

CANADA / JUDGMENT

L.W. v. F.W.

2018 BCSC 1924

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 1924 L.W. v. F.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.W. v. F.W.,

2018 BCSC 1924

Date: 20181106

Docket: E170226

Registry: Vancouver

Between:

L.W.

Claimant

And

F.W., C.C.S., and ABC B.C. Ltd.

Respondent

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

Counsel for the Claimant:

A. Thiele

The Respondent appearing on his own behalf:

F. W.

Place and Dates of Trial:

Vancouver, B.C.

July 5-6, 11-13 & 17, 2018

August 20, 2018

September 21, 2018

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2018

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Introduction

- [1] During their marriage, both parties enjoyed a lavish lifestyle that was beyond their means. If their marriage had not broken down and had they remained together, they would have had to face the consequences of their excessive spending. It would have, however, been manageable with decreased spending and F.W.'s undistracted attention to his business combined with his seemingly irrepressible income earning potential. Unfortunately, their standard of living will suffer as a result of the breakdown of their marriage, which has distracted F.W. from his business (referred to in the style of cause as "ABC B.C. Ltd.") and

adversely impacted on his ability to earn income in the short term.

- [2] The parties' matrimonial home is located in Burnaby, British Columbia. L.W. and the two biological children of the marriage (who are 11 and 10 years old) reside there, together with L.W.'s 18-year-old daughter from her prior marriage.
- [3] Fortunately, the parties settled their dispute concerning custody and the appropriate access regime for the two younger children during the latter stage of the trial. An order that I am satisfied is in the best interests of the two children of the parties' 11-year marriage was entered with the Registry, by consent.
- [4] The issues left for determination concern division of assets and spousal and child support (for the two younger children only since support for the claimant's oldest child is being paid by the claimant's first husband). They involve complex factual and legal issues concerning: (a) F.W.'s income earning potential; (b) the amount of income that should be imputed to L.W.; (c) determining whether F.W. has assets which are unaccounted for; (d) claims for retroactive child and spousal support; and (e) identifying legitimate debts for which F.W. is responsible, and for those that he is, determining if they are family debts, and if they are, what allocation between husband and wife should result.
- [5] The facts set out in these reasons are my findings of fact. Before turning to them, I wish to briefly describe the statutory framework in which the parties advanced their competing claims and the amendments to those claims that arose during trial.
- [6] L.W.'s claim for spousal and child support is brought pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) ("Divorce Act"). Her claim for division of assets and debts is per the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). There is no incompatibility between the two statutes in this case in respect of the support claims. The relief I have granted for the support claims is per the Divorce Act.
- [7] Both parties sought to amend their claims during closing argument. F.W. wished to include a claim for occupational rent arising from L.W.'s continued occupation of the matrimonial home with their children post-separation. L.W. did not object and as a result, I granted leave to F.W. to amend his counterclaim (and response to notice of civil claim if necessary) to assert the claim. On the last day of closing argument, L.W. sought to amend her notice of civil claim to include a claim for retroactive child support on the basis that as a matter of law, it should have been advanced in priority of her existing pleaded claim for a lump sum award of retroactive spousal support. Up until that point, her position was that no claim for child support was being advanced. In the absence of any objection from F.W., I granted leave to L.W. to amend her notice of civil claim.
- [8] As a result, both parties should amend their pleadings to ensure that there are accurate pleadings encapsulating those amended claims. If L.W. has not already done so by the time these reasons are released, she shall within 14 days file her amended notice of civil claim to plead her claim for retroactive child support. Thereafter, F.W. shall file his amended

response and counterclaim to plead his claim for occupational rent. He should also include in his response his pleaded defence to L.W.'s amended claim for retroactive child support. If L.W. has already filed her amended pleading, then F.W. shall file his amended pleadings within 14 days of the issuance of these reasons. If not, then F.W. shall file them 14 days following service of L.W.'s amended notice of civil claim.

Background Facts

- [9] F.W. is a sophisticated businessman whose company, A.B.C. Ltd. ("ABC") supplies, installs, and maintains private automated teller cash ("ATM") machines to all manner of businesses, such as retail store operators, casinos, municipal events and festivals, concerts, and charitable events. He is 40 years old. His engaging personality, unyielding work ethic, entrepreneurial spirit, and aptitude for numbers account for his success since he began his business in 1996. F.W. did not finish his courses at university, where he was studying economics. When he left university, he worked for the Royal Bank in various retail positions (often referred to generically as "tellers"). He saw an opportunity to provide ATMs outside of chartered banks and other financial institutions to retailers and others, and seized it. He aggressively sought out business, and delivered on his promises to provide service in key areas where his competitors were failing. He built up a highly successful business over time, generating substantial revenues through transaction fees charged per use on ATM machines. F.W. ran significant personal expenses through the business. He leased and obtained loans for luxury vehicles for himself, his wife, and his mother.
- [10] Although ABC's corporate year end is March 31, F.W. is required to report his income to the Canada Revenue Agency ("CRA") based on a calendar year. For the years 2013 to 2016, F.W. reported Line 150 incomes of \$356,283, \$246,899, \$526,903, and \$255,911, respectively, which included both salary and dividends. When the parties separated in November 2016, F.W. was on track to earn well over \$250,000 for that year. By then, his business pursuits had been structured through several corporate entities (including holding companies). He was greatly assisted by a private accounting firm. In his Form 8 sworn on March 10, 2017, F.W. reported a Line 150 income of \$254,300, which was said to be based on his 2016 income.
- [11] In 2017, F.W. reported Line 150 income of \$293,591. It was reported on his tax return to be comprised of income of \$197,850, dividends of \$90,880, and commission income of \$4,860 (F.W. also held a real estate license at that time and earned commission income when acting as a realtor involved in the acquisition of condominiums for his family). The dividend amount was part of a larger dividend he received from ABC in 2017. Acting on the advice of his accountants, F.W. deferred \$200,000 of that dividend to report in subsequent years to gain more favourable tax treatment.

- [12] F.W. and L.W. met in October 2006. Their attraction to each other was instantaneous. They were together almost every day and then eloped to Hawaii approximately six weeks later, in December of that year. They participated in a religious ceremony in the Lower Mainland in April 2007. According to L.W., F.W. readily agreed to spend \$70,000 on an elaborate wedding and spent over \$25,000 on a diamond ring. This was L.W.'s second marriage. She has a daughter from her first marriage who was then six years old.
- [13] L.W. is currently 41 years old. L.W. thought about pursuing studies after she completed high school and for a short time attended courses toward a certificate in financial management at B.C.I.T. She decided to defer any post-secondary studies while she worked in administrative assistant positions in Vancouver. She moved away from employee status when she bought a small business. When L.W. met F.W., she was the owner-operator of a tanning salon in the Kitsilano area of Vancouver, where she was earning between \$60,000 and \$72,000 per year.
- [14] The parties' first child was born in May 2008; their second was born in June 2009. L.W. decided to sell her business when she and F.W. decided that she should devote her attention to raising their family. Aided by her husband's business acumen, L.W. sold her business in 2008 for \$60,000. At this point, L.W. was entirely dependent on F.W. for financial support. He looked after all of their financial affairs. L.W.'s knowledge of her husband's business dealings, including revenue stream, profit, and debts, was minimal at best. Aside from a brief period when she owned the tanning salon, the only income L.W. earned during their marriage was as a result of short term income splitting organized by F.W. and his professional advisors. However, the funds attributed to L.W. were paid to F.W.
- [15] They bought their initial matrimonial home (a townhouse) in 2008. They sold it in 2013 and bought their current and much larger matrimonial home in Burnaby for \$1.3 million. F.W. paid for all expenses to maintain his wife and children and their home, which for a time included a live-in nanny/housekeeper. He paid for renovations to their matrimonial home, luxury items such as their Mercedes-Benz vehicles, their respective Rolex watch collections, L.W.'s luxury handbags and jewellery, luxury vacations to Mexico, New York, the Dominican Republic, Hawaii and Europe, Canucks hockey and Whitecaps soccer season tickets, numerous dinners at local high-end restaurants, and their respective cosmetic surgeries and medical and dental procedures (including liposuction, body sculpting, and dental veneers). Although it is not clear when these payments to L.W. began, F.W. provided his wife with a monthly allowance of \$2,000 per month to spend on herself at her discretion.
- [16] For three years from September 2013 to June 2016, the two younger children attended private school in the Fraser Valley at a cost of \$32,000 per year. L.W. drove the children to and from school each day.
- [17] The parties also purchased, through pre-sales contracts, two condominiums to be built in Winnipeg in 2012 and 2013 ("Winnipeg condos"), and two condominiums in Olympic Village Development ("Olympic Village condos") located in Vancouver in 2014. The transaction involving the Olympic Village condos did not complete until after the parties separated.

- [18] Their marriage hit a significant rocky patch that unfortunately led to its downfall. Each party provided different accounts of what caused their marital difficulties. L.W. blamed it on F.W.'s substance abuse and F.W. on L.W.'s uncontrolled spending. They decided to separate in November 2016. Their disagreements became more pronounced, which ultimately resulted in this litigation and in addition to the trial, numerous interlocutory applications brought by both parties. At trial, each party accused the other of bringing or forcing unnecessary pre-trial applications. As I see it, this is a matter for costs, although from what I have gathered in the evidence, both parties appear to have brought their fair share of applications. Whether they were unnecessary or abusive is a matter that should be left to submissions when costs are dealt with at a later date.
- [19] For various reasons, after separation, both F.W. and L.W. continued to live in the matrimonial home with their children, although F.W. lived downstairs in separate and smaller quarters. He remained there until close to the start of the trial, when he moved into an apartment owned by a friend sometime in May 2018.
- [20] F.W. attended part of a family vacation with L.W. and their children in southern California in the summer of 2017, and paid for part, but not all of the expenses in spite of a promise to pay more. According to F.W., he objected to certain expenses incurred by L.W. as either inappropriate or excessive, or both. It will suffice to note that their current disagreement concerning these expenses involving their children - which are small in relation to their overall spending habits - typify their ongoing quarrels over money since separation.
- [21] Following separation, F.W.'s business lost a key account with a well-known casino located in the Lower Mainland. The casino provided approximately 60% of ABC's revenue. Although ABC has secured other accounts in this province and in Ontario, it has not been able to replace all of the lost revenue. F.W. has also been distracted from his business by this litigation, most notably as a result of his preparation for and attendance at the trial. He has suffered a drop in his personal income.
- [22] In December 2016, F.W. reduced the limits on the credit cards used by his wife and removed her access from some of their bank accounts. He also cut off medical and dental plan benefits for his wife and her eldest daughter.
- [23] F.W. began making spousal and child support payments in February 2017, but stopped paying spousal support at the end of March and child support at the end of June of that year.
- [24] F.W. withdrew approximately \$13,000 from the parties' joint line of credit to make some of the support payments, claiming that it was the only means by which he could obtain the funds. He did, however, continue to pay for the children's expenses such as private school tuition and significant sports and dance fees. When L.W. found out that he had drawn from the line of credit to make the support payments, she instructed the bank to restrict withdrawal of funds from that account to only those withdrawals where the signatures of both parties authorizing them were provided. The bank agreed.

- [25] Pending determination of the financial issues in the case, L.W. has been relying on her own personal credit card and line of credit she established prior to her marriage with F.W. to support herself and pay for the children's expenses not covered by F.W. She has also been without a vehicle since her leased Mercedes Benz SUV was turned back to the dealership when the lease expired in July 2017. She has and continues to rely on friends and her first husband who have loaned her their spare vehicles from time to time.
- [26] During trial, each party criticized the other's spending habits. Each insisted that the other had been acting unreasonably in continuing to spend money when they could least afford to do so. Both parties have reduced some unnecessary expenses to some degree.
- [27] The two younger children currently attend public school in Burnaby. L.W.'s oldest daughter plans on attending a local university in the 2018 fall term.

Division of Family Assets and Debts

Assets

- [28] The statutory framework for the division of family property and debt is set out in s. 81 of the FLA. It provides that on separation, each spouse is presumptively entitled to an undivided half interest in all family property and is responsible for half of all family debt, unless the reapportionment provisions are engaged. Family property is defined in s. 84 and includes property owned by at least one spouse on the date of separation as well as property acquired by a spouse post-separation if it is derived from a family asset or assets owned by a spouse at separation. Family debt is defined in s. 86 as all financial obligations incurred by a spouse during the relationship as well as debt incurred after the date of separation if it is incurred to maintain family property. Family property and debt are valued at the time of the hearing or trial, absent a court order to a different effect.
- [29] The reapportionment provisions applicable to this case are found in s. 95, which provides the court with the power to reapportion family property or family debt, or both, if it finds that equal division is significantly unfair after having considered the various factors set out in s. 95(2) and (3) Those factors are:
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;

- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[30] In this case, reapportionment arises for consideration in respect of a debt, of approximately \$1.2 million, allegedly owed by ABC to a third party and personally guaranteed by F.W. The existence of the debt was not disclosed by F.W. until late in the litigation.

[31] Unless stated otherwise, all dollar amounts refer to Canadian currency.

Matrimonial Home

[32] The parties' matrimonial home was appraised at \$2,070,000 as of November 14, 2017. No issue has been taken by either party with the appraiser's opinion, although F.W. suggested in closing argument (without any evidence to support it) that its value has dropped. In the absence of any other evidence, there is no basis to attribute any value to the matrimonial home other than that determined by the parties' jointly retained appraiser.

[33] The last known values of the mortgage and secured line of credit registered on title are as of October 2017 in the amounts of \$756,245.85 and \$232,836.96, respectively. F.W. continues to make the monthly payments for both, which reduces the total indebtedness owing to the bank as each payment is made. I agree with L.W.'s submission that there was, at the time of trial, approximately \$1 million in equity. Until recently, F.W. paid for all expenses related to the home. After the trial began, L.W. began paying for the internet and cable bill. Gardening services were eliminated in the summer of this year. L.W. has since September begun paying

for BC Hydro.

- [34] Although L.W. said she would like to buy out F.W.'s interest in the matrimonial home, she has not provided any evidence to demonstrate that she can qualify for the requisite financing. I am not satisfied that she has the means to do so based on the evidence adduced at trial. In any event, in closing argument, the parties agreed that the matrimonial home should be sold, and when it is, the net proceeds should be divided equally between them, subject to certain holdbacks which I set out in these reasons.
- [35] F.W. submits that the home should be listed for sale as soon as possible because he lacks the means to make the mortgage and line of credit payments, pay spousal and child support, and pay for a modest residence for himself. At one point, L.W. brought an interlocutory application to sell the home but at this juncture, she proposes that the listing be postponed until the children complete their school year ending in June 2019 in order to avoid disruption to them during the current school year. I accept that moving to a different home will upset the children, but no evidence has been provided to establish any deleterious effects on the children from moving to a new home other than that which would typically be expected. I also reject L.W.'s submission that forcing her to sell the house will result in her moving into community subsidized housing with her children. L.W. conceded that she may have to move in with her parents who reside in Surrey, but if required, it would only be on a short term basis to allow her time to find alternate suitable accommodation.
- [36] It should be clear to the parties that even if L.W. returns to the workforce in the near future, the parties would still collectively lack the means to meet their known debt obligations (not to mention contingent obligations) unless the matrimonial home is sold. L.W. certainly lacks the means to pay for the mortgage and expenses associated with the matrimonial home if she continues to reside in it. Given F.W.'s current reduced income, it is highly likely that he will be unable to make the mortgage and loan payments on an ongoing basis as well pay spousal and child support and rent for his own modest accommodation. Nor does his present income provide sufficient spousal support to L.W. to meet the mortgage and line of credit payments. To these points, L.W. argued in closing submissions that F.W. could let their mortgage and line of credit go into default while L.W. and the children resided in the matrimonial home in order to meet his support obligations. However, that would provide only a temporary reprieve for the parties until the bank brought foreclosure litigation and the house was sold through a conduct of sale order, all of which would reduce the parties' equity in the home as interest continued to accumulate.
- [37] Thus, and while it is most unfortunate for the children, there is no good reason to delay the inevitable. The matrimonial home should be listed for sale forthwith so that the parties may be freed up from their respective debt loads and provide them with funds realized from the equity. There shall be joint conduct of sale. The parties have liberty to apply in the event orders or directions are required in respect of the sale. L.W. and the children shall continue to occupy the matrimonial home until it is sold.

- [38] One of F.W.'s objections to paying spousal support is his assertion that his contribution towards the expenses and debts associated with the matrimonial home purportedly equal if not exceed his support obligations. He submits that it would be unfair to require him to pay spousal support while he continues to pay those expenses, unless he is given a credit for rent that L.W. should pay. F.W. raised the issue a number of times in his evidence and in submissions as a factor that he submits should be taken into account in determining his spousal support obligation or a reapportionment analysis (his counterclaim pleads unequal division of family property and debt per s. 95(2)(a) and (i) of the FLA).

Olympic Village Condos

- [39] In approximately November 2014, through one of his holding companies (referred to by the parties as "097"), F.W. signed pre-sale contracts to purchase the Olympic Village condos located in Vancouver. He drafted the contracts himself as he was a licensed real estate agent (he gave up his license effective December 31, 2017). 097 completed on the sales in January 2018.
- [40] Shortly after the purchase by 097 closed, which was after the parties' separation, and as a result of an order of the Court brought by L.W. in this action, ownership of the units was notionally transferred from 097 by way of a "butterfly transaction" to another holding company (referred to by the parties as "114") in which both parties are directors and equal shareholders. This allowed L.W. to hold an interest in the units.
- [41] The Olympic Village condos were listed for sale almost immediately after the purchase by 097 closed. They were sold in April 2018. Net proceeds of \$333,024.04 were placed into the trust account of L.W.'s law firm pending the outcome of the trial and payment of capital gains tax. The parties agree that those funds shall continue to be held in trust until the capital gains tax as assessed by the CRA is paid. Any funds remaining thereafter shall continue to be held in trust to satisfy the parties' respective share of family debts. Once they are, then in the absence of consent of both parties, L.W.'s entitlement to any remaining funds in trust at that point shall not be paid until the issue of whether L.W.'s entitlement to them is subordinated to any potential claims brought by creditors of F.W. pursuant to the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163 ("FCA"), is determined by court order. Regardless, if no such claims are issued in this Court by December 31, 2019, then such distribution may be made to L.W. after January 1, 2020. Likewise, no distribution shall be made to F.W. in respect of his entitlement to any such remaining funds until after January 1, 2020 and only so long as no such FCA claims are issued by December 31, 2019.

RRSPs and Investments

- [42] F.W. maintains RRSP and US and Canadian dollar investment accounts at the Canadian Imperial Bank of Commerce ("CIBC") and Wood Gundy. F.W.'s evidence was that the value of his investments and RRSPs as of October 2017 was \$228,155 (including a \$22,681 RESP). In February 2018, L.W. obtained a court order authorizing a \$100,000 tax-free spousal roll over

from F.W.'s RRSP, which was effected in April. Thereafter, the value of F.W.'s investment accounts, including the RESP, as of April 2018, reduced to approximately \$114,640. The current balances are not in evidence. The parties agree that these accounts should be equalized. They should ensure that it takes into account the roll over to L.W. Equalization may be done through a tax-free spousal roll over of either cash or stocks in specie, at her option. F.W. shall forthwith provide to L.W. the particulars and statements of each investment account, including RRSPs and RESPs. Once the account balances are finalized, the parties shall take all necessary steps, forthwith, to effect the requisite equalization.

Value of ABC

- [43] In terms of the company's assets, ABC owns the condominium where its office is located along with office equipment and furnishings and ATM machines. It also leases several vehicles.
- [44] The net value of the condominium, after taking into account the estimated mortgage balance was, at the start of the trial, approximately \$190,000.
- [45] No evidence of value of the office equipment and furnishings has been adduced. F.W. introduced evidence attempting to show that there was little value to the ATM machines if sold to a private reseller once expenses associated with such a sale, such as shipping costs, were taken into account. Nonetheless, F.W. maintains that there is value to his company beyond the condominium that it owns.
- [46] ABC leases a 2015 Mercedes Benz Sprinter van (as a service vehicle), a 2015 Mercedes Benz C400 sedan (used by an employee), and a 2013 Mercedes Benz ML350 SUV (driven by F.W.'s mother and was due to be returned to the dealer when the lease expires in October of this year).
- [47] Aside from the equity in the condominium, the value of the business itself is in dispute. The parties jointly retained a valuation expert in mid-June 2018, shortly before trial was to begin. It was only after the trial began that I was made aware of the expert's late retainer and that his opinion could be ready during trial only if he was provided with additional documents from ABC. I was subsequently advised by the parties that after the valuator had obtained the documents he needed, he determined that there was a substantial amount of cash - approximately \$500,000 - unaccounted for in ABC's financial statements and books and records. The parties advised me that according to the valuator, this resulted in an increase of the opening deficit for ABC's financial year end of March 31, 2018 by approximately \$730,000. This in turn caused a significant reduction in the value of the company's shares by close to \$500,000. The parties informed me that as a consequence, they instructed the valuator to terminate his work as in his opinion, his findings essentially rendered little to no value to ABC beyond the net equity in the condominium and the value of office and ATM equipment and goodwill.

- [48] Apart from evidence concerning the value of the condominium (which came from separate sources including appraisal evidence), I did not receive any evidence of value of the company's assets or its goodwill other than from two sources. The first was evidence provided by F.W. concerning the cost of the ATM machines (and their potential value for resale) and the company's current sources of revenue and debts. The second was from Mr. Daisen Gee-Wing, whose role in the case I discuss in the "Debts" section of these reasons. He believed that there is value in the company for a subsequent purchaser who operates it as a going concern. His evidence in this respect was off-the-cuff speculation (with no indication of potential value) given in answer to questions put to him during cross-examination. Consequently, I do not place much weight on it other than to support my finding that there is some, albeit undefined, value to the company.
- [49] Accordingly, I am satisfied from what F.W. has adduced in evidence that there is likely no value to the ATM machines on resale given the discount to value in a resale market, shipping costs to a putative purchaser(s) or third party seller, and ABC's current indebtedness in respect of their acquisition. I am satisfied, however, that there is some value to the company's goodwill given its reputation in the marketplace, although that said, much of it is founded in F.W.'s efforts and prominence in and for the company. Given the absence of any valuation evidence concerning goodwill, I am unable to make a specific finding as to amount. However, overall, I am satisfied that the highest value for ABC would be realized if it were sold as a going concern.
- [50] Even though L.W. disagrees with F.W.'s submission that ABC's value is far greater than a nominal amount, her position is that whatever value there is should be given wholly to F.W. without any equalization payment in return, so long as the equity in the condominium is split between them. The only dispute F.W. has with her position is that he says the value of the condominium has decreased since the appraisal was prepared. There is no evidence to support his submission. His submission also does not take into account the declining mortgage balance on the property in light of his ongoing payments. I have determined that the appropriate result is an equalization based upon the evidence. F.W. shall pay an equalization payment to L.W. in the amount of \$95,000, which is one-half of the equity in the condominium at the start of trial.

Other Assets

- [51] I turn now to the equalization of the parties' other assets. They have agreed on some but not all of their remaining assets.

Rolex Watch and Luxury Handbag Collections

- [52] F.W. shall retain his significant Rolex watch collection, valued at over \$40,000 USD. I agree with L.W. that an appropriate value in Canadian dollars for the equalization analysis is \$60,000. She shall retain her Rolex watch collection. The only evidence of value I have comes from L.W.'s Form 8, at \$10,000.

- [53] L.W. wishes to retain her luxury handbags. There is no evidence of value for these used handbags other than L.W.'s Form 8, at \$5,000. While I appreciate F.W.'s umbrage at that value since the cost of two of her many handbags was close to \$11,000, no other evidence of value was adduced.
- [54] When the value of L.W.'s assets of \$15,000 is offset from the value of F.W.'s watch collection, the net amount to be equalized is \$45,000. Accordingly, F.W. shall make an equalization payment to L.W. in the amount of \$22,500.

Vehicles

- [55] F.W. wishes to retain his 2014 Mercedes Benz model SL 55, 2010 Subaru station wagon, 2014 Ducati "Monster" motorcycle, as well as the 2011 Vespa scooter he purchased for L.W. The parties do not agree on values.
- [56] The 2003 Subaru station wagon is currently off road and not drivable due to needed repairs. I agree with F.W. that L.W.'s proposed \$5,000 value is high in the current circumstances even though she took that value from his Form 8. But I disagree with him that it has no value. In the absence of evidence concerning those repairs, I am left with attributing a nominal amount of \$2,500 to the Subaru.
- [57] There is no evidence that the Vespa is not driveable or that its value has diminished since F.W. delivered his Form 8 in March 2017, in which he deposed to a value of \$2,000. That is the value that shall be used for the equalization analysis.
- [58] Likewise, the value of \$12,000 for the Ducati motorcycle shall be used as it comes from F.W.'s Form 8 and is the only evidence of value.
- [59] The only remaining vehicle in dispute is F.W.'s 2003 Mercedes Benz SL 55, which he values at \$30,000 and which L.W. values at \$40,000. The best evidence of value comes from a combination of documents adduced into evidence by F.W. from a Mercedes Benz dealer and advertised sales prices on the internet, and it supports the value asserted by F.W.
- [60] Thus, F.W. shall make an equalization payment of \$23,250, which is one-half of the total value of \$46,500, which I have determined should be attributed to those vehicles that F.W. seeks to retain.

Income Tax Refund

- [61] F.W. received an income tax refund from the CRA in the amount of \$40,000, which he used to pay for legal fees. He shall pay L.W. \$20,000 as an equalization payment.

W. Family Trust

- [62] L.W. only recently became aware of the W. Family Trust, which was established by trust deed dated effective July 14, 2013. F.W. did not disclose the existence of the trust or trust documents in his document production or trial brief. F.W. and his brother are named trustees; the settlor was their father. The trustees are authorized by cl. 10.1 of the trust deed to appoint beneficiaries from time to time, so long as the appointments are made before the final distribution date, which is the earlier of 80 years from the date of the trust deed or the date on which the trustees in their discretion select and evidence in writing.
- [63] L.W. complains that she has been deliberately excluded as a beneficiary from the trust and its assets. F.W. testified that his purpose in establishing the trust with his father was to provide for his children in the future.
- [64] In his trial brief, F.W. asserted that ABC is an asset of the W. Family Trust, but he did not adduce any evidence to prove the allegation.
- [65] The only other purported trust assets that I was made aware of are the Olympic Village condos, but L.W. previously obtained a court order to effect the butterfly transaction that in turn has provided her with a beneficial interest in them and their corresponding net sale proceeds.
- [66] Without in any way condoning F.W.'s failure to abide by his production obligations in this as well as other respects, there was insufficient evidence from which I can determine any other potential trust assets, nor sufficient evidence from which I can find, as L.W. asks me to do, that the trust was a sham to exclude her from family assets.

Hidden Assets

- [67] L.W. contends that F.W. has hidden funds in undisclosed bank accounts or has used funds to purchase undisclosed assets. She has not adduced any evidence in support of the allegation and instead relies on the evidence adduced in F.W.'s case together with the adverse inference she says I should draw from his failures to abide by his document production obligations (both in terms of timing and substance) during the litigation.
- [68] In terms of the adverse inference issue, in her evidence and submissions, L.W. cited many instances of F.W.'s breaches of his disclosure obligations. She maintains that even now, F.W. has failed to make adequate disclosure.
- [69] I agree with L.W. that in addition to his failure to disclose certain significant debts to L.W. during their marriage, F.W. has delayed and in some instances failed to provide the disclosure required by the Supreme Court Family Rules ("Rules"). I also agree that his delicts concern significant financial matters that bear on the financial issues in this case. I also reject many of the explanations provided by F.W. for his failure to abide by his disclosure obligations (such as his inability to amass the documents as he is a self-represented litigant). He was represented by counsel throughout the proceedings until the eve of trial. F.W. has

failed to provide any reasonable explanation, and in some cases, none at all, for his failure to comply with his production obligations. F.W. sought to produce financial records during the argument phase of trial, seeking to have them entered into evidence. L.W. agreed to nearly all of F.W.'s requests to do so, and only disagreed where the provenance of documents was in issue or she was without opportunity to investigate to her prejudice (that could not be ameliorated on terms).

- [70] L.W. relies on several case authorities for her submission that costs are an insufficient remedy in these circumstances and that instead I should go further and infer that F.W. holds undisclosed assets since the negative impact on the non-disclosing spouse is a result of his own volition: *Cunha v. da Cunha* (1994), 99 B.C.L.R. (2d) 93 at 2, 4, 8 (S.C.); *Mansoor v. Mansoor*, 2012 BCSC 602 at paras. 19, 25-28, 31; *Friedlander v. Claman*, 2014 BCSC 2136 at paras. 11-18, 2015 BCSC 482 at paras. 12, 53, 54, 56; *Laxton v. Coglon*, 2008 BCSC 42 at paras. 27, 32; *Kiamanesh v. Kiamanesh*, 2004 BCSC 1052 at paras. 32, 34; *Wu v. Sun*, 2011 BCCA 239 at paras. 41, 45.
- [71] F.W. denied all suggestions of hiding funds or assets when it was put to him in cross-examination. At one juncture during his closing argument, F.W. conceded that he could not provide an accounting for approximately \$1.156 million of funds he received from his corporate interests. The only explanation he could provide was that he spent cash for the benefit of his wife and family, such as meals out, travel, home renovations, and expensive gift items. He characterized the cash outlay to be an average of \$159,000 per year. Some receipts to support his submission were in evidence, such as the purchase of expensive handbags for L.W., some meals out, and some of the children's activities, but they were only a small fraction of the amount. On F.W.'s own evidence, he did not set aside the funds to pay a substantial debt that he claims is owed to a third party of approximately \$1.2 million. At his request, I allowed him additional time to prepare an accounting from documents in evidence in order to prove his submission.
- [72] F.W. prepared several varied iterations of written submissions attempting to account for his use of funds. Even on his best argument, F.W. was still unable to account for over \$400,000. However, L.W.'s counsel was able to demonstrate, through a rudimentary analysis of the submissions and documents produced by F.W. and entered into evidence, that F.W.'s accounting contains numerous significant erroneous double-counted and exaggerated expenditures. For example, she demonstrated: (a) inappropriate duplication in respect of his tax payments to the CRA, vehicle down payments, and down payment to purchase the matrimonial home; (b) exaggerated payments concerning the matrimonial home such as utilities, ADT, and gardening services, and the \$2,000 monthly allowance to L.W.; and (c) unsubstantiated charges for personal credit cards.

- [73] In her analysis, L.W.'s counsel gave F.W. the benefit of any doubt where an expense could arguably be designated as an appropriate non-duplicated family expense. For example, counsel's analysis accepted at face value F.W.'s submission concerning certain withdrawals from the parties' chequing account (totalling approximately \$800,000) were all on account of family expenses despite deficient corroborating evidence such as copies of cheques.
- [74] From her detailed analysis of the documents and evidence produced by F.W., L.W.'s counsel has established on behalf of her client that F.W. has not accounted for \$1,947,766 of funds he has received. Even assuming that F.W. could demonstrate that he is entitled to full credit for his credit card charges (which L.W. took issue with), the dollar amount of unaccounted for funds would nevertheless still be at least \$1.5 million.
- [75] Accordingly, I have determined that F.W. has unaccounted for assets well beyond his self-acknowledged \$400,000. I find on the balance of probabilities that it is at least \$1.5 million and more likely the \$1.947 million reflected in counsel's analysis. My finding is not based solely on an adverse inference drawn from F.W.'s failure to abide by his disclosure obligations. It is predicated on the documents and evidence from F.W. and the compelling analysis of L.W.'s counsel.
- [76] L.W. did not claim for any portion of the hidden assets. Instead, she relied on the fact of hidden assets as a basis to reapportion a potential high value third party debt, which F.W. asserts is a family debt, said to amount to \$1.2 million and purportedly owed by ABC and F.W. as guarantor. As a result, I will deal with the effect of my finding in the section entitled "Debt to BDK" section of these reasons.

Debts

- [77] Under s. 86 of the FLA, family debt includes all financial obligations incurred by a spouse from the commencement of the relationship until separation, and those incurred following the date of separation if incurred for the purpose of maintaining family property.
- [78] Once a debt is determined to be a family debt, the court may engage in a reapportionment analysis for some or all of the debt on the basis of significant unfairness: FLA, s. 95.
- [79] F.W. claims that three separate debt obligations - to a third party, to his parents, and to the CRA - are family debts in which L.W. should be held to an equal account. L.W. disputes that any of them are family debts. L.W. in turn claims that certain credit card and line of credit debt she has incurred to maintain the family since separation, especially in view of F.W.'s failure to pay spousal support, are family debts.

Debt to BDK

- [80] ABC entered into an agreement with BDK Development Corporation ("BDK") effective August 31, 2011. The agreement ("BDK Agreement") called for ABC to pay BDK for its consulting services, based on one-half of ABC's share of certain ATM transaction fees once certain milestones were reached. Under the BDK Agreement, BDK would be paid a minimum of \$500,000. Depending on the success of ABC's ATM business, BDK could be paid well in excess of \$1 million.
- [81] BDK is the agent for the owner of a large property in the Lower Mainland where the casino which ABC supplied ATMs was located. With the assistance of BDK's principal, Mr. Daisen Gee-Wing, ABC had already obtained the exclusive opportunity to provide ATM machines throughout the landlord's property. With BDK's further assistance, ABC was able to obtain an exclusive and what turned out to be a highly lucrative contract to provide ATMs in the casino.
- [82] The transaction fees earned and paid to ABC flowed from a joint venture agreement that ABC reached with another entity. Although Mr. Gee-Wing was adamant in his testimony that the landlord knew of the BDK Agreement, F.W. could not say the same of ABC's joint venture partner. He vacillated between saying they were unaware or "were likely" unaware of it and admitted that he did not tell them. He also agreed in cross-examination that "it is fair to say that I was skimming off of the transactions" and there "was no easy way for [them] to find out - they had to trust me."
- [83] F.W. explained his rationale for entering into the BDK Agreement. He described Mr. Gee-Wing's efforts as indispensable to ABC's financial success, not only in securing contracts with the casino and the landlord (whom I understand to be the property owner), but in helping F.W. obtain his license with the regulatory authority responsible for casinos and gambling related licenses (in whose ambit service providers such as ABC fell into) and approvals from financial service providers, such as Interac and Visa Plus (who provide the cash for the ATMs). Mr. Gee-Wing also assisted ABC in clearing machine malfunctions when he was on site after hours. F.W.'s evidence that Mr. Gee-Wing was the decision maker for the landlord in respect of service providers was confirmed by Mr. Gee-Wing in his evidence. Mr. Gee-Wing confirmed that he was sufficiently impressed with F.W.'s motivation, personality, and promises for prompt service when he met him in 2002 that he decided to take a chance and give F.W.'s fledgling business its first big contract, which was to provide ATMs for the landlord. F.W. testified that Mr. Gee-Wing went far beyond his job duties to advocate for ABC, both to the landlord and to the casino. Mr. Gee-Wing's evidence did not go that far, however, as he admitted that many of his actions were part of his job duties for the landlord.

- [84] In his evidence, Mr. Gee-Wing said that without asking for it, ABC (through F.W.) offered the compensation described in the BDK Agreement to him even though he declined, at least initially, to take it. At one point, Mr. Gee-Wing said that he never expected let alone asked to be compensated for his assistance to ABC and F.W. He also testified that he did not ask for the specific terms, including the milestone dates set out in the BDK Agreement and F.W.'s personal guarantee.
- [85] F.W. and Mr. Gee-Wing testified that the monies are now due and owing to BDK, in the approximate total amount of \$1.2 million. ABC has failed to pay it.
- [86] Instead of putting the funds away to pay BDK when the milestone dates were achieved, F.W. used funds from ABC to help purchase assets such as the matrimonial home and the Winnipeg condos and Olympic Village condos.
- [87] Immediately prior to the start of the trial of this action, BDK issued a lawsuit in this Court seeking judgment against F.W. and ABC. F.W. says that neither he nor ABC intend to defend the action. In that action, BDK claims that certain assets acquired by F.W. (such as the Olympic Village condos) should be set aside on the basis that they were obtained through a fraudulent conveyance.
- [88] F.W. did not disclose the BDK Agreement and debt until November 2017, close to the first scheduled trial date in this action. The debt to BDK is not disclosed in ABC's financial statements provided to L.W. up to that time. It appears as if ABC has assigned the BDK debt to one of F.W.'s numbered companies, 089.
- [89] L.W. testified that she did not know about the purported debt to BDK until F.W. disclosed it in the litigation. F.W. testified to the contrary and tendered into evidence text communications with L.W. discussing the issue of money owing to BDK and its effect on their equity in the matrimonial home. I agree with L.W.'s submission that those communications took place in 2017, which is post-separation, and do not, on their own, demonstrate any prior knowledge on the part of L.W.
- [90] F.W. also points to L.W.'s tone in one of her text messages, suggesting that her matter of fact tone suggests that she was well aware of the BDK debt prior to separation and did not object to it. I do not draw that conclusion from the text message. She was simply responding to F.W. that if a debt was owed, there was no equity left in the matrimonial home. Nor do I make that finding from the evidence. While I had some difficulties with the reliability and credibility of L.W.'s evidence concerning certain issues relating to parenting issues, I found the rest of her evidence to be both reliable and credible. My finding is that L.W. only became aware of the BDK Agreement and purported debt post-separation.

- [91] After the BDK debt was disclosed, and for much of the trial, L.W.'s position was that the debt was a sham and "divorce proofing tactic". However, following her counsel's cross-examination of Mr. Gee-Wing, she resiled from that position and instead argued in closing submissions that the BDK Agreement lacks contractual effect for a number of reasons, including:
- (a) Its terms are vague and lack contractual effect.
 - (b) It is without contractual effect since it involves a gratuitous promise to pay without consideration as it involved both past services provided by Mr. Gee-Wing (since the ATMs were already placed in the casino and the landlord's premises before the BDK Agreement was entered into) and future services that were already part of Mr. Gee-Wing's contractual duties for the landlord.
 - (c) If there is contractual force to the BDK Agreement, the quantum is excessive.
- [92] At one point, her counsel advised that L.W. intends to seek leave to defend the BDK action if necessary. Short of being able to obtain leave, she is powerless to defend against it.
- [93] If BDK is successful in its action and the debt is a family debt, it is large enough to eliminate all of the parties' equity in the matrimonial home. BDK has threatened (but has not brought) an application seeking to enjoin distribution of assets in this proceeding until its claim in the separate action is determined.
- [94] I do not agree with L.W. that it is appropriate for me to decide the validity of the BDK debt in this action, especially where BDK lacks the opportunity to participate as a party. Nor do I agree that she has demonstrated that F.W. entered into the BDK Agreement in order to divert family assets away from her.
- [95] L.W.'s ultimate position is that any debt owed to BDK should be fully allocated to F.W. on the basis that it would be significantly unfair for her to bear any part of it. She relies on s. 95(2) and (3) of the FLA and advances several reasons to ground her submission.
- [96] The first is in light of F.W.'s decision not to defend an otherwise defensible claim. In closing argument, L.W. relied on a number of authorities as part of her submission seeking to have me find the debt to be unenforceable as against ABC: G.H.L. Fridman, Q.C., *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at 109; *MacKenzie v. MacKenzie*, 1996 CanLII 3698 (P.E.I.S.C.T.D.); *R.C.H. Enterprises Ltd. v. Batisse d'acier Hercule Ltee.* (1977), 16 N.B.R. (2d) 338 (C.A.); *Re Grosch*, [1945] 3 D.L.R. 63 (Alta. C.A.); *Richmond Realty Ltd. v. Charlton Enterprises Ltd.*, 1990 CanLII 2212 (B.C.S.C.); *Rogers v. Hutton*, 1994 CanLII 1367 (B.C.S.C.); *Harris v. Muntener*, 1995 CanLII 2301 (B.C.S.C.).
- [97] L.W. also advanced, as an additional ground for full allocation to F.W. of any debt owed to BDK, her complete inability to avoid or limit the debt obligation (such as avoiding F.W.'s personal guarantee), including her total vulnerability to F.W.'s control over his business affairs, her inability to stop or even question the making of the BDK Agreement, her inability

to ensure that sufficient funds were set aside to pay for the debt, and her inability to settle the debt with BDK at this time. She also submits that had she known of the debt, she would have objected to F.W. purchasing the Olympic Village condos and the Winnipeg condos (which also caused F.W. to borrow close to \$190,000 from his parents to complete the Winnipeg condos transaction; that debt, which I have found to be a family debt, is discussed in the next section).

- [98] Another factor that L.W. raised in respect of reapportionment of various debts is the significant disparity between the parties' ability to earn income. In support she relied on certain case authorities dealing with reapportionment of income tax debts: *T.T. v. J.M.H.*, 2014 BCSC 451 at para. 107; *Moore v. Moore*, 2012 BCSC 987 at paras. 85-93; *Hicks v. Hicks*, 1996 CanLII 2420 at paras. 44-49 (B.C.S.C.); *Clarke v. Clarke*, 2014 BCSC 1617 at paras. 71-78.
- [99] L.W. also points to the value of the hidden assets as more than sufficient to satisfy any debt owed to BDK.
- [100] The threshold to establish significant unfairness is high. The parties' relative contributions to the asset or debt is not relevant to the enquiry. In *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42, the Court of Appeal noted that reapportionment requires "something objectively unjust, unreasonable or unfair" in an "important or substantial sense." At paras. 43-44, the Court of Appeal distinguished the approach to be taken under the FLA from its predecessor:
- [43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c) and to post-separation increases in value beyond market trends caused by one spouse (95(s)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.
- [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the

circumstances in which it may be considered and relied on are intended to be much constrained.

[101] I also consider relevant the remarks of the Court of Appeal at para. 41:

[41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.

[102] I agree with L.W. that if the BDK debt is valid, it would be significantly unfair to treat it as a family debt. She has met the test and established that there will be significant unfairness if the purported debt is not reapportioned. She has more than exceeded the threshold of weighty, meaningful, or compelling, having regard to the factors in s. 95(2) (d), (e), (g), and (i). If valid, and if it is a family debt, it should be reapportioned wholly against F.W. I have made that determination for the following reasons:

- (a) The debt was not incurred in the normal course of the relationship between the parties.
- (b) F.W. failed to disclose the debt during the marriage and not until late in the litigation.
- (c) As a result of F.W.'s non-disclosure during the marriage of his intention to enter into the BDK Agreement:
 - (i) L.W. was unable to avoid or limit the purported debt obligation, including the provision of a gratuitous personal guarantee provided by F.W.;
 - (ii) L.W. was unable to take steps to ensure that the funds necessary to pay the debt were set aside;
 - (iii) in the absence of any knowledge of the BDK Agreement, L.W. agreed to incur additional family debt to purchase the Olympic Village condos and the Winnipeg condos; and
 - (iv) L.W. agreed to repay her share of the loan from F.W.'s parents from her share of family assets in order to complete the transactions involving the purchase of the Winnipeg condos.
- (d) The BDK debt claim, if valid, exceeds the value of the parties' equity in the matrimonial home.

- (e) Due to the significant disparity in the parties' income earning potential, L.W. is otherwise unable to pay her share of the BDK claim except from her share of the sale proceeds of the matrimonial home.
- (f) F.W.'s decision not to defend against any aspect of BDK's claim.
- (g) F.W.'s failure to adequately account for \$1.5 to \$1.947 million, which was more than enough to pay for the BDK debt.
- (h) The adverse inference I have drawn from that failure and from his significant ongoing failure to comply with his disclosure obligations under the Rules.

[103] In reaching my decision that the debt, if valid, should be reapportioned entirely against F.W., I have also relied on the reasoning in the decisions previously referred to as well as those cited by L.W.: *Zellweger v. Zellweger*, 2018 BCSC 1227 at paras. 108-111; *E.E.H. v. C.L.M.*, 2017 BCSC 1299; *Yousefian v. Jafarmadar*, 2018 BCSC 855 at paras. 103-105; *M.C.V. v. F.V.*, 2018 BCSC 96 at paras. 123-127; *Bamford v. Mulyati*, 2017 BCSC 945 at para. 43; *Ahmadi-Abbasabadi v. Ahmadian*, 2017 BCSC 646 at paras. 170-171; *Nanara v. Nanara*, 2017 BCSC 1447 at paras. 62-63, 89.

[104] Case authorities decided under predecessor legislation to the FLA, such as *Moore* at para. 93, hold that a reapportionment analysis, at least in cases involving a tax debt, should take into account any direct or indirect benefit enjoyed by the unwitting spouse. Relying on that proposition, F.W. argued that L.W. and their children enjoyed the fruits of those funds and it should be taken into account. He testified that these funds were spent on restaurants, bars, watches, handbags, clothing, vacations, groceries, and gifts in an amount of approximately \$159,000 per year over a six year period.

[105] His submission has no bearing on the analysis for two reasons. The first is that while his submission may have had relevance for an analysis under predecessor family law legislation had I not found undisclosed assets, it is no longer relevant under the FLA. Second, even if it could, F.W. has not established that the unaccounted for funds have been expended on his family or that his family has enjoyed any potential benefit from them.

[106] In summary, any debt owing to BDK by ABC and as guaranteed by F.W. is reapportioned wholly to F.W.

Loan from F.W.'s Parents

[107] F.W. used funds from his business (albeit indirectly through a holding company referred to as "583") and monies loaned to him by his parents to purchase, through a pre-sale, the Winnipeg condos. The pre-sales contracts were signed prior to separation. The parties separated before the closing date.

- [108] Despite a falling real estate market, F.W. was intent on completion due to his concern for personal liability flowing from personal guarantees contained in the contract documents. To allow him the financial means to complete the transaction, F.W. borrowed \$190,000 from his parents. The loan agreement provided for interest to be paid on any outstanding balance. F.W. now claims that the loan he received from his parents, which is documented in an agreement signed by himself and L.W., is a family debt.
- [109] The loan agreement is dated May 12, 2017, which is also after the parties separated. It was entered into when a s. 91 FLA restraining order was in effect. Although there is no direct evidence of whether L.W. obtained legal advice before signing the document, she did sign it in front of her trial counsel. Clause 2 of the loan agreement provides that F.W.'s parents shall be repaid in priority to any claims by L.W. in this case:
3. Forthwith upon a sale of either or both of the Winnipeg properties, [F.W.'s] parents shall be repaid their loan with interest thereon after any institutional financing secured against the property is discharged. The repayment to [F.W.'s] parents shall be in priority to any claims by [L.W.] in the Family Law Case.
- [Emphasis added]
- [110] The properties were later sold at a loss. Approximately \$55,000 of the debt was repaid from the sales proceeds, in priority to the BDK debt. The current amount owing is just over \$104,000. Interest continues to accrue on the outstanding balance.
- [111] L.W. admitted that she hoped that by completing the transactions she and F.W. would "make money". It did not turn out that way, but the result is irrelevant to the contractual analysis.
- [112] The language of the loan agreement is unambiguous. L.W.'s tenuous evidence of her subjective intention and of her thinking at the time she agreed to sign the document does not bear on its interpretation. I reject L.W.'s submission that the parents' priority is confined to the proceeds from the sale of the condominiums.
- [113] I agree with F.W. that the loan falls under the definition of family debt per s. 84(1)(b)(i), since it was incurred with the consent of both parties after separation in order to preserve to the greatest extent possible the value of an asset acquired by F.W. from family assets prior to separation.
- [114] According to F.W., his parents wish to be repaid. However, the amount of the loan that remains outstanding (with accrued interest) must be finalized. Once the final amount is ascertained, it should be repaid by the parties from the parties' entitlement to family assets in an equal amount. If the parties are unable to agree upon the amount as between themselves and F.W.'s parents, then the matter shall be referred to the Registrar for determination and certification as to amount per 18-1(1) and (2) of the Rules.

Canada Revenue Agency

- [115] F.W. testified that he mistakenly failed to file corporate tax returns for 089 for the tax years 2011 to 2017. He said that it was only after preparing for this litigation that he realized the requirement for filing. He has done that through voluntary disclosure with the CRA, with the help of professional tax advisors. F.W. estimates the tax debt is approximately \$150,000, excluding interest and penalties.
- [116] F.W. did not disclose the purported tax liability in his Form 8 or in his subsequent list of documents or trial brief. There is evidence that the disclosure was sent to the CRA by F.W.'s tax advisors, but there is no evidence of CRA's position. More fundamentally, however, F.W. has not established that any debt that might be owing to the CRA is family debt because he has not established that he is personally liable for it.
- [117] Consequently, I do not need to determine the merits of L.W.'s submissions that F.W. purposefully did not file corporate tax returns for seven years and then only did when his wife sought to pursue her interest in family assets. Nor do I need to determine L.W.'s reapportionment argument which was predicated on two grounds: (a) her lack of knowledge of 089's multiple failures to file tax returns; and (b) her lack of control over or power to effect any of F.W.'s filings with the CRA, including his corporate filings, such that she was "powerless" to take steps to prevent the defaults.

Personal Credit Cards and Lines of Credit

- [118] L.W. incurred debt after separation on her Royal Bank of Canada ("RBC") visa and line of credit (that she established before meeting F.W.) in the amount of \$17,637.24. She says it is family debt and should be apportioned equally with F.W. She incurred those debts post-separation primarily to support herself (e.g., food and gas), but also to pay for the children's expenses not paid for by F.W. as a result of F.W.'s failure to make spousal and child support payments to her beyond those that he made in 2017.
- [119] The debt she incurred does not fall under the definition of family debt in the FLA since it was not incurred post-separation to maintain a family asset. However, her debt is a factor to be considered in her claim for an award of retroactive spousal support.

Other Expenses

- [120] F.W. seeks to recover at least half of the funds he has expended for joint experts (including the cost of a report he obtained from Dr. Elterman concerning parental contact issues and the cost of appraisals for the matrimonial home and the condo owned by ABC), the cost of an unsuccessful mediation, and the professional fees incurred for the Olympic Village condos' butterfly transaction. F.W. has paid for all of those costs.
- [121] The fees charged by experts retained by the parties for the litigation, including the costs of joint experts, should be dealt with when costs are determined.

- [122] L.W. agrees to pay one-half of the costs of mediation. She shall reimburse F.W. out of her share of the net proceeds from the sale of the matrimonial home.
- [123] I agree with F.W. that the reasonable costs related to the butterfly transaction should be shared equally between the parties. The parties should determine those costs and sort out their respective shares. L.W. shall reimburse F.W. out of her share of the net proceeds from the sale of the Olympic Village condos. If the parties are unable to agree on the amount, then they can arrange to appear before me to determine it.

Determining Incomes for F.W.'s Support Obligations

- [124] In addition to an order for F.W. to pay ongoing monthly basic child support and to pay his proportionate share of s. 7 expenses, L.W. seeks an order for lump sum retroactive child support. If a retroactive child support order is not available, then she seeks an order for lump sum retroactive spousal support in addition to having his ongoing spousal support obligations paid partly by a lump sum and through regularized monthly payments. She seeks a lump sum payment owing to what she submits is uncertainty over F.W.'s ability to pay spousal support on an ongoing basis. She also seeks to secure F.W.'s ongoing child support obligations through his existing life insurance policy which currently lists L.W. as the sole beneficiary, until the children reach the age of majority.
- [125] Her claim for a lump sum payment is predicated in part on what she described as F.W.'s unilateral and "arbitrary" cessation of spousal and child support in April and June 2017 respectively, and what she describes as his "demonstrated willingness to obstruct the legal process by heavy handed litigation tactics and financial intimidation." L.W. submits that inasmuch as F.W.'s assets are, apart from the matrimonial home, held in his various corporate interests and otherwise hidden elsewhere, she is unlikely to be successful in collecting any court ordered periodic support through the Family Maintenance and Enforcement Program. For the reasons set out below, I have concluded that it is premature to determine a final order concerning ongoing spousal support and have instead ordered interim payments with a review to take place in one year's time. For that reason, a lump sum order for future spousal support is not appropriate at this time.

F.W.'s Income

- [126] I am persuaded that F.W.'s present ability to earn income through ABC has, at least for the foreseeable short term, been adversely impacted by the loss of ABC's mainstream casino client, which over time accounted for as much as 60% of ABC's revenue. I accept that F.W. has taken steps to reduce costs to his business (including payroll) in light of declining revenue. F.W.'s ability to earn income has also been impacted by his ongoing focus to this litigation during the trial.

- [127] ABC has been subject to closer scrutiny from the provincial authority in charge of gaming licenses, the Gaming Policy and Enforcement Branch ("GPEB"), due to F.W.'s past business affiliation with a person of interest to that authority. F.W. is also required to report the BDK lawsuit and the results of the valuator's findings concerning \$500,000 of unaccounted for cash to GPEB. I accept F.W.'s evidence that the circumstances surrounding those matters and the revelation of a prior substance abuse problem could well impact the terms on which GPEB is prepared to renew ABC's authority to provide ATMs for casinos. It is entirely possible that GPEB, following what I am advised is its current audit of ABC, may not renew the license at all. Either event could affect ABC's ability to earn revenue. If the license is not renewed, ABC will suffer significant loss of revenue in the short term as it searches for other clients, and F.W.'s income would be significantly and adversely affected as a result.
- [128] Determining the true effect of long term negative contingencies that will or might affect F.W.'s ability to earn income is premature given the present uncertain circumstances pending the outcome of the audit and the outcome of ABC's license renewal process with GPEB. Applying the reasoning in *S.C. v. E.C.*, 2004 BCSC 1719 at para. 37, it is not appropriate to anticipate those contingencies at this time for the purpose of setting a long term spousal support award. See also: *Cotter v. Cotter*, 2015 BCSC 1730 at paras. 27-29, citing *Leskun v. Leskun*, 2006 SCC 25 at para. 37 and *Morck v. Morck*, 2013 BCCA 186 at para. 17.
- [129] I am satisfied that F.W. is currently capable of earning, as either income or dividends, or both, at least \$175,000 and more likely close to or at \$200,000 from ABC and his other companies. I reject his evidence that his income earning ability is currently \$110,000 (which differed from the \$177,000 plus figure he identified in his opening statement). His obligation for interim spousal and child support should be based on his current ability to earn income, which I set at \$190,000. It should be treated as an interim award pending the outcome of the GPEB audit and renewal process. A full review *de novo*, not predicated on changes in material facts, but engaging the same factors as in an initial support application, per s. 168(3) of the FLA and *McEachern v. McEachern*, 2006 BCCA 508, should take place by in the fall of 2019, but by no later than December 1, 2019.

Imputing Income to L.W.

- [130] The parties agree that notional income should be imputed to L.W. They disagree over the amount. L.W.'s position is that imputing \$30,000 commencing November 1, 2018 is reasonable in the circumstances since working either part or full time has not been realistic until recently. F.W. submits that L.W. should have been working long ago, even prior to separation, and that an income of \$72,000 should be imputed to her.
- [131] L.W. testified that she did look for work earlier this year and briefly worked for a friend hosting a pleasure boat in Puerto Vallarta but was only paid \$1,000. She explained that she also had to put her job search on hold shortly thereafter when her aging father was diagnosed with a terminal illness. As the only member of her family that is not employed, she says it fell on her to assist her mother and attend to her father on a daily basis,

especially while he has been in the hospital. F.W. takes issue with this and submits that it does not provide a reason to alleviate L.W. from her responsibility to seek employment.

- [132] L.W. has also reapplied for a study program where she can qualify as an educational assistant and is hoping to be accepted and start in February 2019.
- [133] L.W. also explained that she could not look for work until this year since she needed to be available for the children during the period of time post-separation when F.W. was suffering from the consequences of his substance abuse issues. I accept her evidence that there were many occasions when F.W. would suddenly disappear without notice and L.W. had to remain on call to attend to the children during the times that F.W. was supposed to have the children in his care.
- [134] She also said that the interlocutory aspects of this litigation have consumed a great deal of her time, up to and including trial, such that no employer would have hired her, even on a part-time basis knowing that she needed to attend to court proceedings from June until the trial concluded (which was scheduled to conclude in the following month).
- [135] L.W. testified that she would like to set up her own business to operate an eyelash studio, but offered no evidence such as business plan or ability to obtain financing. I do not accept that L.W. is currently capable of achieving her tanning salon earnings, which is the basis of F.W.'s position. L.W. has no means to access capital to purchase a small business. However, with the current contact schedule and the age of the children, I accept F.W.'s submission that she is now able to work full-time.
- [136] In the absence of evidence establishing that she has the means to set up her own business, I find that the most likely readily available income source for L.W. at this time (that exceeds minimum wage) is work as an administrative assistant or in a clerical capacity.
- [137] In my opinion, L.W. should have looked for work in earnest starting in January of this year when it became apparent that the erratic nature of F.W.'s availability due to his substance abuse issues had firmly abated. I accept that the plethora of interlocutory applications and attending to her father and at trial, have been all-consuming, but in my opinion, especially since the trial was originally scheduled to conclude in early July, those matters should not have prevented L.W. from engaging in a job search with a view to starting work by September 1 of this year.
- [138] I have determined that it is fair and appropriate to impute an annual income to L.W. starting on September 1, 2018 of \$30,000, increasing to \$40,000 six months' later, i.e., March 1, 2019. L.W. is capable of earning an even greater income over time and as a result of that finding, it is also essential to determine the outcome of L.W.'s application to attend the educational assistant program. Consequently, I have determined that a review of her earnings and income earning prospects are warranted at the same time as the review of F.W.'s income earning potential takes place next year. Thus, the review to determine a final award should be coordinated to be conducted at the same time as the review of F.W.'s

income in the fall of 2019, and no later than December 1 of that year. The nature and scope of the review is on the same basis as the review of F.W.'s support obligation.

Conclusion

- [139] It is premature to determine a final award for spousal and child support, let alone for an indefinite period for spousal support as sought by L.W.
- [140] The findings I have made concerning the incomes to be imputed to the parties are interim only. Final orders shall be determined following a review to be undertaken in the fall of 2019 and no later than December 1, 2019. The assessment shall not be predicated on proof of material change(s) in circumstances. For example, current submissions regarding the propriety of lump sum awards and security (e.g., in the form of life insurance) are not precluded.
- [141] In the interim, F.W.'s obligation to pay spousal and child support is based on an annual income of \$190,000. Income shall be imputed to L.W. in the amount of \$30,000 per annum effective September 1, 2018 and increased to \$40,000 on March 1, 2018.

Retroactive Child or Spousal Support

- [142] L.W. seeks an order for a lump sum award for retroactive child or spousal support in the amount of \$50,000 to cover the period July 1, 2017 to the start of trial. She bases the amount on earnings of \$200,000 per year for F.W. and in terms of a retroactive spousal support order, she relies on the mid-point of DivorceMate calculations. L.W.'s claim does not take into account any imputed income for herself. L.W.'s position is that \$200,000 is more than reasonable since she says that F.W. made (and still earns) more than that amount. Her submission is based in part on F.W.'s 2017 T4 earnings of \$197,850.88 plus the dividends that F.W. received that year totalling approximately \$290,000 (of which he deferred \$200,000 to be reported in a subsequent year or years).
- [143] D.B.S. v. S.R.G., 2006 SCC 37 is the leading case concerning retroactive support orders. The case involved child support but the analysis also applies to L.W.'s alternate claim for retroactive spousal support. See also Kraft v. Kraft 2018 BCSC 496 at paras. 82-83, citing D.B.S.; Ducharme v. Rempel, 2016 BCCA 198 at paras. 16-19. The factors to be considered by the court are:
- (a) whether there is a reasonable excuse for why spousal support was not sought earlier;
 - (b) the conduct of the payor;
 - (c) the circumstances of the recipient spouse; and
 - (d) any hardship occasioned by a retroactive award on the payor spouse.

- [144] None of those factors are decisive. The Court in D.B.S. said that when considering whether to order retroactive support, "At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix": para. 99.
- [145] The date of effective notice of the support claim is a factor in the analysis: D.B.S. at para. 118. However, an applicant's delay or misconduct in seeking support carries more weight in the spousal support analysis: Ducharme at para. 17; Kraft at para. 83. Delay in seeking a retroactive spousal support award does not arise in this case. It does arise to a limited extent concerning child support. Although L.W. gave notice of her intention to seek child support when she filed her notice of civil claim, she was consistent and definitive in her position up until the last moments of closing argument on September 21, 2018, that she was not seeking retroactive child support. It was at that time that she amended her position.
- [146] Quite apart from any issues and concerns arising from that change in position, in light of my finding that F.W. has essentially provided support for nearly all significant aspects of the children's needs (accommodation, food, clothing, and activities) when no order was in place, I am of the opinion that a retroactive child support order is neither appropriate nor warranted in this case. Also, to borrow from the language in D.B.S. at para. 95, the children would not receive any "discernable benefit from the award". I will therefore consider the claim in the context of a claim for a retroactive spousal support order.

Blameworthy Conduct

- [147] In D.B.S., Mr. Justice Bastarache said, at para. 106, that courts should "not hesitate to take into account" a payor's blameworthy conduct when considering "the propriety of a retroactive award", and should also "take an expansive view of what constitutes blameworthy conduct". He described it in the context of child support as "anything that privileges the payor parent's own interests over his or her children's rights to an appropriate amount of support." It includes hiding income, intimidating the recipient parent, misleading the recipient parent that the payor's obligations are being met, or consciously choosing to ignore the obligation. Determining whether the payor engaged in blameworthy conduct is a subjective question involving "objective indicators": D.B.S. at para. 108.
- [148] During trial, F.W. readily acknowledged his ongoing obligation to pay spousal support. After he was put on notice of L.W.'s claim for spousal support in January 2017, he began making spousal support payments of \$2,500 per month, but stopped two months later. His payments totalled \$5,000.
- [149] F.W.'s primary justification for not paying spousal support at any other time is that he says he has paid for all of the expenses related to the matrimonial home, including the mortgage and line of credit expenses, which he says are approximately \$5,400 per month. But the figures he provided total approximately \$5,275 per month, broken down as follows: \$3,231.45 for bank mortgage; \$803.27 for line of credit; \$259.26 for insurance; \$214.40 for

BC Hydro; \$170.02 for Fortis gas; \$157.50 for automatic sprinkling system; \$42 for Telus; \$58.56 for ADT security; and \$338.61 for Shaw cable and internet. His position is that he has more than satisfied his support obligation, especially in the absence of any contribution towards those expenses from L.W. For the 22 month period between January 1, 2017 and October 30, 2018, those payments total approximately \$116,050.

[150] In D.B.S. at para. 109, Bastarche J. identified one of the factors that could militate against a retroactive award is whether the payor has indirectly met his support obligation by paying reasonable and appropriate expenses beyond his statutory obligation. Thus, the amounts paid by F.W. to maintain the matrimonial home is a relevant factor. In my opinion, it is not a full answer to L.W.'s claim for a retroactive support order for a number of reasons:

- (a) It is not up to the payor to choose how the money should be spent.
- (b) His payments also provided F.W. with accommodation as he continued to live in the matrimonial home until some time in May 2018.
- (c) Those payments provided accommodation for F.W.'s children and in that sense met some of his basic child support obligation.
- (d) F.W.'s payments to the mortgage and line of credit also increased the net equity in the matrimonial home, which will be to his benefit when it is sold.
- (e) F.W.'s failure to pay spousal support beyond two months forced L.W. to incur credit card and line of credit debt to support herself and to meet certain expenses of the children not covered by F.W.

[151] For those reasons I have no hesitation in finding blameworthy conduct on the part of F.W.

Circumstances of L.W.

[152] Although F.W. provided housing (and all related costs) and, for the most part, food for the children during the time leading up to trial, L.W. nonetheless suffered hardship because she was without funds to provide for herself, including a vehicle. L.W. received some relief from federal government assistance, which she was forced to apply for when she was without funds and no further access to credit. In light of F.W.'s addiction issues, she could not realistically look for work until January 2018. She was wholly dependent on F.W. for funds, except for: (a) approximately \$600 per month she received for basic child support for her eldest daughter from her first husband and (b) a lump sum child care benefit payment in the amount of \$18,900 in 2017. F.W. cut off access to L.W.'s access to their joint credit cards. He also used their line of credit to meet some of his support obligations.

- [153] F.W. seeks to have the child care benefit payment equalized between the parties on the basis that it is a family asset. I disagree. Through her repeated efforts, L.W. obtained this sum post-separation to help her meet her expenses in the absence of spousal and child support. Also, as mentioned, L.W. also had to run up debt on her own credit card and line of credit to cover her own expenses and those of the children not covered by F.W.
- [154] The level of F.W.'s blameworthiness is significantly enhanced in the context of a high dollar value of undisclosed assets he acquired from cash made available to him from his corporate holdings. L.W.'s circumstances in having to apply for federal support, run up debt, and borrow vehicles for her basic needs are also compounding aggravating factors material to L.W.'s circumstances and the level of F.W.'s blameworthiness.

Hardship

- [155] F.W. claims that he lacks the means to pay a retroactive spousal award at the same time he is paying child and spousal support and for his own accommodation.
- [156] Hardship to the payor parent is another factor to consider in the analysis of whether a claim for a retroactive award is justified: D.B.S. at paras. 114-116. A broad view of hardship is taken since unlike prospective awards, retroactive awards are based on past income and not necessarily linked to what the payor can currently afford and may disrupt the financial affairs of the payor: D.B.S. at para. 115. Bastarache J. cautioned in D.B.S. at para. 116 that courts should attempt to "craft" the retroactive award in a manner that minimizes hardship.
- [157] I agree with F.W.'s submission concerning his present circumstances in the context of his current income of \$190,000, his ongoing obligation to pay for the debts and expenses associated with the matrimonial home, his own accommodation, and interim spousal and child support, and only if I exclude any consideration of access to undisclosed assets. My finding concerning his hidden assets erodes any semblance of hardship. Regardless, once the matrimonial home is sold and the debts are paid, F.W. will clearly have the means to satisfy an award from his share of the proceeds of sale. On that basis, hardship is clearly avoided if any award is paid out of F.W.'s share of the sale proceeds once the matrimonial home is sold.

Determination

- [158] To assist in my determination of the quantum of F.W.'s obligation to pay past spousal support since notice was given in January 2017, I have considered the range set out in the Spousal Support Advisory Guidelines [Guidelines] as well as the parties' means, needs, and other circumstances of the parties, including the length of their relationship and the functions performed by each during their marriage, in order to ensure that the economic reality and particular circumstances of the family are properly accounted for: Kraft at para. 128.

- [159] I have relied in part on the DivorceMate Tables using F.W.'s income reported in his 2017 tax return (\$254,300), the ages of the parties and the children, the length of marriage, and that L.W. had primary care of the children.
- [160] The results are as follows. Based on income of \$254,300 attributed to F.W. and no income to L.W., the range from the Tables for the low, medium, and high categories are \$5,055, \$5,699, and \$6,261 per month, respectively, which for 18 months (from separation in November 2016 to the start of trial in the latter half of June 2018) total \$90,990, \$102,852, and \$112,698, respectively.
- [161] On this analysis, F.W.'s payments for the matrimonial home of \$116,050 and the combined amount of his prior spousal support payments of \$5,000, all of which total \$121,050, exceed his maximum total past spousal support obligation since separation.
- [162] For the 12-month period claimed by L.W., the total support amount is lower. Depending on which point in the Tables are used, the totals are \$60,660, \$68,388, and \$75,132, respectively.
- [163] However, I note that at paras. 126-129 of D.B.S., Bastarache J. cautioned that when determining quantum, courts should do so in a manner that is consistent with the applicable statutory scheme and avoid "[b]lind adherence to the amounts set out in the applicable Tables." The result should be "fair"; the award should be tailored to the circumstances of each case. Guidance may be taken from the Guidelines not only as to amount but to other means (such as those set out in ss. 3(2), 4, and 9 or by varying the period covered by the order despite notice).
- [164] Determining whether a retroactive support award should be made is not only complicated by the fact that F.W. lived in a portion of the matrimonial home until recently, but also because the payments he made include that portion of his child support obligation intended to contribute towards a residence for his children. Moreover, he (as well as L.W.) will benefit from the increased equity in the matrimonial home through debt reduction. Therefore, I have determined that only a portion of F.W.'s payments should be considered as contribution towards spousal support.
- [165] In view of L.W.'s consent to F.W.'s application to amend his pleading to include a claim for occupational rent, F.W.'s claim must be considered, both in terms of the claim for a retroactive support order for June 2018 and for F.W.'s ongoing spousal support obligation.
- [166] Occupational rent was described by Mr. Justice Rogers in *Hack v. Hack*, 2013 BCSC 2134 at para. 39 as having "an uneasy relationship with family law." In non-family law cases, occupational rent is claimed by a co-owner who has been ousted from the property on the basis that a co-owner has the right to equal entitlement to use of the property. Ouster is no longer required as prerequisite to advance a claim. In family law cases, Rogers J. said:
- [39] The difficulty with occupation rent in matrimonial cases arises out of the fact that spouses typically cohabit not because they are co-owners in a commercial senses but, rather, because they have committed themselves to their relationship. When that relationship

breaks down, remedies other than occupation rent typically come into play. Those remedies include spousal and child support, and orders such as requiring one party to pay property-related expenses. Occupation of the jointly owned house is often taken into account when such orders are crafted. Because those orders contemplate the financial needs of the parties, in matrimonial cases occupation rent is not commonly awarded as a discrete item of relief.

[167] It is not typically advanced as a stand-alone claim, but is usually considered in the reapportionment analysis: *Holland v. Holland*, 2017 BCCA 75 at para. 23; *Shen v. Tong*, 2013 BCCA 519 at para. 91. Reapportionment is appropriate when an equal division would be significantly unfair: *Shen* at para. 91. Where a stand-alone order for occupational rent is made, it is a discrete order made as a result of a determination that it is necessary to achieve equity between the parties: *Shen* at para. 94; *Hack* at para. 41.

[168] In *Ross v. Ross*, 2013 BCSC 1716 at para. 47, Mr. Justice Verhoeven cited the reasons in *Casey v. Casey*, 2013 SKCA 58 at para. 48, where Mr. Justice Lane cautioned that the remedy is "exceptional", one that "should be used cautiously," and utilized to "obtain justice and equity in appropriate circumstances." Verhoeven J. also cited, from the same paragraph of the Saskatchewan Court of Appeal's reasons, its discussion concerning the factors to be considered in respect of an occupational rent claim in family law cases:

[48]

3. The following factors, where relevant, are appropriately considered:

- The conduct of both spouses, including failure to pay support, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home (*Peltier* at paras. 16-17; *Wilgosh* at paras. 99 and 109; *Good* at para. 90).
- Where the children are residing and who is supporting them (*Good* at para. 90; *Peltier* at paras. 16-17; *Wilgosh* at para. 108).
- If and when a demand for occupational rent was made (*Wilgosh* at paras. 100 and 106, *Good* at para. 90, and *Peltier* at para. 16).
- Financial difficulty experienced by the non-occupying spouse caused by being deprived of the equity in the home (*Peltier* at paras. 16-17; *Wilgosh* at para. 106).
- Who is paying for the expenses associated with the home. This includes who is paying the mortgage and other upkeep expenses (maintenance, insurance, taxes, etc.). If there is no mortgage, occupational rent may be needed to equalize accommodation expenses (*Good* at para. 90; *Peltier* at paras. 16-17; *Wilgosh* at paras. 105-106 and 108).
- Whether the occupying spouse has increased or decreased the selling value of the property (*Peltier* at paras. 16-17).
- Any other competing claims in the litigation that may offset an award of occupational rent (*Wilgosh* at para. 108; *Good* at para. 92).

4. The remedy is a discretionary one requiring the balancing of the relevant factors to determine whether occupational rent is reasonable in the totality of the circumstances of the case.

[169] In *Holland*, at para. 24, the Court of Appeal set aside the order for occupational rent on the basis that notice was only provided shortly before trial and never in the pleadings. In the case at bar, L.W. has not raised lack of notice as a defence to the claim.

[170] Sufficiency of notice was also raised a defence in *Shen*, but the Court of Appeal determined, on a different basis, that the trial judge erred in allowing the claim. In that case, the claimant sought to recover, through reapportionment, his costs for separate rental accommodation of \$1,600 per month while he was at the same time making the payments necessary to maintain the matrimonial home being occupied by the respondent. The Court of Appeal held the trial judge erred in treating it as a stand alone claim and said that "if a rental compensation claim was to be considered at all, it should have been considered as a factor to be weighed in the division of assets": para. 49. The effect of the trial judge's order was to reduce the respondent's share of family assets "in the order of 6%", which I take from the reasons was viewed by the Court of Appeal to be inordinate.

[171] *Hack* is an example of a case where a discrete award was made that did not involve reapportionment. In that case, the respondent husband occupied the matrimonial home between August 2011 and June 2013, while the claimant wife lived elsewhere in her own accommodation. There was no evidence that Ms. Hack experienced significant hardship by not having access to the equity in the matrimonial home: para. 50. Rogers J. declined to infer, as Ms. Hack urged him to do, that Mr. Hack frustrated a sale of the matrimonial home by causing water leaks and making repairs to the house. Nonetheless, he allowed the claim on the basis that Mr. Hack's "dedication to the task" of listing and selling the home "varied". Rogers J. awarded occupational rent at \$1,000 per month for one year.

[172] In considering the means, needs, and circumstances of the family, it is clear that F.W.'s failure to pay support caused L.W. to incur debt (to support herself and to a much more limited extent, the children) and also to rely on others to loan her vehicles once the lease for her Mercedes Benz SUV expired. She was without financial means to purchase or lease a similar or any other vehicle and was forced to borrow vehicles from her friends and acquaintances to attend to her needs and some of those of the children. In the meantime, F.W. had access to multiple vehicles and significant funds.

[173] Moreover, F.W. has not demonstrated hardship during the period in which retroactive spousal support is sought due to any lack of access to the equity in the matrimonial home. His current hardship in satisfying a retroactive award is ameliorated by allowing him to defer payment, if necessary, until he receives his share of the sale proceeds from the matrimonial home.

- [174] When looking at the issue holistically, I have concluded that F.W.'s blameworthy conduct and the financial circumstances suffered by L.W., together with the benefits F.W. obtained in the payments that he made (i.e., his accommodation, increase in his share of the equity, and contributions toward child support) offset any potential credit that could be given for the payments F.W. made to maintain the matrimonial home in any reapportionment analysis. The matter of F.W.'s undisclosed assets is also a factor that I have considered in the blameworthy conduct analysis.
- [175] In those circumstances, it is my determination that the amount claimed by L.W. of \$50,000 is fair and appropriate. It reflects an amount that is less than the low point of the range in the DivorceMateTables when considering F.W.'s income reported on his 2017 tax return and the fact that he actually received but deferred \$200,000 of additional income (to be included in his reported income in subsequent years). The payment to L.W. should be made no later than when F.W. has access to his share of his proceeds from the sale of the matrimonial home.

F.W.'s Interim Child Support Obligation

- [176] Since trial did not complete within the parties' original time estimate, I made mid-trial interim orders (without prejudice to either parties' rights to assert a higher or lower amount should be assessed) that effectively required F.W. to pay child support commencing in July 2018 to the release of these reasons. The amounts were intentionally conservative. The support payment for July 2018 was based on income of \$110,000 and on income of \$170,000 for the following month. The last order I made, on September 21, 2018, required F.W. to pay \$2,150 per month on an interim without prejudice basis. For reasons that I explain in the next section, I also ordered F.W. to pay an additional \$300 per month to L.W. on account of the cost of BC Hydro.
- [177] As a result of my findings in these reasons, F.W. shall pay interim child support commencing from July 1, 2018, based on his income of \$190,000, taking into account the point in time incomes that I have imputed to L.W. and the shared custody arrangement (established by the parties' consent order entered during the trial). The amounts paid by F.W. per the mid-trial orders shall be applied as a credit. His child support payments shall be made on the 15th of each month.
- [178] A review of the DivorceMate Tables reflecting F.W.'s income of \$190,000 with no income imputed to L.W. result in support payments of \$2,631 per month premised on shared parenting. When \$30,000 and \$40,000 are imputed to L.W. the amount drops to \$2,147 and \$1,996, respectively. The parties should, within 30 days, confirm the amounts to be paid by F.W. once he is given credit for the payments he has made per the interim mid-trial orders, and set out in the form of order to be entered with the Registry the specific dollar amounts of his child support obligation. Failing agreement, they should forthwith arrange to provide further submissions so that I may determine it. Until those amounts are determined, F.W. shall continue to pay the current amount made in my last interim order of \$2,150 per

month.

- [179] Special expenses shall be paid in accordance to the parties' respective imputed incomes. L.W. objects to what she describes as F.W.'s decision to continue to enroll the children in high cost activities that they are unable to afford. I agree that her request that special expenses be limited per child per year is reasonable in the parties' current circumstances. I think that the \$2,000 figure she proposes is low given the high level of soccer and dance participated to date by their son and daughter, respectively. In my opinion, a more appropriate figure based on the parties' current incomes is \$3,000 per child. If either party chooses to spend more than that amount, it shall be wholly on their own account absent written consent from the other spouse or court order.
- [180] I also agree with L.W. that apart from soccer and dance, the parties must discuss and agree upon extra-curricular activities that impact on the parties' parenting time. I do hope that they can resolve any differences through discussion and if necessary, family counselling or mediation, as opposed to returning to court with its attendant costs.

F.W.'s Interim Spousal Support Obligation

- [181] F.W. is obliged to pay spousal support until the review occurs, premised on income of \$190,000 per year, and based on the point in time incomes imputed to L.W. and the shared parenting regime. I agree with L.W. that spousal support should be set at the mid-range of the Guidelines for the interim awards in view of the length of the parties' relationship, L.W.'s role to date as the children's stay-at-home primary caregiver since birth, and the parties' financial circumstances.
- [182] As mentioned, F.W.'s claim for occupational rent also arises when considering ongoing spousal support. His claim is predicated on his payment of expenses for the matrimonial home.
- [183] As was the case in Hack, no evidence of rental value has been adduced. The most that I have is evidence of the expenses paid by F.W. He has not advanced a claim for compensation for the cost of the rent of his new accommodation. Nor is there evidence of that cost.
- [184] F.W. testified that paying for all of the expenses associated with the matrimonial home, his own accommodation, and child and spousal support will cause him extreme hardship. His submissions concerning hardship were premised on what he maintains is his current income of \$110,000 (and not the \$190,000 figure I have found). Regardless, I am satisfied that hardship exists if he makes all of those payments on that income and the income I have imputed to L.W. For example, with no imputed income to L.W., F.W.'s monthly payments (without regard for F.W.'s own accommodation) for July and August 2018 total \$12,275 (comprised of \$5,275 for the matrimonial home, \$2,631 for child support, and over \$4,369 for spousal support if the mid point of the Tables is used). Once \$30,000 is imputed to L.W. effective September 1, 2018, F.W.'s payments decrease to \$10,800 (\$2,147 for child

support and \$3,378 for spousal support). With \$40,000 imputed to L.W., that amount drops to \$10,302 (child support drops to \$1,996 and spousal support to \$3,031).

- [185] Keeping in mind the reasoning from the case authorities concerning significant unfairness, s. 95(2)(i) of the FLA, and that reapportionment is the usual remedy when there is merit to an occupational rent claim, I would have allowed reapportionment in favour of F.W. since I have determined that it would be significantly unfair to require him to expend all or more than all of his monthly net income while he is denied access to his share of equity in the house.
- [186] However, determining an appropriate reapportionment in order "to do equity" between the parties is made difficult because there is no means to determine how long it will take for the matrimonial home to be sold and thus no means to determine the extent of the inequity to F.W. in being denied access to his share of equity. Consequently, I am of the opinion that this case falls within the exceptional circumstances category where a discrete award for occupational rent is necessary.
- [187] Complicating the determination of the amount of the award for the occupational rent claim is the absence of evidence of rental value and of the amount F.W. is paying for his current accommodation.
- [188] As a result, I am in the same position as Rogers J. was in Hicks (where only a nominal amount was awarded).
- [189] Moreover, in the final moments of closing submissions on September 21, 2018, I was advised by L.W.'s counsel - and F.W. confirmed it - that F.W. recently, and unilaterally without notice to L.W., advised BC Hydro that he would no longer pay for electricity to the family home. L.W. and the children woke up one morning to find no power in the house. Fortunately, L.W. was able to set up an account in her own name and is currently paying for it (presumably out of funds she receives from F.W. as a result of the interim child support orders I made during trial). In his submission, F.W. sought to justify his conduct on the basis that he could no longer afford to pay for BC Hydro, that L.W. continued to incur exorbitant expenses, and that she would have known about the power issue if she had read her mail (he asserted that she would have received a termination notice from BC Hydro). Even though this information was not adduced into the record as sworn evidence, it was confirmed by F.W. He also confirmed that he no longer intends to pay for the Fortis gas bills for the matrimonial home; he only intends to pay for the mortgage and line of credit.
- [190] The amount of F.W.'s payment of expenses for the matrimonial home impacts on the value of the credit to be given to him in respect of his occupational rent claim. Once payments other than the mortgage and line of credit are removed from the analysis, F.W.'s total monthly payment is reduced by \$1,241, from \$5,275 to \$4,034.72. With that adjustment, F.W.'s total payments (including mid-Table spousal support and child support) commencing September 1, 2018 are \$9,559 per month, which will decrease to \$9,061 per month on March 1, 2019 when the income attributed to L.W. increases by \$10,000. Regardless, both amounts

will nonetheless exhaust his monthly net income from a gross income of \$190,000.

- [191] F.W.'s conduct in dealing with BC Hydro is irrelevant to spousal support analysis since misconduct (which in this case is alleged) is not relevant to determining spousal support. To borrow from the language of ss. 15.2(5) and (6) of the Divorce Act, it is the "condition, means, needs and other circumstances of each spouse" (including the length of time of cohabitation and the functions performed by each spouse during cohabitation) and the economic advantages or disadvantages to the spouses arising from the marriage or its breakdown that matter: see also *Leskun v. Leskun*, 2006 SCC 25 at paras. 16-24; *Kraft* at paras. 72-81.
- [192] However, the cost of BC Hydro was not intended to be absorbed by the interim child support I ordered mid-trial before being apprised of the issue. For that reason, and also to ensure that BC Hydro is maintained to avoid waste to the matrimonial home over the fall and winter months until the property is sold, I ordered F.W. to make the additional payment to L.W. of \$300 per month on September 21, 2018.
- [193] In all of those circumstances, and in the absence of any evidence concerning value to be ascribed to L.W.'s occupation of the matrimonial home, I have determined that F.W. should be given a credit to offset his spousal support obligation of \$2,000 per month for July and August 2018, while he paid for all of the costs associated with the matrimonial home. Without the order requiring F.W. to pay for BC Hydro, I would have reduced the amount by half commencing in September 2018 to coincide when he reduced his payments to the mortgage and line of credit. With that order, however, I have determined the credit amount should be reduced from \$2,000 per month to \$1,300 commencing September 1, 2018. These credits shall be applied to offset F.W.'s spousal support obligation for so long as F.W. continues to pay the mortgage, line of credit, and the BC Hydro payment to L.W. If he fails to do so, or if he is no longer required to do that because the matrimonial home is sold prior to the review in the fall of 2019, then he shall no longer be entitled to the credit.
- [194] The figures I have discussed in this section are taken from my review of the DivorceMate Tables. As with child support, the parties should carry out their own analysis and agree on the amounts of spousal support, and include them in the form of order. They should do so within 30 days. Failing agreement, they should arrange to appear before me for determination.

Production of Financial Statements and Personal Tax Returns

- [195] For the review for both child and spousal support, F.W. shall produce to L.W. the year-end corporate tax returns for the companies in which he has an interest, including ABC, forthwith after they are prepared for their respective corporate year ends. He shall also produce his filed tax returns and notices of assessment from the CRA for tax years 2018 and 2019 forthwith upon receipt.

Medical and Dental Plans

[196] F.W. shall also forthwith take steps to ensure that L.W. and his two children are included as members under his current British Columbia medical services plan ("MSP") and privately held extended medical and dental plans.

Life Insurance

[197] Certain information concerning F.W.'s life insurance policy was gleaned during closing submissions, when I was advised by L.W. that the policy is in the name of F.W. and L.W. and that the beneficiaries could not be amended without the consent of both parties. If that is the case, then presumably it would mean that neither party can unilaterally terminate the policy without the authorization of the other. However, that may not prevent the insurer from cancelling the policy in the event of non-payment. I was not provided with any other pertinent information. In the absence of responding submissions from F.W. that can be construed as an admission of L.W.'s submissions, it is not appropriate to deal with L.W.'s claim in the absence of evidence. Presumably, L.W. will make suitable arrangements with the insurer requiring the insurer to notify her in the event of non-payment so that she may remedy the default and avoid cancellation.

Summary

Assets and Debts

[198] The matrimonial home shall be listed for sale forthwith. The parties shall have joint conduct of sale, with liberty to apply for further orders or directions. The net proceeds of sale shall be divided equally between the parties, subject to the parties' respective obligations for equalization payments and on account of the loan from F.W.'s parents, and if necessary, the retroactive spousal support order that I have made.

[199] The loan from F.W.'s parents is a family debt that is to be repaid by the parties. If it is not paid by the time the matrimonial home is sold, then it shall be paid from the net proceeds of sale once the loan amount is assessed by the Registrar and the Registrar's certificate is issued per Rule 18(2).

[200] F.W. shall retain his motor vehicles, the Vespa, the Ducati, and his Rolex watch collection. L.W. shall retain her handbag and Rolex watch collections.

[201] F.W. shall retain all of his corporate interests to the exclusion of L.W.

[202] F.W. shall make certain equalization payments to L.W., as follows:

- (a) one-half of the value of the current value of F.W.'s investment accounts after accounting for the tax-free spousal rollover to L.W., through a tax-free spousal roll over, or at L.W.'s option, in specie, to an account opened in the name of L.W. at F.W.'s original cost base, to be effected as soon as possible;

- (b) \$22,500 on account of their respective Rolex watch collections and L.W.'s luxury handbag collection;
- (c) \$23,250 on account of motor vehicles, Vespa scooter, and Ducati motorcycle;
- (d) \$20,000 on account of F.W.'s income tax refund from the CRA; and
- (e) \$95,000 on account of the condominium owned by ABC.

[203] Those equalization payments shall be made no later than from F.W.'s share of the proceeds from the sale of the matrimonial home.

[204] The parties shall use their best efforts to effect all transfers and roll-overs as soon as possible.

[205] F.W. shall forthwith provide to L.W. the particulars and statements of each of his investment accounts, including RRSPs and RESPs.

[206] Net proceeds of \$333,024.04 from the sale of the Olympic Village condos presently held in the trust account of L.W.'s law firm shall continue to be held in trust until the capital gains tax consequent on the sale of those units, as assessed by the CRA, is paid. Any remaining funds will continue to be held in trust to satisfy the parties' respective share of family debts. L.W.'s entitlement to any remaining funds in trust at that point, shall, in the absence of the consent of both parties, not be paid to her until the issue of whether her entitlement is subordinated to any potential claims brought by creditors of F.W. pursuant to the FCA is determined by court order. Regardless, if no such claims are issued in this Court by December 31, 2019, then such distribution may be made to L.W. after January 1, 2020. Likewise, no distribution shall be made to F.W. in respect of his entitlement to any such remaining funds until after January 1, 2020 so long as no such FCA claims are brought by December 31, 2019.

[207] F.W. has not proven that any debt purportedly owed by 089 to the CRA is a family debt.

[208] I make no determination of the parties' respective liability to BDK, other than to say that if it is a valid debt, then it is wholly reapportioned to F.W.

[209] The debt L.W. incurred post-separation as a result of F.W.'s failure to pay support is not a family debt.

[210] F.W. shall continue to pay \$300 per month to L.W. on account of the cost of BC Hydro until the matrimonial home is sold.

Spousal and Child Support

Spousal Support

[211] F.W. shall pay retroactive spousal support to L.W. in the lump sum amount of \$50,000 no later than from his share of the proceeds from the sale of the matrimonial home.

- [212] Commencing July 1, 2018, F.W. shall also pay, on an interim basis, effective the 15th of each month until the amount is varied by court order or consent, ongoing spousal support based on income of \$190,000 per year, taking into account the point in time imputed incomes to L.W. of \$30,000 and \$40,000 per annum and offset credits on account of F.W.'s occupational rent claim.
- [213] F.W. is entitled to credit from his spousal support obligation in the amount of \$2,000 per month for July and August 2018 and thereafter, \$1,300 per month so long as he pays the mortgage and line of credit and the BC Hydro payment of \$300 per month to L.W.
- [214] The ongoing spousal support order is interim. A final order shall be made following a review of F.W.'s income and the income to be imputed to L.W., which shall take place by the fall of 2019, and in any event, by no later than December 1, 2018.
- [215] The parties shall calculate the amounts of F.W.'s spousal support obligation to be included in the form of order, based on these reasons, within 30 days. Failing agreement, they should arrange with Trial Scheduling to appear before me for determination.

Child Support

- [216] F.W. shall pay child support on an interim basis commencing July 1, 2018, premised on an annual income of \$190,000. Like the order for spousal support, F.W.'s income for the purpose of establishing a final order shall also be reviewed by the fall of 2019, and no later than December 1, 2019 for the purpose of establishing a final order.
- [217] The parties shall forthwith calculate the amount of child support based on my reasons and the parenting regime established by their entered consent order. They should resolve the amount and any requisite adjustments within 30 days. Failing agreement, they should make arrangement to appear before me so that I may determine the amount. Until those amounts are determined, F.W. shall continue to pay the current amount of \$2,150 per month on the first of each month or as otherwise agreed to in writing by the parties.
- [218] Special expenses shall be paid in accordance to the parties' incomes. Absent written consent from each party or court order, special expenses are limited to \$3,000 per year per child. If either party chooses to spend more than that amount, it shall be wholly on their account absent consent from the other party or court order. Apart from the children's participation in soccer and dance, the parties must discuss and use best efforts to agree upon extra-curricular activities that impact on the parties' parenting time, with liberty to apply.

Miscellaneous

- [219] F.W. shall produce his year end corporate tax returns for the companies in which he has an interest, including ABC, forthwith after they are prepared for their corporate year ends. He shall also produce his notice of assessment and any notices of reassessment from the CRA for tax years 2018 and thereafter forthwith upon receipt.
- [220] F.W. shall forthwith take steps to ensure that L.W. and the children of the marriage are beneficiaries of his MSP and extended medical and dental health plans.
- [221] L.W. reimburse F.W. one-half of the costs of mediation out of her share of the net proceeds from the sale of the matrimonial home.
- [222] Likewise, costs reasonably incurred to effect the butterfly transaction are to be shared equally between the parties. L.W. shall reimburse F.W. out of her share of the net proceeds of sale of the Olympic Village condos.
- [223] The obligation to pay costs of jointly retained experts shall be determined when costs are spoken to by the parties.
- [224] In the absence of evidence concerning the life insurance policy, I am unable to determine the claim made by L.W.

Costs

- [225] The parties may arrange to speak to costs.

"Walker J."

The Honourable Mr. Justice Walker

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