
CANADA / JUDGMENT

M.C.V. v. F.V.

2018 BCSC 96

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 96 M.C.V. v. F.V.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.C.V. v. F.V.,

2018 BCSC 96

Date: 20180122

Docket: E142695

Registry: Vancouver

Between:

M.C.V.

Claimant

And

F.V.

Respondent

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for Claimant:

J.C. Fiddes

Counsel for Respondent:

S. Jones

Place and Date of Trial:

Vancouver, B.C.

October 17 to 21, 2016

December 16, 2016 and

April 25, 2017

Written Submissions:

May 30, 2017

June 1, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 22, 2018

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INTRODUCTION

[1] The parties to this matrimonial dispute were married on December 28th, 2003.

- [2] As of trial the claimant, Ms. C., was 43 years old and the respondent, Mr. V., was 73 years old. The parties separated for the first time in June 2009 but later reconciled in January 2010. They separated for the final time on March 28, 2013.
- [3] There is one child of the marriage, P. born in August, 2004. She is now 13 years old. Commendably, the parties resolved all parenting issues prior to trial.
- [4] In order to protect the privacy and well-being of the parties' child, I have used initials for the parties and their child and to the extent possible omitted references to non-essential details. I am not aware of any order that the parties' initials be used in the style of cause. If there is no previous order, I make that order in these Reasons.
- [5] I have determined that the Family Law Act, S.B.C. 2011, c. 25 [FLA] applies to this matter as it was in effect at the time this lawsuit was commenced. I will return to this issue later in these Reasons.
- [6] The other contentious issues are the determination and division of family property, including whether there should be an unequal division of family property, the quantum of child support, and the quantum and duration of spousal support payable to Ms. C. The parties disagree on their respective incomes for purposes of the Federal Child Support Guidelines, SOR/97-175 [the Guidelines] and spousal support.
- [7] The central controversy regarding family property relates to Mr. V.'s interest in a trust he settled on November 24, 2005 (the "B.C. Trust"). Mr. V. is also a beneficiary of a trust in Liechtenstein (the "European Trust"). A significant issue arises in relation to the adequacy of Mr. V.'s disclosure regarding the European Trust.
- [8] Before turning to the issues and the analysis, I will summarize the pertinent factual background.

OVERVIEW

- [9] In these Reasons, the summary of facts that follow reflects evidence that either was not in dispute, or, where it was in dispute, the factual findings I have made based on the consideration of the evidence of the whole.
- [10] The financial records in this case, which will be addressed later in these Reasons, were incomplete. The evidentiary difficulties were compounded because, in some instances, the evidence on material issues was undeveloped and without any documentary support.
- [11] Mr. V. was a poor historian, a shortcoming that was compounded by the sometimes rambling delivery of his testimony and his tendency not to remain on topic. On occasion, the content of his answers appeared scattered, thereby making it difficult to follow the coherency of his testimony. I conclude that the frailties of some aspects of his testimony were the product of an imprecise style of communication rather than an attempt to be deliberately evasive. In evaluating his evidence as a whole, I found him, for the most part, to

be a credible witness who endeavoured to provide a forthright account of pertinent events. However, an issue arises with respect to his credibility in relation to the monthly distributions he receives from the European Trust. I will address that evidence separately later in these Reasons.

- [12] I turn to the assessment of the credibility and the reliability of Ms. C.'s testimony. Given that English is not her first language, I found that, at times, she did not always appreciate the nuances that counsel was attempting to elicit. From time to time during her cross-examination, I also found Ms. C. to be somewhat argumentative and unresponsive. However, I am not persuaded that, overall, she was a discreditable witness.

Mr. V.

- [13] Mr. V. was born and educated in Switzerland. He apprenticed as a roofer. After fracturing his back, he discontinued his apprenticeship. He then attended a commercial school and obtained a commerce degree.
- [14] Mr. V.'s father was a businessman in Switzerland. He owned a company, Ringball Corporation ("Ringball"), which had offices in Canada.
- [15] Mr. V. immigrated to Canada in 1968 with his first wife and child; he worked for Ringball in Toronto. In 1970, Mr. V. was transferred to Vancouver as an assistant branch manager; he was eventually promoted to branch manager.
- [16] From 1976 to 1981, Mr. V. lived in England. After taking the requisite teacher training, he taught at a Waldorf school in England. Mr. V. moved back to Vancouver in 1981 and helped establish the Waldorf School in North Vancouver.
- [17] When Mr. V. returned to Canada, he resumed his employment with Ringball serving as vice-chairman. He was eventually appointed chairman. After his father's death in the 1990's, Mr. V. was dismissed as the chairman of the company. Ringball paid him a 10-year retirement bonus over a 10-year period. Mr. V.'s tax returns show that he received \$250,966.88 in 2007 and \$148,047.20 from Ringball in 2008. The severance payments ceased after 2008.
- [18] Mr. V. separated from his first wife in the early 1990's. Mr. V. had four children with his first wife who are now ages 51, 48, 42 and 32. Each of his adult children live in British Columbia.
- [19] Mr. V.'s second marriage ended in approximately 2000.
- [20] Mr. V. met Ms. C. in 2001. The parties agreed that, for the purposes of this proceeding, they commenced their marriage-like relationship on June 1, 2002.
- [21] In 1982, Mr. V. and his first wife purchased a 10-acre property near Squamish, British Columbia ("the Squamish Property"). It was transferred from their joint names into Mr. V.'s sole name in 1993.

- [22] Mr. V. has had a long-standing commitment to the pursuit of biodynamic farming, a farming method that does not use any chemicals. To this end, Mr. V. constructed a rural residential acreage/farm on the Squamish Property, known as C-Dar Lodge. It is a biodynamic demonstration farm serving as an educational site for courses and workshops on biodynamic farming.
- [23] Mr. V. has a close association with the Gaia Protection Foundation ("Gaia Foundation") which was founded by his father in Liechtenstein. Mr. V. described it as a foundation that supports biodynamic agriculture activities around the world and provides financial support for conferences and the purchase of the appropriate farm implements. According to Mr. V., there is a possibility that in the future the Gaia Foundation may compensate him for his past services but there is no binding obligation for it to do so.
- [24] The Gaia Foundation is the registered owner of lands adjacent to the Squamish Property. Neither party asserts that the adjacent land is family property.
- [25] The Gaia Foundation has also lent funds to Mr. V. for construction of the "Gatehouse" (see below) and holds a registered mortgage on the Squamish Property currently totalling approximately \$330,000 (the "Gaia Mortgage"). Additionally, the Gaia Foundation paid for a tractor, manure spreader, and other farm implements used on the Squamish Property.
- [26] The Squamish Property was historically appraised as of June 1, 2002 by Cunningham & Rivard Appraisals for \$950,000. The appraised value as of September 2, 2016 is \$2,275,000. There are two buildings on the Squamish Property:
- i. C-Dar Lodge: The main house on the property. The structure was built in 1989 and is approximately 9000 square feet. It has approximately eight bedrooms, four full bathrooms and two half bathrooms.
 - ii. The Gatehouse: This structure was built in 2007 and contains a commercial kitchen, a self-contained two bedroom suite on the upper level and a "great room" on the main floor. This structure was originally built as a conference hall to host events for biodynamic farming.
- [27] In or about 1996, Mr. V. purchased an apartment in North Vancouver (the "Apartment"). The Apartment was historically appraised by Cunningham & Rivard Appraisals as of June 1, 2002 for \$188,000. It was appraised as of September 2, 2016 for \$510,000.
- [28] I accept Mr. V.'s testimony that he received approximately \$1.25 million as an inheritance after his mother passed away in Switzerland in 2001. He maintains that he expended the bulk of his inheritance on improving the Squamish Property. There was no documentation adduced in this regard. In the absence of any cogent evidence on the point, I am unable to make any reliable conclusions regarding the disposition of Mr. V.'s inheritance.
- [29] Mr. V. settled the Squamish Property on the B.C. Trust on November 24, 2005. Mr. V. is a settlor, one of two trustees, and a discretionary beneficiary of the B.C. Trust. I will return to the B.C. Trust later in these Reasons.

[30] As I mentioned, Mr. V. is also a beneficiary of the European Trust. Since his father's death, Mr. V. has received monthly distributions from the European Trust. He says that, although he initially received distributions of \$7,500 per month, he currently receives \$8,000 per month. He does not declare these distributions on his Canadian tax returns. I will return to the distributions from the European Trust later in these Reasons.

Ms. C.

- [31] Ms. C. was born in Mexico City, Mexico. After graduating from high school, she worked for a bank in Mexico City. Initially, she worked as a hostess and, at some point thereafter, in some type of executive position. The evidence on her employment prior to commencing her relationship with Mr. V. was not well-developed.
- [32] After Ms. C. came to Canada in 2001, she completed an English language course as well as a basic computer course. She also travelled with Mr. V. She did not work outside the home until after separation.
- [33] As previously mentioned, Ms. C. and Mr. V. commenced their marriage-like relationship on June 1, 2002 and they married in December 2003. They travelled extensively during the marriage, including to Mexico, Europe, Australia, and New Zealand.
- [34] In 2005, the parties agreed that they would build the Gatehouse to generate additional income. They contemplated that it would serve as a centre for biodynamic farming conferences and other events, such as weddings, and that Ms. C. would act as the event coordinator. The corporate vehicle that operated the Gatehouse business was Five Seasons Sales Corp. ("Five Seasons").
- [35] Mr. V. and Ms. C. are the sole shareholders and directors of Five Seasons. Five Seasons owes Mr. V. a shareholders' loan of \$200,000 (the "Shareholder's Loan"). It generates income by renting out rooms in the Gatehouse, C-Dar Lodge, and parcels of the Squamish Property for the placement of trailers and yurts. Balancing the evidence as a whole, I find that Five Seasons generates minimal net income and, for the most part, any earnings are applied to offset farming expenses.
- [36] The parties originally contemplated that Ms. C. would manage the business operations of Five Seasons in order that Mr. V. could focus on teaching, conferences, and promotion. However, on account of various issues, including those relating to the family dynamics, this never transpired. The business model as originally contemplated was not successful. Although Ms. C. participated in various aspects of operating the business, such as organizing events for the participants, preparing rooms, and cooking, she never assumed the management of the business. After 2008, her involvement was largely limited to cooking, cleaning, and other chores. By 2010, she had entirely phased out any active involvement with Five Seasons and Mr. V. hired a secretary to assist him in managing the business.

- [37] In 2012, Ms. C. took a three day food preparation course. The evidence does not establish that Ms. C. undertook any other courses or training during the marriage.
- [38] Since the parties' final separation in March 2013, Ms. C. has resided with P. in the Apartment. Her stated intention is to continue living in British Columbia. P. attends the Waldorf School in North Vancouver.
- [39] I will address Ms. C.'s employment after separation later in these Reasons.

Post Separation Circumstances

- [40] The evidence clearly establishes that even after their separation, the parties remained linked financially. Mr. V.'s evidence, which I accept, is that following separation he has continued to pay Ms. C.'s and P.'s expenses, including strata fees and some of the other expenses relating to the Apartment. This is borne out by the fact that Ms. C. seeks no retroactive child or spousal support in this action.

PARENTING ARRANGEMENTS AND RESPONSIBILITIES

- [41] Since separation, the primary residence of P. has been with Ms. C. The parties have consented to the following order:
1. [P.] shall share her time between [Ms. C.] and [Mr. V.] in the following manner:
 - a) Save for vacation time as hereinafter referred to [P.] shall reside with [Ms. C.] from 6:30 PM on Sundays to the conclusion of school on Fridays
 - b) On alternating weekends from the conclusion of school on Fridays until 6:30 PM on Sundays [P.] shall reside with [Mr. V.]
 - c) [P.] shall spend Christmas day 2016 with [Ms. C.] and New Year's day 1 January 2017 with [Mr. V.] alternating these days year by year thereafter
 - d) Summer and Spring breaks from school equally with [Ms. C.] and [Mr. V.] as to summer break alternating every 2 weeks.
 2. By consent the parties shall exercise all parental responsibilities, except those under s. 41(a) and (b), of the Family Law Act as follows:
 - a) In the event of the death of a guardian, the surviving guardian will be the only guardian of the child;
 - b) Each guardian will have the obligation to advise the other guardian of any matters of a significant nature affecting the child;
 - c) Each guardian will have the obligation to discuss with the other any significant decisions that have to be made concerning the child, including significant decisions about the child's health (except emergency decisions), education, religious instruction and general welfare;

- d) The guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;
- e) In the event that the guardians cannot reach agreement on a significant decision despite their best efforts, the parties or either of them will have the right to apply pursuant to s. 49 of the Family Law Act for directions with respect to any decision they cannot jointly make;
- f) Each guardian will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.

DIVORCE

[42] The parties have now lived separate and apart from more than one year. The required residency has been proven and there are no bars to the divorce. Subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the parties are divorced effective on the 31st day after the date these Reasons are released.

ISSUES

[43] The contentious issues I must determine fall into three main categories: division of family property, child support, and spousal support. The issues may be summarized as follows:

- a. Division of family property and Ms. C.'s claim for reapportionment;
- b. Claim for child support and the determination of each party's income for purposes of calculating child support;
- c. Spousal support issues:
 - i. The basis for Ms. C.'s entitlement is to spousal support;
 - ii. The quantum and duration of spousal support;

[44] In broad terms, the provisions of the FLA provide that all real or personal property owned, legally or beneficially, by either spouse on the date of separation is family property to be divided equally unless it falls under the definition of "excluded property" or unless an equal division would be "significantly unfair": *Kneller v. Greenwood*, 2015 BCSC 1410 at para. 105. On separation, family debts will also be subject to a presumptively equal division. The onus of demonstrating that property is excluded property is borne by the spouse making the claim. The increase in value of excluded property over the course of the spousal relationship constitutes family property: *J.D.G. v. J.J.V.*, 2016 BCSC 2389 at para. 129. The court must not order a division of excluded property unless, in the limited circumstances prescribed by s. 96, the interests of justice require it.

[45] Section 87 of the FLA prescribes that the value of family property and debt is the fair market value as of the date of the hearing, unless an agreement or order provides otherwise.

- [46] Prior to the enactment of the FLA, the appellate authorities established that a court should make the appropriate division of assets before considering spousal support. This is because a person's asset base is relevant to support: *Foster v. Foster*, 2007 BCCA 83; *Narayan v. Narayan*, 2006 BCCA 561 at para. 33; *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 86. Since the enactment of the FLA, the courts in this province have continued to apply this approach: see *Parton v. Parton*, 2016 BCSC 1528 at para. 18. However, as noted by the Court in *Parton*, pursuant to s. 95(3) of the FLA, the question of spousal support may be considered as part of the analysis of the claim for reapportionment if the spousal support objectives cannot be met through an order for spousal support.
- [47] In this case, there is no suggestion that the spousal support objectives cannot be met through an order for spousal support. Accordingly, I will address family property before turning to spousal support.
- [48] Unless otherwise noted, all monetary sums referred to in the next sections of my Reasons have been rounded up or down for convenience.

STATUTORY FRAMEWORK

- [49] Effective March 18, 2013, the FLA, a new legislative scheme governing family law came into force in this province.
- [50] The operative provisions of the FLA in this proceeding are sections 81, 83, 84, 85, 87, 95 and 96. These sections are reproduced in Schedule A of these Reasons.

ANALYSIS

- (i) What constitutes Family Property

The Apartment

- [51] Mr. V. acquired the Apartment in 1996 prior to the commencement of his relationship with Ms. C. Ms. C. acknowledged that the Apartment is excluded property under the FLA and that she has no claim to Mr. V.'s pre-relationship equity in it.
- [52] As of separation, Mr. V. had a line of credit secured by a mortgage totalling \$100,642 on the Apartment (the "Apartment Mortgage"). The parties agree that the Apartment Mortgage indebtedness existing at the time of separation is a family debt. Mr. V. does not dispute that he is solely responsible for the increased additional Apartment Mortgage indebtedness of \$103,000 that he incurred after separation. The total amount outstanding as of trial was approximately \$204,000.
- [53] Pursuant to s. 84(2)(g)(i) of the FLA, the net increase in the value of the Apartment since 2002 is family property. I find the value to be \$221,358, calculated as follows:

Appraised Value in 2016

\$510,000

Appraised Value in 2002

-\$188,000

Gross Increase

\$322,000

Indebtedness at time of separation (not in dispute)

-\$100,642

Net Increase

\$221,358

Other Assets

- [54] The parties do not dispute that the value of the 2008 Toyota Sienna that is in the possession of Ms. C., is \$10,000. Mr. V. has two automobiles cumulatively valued at \$10,000: a Nissan valued at \$4,000 and a Toyota valued at \$6,000.
- [55] In addition, there are miscellaneous assets including farm equipment and animals. Mr. V. estimates the value of those assets to be \$7,500.
- [56] The parties agree that Mr. V.'s RRSP valued at \$39,715 was owned by Mr. V. prior to the commencement of the relationship and is his property alone. It is also uncontroversial that the Registered Education Plan for P., valued at approximately \$29,000, is not family property.
- [57] Ms. C. makes no claim in relation to Five Seasons or the Shareholder's Loan in this proceeding.
- [58] Ms. C. claims that Mr. V.'s Sun Life insurance policy (the "Policy") is family property. However, the current cash surrender value of the Policy and other material details were not established on the evidence. Nor was there any evidence adduced as to when the Policy was acquired. Accordingly, I have concluded that it is not appropriate to make any order regarding the Policy.

The B.C. Trust

- [59] As noted, the central issue in this case is whether it is Mr. V.'s discretionary beneficial interest in the B.C. Trust, or the increase in the value of the principal trust asset, namely the Squamish Property, that constitutes family property.
- [60] Mr. V. and James Titerle, a lawyer, are the trustees of the B.C. Trust (the "Trustees"). Prior to submissions being heard, I directed that Mr. Titerle be served with notice of the proceedings. Counsel advised that he was served and that he would not be appearing.

[61] Before turning to the analysis, I will review the key provisions of the B.C. Trust, set out the position of the parties, and then refer to the well-settled principles of statutory interpretation.

Trust Provisions

[62] The F. V. Family Trust, referred to in these Reasons as the B.C. Trust, is a fully discretionary trust settled by Mr. V. on November 24, 2005. By way of the execution of a declaration of trust, Mr. V. transferred the Squamish Property to the B.C. Trust on the same day.

[63] Pursuant to clause 1.1, Mr. V., his spouse and issue, and any person appointed by the Trustees as a beneficiary are discretionary beneficiaries of the B.C. Trust.

[64] The Trustees have very broad powers, including the unfettered discretion to add or remove beneficiaries. Under clause 2.1(4), the Trustees are empowered to distribute any portion of the capital of the trust to or for the benefit of any one of the beneficiaries. The Distribution Date is defined as the earlier of the date the Trustees determine and 80 years after the date the trust was settled. Clause 2.2 directs the distribution of the trust on the Distribution Date as follows:

2.2 Ultimate Trusts. The Trustees will stand possessed of the entire remaining Trust Property, both capital and income, on the Distribution Date upon the following trusts:

- 1) The Trustees may pay, distribute, allocate or appoint the same to or for the benefit of the Beneficiaries in such respective share or shares or such amounts, and in such manner, and subject to such conditions, as the Trustees in their sole and unfettered discretion determine.
- 2) If the Trustees do not pay, distribute or allocate or appoint all of the remaining Trust Property on the Distribution Date pursuant to clause 2.2(1), the Trustees will on the Distribution Date pay, distribute, allocate or appoint all remaining Trust Property not paid, applied, distributed, allocated or appointed pursuant to clause 2.2(1) equally to the children of the Settlor alive at the Distribution Date, provided that if any child of the Settlor dies before the Distribution Date leaving issue alive at the Distribution Date, such issue shall take in equal shares per stirpes the share of the Trust Property to which such deceased child of the Settlor would have been entitled if alive at the Distribution Date.
- 3) If none of the children or issue of the Settlor are living on the Distribution Date, the Trustees shall pay, distribute, allocate or appoint all remaining Trust Property to the Vancouver Waldorf School in North Vancouver, British Columbia.

[65] There are conflicting provisions in the trust deed with respect to the required number of trustees. Clause 5.1, entitled Resignation of Trustees, provides there is no obligation for there to be any more than one trustee of the B.C. Trust at any time. However, Clause 5.4 stipulates that there shall not be less than two trustees at all times:

5.4 Number and Appointment of Trustees. There shall be not less than two Trustees at all times to administer this Trust and if the Settlor is not one of the Trustees then there shall be three Trustees, subject to the right of the Settlor to specify a different number of Trustees under this clause. The Settlor shall have the power from time to time to increase the number of Trustees and to appoint additional Trustees to fill vacancies caused by any such increase in the number of Trustees, and the Settlor shall have the power to appoint a person by instrument in writing to be a successor Trustee or otherwise fill any vacancy in the Trustees. Such power may be exercised by the Settlor inter vivos or by will or other written instrument. If such power has not been specifically exercised by the Settlor and there is a vacancy in the Trustees by reason of death, refusal to act, resignation, incapacity or discharge of a Trustee, then the remaining Trustee or Trustees shall, as soon as reasonably possible, choose and appoint another person or persons to be a Trustee. Upon execution of any such instrument, the person or persons so appointed will have all the rights, powers, duties, authorities and discretions granted to or imposed on the Trustees under the provisions of this Deed and all right, title and interest in and to the Trust Property will thereupon automatically vest in the Trustees.

[66] Mr. V. executed a document dated November 24, 2005 addressed to the Trustees that states:

The [B.C. Trust] was established by Deed of Trust made on the above date and I am the Settlor.

Pursuant to clause 5.4 of the Deed of Trust, I have the power and authority to appoint new or additional Trustees. If I am not a Trustee of the [B.C. Trust], then there shall always be three Trustees and if there are not three Trustees then I appoint firstly my son, [F.M.V.], secondly, my friend, [M.H.B.], and thirdly, my daughter, [C.S.A] to be a Trustee or Trustees as needed and whenever a vacancy should occur.

[67] On the same day, Mr. V. executed a companion letter of wishes addressed to the Trustees that reads:

Re: [The B.C. Trust]

You have been appointed as the trustees of the [B.C. Trust] and have asked me, as Settlor, to express my preference regarding the [B.C. Trust]. It is my desire that you exercise your discretion to hold the Principal Residence forming a part of the Trust Property for the use of the Beneficiaries and myself until my death. Following my death, I would like my wife, [Ms. C.], to be allowed to continue to live in the Principal Residence for a period of three years after the date of my death. It is also my desire that at the expiration of such three year period, you will distribute the Principal Residence and any other Trust Property equally among my children who are alive as of that date, or if any of my children have died leaving issue as of that date, to the issue of that child equally the share which would have been allocated to that child if that child was alive on that date.

The [B.C. Trust] is a discretionary trust and it will always be in your power, in holding and distributing the Trust Property to the Beneficiaries, to make such arrangement as you think is appropriate. I understand that my wishes as expressed in this letter are not legally binding on the Trustees.

Position of the Parties

- [68] Ms. C. acknowledged that the Squamish Property is excluded property under the FLA and that she has no claim to Mr. V's pre-relationship equity in it. Her primary contention is that, pursuant to s. 84(2)(f) of the FLA, the increase in the value of the Squamish Property since June 2002 constitutes family property.
- [69] Ms. C. also asserts that because the B.C. Trust is not the registered owner of the Squamish Property, she is entitled to rely on the fact that Mr. V. is the registered owner of it. In essence, she asserts that Mr. V's legal interest in the Squamish Property constitutes family property.
- [70] Mr. V. submits that s. 84(1)(a) is the operative provision of the FLA, and that it is the value of Mr. V's discretionary beneficial interest in the B.C. Trust that is family property. While he disputes that the increase in the value of the Squamish Property is family property, his counsel did not develop any submissions regarding the potential applicability of s. 84(2)(f), other than to argue that it would be unjust for this provision to apply to a trust that was settled prior to the enactment of the FLA.
- [71] The conflict between clause 5.1 and 5.4 in the trust deed as identified above, and the consequent potential application of s. 84(3) to this case was not raised by either party. Accordingly, I decline to consider those matters on the merits.

Statutory Framework

- [72] Earlier in these Reasons I referred to the relevant provisions of the FLA. For ease of reference, I set out below the key statutory provisions that inform the analysis of the issues pertaining to the B.C. Trust:

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (2) Without limiting subsection (1), family property includes the following:

- (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
- (g) the amount by which the value of excluded property has increased since the later of the date
- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.
- (3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which
 - (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
 - (b) the spouse has a power to transfer to himself or herself that part of the trust property, or
 - (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

Excluded property

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
- (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
- (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;

Legal Framework

[73] The Supreme Court of Canada distilled the modern approach to statutory interpretation in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25:

- [72] The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of [the Legislature] by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute. In addition to this general roadmap, a number of specific rules of construction may serve as useful guideposts on the court's interpretative journey.
- [74] The purposive approach is codified in s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, which provides that "every enactment must be construed as remedial, and must be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects": *CBV Collection Services Inc. v. Consumer Protection B.C.*, 2017 BCSC 1018 at para. 53.
- [75] The starting point in statutory interpretation is to look to the plain meaning of a legislative provision. The "plain meaning rule" is invoked if the court is satisfied that the natural and ordinary meaning should be adopted because the words of the statute are in themselves precise and unambiguous: *Brenner v. Brenner*, 2010 BCCA 553 at para. 26.
- [76] The presumption of internal coherence of a statute is another important interpretative principle. The authorities establish that statutory provisions dealing with the same subject matter should be read together where possible to avoid conflict. Statutory provisions are presumed to work together to form a rational and internally consistent framework: *Assessor of Areas #20 and #23 v. Interior Health Authority*, 2006 BCSC 930 at para. 23.

Discussion

- [77] As previously mentioned, in November 2005 Mr. V., in his personal capacity, transferred his beneficial ownership of the Squamish Property to the Trustees of the B.C. Trust. Mr. V., as one of two trustees of the B.C. Trust, has the discretion, to be exercised with his co-trustee, to favour his own interests over those of the other beneficiaries and the power to administer the trust property entirely in his own interest, including transferring the Squamish Property to himself.
- [78] I turn first to Ms. C.'s argument regarding the legal title of the Squamish Property. Mr. V. remains the registered owner of the Squamish property. Under the Land Title Act, R.S.B.C. 1996, c. 250, s. 23(2) and subject to the statutory exceptions, there is a statutory presumption that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the title. It is well-settled, however, that the statutory presumption is further subject to equitable principles and may, in certain circumstances, be displaced to recognize another party's beneficial interest in the property: *Dhaliwal v. Ollek*, 2012 BCCA 86 at para. 6; *Modonese v. Delac Estate*, 2011 BCSC 82 at para. 138, *aff'd* at 2011 BCCA 501; *Bajwa v. Pannu*, 2007 BCCA 260 at para. 23.

- [79] Madam Justice Fleming in J.D.G. interpreted property that is "owned by" a spouse in s. 84(1)(a)(i) to mean property that is legally and beneficially owned: at para. 178. I agree that the legal interest in property that a spouse holds for others has no value as family property. Accordingly, the fact that Mr. V. is the registered owner of the Squamish Property does not render it family property. To conclude otherwise would effect a result not intended by the Legislature.
- [80] I turn next to consider Mr. V.'s contention that it is his interest in the B.C. Trust, not the increase in value of the Squamish Property itself, that is family property. In my view, when the words of ss. 84 and 85 are read in context harmoniously with the scheme of the FLA and the intention of the Legislature, Mr. V.'s interpretation cannot prevail. My reasons for that conclusion follow.
- [81] As a preliminary matter, I note that the word "property" is not defined in section 1 of the FLA. In H.C.F. v. D.T.F., 2017 BCSC 1226, Mr. Justice Voith observed, at para. 86, that the definition of family property in s. 84 is "very broad" and that the word "property" is necessarily at least as broad.
- [82] With respect to the legislative history, I am not aware of any express commentary on the enactment of the trust provisions in sections 84 and 85 of the FLA in the Hansard Record.
- [83] The FLA refers to trust interests in four provisions: ss. 85(1)(f), 85(1)(e), 84(3) and 84(2)(f).
- (i) Subsection 85(1)(f): Under this provision, a spouse's beneficial interest in property held in a discretionary trust where the spouse is not the settlor and did not make any contribution to the trust is excluded from family property. Notably, there is no statutory definition of what qualifies as a "discretionary trust". The FLA does not specify whether such trusts must be purely discretionary or whether it applies to trusts with both discretionary and fixed interests.
- (ii) Subsection 85(1)(e): Property that is considered to be excluded property, based on the criteria in ss. 85(a) to (d), will remain excluded property even if it has been settled in a trust for the benefit of a spouse. By way of illustration, this provision would exclude property in a testamentary trust.
- (iii) Subsection 84(3): Property contributed to a trust by a spouse where the spouse has a vested interest or where the spouse has the power to distribute the property to himself or herself or has the power to terminate the trust and thereby cause the property to be returned to the spouse, is deemed to be family property.
- (iv) Section 84(2)(f): If s. 84(3) does not apply, property that a spouse disposes of after the spousal relationship began (such as settling the property upon a trust) and where the spouse retains authority alone or with another party over the trust property to require its return or to direct its use or further disposition in any way, is deemed family property.

- [84] The above categories are not exhaustive as other trust interests may be captured under s. 84(1)(a)(ii).
- [85] The only case that counsel referred to that addressed a spouse's trust interest in the context of the FLA, specifically s. 84(1)(a)(ii), is *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272. In *S.L.M.W.*, the Court found that the spouse's interest as one of four discretionary beneficiaries in a trust constituted "a beneficial interest of at least one spouse in property": at para. 99. The spouse was one of two trustees of the trust. Since he had acquired that interest before the relationship began, the Court held that only the increase in value of his interest in the trust was family property. The Court directed the parties to make further submissions on the nature of that interest. I am not aware if there has been any further judicial consideration of the issue.
- [86] The factual matrix that confronted the Court in *S.L.M.W.* did not require the consideration of s. 84(2)(f). The case does not advance Mr. V's argument.
- [87] For the reasons that follow, I have determined that s. 84(2)(f) applies to the case at hand. It is therefore unnecessary for me to determine whether, in light of established principles of statutory interpretation and the terms of a particular trust, a spouse's interest in a trust that is not expressly captured by the sections referred to above, constitutes a beneficial interest in property under s. 84(1)(a)(ii). The nuances of the issues that arise will be addressed by another court.
- [88] Given the statutorily imposed interplay of s. 84(2)(f) with s. 84(3), the Court must first consider whether the transfer of property by a spouse to a trust is captured by s. 84(3). If it is not, the legislation requires the court to consider s. 84(2)(f). In this case, neither party suggested that s. 84(3) was applicable.
- [89] In my view, the words of s. 84(2)(f) are unambiguous. Applying its ordinary meaning, the constituent elements of this class of family property as they apply to this case are discussed below:
- (i) It excludes property to which s. 84(3) applies: As previously stated, neither party asserts that sub-section 84(3) applies to this case;
 - (ii) It requires a disposition: a spouse must have disposed of the property;

With respect to the definition of "dispose", Madam Justice Fenlon (as she then was) in *P.G. v. D.G.*, 2015 BCSC 1454 stated as follows:

- [72] The Interpretation Act, R.S.B.C. 1996, c. 238, s. 29, defines "dispose" as follows:

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

[73] In *Cominco American Inc. v. Duval* (1993), 89 B.C.L.R. (2d) 83 (S.C.) Huddart J. held that a definition in the Interpretation Act applies unless a contrary intention appears in the legislation in issue (at para. 4). No such contrary intention appears in the FLA.

Mr. V., by transferring the Squamish Property to the B.C. Trust, clearly disposed of it;

(iii) The subsection imposes a temporal condition: a spouse must have disposed of the property after the spousal relationship began. Here, Mr. V. settled the B.C. Trust approximately three years after commencing his marriage-like relationship with Ms. C.; and

(iv) The subsection requires that the spouse who has made the disposition has retained authority, to be exercised alone, or with another person, to require the return of the property, or to direct its use or further disposition in any way. In his capacity as one of the Trustees, Mr. V. has broad powers to direct the disposition of the Squamish Property.

See Carmen S. Theriault, QC, "WESA, Trusts and Family Law" (Vancouver, Continuing Legal Education Society of British Columbia, 2015).

[90] On its plain meaning, reading the words in context and in their grammatical and ordinary sense, I conclude that this is a case in which s. 84(2)(f) was intended to apply.

[91] The next question is what is captured as family property under s. 84(2)(f): the Squamish Property or Mr. V.'s interest in the B.C. Trust.

[92] Although s. 83(4) states that "property includes a beneficial interest in property unless a contrary intention appears", the provisions of sections 84 and 85 clearly draw a distinction between property and a spouse's beneficial interest in property.

[93] Section 84(3) expressly states that family property includes that part of trust property contributed by a spouse to the trust. Although s. 84(2)(f) does not expressly reference trust property, it does specifically state that property disposed of by a spouse after the relationship began is included as family property. Given the plain wording of s. 84(2)(f), I conclude that the legislative intent was to capture the Squamish Property as family property. I am not persuaded that the section can be interpreted to sustain the finding that Mr. V.'s interest in the B.C. Trust is family property. Nor is it open to the Court, given the legislative context, to hold both the Squamish Property and Mr. V.'s interest in the B.C. Trust as family property. Such a result would be incongruous with the objects of the legislative scheme.

[94] Section 84 cannot be meaningfully interpreted without reference to s. 85. The meaning and scope of s. 84 is inextricably linked to s. 85 and the legislative scheme for excluded property. More specifically, s. 84(2)(f) is subject to s. 85, which excludes pre-relationship property from the otherwise broad and inclusive definition of "family property" in s. 84. Property acquired by a spouse prior to the relationship is excluded whether held directly by the spouse or in trust for the spouse.

- [95] Excluded property is defined in s. 1 of the FLA as property that would otherwise be family property but is excluded under s. 85. By virtue of s. 84(2)(f), the Squamish Property satisfies the threshold requirements in s. 84 for being classified as family property. Crucially, however, since the Squamish Property was acquired by Mr. V. before the relationship between the spouses began, it qualifies as excluded property under s. 85(1)(a). Accordingly, pursuant to s. 84(2)(g), the family property in this case is not the entirety of the Squamish Property, rather it is the amount by which the value of the Squamish Property has increased since the date the relationship between the spouses began.
- [96] The additional considerations set out below support this interpretation.
- [97] Mr. V. candidly explained that his objectives in settling the B.C. Trust were to protect the Squamish Property from potential creditors and to insure that, on his death, he would "leave something" for his children. The fact that he organized his affairs to protect his property from business risks is not generally objectionable: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 52. In any case, Mr. V.'s estate planning and creditor protection objectives, whatever they may have been, are not relevant to the analysis in this case. The plain effect of the transaction was the deliberate divestment of Mr. V.'s interest in potential family property under the FLA.
- [98] Applying a purposive interpretation, I conclude that it was the intention of the Legislature to discourage such transactions and recapture potential family property that was disposed of by one spouse prior to separation. This is not a novel concept in matrimonial law in this province. Notably, under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] the concept of tracing or a compensation order was employed by the courts to rectify the disposal or a conversion of a potential family asset prior to trial: *Billingsley v. Billingsley* (1991), 36 R.F.L. (3d) 188 at paras. 10-17 (B.C.C.A.).
- [99] It is also a paramount principle of statutory interpretation that a legislative provision should be construed in a way that best furthers its objects. One of the objectives endorsed by the FLA is the imposition of a new property regime that simplifies property disputes and imposes more limited circumstances in which judicial discretion can be exercised, thereby enhancing clarity and predictability of outcomes: *V.J.F.* at para. 5. The application of the plain meaning of s. 84(2)(f) leaves little room for judicial discretion in identifying what constitutes family property.
- [100] In summary, after considering the grammatical and ordinary sense of ss. 84 and 85 in harmony with the overall scheme of the FLA, I conclude that the interpretation advanced by Mr. V. cannot prevail. Section 84(2)(f) is the operative provision in this case. Subject to the deductions I will address in the next section of my Reasons, I conclude that the amount by which the value of the Squamish Property has increased since the date the spousal relationship began, June 1, 2002, constitutes family property.

[101] Ms. C. seeks a monetary judgment against Mr. V. personally. Accordingly, the Court need not address the thorny issue of the rights of the other beneficiaries of the B.C. Trust. I will address the amount of the judgment in the next section of these Reasons.

Mortgage Registered on the Squamish Property

[102] The Gaia Mortgage was registered on the Squamish Property in favour of the Gaia Foundation on November 22, 2005. Mr. Titerle, the other trustee, approved the Gaia Mortgage. The principal amount of the Gaia Mortgage was originally \$240,000 but was later increased to \$330,000 in March 2006 to account for further advances. There are additional outstanding arrears of \$62,827.

[103] Ms. C. contends that the Gaia Foundation "may well" forgive the principal portion of the Gaia Mortgage by way of compensation to Mr. V. for his past unpaid services. The totality of the evidence does not support such a finding. As such, I have not considered any possible debt forgiveness in my analysis of the case.

[104] Mr. V. candidly explained that he made the stipulated periodic payments under the Gaia Mortgage for approximately two years but thereafter ceased making the monthly payments because he encountered financial difficulties. I accept his evidence on this point. I also accept Mr. V.'s evidence that the Gaia Mortgage will have to be paid out in full if the Squamish Property is sold. Mr. V.'s assertions accord with the documentary evidence.

[105] Accordingly, I find that the \$330,000 plus accrued arrears of \$62,827 (\$392,837 in total) constitutes family debt and must be deducted from the equity increase of \$1,325,000. This equals \$932,173

[106] In her written submissions, Ms. C. also relies on s. 85(1)(d) and asserts:

These sections seem to suggest that the definition of property under the FLA includes monies payable under an insurance policy that represents compensation for lost income for a spouse. Compensation to the Respondent for lost income for while working for GAIA (albeit in the form of a forgiven mortgage) is of the same genre and it is submitted is thus family property.

[107] In light of my findings, I am not persuaded that there is any merit to this submission.

Shareholders' Loan

[108] Mr. V. argues that the Shareholders' Loan should be deducted from the increase in the value of the Squamish Property. He asserts he funded the loan using his pre-relationship savings and assets. He maintains that these funds were used for construction of the Gatehouse on the Squamish Property which increased its value as reflected in the most recent appraisal.

[109] This assertion is disputed by Ms. C.

- [110] The Court of Appeal in *Shih v. Shih*, 2017 BCCA 37 at para. 40 clarified that the FLA does not demand "precision" or "mathematical certainty" in the standard of proof for establishing a claim to excluded property. A trial judge is permitted to draw reasonable inferences in appropriate circumstances. However, Shih also notes that, in order for a spouse to establish that property is excluded, he or she must do so with clear and cogent evidence: at para. 43.
- [111] Although it should have been a relatively straightforward matter, Mr. V. did not produce any documentary evidence to support his assertion. He did not explain the reason he failed to do so. Moreover, Mr. V.'s testimony on the disputed transaction was vague and somewhat muddled. He estimated that he contributed \$100,000 from his pre-relationship savings to the construction of the Gatehouse, not \$200,000 as his counsel now asserts. In the absence of clear and cogent evidence to support his assertion, I am not prepared to accept Mr. V.'s evidence on this controversial matter. In the result, I am unable to find on a balance of probabilities that \$200,000 should be deducted from the increase in value of the Squamish Property.

Transition Provision

- [112] The operative provision is s. 252 of the FLA. It provides as follows:

Transition -- proceeding respecting property division

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

- (2) Unless the spouses agree otherwise,
- (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
 - (b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

- [113] Mr. V. argued that when he settled the B.C. Trust the FLA was not in effect and that he arranged his affairs according to the law as it was in 2005. He argues that it would be most unjust if he had to bear the consequences of the new legislation. However, this was not raised in his pleadings. In fact, in his counterclaim, Mr. V. sought an order for property division under the FLA. Furthermore, he made no submissions as to what the appropriate division of property would be under the FRA regime.

- [114] The applicability of the FLA in a retroactive or retrospective fashion was considered by the Court of Appeal in *Newton v. Crouch*, 2016 BCCA 115 and *Matteucci v. Greenberg*, 2016 BCCA 116. In *Newton*, the court addressed the applicability of the new legislation to unmarried partners who separated prior to the FLA coming into force. In dismissing the appeal, *Savage J.A.* concluded that the presumption against retrospectivity had been

rebutted and the FLA regime applied: at para. 50. Savage J.A. underscored that, rather than labelling the effect as retroactive or retrospective, the key question is whether or not the effect of the law is unfair, unexpected, or contrary to the rule of law: at para. 73.

[115] In *Matteucci*, at para. 46, the Court of Appeal further clarified that the "FLA defining provisions are attaching new consequences for the future, as of the date of the passage of the statutory provision, with respect to a state of affairs that existed in the past". If the FLA's property division scheme is not retrospective in its application, it would theoretically allow any number of property claims to be litigated under the FRA going forward, as long as the pertinent trusts were settled prior to the coming into effect of the FLA. In the absence of such an express provision in s. 252, I am driven to the conclusion that this was not the Legislature's intention. Furthermore, I find that the application of the FLA property regime in this instance is not unfair or contrary to the rule of law.

[116] The transition provisions in the FLA regarding property division are clear. The FLA continues to apply to agreements or orders made before the FLA came into force. The FLA may also apply where property division proceedings are started prior to the enactment of the FLA but the parties consent to the application of the FLA after the fact. Importantly, s. 252 does not express, as an exception to its applicability, a claim for property division relating to any trust settled prior to the enactment of the FLA. If the Legislature had intended the FRA to apply to claims relating to trusts settled prior to the enactment of the FLA, it would have explicitly said so.

(ii) Division of Family Property

[117] As I stated earlier, the FLA property regime is grounded in the presumption that family property or debt is to be divided equally regardless of use or contribution. Section 95 allows for the unequal division of family property or debt where equal division would be significantly unfair based on the factors set out in ss. 95(2) and (3).

[118] Section 96 mandates that the court must not order a division of excluded property unless (a) family property or debt located outside B.C. cannot practically be divided or (b) it would be significantly unfair not to divide excluded property having regard to only two factors: (i) the duration of the parties' relationship and (ii) any direct contribution by a spouse to the preservation or maintenance of the property.

Claim for Unequal Division

[119] Ms. C. argues that, by failing to produce the European Trust indenture and financial statements, she has been deprived of the opportunity to determine if Mr. V.'s interest in that trust, specifically its increase in value, is family property under the FLA. Similarly, she contends that it can reasonably be inferred that Mr. V. has other assets in Europe that generate income and may have increased in value since 2002. She submits that, due to Mr. V.'s failure to make adequate disclosure, it would be significantly unfair to divide the disclosed family property equally.

[120] Mr. V. submits that he has made persistent efforts to obtain information and, despite his numerous requests, he has only been provided very limited information on the European Trust. He disputes that he has any assets in Europe and contends that there is no evidentiary foundation for such a claim.

[121] The authorities establish that the "significant unfairness" threshold imposes a higher standard than the "unfairness" test under the FRA. It will be met only where an equal division would produce compelling unfairness having regard to the factors set out in ss. 95(2) and (3).

[122] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, the Court of Appeal interpreted the legislative intent of section 95 as constraining the exercise of judicial discretion:

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.

[123] In my view, a spouse's failure to disclose financial assets may be considered as a factor under section 95(2)(i) in ordering an unequal division of family property. In certain circumstances, a failure to order unequal division in the face of a failure to disclose assets or debts may lead to significant unfairness: *E.H.H. v. C.L.M.*, 2017 BCSC 1299 at para. 119.

[124] Ms. C. relies on the approach taken by Mr. Justice Fraser in *Cunha v. Cunha*, (1994), 99 B.C.L.R. (2D) 93 (S.C.), a case decided under the FRA. The *Cunha* approach urged a robust exercise of the adverse inference power when one party in matrimonial litigation conceals assets: at paras. 11-13.

[125] In *Laxton v. Coglon*, 2008 BCSC 42, Mr. Justice Kelleher clarified that the Court in *Cunha* did not reapportion family assets pursuant to s. 65 of the FRA. Rather, the Court, having not been satisfied that adequate disclosure had been made, inferred that the value of the undisclosed assets was at least equal to the value of the disclosed assets: at paras. 27-29. It is key that the principle in *Cunha* only applies where there is a sound evidentiary basis to support the notion that one of the parties to the litigation has hidden assets. See also *Nearing v. Sauer*, 2015 BCSC 58, at para. 126.

[126] In *Wu v. Sun*, 2011 BCCA 239, the Court of the Appeal, while affirming that strong measures are justified in discouraging nondisclosure, cautioned that there must be sufficient evidence upon which the court may draw any adverse inferences regarding the existence of undisclosed family assets: at paras. 40-42.

[127] In *Nearing*, the Court concluded, at para. 132, that the adverse inference referred to in *Cunha* and the subsequent authorities continues to be applicable to the new regime for property division under the FLA. I agree.

[128] With these considerations in mind, I turn to the facts of this case.

[129] I summarize below the facts established on the evidence:

- According to Mr. V., his late father settled the European Trust for the benefit of Mr. V. and his four siblings. I accept that Mr. V. does not know who, if any, the other beneficiaries of the trust might be.
- Mr. V. receives monthly distributions from the European Trust. He believes that after his death his five children may receive distributions from the trust.
- Reinhard Suhner, a lawyer and accountant in Switzerland, represents Mr. V. for the purposes of any communication with the trustees of the European Trust. He also represents Mr. V.'s siblings, one of whom is now deceased. Mr. V. does not know what his siblings receive from the trust.
- Mr. Suhner meets with the trustees twice a year and makes requests for distributions from the trust. By way of illustration, in the past he relayed a request for reimbursement of Mr. V.'s dental work which was eventually reimbursed by the trustees. The trustees have also paid the tuition fees for P.'s attendance at the Waldorf School in North Vancouver.
- Mr. V. has never received any documentation relating to the European Trust.
- Following his father's death in the early 1990's, Mr. V. sought to obtain documents from Mr. Suhner regarding the trust but to no avail. Mr. V. estimates that he has requested copies of the material documentation 25 to 30 times.
- In 2001, in Liechtenstein, Mr. V. met with Dr. Meier, whom he believes to be a trustee, but Mr. V. was not provided any pertinent information in their meeting.
- Mr. V. has consulted lawyers about compelling production of documents relating to the European Trust. However, he ultimately concluded that it was too costly an endeavour to pursue.
- Documentation was produced at trial that indicates that, on March 19, 2014, Mr. V.'s solicitor sent an email to Mr. Suhner forwarding the requests for information sent by Ms. C.'s lawyer in a letter of the same date. The evidence shows that Mr. V.'s solicitor had made previous requests for pertinent documentation.
- On May 7, 2014 Mr. V.'s solicitor sent an email to follow-up with Mr. Suhner.
- No response to these inquiries has been produced in this litigation.

[130] Balancing the evidence as a whole, I cannot conclude that Mr. V. is concealing assets. Mr. V. has disclosed the existence of the European Trust. He disclosed that he receives monthly distributions from the European Trust. Mr. V. has also disclosed that the European Trust has paid for his medical expenses in the past and has made charitable donations on his

behalf. Mr. V. was forthright in disclosing that he believes that his siblings are also beneficiaries of the European Trust. I accept that Mr. V. sought a copy of the trust deed, and related information for his own edification on many occasions and that he has repeatedly been denied that information. It can be reasonably inferred that Mr. Suhner has not responded to Mr. V.'s requests for information made during the course of this proceeding.

[131] Moreover, the evidence does not establish the nature of Mr. V.'s interest in the European Trust beyond the trustees having discretion to make distributions to Mr. V. from the trust. There is no evidence before this Court with respect to the duration of the trust, the value of its assets, and who the other beneficiaries might be. I conclude that there is an insufficient evidentiary basis before the Court to make any reliable conclusions regarding the attributes of the European Trust.

[132] Similarly, there is an insufficient evidentiary basis for this Court to reasonably draw any inferences that Mr. V. has other undisclosed assets in Europe that generate income or the value of which may have increased since 2002. While I found Mr. V.'s evidence on the various financial transactions involving his siblings difficult to follow and somewhat inconsistent, I am not persuaded that I can make any reliable conclusions regarding undisclosed assets in Europe.

[133] In the end, I do not consider it appropriate to draw any adverse inferences regarding the existence of undisclosed family property.

[134] All things considered, I am not persuaded that Ms. C. has met the high threshold that Jaszczewska requires for an unequal division. In the result, Ms. C. is entitled to an equal share of family property.

Ms. C.'s Entitlement

[135] I summarize below the family property:

Property

Value

Increase in value of Squamish Property since June 2002 less the Gaia Mortgage of \$330,000 and arrears of \$62,827

\$932,173

Increase in equity of the Apartment since June 2002

\$221,358

Farm Equipment and Animals

\$7,500

Total Family Property

\$1,161,031

- [136] Given that the parties' vehicles are equal in value, I order that each of the parties retain their own vehicles.
- [137] Ms. C. is entitled to a judgment for \$3,750 which equates to 50% of the value of the farm equipment and animals.
- [138] I turn next to the excluded properties: the Apartment and the Squamish Property. Pursuant to s. 96, the Court must not order a division of excluded property unless it would be significantly unfair not to do so.
- [139] With respect to the Squamish Property, Ms. C. seeks a monetary judgment. She is presumptively entitled to 50% of \$932,713 which is the increase in the net value of the Squamish Property less the total of the Gaia Mortgage of \$330,000 and arrears of \$62,827. This amount equals \$466,087. I am not persuaded that there is any merit to Mr. V.'s alternative submission that, if the increase in the value of the Squamish Property constitutes family property, it should be unequally divided in his favour. On the totality of the evidence, I conclude that it is not significantly unfair in this instance to divide the increase of the Squamish Property equally between the spouses.
- [140] The increase in the equity of the Apartment since June 2002 is \$221,358. Ms. C. is presumptively entitled to 50% of the increase in the net value which equals \$110,679. Mr. V.'s pre-relationship equity in the Apartment is \$188,000 and his presumptive 50% share of the increase in its net value is \$110,679. His total interest equals \$298,679.
- [141] Ms. C. submitted that the Apartment should be transferred to her solely. As I understood the submissions of Mr. V.'s counsel, Mr. V. was not opposed to transferring his interest in the Apartment to Ms. C. provided the issues with the Apartment Mortgage indebtedness could be resolved.
- [142] The parties used the Apartment at various times during their 10 year spousal relationship. In 2012, prior to the final separation, Ms. C. resided during the week at the Apartment with P. in order that P. could attend school in North Vancouver. Mr. V. continued residing at the Squamish Property. Since the parties' separation in March 2013, Ms. C. has continuously resided at the Apartment with P. and has been largely responsible for its preservation and maintenance. In all the circumstances, I order that Mr. V. transfer his interest in the Apartment to Ms. C. I find that to order otherwise would be significantly unfair to Ms. C. having regard to the factors set out in s. 96(b).
- [143] As between the parties, Mr. V. is to be solely responsible for the increase in the Apartment Mortgage indebtedness that he incurred after the parties separated, and Ms. C. will be responsible for the payment of that portion of the Apartment Mortgage owing as of the date of separation. Mr. V. shall take all reasonable steps to relieve Ms. C. of any obligation to pay the portion of the Apartment Mortgage that he is responsible for. The parties have leave to apply regarding any issues that arise regarding the payment of the mortgage and the

accounting of other expenses.

[144] In summary, Ms. C. is entitled to:

50% of the increase in the net value of Squamish Property:

\$466,087

+ 50% of the value of farm equipment & animals:

\$3,750

+ 50% of the increase in net value of the Apartment:

\$110,679

Gross Entitlement

\$580,516

- Transfer to Ms. C. of her interest in the Apartment:

-\$110,679

- Transfer to Ms. C. of Mr. V's interest in the Apartment:

-\$298,679

Net Entitlement

\$171,158

[145] In the result, after accounting for the transfer to Ms. C. of both her and Mr. V's interest in the Apartment, Mr. V. shall pay Ms. C. \$171,427.

[146] The parties are at liberty to apply for further directions as may be necessary to implement this term of my order.

[147] Finally, Ms. C. shall transfer her shares in Five Seasons to Mr. V. or at his direction. In the event that there are any unanticipated corporate or income tax issues arising from the transfer of shares, either party shall have liberty to apply.

[148] Unless otherwise stated, the parties will be responsible for their own debts incurred after separation.

(iii) Income of the Parties

[149] Before addressing child support and the quantum and duration of spousal support, it is necessary to first consider the current income of both parties.

Legal Framework

- [150] In addition to considering each parties' declared income, there is a broad judicial discretion to impute income to either or both of the spouses for the purposes of determining child and spousal support.
- [151] Both parties are obligated to contribute to the support of their children and must earn what they are capable of earning. The Court enforces this obligation by imputing income. The imputation of income involves consideration of the guiding principles set out in s. 19(1)(a) of the Guidelines. The overarching objective of the Guidelines is to establish a fair standard of support for children in order to ensure that they continue to benefit from the financial means of both parents after separation: J.D.G. at para. 268.
- [152] Section 19 of the Guidelines permits the court to impute income in several scenarios, including where a parent is intentionally under-employed or unemployed, appears to have diverted income, or has failed to provide obligatory income information. The court's power to impute income under s. 19 is not limited by the restrictions set out in ss. 16-18 of the Guidelines: *Ouellette v. Ouellette*, 2012 BCCA 145 at para. 66.
- [153] Imputing income for intentional unemployment or under-employment does not require a finding of bad faith on the part of the spouse in respect of whom imputation is sought; it only requires a finding that he or she is not earning to capacity: *Beissner v. Matheusik*, 2014 BCSC 1785 at para. 37, *aff'd* 2015 BCCA 308.
- [154] In light of Ms. C.'s claim for spousal support, the Court must also be mindful of the principles that inform the imputation of income to an under-employed spouse in the context of considering self-sufficiency under s. 15.2(6)(d) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The court's discretion to impute income recognizes that, insofar as it is practicable, and having regard to all of the circumstances, spouses seeking support are required to make reasonable efforts to support themselves: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 34.
- [155] If the court determines that one or both of the parties' stated incomes do not represent their "means" (interpreted to include all pecuniary resources from which a person receives gains or benefits) or their ability to earn income, it may impute income at a level commensurate with their means: *L.F. v B.F.*, 2012 BCSC 1073 at para. 153.
- [156] Although there is no analogous statutory framework to the Guidelines to impute income for spousal support purposes, the court retains a broad discretion to impute income to a spouse for the purposes of spousal support: *L.F.* at para. 153. In general terms, the test for imputing a spouse's income in order to determine spousal support is similar to the test that applies with respect to child support; the essential issue is one of reasonableness: *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-37.

[157] The appellate authorities have cautioned the imputation of income should not be the product of speculation or guess work. The party seeking to have income imputed must establish an evidentiary basis for such a finding: *Marquez* at para. 36. The amount imputed must align with a realistic reflection of the party's education, work history, skills, age, any health conditions that may adversely impact the party from a vocational standpoint and other matters such as the availability of work: *Cotter v. Cotter*, 2015 BCSC 1730 at para. 49, *aff'd* 2016 BCCA 254; *Marquez* at para. 37; *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (B.C.S.C.) at paras. 14 and 20.

Mr. V.'s Income

[158] The determination of Mr. V.'s Guideline income was a central controversy at trial.

Position of the Parties

[159] At trial, Mr. V. submitted that his annual income for child support purposes was \$163,241.60. He asserted that he receives \$96,000 from the European Trust and that, when grossed up, his European Trust income is \$155,241.60. However, in his supplemental submissions for purpose of the Divorcemate calculations, he has calculated his Guidelines income as \$152,074.

[160] Ms. C. counters with the submission that Mr. V.'s income is significantly higher than he asserts. She contends that, in addition to the income he maintains that he receives from the European Trust and his Swiss and Canadian pensions, the following amounts should be included in his annual income:

- i. Payment of the Waldorf School fees - \$12,000;
- ii. C-Dar Lodge property tax paid by Five Seasons - \$3,886;
- iii. Conference fees of \$5,000;
- iv. Given the shortfall between his income and stated expenses and his deficient disclosure regarding the European Trust, she also asserts that an additional \$60,000 of annual income should be imputed to Mr. V.

Discussion

[161] The essential task of the Court is to determine a fair figure for Mr. V.'s current income from which support is to be paid.

[162] Based on his most current tax return tendered in evidence, Mr. V. receives, per annum, a Canadian pension income of \$5,235.84 and a Swiss pension income of \$6,258.97. This totals \$11,495 (Canadian) per annum.

- [163] There is an insufficient evidentiary foundation to establish that the tuition payments for the Waldorf School of approximately \$11,000 per year (which have been historically been paid by the trustees of the European Trust) should be characterized as income to Mr. V. Furthermore, the evidence as a whole does not support a finding that Mr. V. currently earns any net income from either the farm operations or the events held on the Squamish Property.
- [164] I turn to the distributions Mr. V. receives from the European Trust. According to Mr. V., he receives \$8,000 a month or \$96,000 per annum from the trustees of the European Trust. As previously mentioned, he does not pay income tax on this amount.
- [165] I found it troubling that there was no disclosure of any banking documents showing regular deposits from the trustees of the European Trust into an account in Mr. V.'s name. It would have been a relatively straightforward matter for Mr. V. to produce supporting documentary evidence with respect to the distributions he receives from the European Trust. He did not explain the reason that he failed to produce this documentation.
- [166] Mr. V. disclosed only two bank accounts: a Royal Bank chequing account and savings account. At trial, Mr. V. produced his Royal Bank chequing account statements from January 1, 2014 to July 9, 2014 and for the entirety of 2015. There were no statements from his savings account produced at trial.
- [167] I have reviewed all of the Royal Bank statements produced at trial. The evidence does not establish the source of the various wire transfers or the deposits shown on the statements. I have added up each of the deposits that were \$2,000 or more (the "Deposits"). The Deposits from January 1, 2014 to July 9, 2014 total \$106,333. Notably, the statements show only a single deposit of \$8,000 made in April 2014. The statements for 2015 total \$72,929.96 and do not show any deposits of \$8,000. On my calculations, based on an averaging of the 2014 and 2015 Deposits, the average monthly "Deposit" was approximately \$9,435.
- [168] Balancing the evidence as a whole, I am not satisfied that the Court has a full and accurate picture of Mr. V.'s financial means and actual capacity to pay support. In his Form 8 financial statement and at trial, Mr. V. maintained that he receives \$8,000 per month from the European Trust. Mr. V.'s bank account statements are compelling evidence that the financial resources available to him as income are greater than he has disclosed. In short, I find that Mr. V.'s, income, as disclosed in his Form 8, is not reflective of his financial means for the purposes of fixing child and spousal support.
- [169] All things considered, I have determined it is appropriate to impute an additional income of \$1,500 per month to Mr. V.
- [170] In summary, I find that Mr. V.'s means to pay support is equivalent to \$9,500 per month or \$114,000 per year from the European Trust, plus his annual pension income of \$11,495. The income from the European Trust must be grossed up separately from the annual pension income for income tax purposes.

[171] In the result, I determine Mr. V.'s annual income for purposes of fixing child support to be \$184,045.

Ms. C.'s Income

[172] Ms. C. contends that the income she earned after separation was reasonable in light of her circumstances. Ms. C. submits that her Guideline income should be her line 150 income on her 2015 tax return: \$12,259.00. That figure was comprised of \$624 in income she earned as a retail clerk and \$11,634 (net) she earned as a nanny. Her line 150 income in 2014 was \$3,590.

[173] Mr. V. counters with the submission that the Court should impute an income of \$21,700 to Ms. C. This figure represents full-time employment (40 hours a week for 50 weeks) at the minimum wage rate as of trial (\$10.85).

[174] As of trial, Ms. C. was working on a part-time basis both as a retail clerk and as a nanny. She was also earning \$70 per week for a part-time cooking position. Mr. V. points out that there is no reliable documentary record of the income she receives as a nanny. She says she earns \$15.00 per hour as a nanny. She acknowledged that her bank records cannot be relied on with respect to her nanny wages because she was sometimes paid her wages in cash. She, in turn, paid her bills using those cash payments. Ms. C. produced weekly time records prepared by her employer for the periods from July 2015 to December 2015 and January 2016 to September 2016. Balancing the evidence as a whole, I accept her testimony regarding how much she earns as a nanny.

[175] I turn to address the diligence with which Ms. C. has pursued employment. There was a dearth of reliable evidence detailing her efforts to secure full-time employment.

[176] Other than her attendance at a single YWCA workshop regarding preparation of job applications and resumes, there was no evidence adduced pertaining to any concrete steps Ms. C. has taken to secure full-time employment. There is no evidence that Ms. C. attended any employment centres, sought any employment counselling, or made any reasonable attempts to pursue upgrading or updating her skills. Overall, her evidence does not disclose within an acceptable degree of specificity her job search efforts or prospects for full-time employment.

[177] Ms. C. testified that she wished to improve her English and pursue a course in interior design at a cost she estimated to be approximately \$102,000. She indicated that the course would take three to four years to complete because she intended to undertake it on a part-time basis. However, she did not produce any documentation from the pertinent educational institution regarding details such as tuition or any other expenses related to the course or the length of the course.

- [178] After the separation, Mr. V. is not required to bear the burden of Ms. C.'s choices if those choices are not reasonable in all the circumstances. Ms. C. is obligated to contribute to P.'s financial support and to work to her capacity. P. is 13 years old. There is no suggestion on the evidence that P.'s needs require Ms. C. to be available such that she is constrained from obtaining full-time employment.
- [179] In determining what may be practicable in promoting Ms. C.'s self-sufficiency, the Court must conduct an individualized inquiry of her particular circumstances. This entails consideration of all of Ms. C.'s circumstances including her age, skill, education and whether there is a realistic prospect of her becoming self-sufficient: *Tedham v. Tedham*, 2005 BCCA 502 at para. 33.
- [180] It is reasonable that Ms. C. should be working approximately 37.5 to 40 hours a week with the overall objective of becoming more economically self-sufficient to the extent practicable in her overall circumstances. The appellate authorities caution that the courts must be realistic about assessing self-sufficiency. I have not overlooked the fact that English is Ms. C.'s second language. Nonetheless, on the evidence, I cannot conclude that Ms. C. has made adequate efforts to find appropriate full-time work. She must concentrate her efforts on improving her income beyond that which she is presently earning. Having regard to all of her circumstances, I am not persuaded Ms. C. has taken reasonable steps to promote her economic self-sufficiency.
- [181] I conclude that Ms. C. continues to be intentionally under-employed pursuant to s. 19 of the Guidelines. I accept, however, that it is quite unlikely that, unless she updates or upgrades her skills, Ms. C. will be able to secure a full-time position at a wage rate greater than minimum wage.
- [182] In all the circumstances, I conclude that it is fair and reasonable to impute an annual income to this Ms. C. of \$22,132. This represents full-time work at 37.5 hours per week at the current minimum wage of \$11.35.
- [183] In summary, I find Ms. C.'s Guideline income to be \$22,132.

(iv) Child Support

- [184] Under the Guidelines, the presumptive rule mandates payment of the "table" amount of child support based on the payor's annual income and an additional amount, if any, for extra or special expenses under s. 7 based on both parents' annual income. Section 11 of the Guidelines authorizes the payment of child support to be paid periodically, in a lump sum, or in a combination of lump-sum and periodic payments.

[185] At Mr. V's request, the trustees of the European Trust pay P.'s tuition of approximately \$11,000 a year at the Waldorf School. To the best of Mr. V's knowledge, they will continue to do so. P. takes weekly cello lessons; she also has a math tutor once per week. She takes ski lessons and is engaged in gymnastics. Neither party provided any detailed calculations or developed any submissions on the quantum of the s. 7 expenses. On the totality of the evidence, my best estimate of the annual s. 7 expenses is \$2,990 calculated as follows:

Cello Lessons (\$25 x 35 weeks):

\$875

Gymnastics:

\$380

Math Tutor (\$25 x 35 weeks):

\$875

Ski Lessons:

\$700

Aerial Silk Class:

\$160

Annual Cost

\$2,990

[186] Ms. C. submits that an award of lump sum child support is appropriate. Ms. C.'s primary contention is that since the principal source of Mr. V's income is from the European Trust it makes enforcement of this periodic order more "impractical, improbable or impossible".

[187] Mr. V. opposes any lump sum child support payment. Mr. V. submits that child and spousal support should be periodic. He underscores that he has demonstrated that he has a reliable source of financial support and that he has voluntarily provided for Ms. C. and P. since separation. He also asserts that he does not have capital assets to draw money from but rather he relies on his regular stream of income from the European Trust and his pensions.

[188] In *Myatt v. Myatt* (1993), 45 R.F.L. (3d) 45, Madam Justice Kirkpatrick (as she then was) canvassed the jurisprudence relating to lump sum child support awards: at paras. 26-36. See also *Zhang v. Sun*, 2016 BCSC 1418 at paras. 279-281; *Britnell v. Grasley*, 2000 BCSC 1322 at para. 67.

[189] The relevant principles in assessing whether lump sum child support should be awarded include:

- i. The existence of animosity between the parties may favour a lump-sum order to reduce future sources of conflict.
- ii. Lump sum awards may be appropriate where a parent has disobeyed a previous support order or there is a history of non-compliance with orders, or where a parent is likely to ignore future orders.
- iii. Lump sum awards may be made when it is neither practical nor feasible for a parent to pay periodic support.
- iv. Lump sum child support award should be made only where there are specific or special circumstances that render it appropriate.
- v. The same considerations that apply to orders for lump sum spousal support apply to lump sum child support.

[190] In this case, Mr. V., through his conduct, has demonstrated his commitment to supporting P. This is borne out by the fact that there is no claim for retroactive child support. I also accept that, since separation, Mr. V. has continued to make payment of s. 7 expenses upon request. He has voluntarily made these payments without any court order.

[191] I do not consider that there is a sound basis to order a lump sum payment. The totality of the evidence satisfies me that Mr. V. is a committed father who will comply with the support order that I have made. Furthermore, given Mr. V.'s overall financial circumstances, an order for a lump sum payment is not practical. In light of the regular distributions he receives from the European Trust, it is more reasonable and practicable for him to make periodic payments.

[192] In all the circumstances, I am not satisfied that it would be appropriate in this case to order a lump sum child support payment.

[193] I order that, effective January 1, 2018, Mr. V. shall pay Ms. C. the table amount of child support in the amount of \$1,622 per month as long as P. remains a child of the marriage within the meaning of the Divorce Act. The parties shall share s. 7 expenses in proportion to their respective Guidelines incomes.

[194] The parties are at liberty to apply to vary my order for child support upon a material change of circumstances.

(v) Spousal Support

a. Grounds for Entitlement

[195] Ms. C.'s entitlement to spousal support is a threshold issue and must be established before the Court analyses the quantum and duration of spousal support: *James v. James*, 2016 BCSC 292 at para. 387. Her entitlement to spousal support must be considered in the context of the governing statutory and jurisprudential framework.

[196] Section 15.2 of the Divorce Act provides the legislative framework for ordering spousal support in this case. In determining a claimant's entitlement to support, this Court must apply the conceptual framework formulated by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. In its analysis, the Court must consider the four objectives set out in s. 15.2(6) of the Divorce Act:

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[197] Section 15.2(4) of the Divorce Act further provides that the Court must, in its analysis of a claim for spousal support, consider the condition, means, needs, and other circumstances of each spouse, including the length of time the spouses cohabited and the functions performed by each spouse during cohabitation.

[198] There are three conceptual models for determining entitlement to spousal support: compensatory, non-compensatory, and contractual. The authorities establish that these models are not mutually exclusive and there is no single basis of support or objective under the Divorce Act that supersedes another: *T.N. v. J.C.N.*, 2015 BCSC 439 at para. 144. While there may be more than one basis for a spouse's entitlement to support, the award is single and indivisible: *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 39. The basis for spousal support, being contractual, compensatory or needs-based, or a combination thereof, will impact the quantum and duration of an award: *A.K. v. N.K.*, 2012 BCSC 1499 at para. 115.

[199] The fundamental underpinning for an order of spousal support is the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown: *Chutter v. Chutter*, 2008 BCCA 507 at para. 49.

[200] The parties agree that Ms. C. has an entitlement to spousal support on both compensatory and non-compensatory grounds. Given the differing positions of the parties as to the appropriate quantum and duration of support, it is necessary to assess each ground.

- [201] The objective of compensatory support is to provide redress to the recipient spouse for his or her efforts which conferred an economic benefit or advantage on the other spouse and for his or her economic disadvantage arising from the marriage or its breakdown: Chutter at paras. 50-51; T.T. v. J.M.H., 2014 BCSC 451 at para. 120.
- [202] Taking into account the factors and objectives in the Divorce Act and applying the governing legal principles, I conclude that Ms. C. has established an entitlement to compensatory support. Her assumption of the primary parenting role during the marriage and after separation resulted in her detachment from the workforce for several years. Mr. V. must compensate Ms. C. for her foregone career opportunities and for the fact that she was left at an economic disadvantage when the marriage came to an end.
- [203] I also find that Ms. C. is entitled to non-compensatory spousal support or "needs-based support" as it is sometimes described. The concept of "need" is flexible, contextual, and varies according to the circumstances of the parties: Loesch v. Walji, 2008 BCCA 214 at para. 39; Myers v. Myers (1995), 17 R.F.L. (4th) 298 at para. 10. In Chutter, the Court of Appeal expressed the objective of non-compensatory support at para. 54:
- ... Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.
- [204] The assessment of the recipient's needs should be informed by the standard of living enjoyed by the parties prior to separation. In McEachern v. McEachern, 2006 BCCA 508, the Court of Appeal affirmed at para. 47 that, while the doctrine of spousal support does not guarantee to either party the standard of living enjoyed during the marriage, consideration of the marital standard of living is a relevant factor in assessing the "needs" of the recipient spouse. This factor should be weighed in light of the length of the marriage.
- [205] In this case, taking into account the marital standard of living and her current circumstances, including the modest income I have imputed to her and her stated expenses, Ms. C. has established a claim for non-compensatory support.
- [206] The authorities caution about the potential danger of double recovery that arises from the interaction between property division and spousal support. However, the courts have also recognized that the equitable sharing of the consequences of a marriage breakdown can be achieved by a combination of spousal support, child support, and division of assets: Bell v. Bell, 2009 BCCA 280 at para. 20.
- [207] As previously indicated, I have ordered a judgment in favour of Ms. C. in the amount of \$171,427 and that the Apartment be transferred to her on terms. The compensatory element of her spousal support claim is largely but not fully addressed through my order for property division. I conclude that while the order I have made will assist Ms. C. in her financial circumstances, it does not preclude a spousal support order.

[208] In conclusion on this threshold issue, I find that Ms. C. is entitled to spousal support on both a compensatory and non-compensatory basis.

b. Quantum of Support

[209] Having determined that Ms. C. has established entitlement to support the next step is to determine the appropriate quantum and duration.

[210] The legal foundation for awarding spousal support is different from that of child support. However, the SSAG, which lacks any legislative status, incorporate the methodology for defining income under the Guidelines as a starting point. It is logical and practical in this particular case that the determination of the parties' income for spousal support purposes be the same as that income attributed to the parties in the preceding section on child support: *Aelbers v. Aelbers*, 2010 BCSC 1574 at para. 12. Therefore, for the purposes of assessing prospective spousal support, I find Mr. V.'s income to be \$184,045 and Ms. C.'s income to be \$22,132.

[211] In *Yemchuk v. Yemchuk*, 2005 BCCA 406, the Court of Appeal accepted the SSAG as a useful tool to assist judges in assessing quantum and duration in spousal support. In subsequent decisions, the Court has restated the utility of the SSAG in establishing the appropriate range of spousal support in order to ensure "a pattern of predictable awards": *Mann v. Mann*, 2009 BCCA 181 at para. 72; see also *Chutter* at para. 101; *Redpath v. Redpath*, 2006 BCCA 338 at para. 38; and *Holland v. Novotony*, 2009 BCSC 1754 at para. 172. However, the appellate authorities have also repeatedly cautioned that while the SSAG are a significant consideration, they are not to be slavishly applied without regard to all the circumstances of a particular case.

[212] As a starting point in the analysis for determining spousal support I have done calculations using the "with child support" formula in the SSAG for a payor earning \$184,045 and a recipient earning \$22,132 after a 10 year relationship.

[213] I have taken into account the parties' entire period of cohabitation from June 2002 to March 2013 while also deducting the seven month period of their temporary separation. A similar formulation for calculating the length of cohabitation was used in *Whalen-Byrne v. Byrne*, 2017 ONCA 729 at paras. 10-11 and I adopt it for the purposes of this case. If one deducts the period the parties were separated, the length of their cohabitation/marriage is 10 years and two months.

[214] As previously stated, I have calculated the annual s. 7 expenses as \$2,990.

[215] Notably, based upon the information disclosed in his Form 8, Mr. V. has continued to pay extended health, dental plan, and MSP premiums for P. The evidence does not establish whether he has continued to pay those premiums for Ms. C.

- [216] Based upon the SSAG and with the parties sharing the s. 7 expenses in proportion to their respective Guidelines income, Ms. C. would be entitled to monthly spousal support ranging from a low of \$2,762 to a high of \$3,508. The midpoint of the range is \$3,140. The SSAG suggests a minimum duration of five years and a maximum duration of 10 from the date of separation.
- [217] The SSAG take into account the age of the parties and the length of the spousal relationship. I have also taken into account my finding that Ms. C.'s entitlement to support is grounded in both compensatory and non-compensatory principles. Additionally, I have also considered the monthly expenses of each of the parties set out in their respective Form 8 financial statements. I note that, in his most recent F8 financial statement, Mr. V. discloses, in addition to the mortgage indebtedness on the Squamish Property and the Apartment, approximately \$10,000 in credit card debt. I must also balance the tax positions and interests of the parties. Finally, I have considered the duration of the spousal support that I order in the next section of these Reasons.
- [218] Balancing all of the relevant factors, I conclude that spousal support of \$3,200 per month is appropriate. In my view, this award addresses both the compensatory and non-compensatory aspects of Ms. C.'s claim and reflects the objectives of the Divorce Act.

c. Duration of Support

- [219] Ms. C. seeks an order for a lump sum spousal support. Mr. V. opposes such an order.
- [220] The position of the parties regarding lump sum spousal support is essentially the same as their respective positions on lump sum child support as set out above.
- [221] Mr. V. also submits that, as Ms. C. has not made reasonable efforts to attain any degree of self-sufficiency, her monthly spousal support should be set at the lower end of the SSAG range for duration.

Legal Framework - Lump Sum Support

- [222] The factors a court should consider in determining whether lump sum spousal support should be ordered were canvassed in *Davis v. Crawford*, 2011 ONCA 294 at paras. 65-76. *Davis* was cited with approval in *Robinson v. Robinson*, 2011 BCSC 1489 at para. 96, aff'd 2012 BCCA 497. The animating principles from *Davis* were helpfully summarized by the Court in *Brandl v. Rolston*, 2012 BCSC 902, appeal dismissed; 2013 BCCA 235, as follows:
- [84] Ms. Brandl seeks periodic and/or lump sum spousal support. In *Robinson*, Madam Justice Watchuk reviewed the Ontario Court of Appeal decision of *Davis v. Crawford*, 2011 ONCA 294, which set out the factors that should be taken into consideration in determining whether lump sum spousal support should be ordered. These are summarized in Ms. Brandl's submissions at paragraph 129:

- a. The court's ability to award lump sum spousal support is not restricted to "very unusual circumstances".
- b. Although a lump sum award should not be made in the guise of support for the purpose of redistributing assets, a lump sum order can be made to relieve against financial hardship, if this has not been done in the division of assets.
- c. Any lump sum award that is made will have the effect of transferring assets from one spouse to the other. The real question in any particular case is the underlying purpose of the order.
- d. A court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any perceived disadvantages of making such an order.
- e. The advantages of making a lump sum award can include the following:
 - i. Ensuring adequate support will be paid in the circumstances where there is a real risk of non-payment of periodic support
 - ii A lack of proper financial disclosure
 - iii Where the payor has the ability to pay lump sum but not periodic support
 - iv Satisfying immediately an award of retroactive spousal support.

Discussion

- [223] For the same reasons that I concluded that lump sum child support was not appropriate, I also find that lump sum spousal support is not appropriate.
- [224] In the present case, there is no history of non-payment or disregard for court orders by Mr. V. He has voluntarily supported Ms. C. since separation in the absence of any court order. She makes no claim for retroactive spousal support.
- [225] Although Mr. V. occasionally travels outside Canada, he remains closely tied to the Squamish Property. He has five children who reside in B.C, including P. He has consistently supported P. I do not consider it a significant risk that he will depart the jurisdiction.
- [226] It has been open to Mr. V. since the parties' separation in 2013 to instruct the trustees of the European Trust to direct his payments elsewhere or to cease making any distributions to him. This has not occurred since the parties' separation which was more than four years ago. In all the circumstances, I am not satisfied that there is a real and substantial concern that Mr. V. will not pay periodic spousal support.
- [227] Given his overall financial circumstances, I am not persuaded that it is reasonably practicable to order that Mr. V. make a lump sum payment to satisfy Ms. C.'s spousal support claim. However, as with the periodic child support payments I have ordered, Mr. V. has the ability to pay periodic spousal support payments.

- [228] The disadvantages of a lump sum award include the possibility that the parties would be effectively deprived of the right to apply for a variation if, on account of the exigencies of life, the means and needs of the parties change. Additionally, there are difficulties inherent in calculating an appropriate award of lump sum spousal support: Davis at para. 68.
- [229] All things considered, the perceived disadvantages of making a lump sum award outweigh any potential advantages of making such an order. I am satisfied that the objectives of spousal support under the Divorce Act will be met by an order for periodic support.
- [230] As I mentioned, the SSAG range for the duration of spousal support is between five to ten years. In all the circumstances, I have concluded that Ms. C. is entitled to spousal support commencing January 1, 2018, until no later than March 31, 2021. She has received voluntary financial support for more than four years since separation. By March 31, 2021, she will have received spousal support for eight years.
- [231] In my view, this period of spousal support will satisfy Ms. C.'s entitlement to both compensatory and non-compensatory spousal support. Mr. V.'s obligation to pay spousal support will be discharged.
- [232] The parties are at liberty to apply to vary my order upon a material change of circumstances under s. 17(1) of the Divorce Act.
- [233] For the period in which Mr. V. is paying spousal support, the parties shall exchange tax returns by May 31st of each year and provide copies of assessments and reassessments (if any) within fourteen days of the receipt of the respective documents from CRA.
- [234] Neither party made any submissions with respect to whether Mr. V.'s support obligations should bind his estate. If Ms. C. wishes to pursue the issue, the parties have leave to file further written submissions implementing a timetable for filing agreed to by counsel. The ultimate deadline for filing will be March 23, 2018.

CONCLUSION

[235] In summary, I make the following orders:

- i. The parties are divorced effective on the 31st day after the date these Reasons are released;
- ii. Mr. V. shall transfer the Apartment to Ms. C. on the conditions set out in these Reasons;
- iii. Mr. V. shall pay Ms. C. \$171,427 on account of the division of family property and debt;
- iv. Mr. V. shall pay \$3200 per month to Ms. C. as spousal support commencing January 1, 2018 until no later than March 31, 2021;
- v. Mr. V. shall pay child support to Ms. C. of \$1,622 per month commencing January 1, 2018 for as long as P. remains a child of the marriage;
- vi. The parties shall share the s. 7 expenses in proportion to their incomes;

vii. Child support and spousal support shall be reviewable upon a material change of circumstances;

viii. For the period in which Mr. V. is paying spousal or child support, the parties shall exchange tax returns by May 31st each year and provide copies of assessments and reassessments (if any) within fourteen days of receipt of the respective documents from CRA.

[236] The parties are at liberty to apply for further directions as may be necessary to implement these Reasons for Judgment.

COSTS

[237] Finally there is the matter of costs. The parties have leave to address the issue of costs following the release of these Reasons. The parties should estimate the length of time required to address the issue of costs and contact Supreme Court Scheduling to schedule a hearing.

"Dardi J."

SCHEDULE A

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

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

Interpretation

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- (3) For the purposes of this Part, property received by a spouse from a trust in respect of the spouse's beneficial interest in property held in the trust must be considered to be property derived from that beneficial interest.
- (4) In this Part, "property" includes a beneficial interest in property unless a contrary intention appears.

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
- (i) property that is owned by at least one spouse, or
- (ii) a beneficial interest of at least one spouse in property;

- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.
- (2) Without limiting subsection (1), family property includes the following:
- (a) a share or an interest in a corporation;
 - (b) an interest in a partnership, an association, an organization, a business or a venture;
 - (c) property owing to a spouse
 - (i) as a refund, including an income tax refund, or
 - (ii) in return for the provision of a good or service;
 - (d) money of a spouse in an account with a financial institution;
 - (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;
 - (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
 - (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.
- (2.1) For the purposes of subsection (2) (g), any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property received from the trust.
- (3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which
- (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
 - (b) the spouse has a power to transfer to himself or herself that part of the trust property, or

- (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

85 (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
 - (b) inheritances to a spouse;
 - (b.1) gifts to a spouse from a third party;
 - (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
 - (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or
 - (ii) of the hearing before the court respecting the division of property and family debt.

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].
- (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.

96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
- (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and

(ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

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