Falkener*, 2020 BCSC 538:

[33] There are four elements that must be satisfied to establish contempt:

- a) the alleged contemnor had notice of the order that [they are] alleged to have breached;
- b) the alleged contemnor has not complied with the terms of the order that [they are] alleged to have breached;
- c) the failure to comply with the order was wilful, that is deliberate and not accidental; and
- d) the alleged contemnor has the ability to make the payment at the time of the order.

[178] In *Bassett v. Magee*, 2015 BCCA 422 at para. 33, the Court of Appeal discussed the standard required to establish contempt. The Court emphasized that because contempt proceedings are quasi-criminal in nature, the rules of strictissimi juris (the strictest interpretation of the law) apply. The party asserting contempt bears the onus of proving the elements of contempt on the criminal standard.

[179] In *Bassett*, the Court of Appeal summarized the requirements as follows:

[34] In short, a court must find that a contemnor "willfully disobeyed a court order that was clear and precise in its meaning" beyond a reasonable doubt: *Jackson* at para. 13. A court must "ensure that no one is found to have transgressed without a full consideration of all the relevant information, including any explanations for the conduct of persons accused of

violating court orders": *Larkin v. Glase*, 2009 BCCA 321 at para. 9. If an order directs a party to provide an item that is not in that party's possession, the party cannot be said to have wilfully or deliberately disobeyed an order that was "impossible" to comply with: *Jackson* at para. 14.

[180] The requirements of contempt were explained in *G. Peter Fraser, John W. Horn & Susan A. Griffin, The Conduct of Civil Litigation in British Columbia*, 2nd ed., loose-leaf (Toronto: LexisNexis, 2007) Vol. 2, Ch. 42 at 42-11:

An application intended to determine whether a person is guilty of a contempt of court, being a matter which affects the liberty of the subject, is to be approached as *strictissimi juris*, i.e., a finding of contempt should not be made in the absence of reliable and meticulous evidence establishing each and every aspect of the alleged contempt...

[Emphasis added.]

[181] Lastly, the Court of Appeal in *Hokhold v. Gerbrandt*, 2016 BCCA 6 at para. 31, emphasized that "contempt of court is a heavy, blunt tool". At para. 32, the Court explained that a "measured response to non-compliance with court orders is the standard; a contempt order should be a last resort to obtaining compliance."

The Parties' Positions

[182] L.M. seeks an order that S.M. pay a \$5,000 fine for contempt. She bases her claim on S.M.'s "history of contravening court orders" and S.M. "bringing vexatious and frivolous applications to court". She further argues:

[T]he Respondent took steps to keep his bank assets out of reach to avoid paying child and spousal support and undermine my claim to family property. The Respondent transferred funds and assets out of our joint bank accounts, requiring me to apply, on May 16, 2018, for an order restraining disposition of family assets.

[183] S.M. argues he was not ignoring court orders. He simply could not make his support payments. Due to the May 2018 Financial Restraining Order he was unable to pay his child support obligations in late 2018 and 2019 because his bank accounts were frozen. Despite L.M. being ordered to amend the Financial Restraining Order at the November 22, 2018 JCC so that S.M. could access the frozen bank accounts to make support payments and run his business, L.M. refused to do so. Instead, in February 2019 L.M. reported him to FMFP when he was unable to make his support payments.

Analysis

[184] S.M. largely avoided the legal process. S.M. did not go to court to try to enforce the order and agreements that L.M. ignored. In addition, S.M. did not file a response to the notice of family claim, although he did provide one to L.M.'s counsel. He was unrepresented and his response was limited. He simply disagreed with what was set out in the notice of family claim.

[185] I am not excusing S.M. for his failure to engage in the legal process, but it is important to consider his actions in light of L.M.'s submission for an order of contempt. In her trial brief, L.M. states:

The Respondent has been in contempt of court throughout these proceedings. The Respondent's conduct includes violating court orders, bringing vexatious and frivolous applications to court, failing to observe court rules, failing to follow the terms of the parties' mediation agreement, and repeatedly threatening and harassing the Claimant.

[186] There was absolutely no evidence before me that S.M. brought vexatious or frivolous applications to court.

[187] In terms of violating court orders, L.M. herself violated court orders. For example, at the November 22, 2018 JCC L.M. agreed to unfreeze certain bank accounts to provide the respondent and his business with the ability to conduct transactions through an operating bank account. However, rather than take steps to unfreeze his bank accounts, L.M. reported S.M. to FMEP on February 8, 2019. FMEP seized approximately \$50,000 from S.M.'s bank accounts for arrears.

[188] L.M. also did not remove the Protection Order despite agreeing to do so in December 2019 pursuant to the Settlement Agreement. The Protection Order was not removed until it was done by court order in August 2020, effective May 2020.

[189] Lastly, L.M.'s assertion that S.M. kept his assets out of her reach to avoid paying child and spousal support and undermine her claim to family property was not proven at trial.

[190] There is no evidence that S.M. wilfully or deliberately disobeyed court orders, or that he brought vexatious and frivolous applications to court. Further, L.M. did not come before this Court with clean hands when seeking an order for contempt because, without a reasonable explanation, she ignored a court order and a provision of the Settlement Agreement to which she is a signatory.

[191] I decline to fine S.M. for contempt of court.

Special Costs

Legal Principles

- [192] This Court has discretion to order that costs of a family law proceeding be assessed as special costs: Rule 16-1(1)(b)(i). Awards of special costs in family and civil proceedings are governed by the same principles: *Chapman v. Chapman*, 2020 BCSC 1896 at para. 4.
- [193] Special costs are appropriate where there has been reprehensible, scandalous, or outrageous conduct in the course of litigation: *Gichuru v. Smith*, 2014 BCCA 414 at para. 78, leave to appeal ref'd [2014] S.C.C.A. No. 547 [Smith]. Special costs serve not only to indemnify the successful litigant for legal fees and disbursements incurred, but also to denunciate and deter litigation misconduct: *Skidmore v. Blackmore* (1995), 122 D.L.R. (4th) 330 at 337, 2 B.C.L.R. (3d) 201; *567 Hornby Apartment Ltd. v. Le Soleil Restaurant Inc.*, 2020 BCCA 69 at paras. 40-42.
- [194] In *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 11, Justice Walker summarized the circumstances in which a claim for special costs may be awarded:
- a) where a party pursues a meritless claim and is reckless with regard to the truth;
 - b) where a party makes improper allegations of fraud, conspiracy, fraudulent misrepresentation, or breach of fiduciary duty;
 - c) where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient;
 - d) where a party made the resolution of an issue far more difficult than it should have been;
 - e) where a party who is in a financially superior position to the other brings proceedings, not with the reasonable expectation of a favourable outcome, but in the absence of merit in order to impose a financial burden on the opposing party;
 - f) where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit;
 - g) where a party brings a proceeding for an improper motive;
 - h) where a party maintains unfounded allegations of fraud or dishonesty; and
 - i) where a party pursues claims frivolously or without foundation.
- [195] It is not necessary for the party's conduct throughout the litigation to have been reprehensible to warrant an award of special costs for the entire action: *Bradshaw v. Stenner*, 2012 BCSC 237 at para. 9. Where an award of special costs for the entire proceeding would be disproportionate, the court has the discretion to award special costs with respect to particular steps in the litigation: Rule 16-1(1)(b)(ii); *Smith* at para. 91; *Chapman* at para. 8.

The Parties' Positions

[196] L.M. makes the same allegations against S.M. as she did under her request for a finding of contempt to justify an order for special costs for full indemnity of her legal fees.

Analysis

[197] I decline to order special costs for full indemnity of L.M.'s legal fees for the same reasons I declined to fine S.M. for contempt of court. While L.M. may have paid a significant amount of money in legal fees, I find that this was primarily a result of choices she made, not S.M. engaging in reprehensible conduct.

Communication App

Legal Principles

[198] Section 225 of the FLA provides that unless it would be more appropriate to make an order under Part 9 [Protection from Family Violence], a court may make an order setting restrictions or conditions respecting communications between parties, including respecting when or how communications may be made.

The Parties' Positions

[199] L.M. seeks an order that all further communications between the parties must go through the parenting application "Our Family Wizard". S.M. opposed L.M.'s request to communicate through a parenting application. He believes they should be able to communicate as ordinary people do when co-parenting.

Analysis

[200] There was evidence before me that the parties have difficulties communicating with each other. L.M. introduced into evidence many messages between herself and S.M., or between S.M. and her lawyers, where S.M.'s tone was highly inappropriate. In addition, both parties testified about the difficulties they have faced communicating about S.M.'s parenting time.

[201] Given these communication difficulties, I order that the parties communicate through the parenting application "Our Family Wizard". I further order that their communications be respectful.

Divorce

[202] The parties have been living separate and apart since 2018. I am satisfied the requirements for a divorce as set out in the DA have been met. I therefore grant a divorce to take effect 31 days after this pronouncement.

Summary of Orders

[203] For the reasons given above, I make the following orders:

a) Income

- i. I impute an income of \$150,000 to S.M. from January 1, 2021 to December 31, 2023. From January 1, 2024 going forward, I impute an income to S.M. of \$250,000.
- ii. If either party disputes S.M.'s prospective imputed income of \$250,000 they may apply for a review. Subject to Scheduling, I will remain seized of the matter.

b) Child Support

- i. From January 1, 2021 to December 31, 2023, I order S.M. to pay \$2,159 in child support per month to L.M. From January 1, 2024 moving forward, I order S.M. to pay \$3,339 in child support per month to L.M.
- ii. I trust the parties to agree upon the calculation of any outstanding arrears of child support, bearing in mind S.M.'s payment of child support through FMEP. If the parties are unable to agree, they may bring the matter, with proper documentation, before me to decide.

c) Section 7 Expenses

- i. From January 1, 2021 to December 31, 2023, I order that the parties pay s. 7 expenses for their two children. S.M. shall pay 79% and L.M. shall pay 21%. From January 1, 2024 moving forward, the parties' respective proportions of these expenses shall be recalculated in accordance with these Reasons.
- ii. I order that S.M. pay \$4,829 to L.M. in respect of the children's past s. 7 expenses.

d) Spousal Support

- i. From January 1, 2021 to December 31, 2023, I order S.M. to pay \$1,549 in spousal support per month to L.M. From January 1, 2024 moving forward, I order S.M. to pay \$4,053 in spousal support per month to L.M., subject to the parties' right to have this amount reviewed in accordance with these Reasons.
- ii. Spousal support shall continue for 13 years.
- iii. I trust the parties to agree upon the calculation of any outstanding arrears of spousal support, bearing in mind S.M.'s payment of spousal support through FMEP. If the parties are unable to agree, they may bring the matter, with proper documentation, before me to decide.

e) Divorce

- i. L.M. and S.M. who were married at Banff, Alberta on May 1, 2004 are divorced from each other.
- ii. Pursuant to s. 12 of the DA, the divorce is to take effect on the 31st day after the date of these Reasons.

f) Miscellaneous

- i. I order that the parties communicate through the parenting application "Our Family Wizard" and that their communications be respectful.
- ii. I decline to order a fine for non-disclosure against S.M.
- iii. I decline to order a fine for contempt against S.M.

g) Costs

- i. I decline to order special costs against S.M. for full indemnity of L.M.'s legal fees.
- ii. I do not view either party as having succeeded on their primary issues. In these circumstances, each party will bear their own costs.

"D. MacDonald J."

- [1] L.M. initially took the position that S.M. reneged on the August 2019 mediation agreement. I allowed the parties to briefly discuss the negotiations that took place during this mediation because S.M.'s allegation that the settlement agreement was based on a "fraud" fell into an exception to settlement privilege: see *Nguyen v. Dang*, 2017 BCSC 1409 at para. 23. While I have some concerns about the mediation process, I need not consider this issue because L.M. did not take the position that S.M. reneged on the agreement in final argument.
- [2] There were many other financial documents in the binders put into evidence by L.M. which were never referred to at trial.

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/04/2022BCSC0477.htm>

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

Prepared on 27 October 2026 · Esheria