

CANADA / JUDGMENT

M.M.A. v. S.M.A.R.

2025 BCSC 1476

COURT

Supreme Court of British Columbia

DECIDED

31 July 2025

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

2025 BCSC 1476 M.M.A. v. S.M.A.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.M.A. v. S.M.A.R.,

2025 BCSC 1476

Date: 20250731

Docket: E230399

Registry: Vancouver

Between:

M.M.A.

Claimant

And:

S.M.A.R.

Respondent

Before: The Honourable Justice Lawn

Reasons for Judgment

Counsel for the Claimant:

J. Aucoin

A. Benzinger

Counsel for the Respondent:

E. Walker

Place and Dates of Trial:

Vancouver, B.C.

April 28-May 2, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 31, 2025

Table of Contents

Introduction.. 4

Issues. 4

Background.. 4

Procedural History. 6

Credibility and Reliability. 10

Preliminary Issue. 12

Parenting.. 16

Legal Principles. 20

Parties' Positions. 22

Analysis. 22

Income Determinations. 24

S.R.'s Income. 24

Legal Principles. 25

S.R.'s Position. 27

M.A.'s Position. 28

Analysis. 31

Section 16. 31

Section 18. 35

Section 17. 38

Section 19. 43

Conclusion on S.R.'s Income.	44
M.A.'s Income.	47
Support Entitlement.	48
Legal Principles.	48
Parties' Positions.	48
Conclusions on Support	49
Retroactive Support	50
Section 7 Expenses.	52
Parties' Positions.	52
Analysis.	53
Life Insurance as Security for Support Obligations.	54
Property Division..	57
Legal Principles.	57
Uncontested Matters.	60
The Joint Expert	60
The Claimant's Position.	62
The Respondent's Position.	65
Analysis.	68
Latent Tax.	68
Shareholders Loan.	70
Tax Debts.	71
Summary of Conclusions on Property Division.	73
Fines.	74
Divorce.	76
Costs.	76

Introduction

- [1] In this family law proceeding, the claimant, M.A., and the respondent, S.R., seek a divorce and final determination of parenting time and responsibilities, child support, spousal support, and property division.
- [2] The parties met in 2013, married on January 1, 2015, and separated on January 22, 2020. The claimant is now 34 years old; the respondent is 42. They have two children, F.R. and M.R., who are respectively ages 7 and 9.
- [3] There are difficult and contested issues in this proceeding centred around S.R.'s income and the value of his half-interest in the consultancy firm, M. Inc. There are also many areas, principally concerning the children and their needs, that are not in significant dispute.

Issues

- [4] The issues requiring resolution are:
 - a) parenting orders;
 - b) determination of the parties' incomes;
 - c) child and spousal support; and
 - d) property division.

Background

- [5] The parties met in Argentina in 2013, when the claimant was working for an airline and the respondent was a frequent traveler. M.A. testified to the beginning of their relationship as a "romantic story" with many trips taken in business class and five-star hotels. It was a life she was not used to.
- [6] The parties were married in Lebanon, where they moved together in 2015. Soon after moving into an apartment in 2015, M.A. learned that she was pregnant. Their first child, M.R., was born in 2016.
- [7] In 2017, the parties moved to Canada: first to Montreal and later that year, to Vancouver, when M.A. testified that she was seven months pregnant. Their second child, F.R., was born in 2018.
- [8] M.A. testified that after her first pregnancy, the parties' marriage was usually "traditional" in the sense that she did not work full time outside the home. Generally speaking, S.R. controlled the family's finances, while she filled the role of a traditional wife and mother in caring for the parties' children.

- [9] Although she considered returning to work, M.A.'s evidence was that S.R. did not want the children to attend daycare. However, both children did eventually do so: M.R. for a short time while the parties were in Montreal, and both children in Vancouver where they later attended Fawkes Academy.
- [10] From 2018 to 2023, M.A. worked outside the home delivering therapy to a child with Autism Spectrum Disorder ("ASD") three hours per week. During Covid, she did some work through a practicum associated with training at Capilano University. She currently delivers Pilates classes at a studio in East Vancouver, two to three hours per week. She is also on-call at a Vancouver fitness facility where she gets paid \$45 per hour to fill in when regular employees are unable to work. This has been the extent of her paid work since the start of the parties' relationship. Going forward, she plans to increase her hours and client base as a Pilates instructor.
- [11] S.R. is a software developer. He and his friend, X.M., started a company in Quebec, where they met while at university. When S.R. relocated to BC, the corporate vehicle for this work became M. Inc., which will be the main subject of the property division between the parties. While the nature of M. Inc.'s current and past contracts was not in dispute, there was significant dispute over its recent partnership with H. Co., and the value of that partnership as part of M. Inc.'s valuation. The two companies are collaborating on a substantial project involving artificial intelligence and seeking to develop a client-facing interface.
- [12] F.R. and M.R. have been diagnosed with ASD. F.R. has Level 3 ASD and significant special needs. She is nonverbal and requires adult assistance for all basic life skills. M.R. has Level 1 ASD and attends school at his grade level. Therapy has helped both children to grow and develop. There is no dispute that both children require full time supervision and other interventions which will be detailed below. In F.R.'s case, she cannot be left alone even for a short time for her own safety.
- [13] Post-separation, and until an interim order was made in April 2024, the respondent paid the children's and the claimant's expenses directly via credit card.
- [14] On April 5, 2024, Associate Judge Vos made an order for interim monthly child support in the amount of \$13,160 and set interim spousal support at \$20,598 per month ("Vos Order"). He also ordered that the respondent pay 76.6 percent of the children's special or extraordinary expenses. The respondent paid these amounts until September 2024, when he unilaterally reduced his total payments to \$20,000 per month. The respondent filed materials to vary the Vos Order in September of 2024, but for various reasons it did not proceed.

- [15] At the close of trial, the respondent urged me to exercise my jurisdiction to make a further interim order pending the release of these reasons, to reduce his monthly payments in line with his position that he had suffered a significant reduction in income. I refused to do so given the complexities involved in determining the respondent's income and the undesirability of a piecemeal approach to decision-making.

Procedural History

- [16] On February 15, 2023, the claimant filed her notice of family claim.
- [17] On March 9, 2023, the parties entered into a s. 91 financial restraining order by consent, which provided for an advance of \$50,000 to M.A. for legal fees.
- [18] On April 27, 2023, the respondent filed his response to family claim and counterclaim.
- [19] On May 23, 2023, the claimant filed her response to counterclaim.
- [20] On June 12, 2023, the parties entered into a further consent order by which:
- a) the respondent would provide draft financial statements and T2 Corporate Income Tax Returns;
 - b) the parties would exchange lists of documents by June 30, 2023, which would include all personal bank and credit card statements from 2018 to the present;
 - c) the respondent would file his Form 8 Financial Statement by July 21, 2023;
 - d) Derek Sanders or another agreed-upon valuator would be jointly retained to value M. Inc. and its predecessor with the costs to be shared equally; and
 - e) the claimant could obtain an expert report on the respondent's Guidelines income, with the respondent to provide all documents requested by the valuator within 14 days of request.
- [21] Pursuant to paragraph (e) above, the claimant retained Lucas Terpkosh of Blair MacKay Mynett to prepare a Guideline Income Report. The Terpkosh Report was admitted into the proceedings for a limited purpose and by consent, to avoid the necessity of having Mr. Terpkosh attend in court.
- [22] On June 26, 2023, the claimant provided her list of documents. The respondent provided his list on the following day, but the claimant takes issue with its completeness. In particular, she says that it was missing most of the required financial disclosure as outlined in the consent order.
- [23] On August 22, 2023, M.A. filed an amended notice of family claim seeking an unequal division of property.
- [24] A scheduled mediation in August 2023 was adjourned, in part due to disclosure failures by the respondent. The parties attended the rescheduled mediation in September 2023, but did not resolve anything.

- [25] The parties agreed to a further extension of the document disclosure deadlines to January 31, 2024. The respondent provided various documents at this time, but substantial disclosure remained outstanding.
- [26] On March 6, 2024, the parties appeared again before Vos A.J. As referenced above, on April 5, 2024, he made the following interim and without prejudice orders:
- a) The respondent's Guidelines income was set at \$1,082,315.
 - b) The respondent would pay monthly child support of \$13,160.
 - c) The respondent would pay monthly spousal support of \$20,598.
 - d) The respondent would be responsible for 76.6 percent[1] of the s. 7 expenses.
- [27] At or prior to the hearing before Vos A.J., the parties consented to parenting time. The respondent is often traveling and does not exercise all his parenting time, so this has never been an area of much contention.
- [28] A number of events took place leading up to the first trial date, scheduled for June 24, 2024. In brief:
- a) On May 3, 2024, at a trial management conference before Associate Judge Harper, S.R. was ordered to produce all outstanding documents pursuant to the experts' requests by May 15, 2024.
 - b) On June 13, 2024, the expert business valuator, Mr. Sanders, advised he could not prepare a business valuation report due to missing documents.
 - c) On June 19, 2024, the parties appeared before Justice Ramsay on the claimant's application for an advance of funds for the purposes of s. 89(a), (b) or (c) of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
 - d) On June 20, 2024, M.A. was granted a capital advance for litigation fees of \$100,000.
 - e) On June 21, 2024, S.R.'s application to adjourn the trial was granted on the basis of incomplete financial disclosure. M.A. was entitled to costs thrown away for three days of trial preparation at Scale B in any event of the cause, payable forthwith by the respondent.
- [29] As of June 2024, there was still a long list of outstanding documents which S.R. had not disclosed, including his personal tax returns and NOAs for 2014 to 2023; draft financial statements and corporate income tax returns for M. Inc. and a predecessor company from 2014 to 2023; a list of personal expenses incurred by the company on behalf of its shareholders; and M. Inc's year-to-date bank statements. The remaining outstanding disclosure was not produced until after the June 2024 trial was adjourned.

- [30] On July 26, 2024, Associate Judge Bilawich granted an order varying the March 9, 2023 s. 91 order so that M.A. could serve it on S.R.'s banks. S.R. immediately took steps to shield certain funds, including withdrawing funds to pay off debts, resulting in the creation of a surplus balance in his Amex card account. He also moved \$260,000 USD out of his TD Direct Investing account into two accounts in the names of the children.
- [31] In September 2024, S.R.'s application to vary the July 26, 2024 order of Bilawich A.J. was not granted.
- [32] Also in September 2024, S.R.'s application to vary the Vos Order of April 5, 2024, was adjourned generally as the order had not yet been entered. He reset this application for March 7, 2025, but the parties agreed to adjourn it.
- [33] Mr. Sanders tendered his business valuation report in October 2024, which covered the period up to the end of 2023. On April 17, 2025, Mr. Sanders updated this report to include 2024.

Credibility and Reliability

- [34] In *R.C.T. v. A.K.T.*, 2023 BCSC 654 at paras. 7-12, Justice Donegan, as she then was, succinctly reviewed the well-known principles that the court must rely on in assessing witness reliability and credibility in the context of a family law dispute. In brief:
- a) Reliability is focussed on the accuracy of the witness's testimony and concerns the witness's ability to observe, recall, and recount events.
 - b) Credibility refers to truthfulness or honesty and is not a proxy for reliability. While an uncredible witness can never give reliable evidence, a credible witness may still give unreliable evidence
 - c) A credibility and reliability assessment must be done critically in the context of the evidence as a whole. The question is whether the witness's evidence is at odds with other evidence, and whether it is implausible or improbable, having regard to the surrounding circumstances.
 - d) A court may believe some, all or none of a witness's testimony.
 - e) Credibility determinations may involve factors that are difficult to verbalize and may not be purely intellectual.
 - f) Determinations of credibility must not be based on emotional evaluations, stereotypes, guesswork, or other impermissible forms of reasoning.
 - g) Credibility determinations must be grounded in reason and be made as objectively as possible.

- h) Caution must be exercised in placing too much reliance on a witness's demeanor or courtroom presentation. The trier of fact has no baseline upon which to assess those things, and everyone reacts to the pressures of the courtroom environment differently.

See also *Yang v. Duralia*, 2020 BCSC 806 at paras. 41-42, 45; *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392; *R. v. R.E.M.*, 2008 SCC 51 at para. 49.

- [35] Both of the parties gave evidence, as did S.R.'s business partner, X.M., and two professionals: Zoe Raffard, an occupational therapist, and Derek Sanders, a business valuator. Mr. Sanders was retained jointly to provide an expert valuation report of M. Inc., and a Guidelines income report for S.R.'s income.
- [36] The professional witnesses and M.A. all presented their evidence clearly and in a forthright manner. M.A. did suffer from some memory lapses and admitted to having a poor memory as to dates. None of this undercut the general credibility of her evidence, much of which had to do with the care and development of her children, a subject about which she is obviously highly knowledgeable and meticulous. This level of care and attention also extended to her evidence as to the processes for obtaining financial support from government for the children. For example, she described the application process for "At Home" program funding for F.R., one of several sets of applications she submitted to obtain this assistance.
- [37] S.R.'s credibility suffered on occasion, in particular when he was cross-examined on M. Inc.'s partnership investment with H. Co., which relationship was the subject of evidence in the context of the property valuation in this matter. In brief:
- a) S.R. stated, somewhat hesitatingly, that he did not know which language H. Co.'s chatbot functioned in because he had never checked. This lack of knowledge is inherently unlikely in the context of the partnership investment he described. Earlier in his testimony, S.R. had referred to the Chatbot as being in the Arabic language when describing the difficulties faced by the project. He also explained how his company and H. Co shared resources.
 - b) It was also inherently not believable that this \$3.6 million USD partnership investment has resulted in no documents. This is so, particularly as S.R. testified that he is or has been working almost exclusively on this project and spending much of his available time to try to bring some value to it.
 - c) S.R. also testified that he had to live in M. Inc.'s office because he did not have an apartment in Vancouver, to save money, leaving the distinct impression that he was sleeping in an actual office. While he described this as a hardship, on cross-examination he admitted that M. Inc.'s office was actually a two-bedroom Yaletown condominium overlooking the water. While this was a small matter, it undermined my assessment of the credibility of his other evidence as it revealed a tendency to exaggerate his circumstances to engender sympathy.

[38] Thus, where there is a conflict between S.R.'s evidence and M.A.'s, I prefer the evidence of M.A. whom I found to be generally credible and reliable.

Preliminary Issue

[39] This leads me to a preliminary issue with respect to M.A.'s characterization of the case. M.A. argued from the outset that this case ought to be characterized as one of family violence due to financial abuse. Her position was that this can be a particular problem in a case where one spouse completely controls a family business and/or has sole control of the finances, as was the case here. She relies on the following three cases:

- a) *Loss v. Walters*, 2024 BCSC 1012 at paras. 98-99, where the Court noted that financial abuse could be a form of psychological abuse and control: see also the FLA definition of "family violence" at s. 1(d)(i) and (ii). In that case, the conduct complained of included threats that the respondent would burn down the claimant's dwelling or destroy or prevent access to property that she needed to run her business, if she did not agree to the entry of a court order or the terms of a mediation agreement.
 - b) *Sattar v. Shahid*, 2024 BCSC 2350 at para. 25, where the Court found that the degree of the respondent's financial control over the claimant amounted to family violence under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. The Court described the nature of the financial control as follows:

[15] Ms. Sattar had no access to money except by the grace of Mr. Shahid. She had no financial information, such as how much he was earning, spending or saving, and no input into any financial decisions. He occasionally permitted her use of a debit card for specific purchases. He gave her virtually no spending money, not even to buy groceries or other essentials for the home. Instead, she was required to give him a list of what was needed and he decided what to buy and what to ignore. At times, she was forced to rely on the neighbourhood's free grocery service for struggling families. Sometimes she had to ask her brother for money for essentials such as anti-lice shampoo (after returning from a visit to Pakistan) or to pay her phone bill.
 - c) *Valastiak v. Valastiak*, 2010 BCCA 71 at para. 13, where the Court referred to the defendant's use of the family restaurant business, which he ran into the ground, as his personal "piggy-bank". The Court did not discuss economic abuse or family violence in this matter, however. The decision centred around whether the \$30,000 compensation order (made under the now repealed Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]) survived the defendant's voluntary assignment into bankruptcy.
- [40] M.A. points to the following examples of instances which were embarrassing, controlling, and/or representative of her dependence on the respondent and the power imbalance between the spouses:

- a) M.A. had to approach X.M. as a go-between to request basic financial assistance after separation, including to obtain funds to pay the children's nanny.
 - b) In 2017, M.A.'s access to one of S.R.'s credit cards was cut off, forcing her to rely on an aunt to purchase groceries. This evidence is disputed and M.A.'s account of what happens relies on hearsay, namely what she was told by a customer service worker at the bank when she called to report the credit card difficulty.
 - c) The fact that after she entered into this relationship at the age of 23, she no longer had any financial independence, having given up her career aspirations.
 - d) S.R. being secretive about his earnings and his business activities.
 - e) S.R.'s conduct of M. Inc., including his failure to keep proper records and to pay taxes on funds withdrawn from the company, as well as the fact that he ran many or most of his personal expenses through M. Inc. while incurring a large shareholder loan.
 - f) S.R. breaching court orders for disclosure and his long-standing failure to comply with financial disclosure obligations, which M.A. characterizes as a "deliberate strategy".
 - g) S.R.'s conduct following the financial restraining order made under s. 91 of the FLA on July 26, 2024, including immediately moving \$260,000 USD from his own account to two accounts in the names of the children.
- [41] S.R. disputes M.A.'s characterization of the 2017 credit card incident. S.R. says that, to his knowledge, M.A.'s credit card was never cut off. S.R. recalls an instance where M.A. contacted him while he was away about her credit card not working. He called the bank and learned that they had flagged a large purchase (an airline ticket) as a suspicious transaction. S.R. says he resolved the issue and got it fixed.
- [42] As noted above, both S.R. and M.A. rely on what they recall being told by a telephone agent at the credit card company. On this evidence, I am unable to determine why, in actual fact, the credit card ceased working for a time while M.A. was buying groceries in 2017. Both parties spoke to agents at the credit card company, but there is no record of exactly what was said. It is also not completely clear that the parties were describing the same incident, as S.R. did not provide a date and M.A. admitted her memory of dates is sometimes imperfect. I am not left in any doubt, however, that there was at least one incident of a credit card not working when M.A. was using it for family expenses.
- [43] S.R. submitted that the conduct complained of does not reach the level that has been described in the "financial family violence" cases relied on by M.A. In brief:
- a) he recalls only one credit card issue, and he says that it was something he resolved over the phone;
 - b) he testified that during the period of informal financial arrangements, M.A. never told him that the amount he was sending was not enough;

- c) he also testified that M.A. never asked to see his tax returns or the financial statements of M. Inc.; and
 - d) while there was a period from September to November of 2024 where he was limited to small support payment amounts due to e-transfer limits while out of the country, when S.R. returned, he made a payment of \$26,000 via bank draft.
- [44] S.R. unilaterally reduced the monthly interim support payments under the Vos Order to \$20,000 from February 2025 onwards. I will address this below. I do not understand this unilateral reduction to be part of M.A.'s argument for financial violence.
- [45] Even taking the evidence at its highest and accepting, for the sake of argument, that S.R.'s conduct may have had something to do with the failure of M.A.'s credit card in 2017, the conduct complained of in this case is of a different nature than that in Loss, Sattar, and Valastiak. It must also be considered that until the order of Vos A.J. in April 2024, S.R. paid M.A.'s rent and other significant expenses directly and/or via credit card, by agreement and largely without protest.
- [46] That is not to say that there have not been delays with S.R.'s disclosure in this litigation, and failures on his part to comply with certain court orders. I will return to those issues below in considering M.A.'s argument that there ought to be a fine levied against S.R. However, these failings do not suffice to elevate what has gone on here to the level of family violence by financial means, as that has been set out in the caselaw.

Parenting

- [47] The parties are to be commended for their level of agreement on matters concerning their two children with special needs. In particular, F.R.'s tendency to ingest non-food items and to bolt, as the witness Zoe Raffard noted, creates significant safety risks and poses challenges to her care. Both parties testified as to the others' strengths as a parent, with S.R. acknowledging M.A.'s skill as a parent, with particular regard to the specific challenges arising from their children's diagnoses.
- [48] During the marriage, S.R. traveled a lot, often for up to seven days at a time.
- [49] After separation in January 2020, M.A.'s evidence was that there were long periods where S.R. was not available, even when she attempted to make contact, and she had to reach out to X.M., his business partner, for financial assistance. This was not seriously disputed by S.R.
- [50] In April 2020, S.R. returned to Canada. Thereafter, he returned to Vancouver about once every three months for seven to ten days, where he would visit M.A.'s home for an hour to see the children and then leave.

- [51] Some time after the parties separated, M.A. was contacted by M.R.'s speech language pathologist at Vancouver Coastal Health, stating that based on her observations, she suspected that M.R. had autism. M.A. obtained a private psychoeducational assessment because it was faster than waiting for the public system and M.A. understood early intervention to be important. The psychoeducational assessment was done in June of 2020 and confirmed a diagnosis of autism. With S.R.'s input, through his business partner X.M., the parties started Applied Behaviour Analysis therapy (ABA) with M.R.
- [52] The claimant describes M.R. as sweet, handsome, curious, and social. He is emotionally aware and does not like school, where he has an educational assistant. He has ASD Level 1 and ADHD. He is working on significant anxiety, with a psychologist with whom he meets weekly, along with a speech therapist and an occupational therapist.
- [53] M.A.'s evidence is that as soon as she learned that M.R. might be autistic, she realized that F.R. likely was as well. M.A. described F.R. as a sweet, agile girl who loves exploring as well as any sensory experience, including anything she can touch with her hands. She removes her clothing because she prefers being naked and has temper tantrums and daily meltdowns, although these things are improving. Now that she has good therapists, she is happier, although she has bad days, especially when she is awake at 3:00 a.m. due to her insomnia.
- [54] Last year, with significant work by professionals, F.R. was daytime potty trained. She needs constant supervision. She enters a state of fight or flight and can run towards the street with no regard for safety. She is largely nonverbal and uses an iPad to communicate. She wears leg braces to attempt to correct for a problem with her hamstrings caused by tiptoe walking and to avoid future surgery. She has a tendency to ingest non-food items. M.A. described clearly and in great detail the difficulty of navigating all of this with a nonverbal child.
- [55] F.R. participates or has participated in several therapies, including speech therapy, occupational therapy (with the witness Zoe Raffard), physiotherapy, a toilet training program, and Social Kiddos Consulting.
- [56] F.R.'s psychoeducational assessment led to a diagnosis of Level 3 ASD. She started school with a very gradual entry. For months she went only for 30 minutes at a time. Right now, she can get through the entire day. She is much better at remaining clothed. While at school she has a full-time educational assistant and needs two adults outdoors to keep her safe, since she runs very fast in the large playground.
- [57] M.A. has not found an activity that F.R. can do. M.R. goes to swimming lessons as well as, in the past, ice skating and, when there were funds for it available, ski camp. He also plays soccer every Saturday.

- [58] M.A. schedules and takes the children to their medical and dental appointments. She has done this both pre- and post-separation. She is the one parent in contact with the school, and she attends parent-teacher nights if a nanny is available to care for the children while she is out.
- [59] It was clear from her evidence that M.A. fully understands her children's special needs and, in particular, her daughter's dysregulation and significant challenges. She has educated herself and spent effort assembling a support system around F.R. that has not only kept F.R. safe, but led to significant improvements. These include successful potty training, increased, though still limited communication, F.R. leaving her clothing on while at school, and staying full days at school.
- [60] M.A.'s evidence was generally supported by that of Zoe Raffard, an occupational therapist who has known the family since she assessed the children in 2021, and who has been working with them weekly for one hour since 2024. She testified that F.R. is still dependent on an adult for many self-care skills. Her propensity to put non-food items in her mouth (known as "pica") is a safety concern, as is her tendency to bolt.
- [61] Ms. Raffard verified that maintaining F.R.'s emotional regulation is foundational for other learning goals and is important in keeping her safe, for example at recess time in the playground at school. Working on this emotional regulation is part of the therapy that Ms. Raffard administers. Ms. Raffard also testified that prior to F.R.'s visits to her clinic, she has to "sweep" for anything that F.R. might put in her mouth, including typical play tools that she uses with other clients.
- [62] Ms. Raffard described the other therapies and resources that F.R. receives or uses, including physiotherapy and leg braces to address the tiptoe walking; speech therapy as she is still largely nonverbal; behaviour consulting and, last year, toilet training through Blackbird consulting. Ms. Raffard recommended that the family avail themselves of the "At Home" program, which requires a doctor's recommendation, assessment by a nurse, and a determination that the child requires a caregiver to complete at least three self-care tasks. Ms. Raffard testified that consistency and a need for sameness are important in helping F.R. achieve her goals, and that many children in the At Home program require its services up to age 18 and beyond.
- [63] Ms. Raffard has never met or spoken to S.R.
- [64] There is no serious dispute that the needs of these children take up nearly all of M.A.'s available time. S.R. has limited ability to share the burden of their care due to his travel schedule. His own evidence indicated that M.A. is a dedicated mother, and he thinks that she is doing a great job. He travels frequently for work. Between September 2024 and the date of trial, he was in Vancouver for a cumulative total of approximately one month. He has not exercised all of his parenting time.

- [65] M.A. testified that parenting arrangements under the Vos Order were by consent. The order provides that S.R. will have parenting time during the last two of every six weeks commencing on April 1, 2024, with M.R. spending Wednesday evening to Saturday evening with S.R., including overnights, and F.R. spending Wednesday, Thursday, and Fridays from 3:00 p.m. to 7:00 p.m., with S.R., traveling back and forth with the nanny. It was in evidence that when S.R. has parenting time with F.R., the nanny is also present. The consent order also provided for S.R. to have holiday parenting time for one week during spring break, one month during summer, and half of each Christmas holiday period, which holiday time was not to impact the regular parenting schedule.
- [66] M.A. testified that S.R. is not presently using all of his parenting time. He is rarely in Canada and his visits are as short as 20 minutes to an hour. At the moment, he has no home in Vancouver but stays in a two-bedroom condominium in Yaletown which is owned by his company.
- [67] M.R. loves his father. To her credit, M.A. acknowledged that S.R. tries to be there for M.R., but in her view he is not present enough to give his son a secure attachment. They communicate via a tablet, but sometimes when M.R. calls his father, there is no answer.
- [68] With F.R., the challenges are more severe because she is nonverbal and needs a very particular approach. M.A.'s evidence was that S.R. has never spent an overnight with F.R. post-separation. M.A. acknowledged that S.R. is very good at throwing F.R. up in the air, which she loves, but M.A.'s view is that he does not know how to interact with her unless it is a very basic thing.
- [69] M.A. testified that ABA therapy is having a positive effect for both children. While S.R. questioned some decisions earlier on, the fact that the therapy is resulting in improvements has led to fewer such questions. S.R. testified that he pushed back when an updated psychoeducational report was requested for M.R. because he questioned the need for more labels.
- [70] Parenting time was not an issue at trial. The parties have consented to the Vos Order as outlined above and, at present, S.R. is apparently not able to exercise all his parenting time in any event. I find that the parenting time set out in that order is appropriate and should continue. The only decision required from this Court concerns parental responsibilities: who should be the ultimate decision-maker in the event of a disagreement.

Legal Principles

- [71] Section 40(3) of the FLA gives the court jurisdiction to allocate parental responsibilities to one or more guardians, each guardian acting separately, or all guardians acting together. Section 40(4) provides:

Parenting arrangements

(4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:

- (a) that parental responsibilities should be allocated equally among guardians;
- (b) that parenting time should be shared equally among guardians;
- (c) that decisions among guardians should be made separately or together.

[72] The best interests of the child are the only factor to be considered when making an order for parenting arrangements: FLA, s. 37(1). Section 37(2) of the FLA sets out the needs and circumstances to be considered when determining what is in a child's best interest. The relevant subsection states:

Best interests of the child

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

Parties' Positions

[73] M.A. submits that the parties should remain joint guardians, but that she ought to be given final say with respect to parenting decisions if the parties cannot agree. She states that she will continue to involve S.R. in major parenting decisions respecting the children. S.R. may apply to the court for direction if he disagrees with her decision(s).

- [74] S.R. submits that the interim parenting agreement as modified by paragraph 1 of the order of Vos A.J. should continue by final order. He opposes M.A.'s position that final decision-making authority on major guardianship decisions after consultation rest with her, although he notes the court's jurisdiction to make such an order under s. 45(1)(a) of the FLA.
- [75] S.R.'s position is that this change is unnecessary and unwarranted. Despite his work travel, he is a loving father, and he is not seeking to interfere "in the reality" that day-to-day decisions are made by M.A. unilaterally. Instead, he argues that major non-emergency decisions should require the agreement of both parents or dispute resolution if agreement cannot be reached, as set out in the interim agreement.

Analysis

- [76] The parties agree that they should remain joint guardians. They disagree as to whether M.A. should be entitled to make final decisions on major issues if the parties are unable to agree, a model sometimes referred to as the Joyce Model.
- [77] S.R. presented his arguments on parenting arrangements under the FLA. M.A. made submissions under both the DA and the FLA. I will conduct my analysis under the provisions of the FLA, but note that the result would be the same had I conducted the analysis under the DA.
- [78] Justice Abrioux, as he then was, summarized the principles applicable to decision-making authority in *J.E.H. v. P.L.H.*, 2013 BCSC 752, as follows:
- [58] In so far as decision-making authority is concerned, the applicable principles can be summarized as follows:
- there has been a general unwillingness to impose mandatory joint decision-making on parents who cannot get along and are unable to communicate. This is out of concern for the well-being of the children;
 - the ability of the parents to communicate and cooperate remains an important factor when considering the best interests of a child:

Jordan v. Jordan, 2001 BCSC 1058 at para. 20

- joint guardianship with no ultimate decision-maker may not be appropriate on the basis that the cost and delay of applying to court each time the parents cannot agree is not warranted. Ultimately a decision has to be made. In such circumstances, the primary caregiver is best able to make the decision after making an effort to seek a consensus with the other parent:

Andrew-Reed v. Reed, 2002 BCSC 513 at paras. 17-18

· a particular parent's understanding of the general and special needs of a child, such as autism spectrum disorders, is a factor which can be taken into account with respect to custody, guardianship, where the primary residence should be and which parent should have the ultimate decision-making power:

M.H.K.J. v. K.J.J., 2011 BCSC 1673 at paras. 78-82

· final decision-making authority can be ordered in situations to avoid continuing conflict due to the level of acrimony between the parents:

S.M.M. v. J.P.H., 2011 BCSC 1084 at para. 227

· the Joyce model of guardianship may well be appropriate if the court is satisfied the primary custodial parent will in fact consult and seek the input of the other parent prior to making major decisions:

Chin v. Frass, 2011 BCSC 272 at para. 29

[59] In Reis v. Bucholtz, 2010 BCCA 115 at para. 28, the Court of Appeal noted that the term "primary parent":

is often used by the courts to describe the parent who is responsible for the day-to-day care of the child. It is not intended to denigrate the role of the other parent, but to recognize an assignment of responsibility.

[79] The evidence in this matter revealed that although the parties' WhatsApp communications were not dysfunctional, there have been times when S.R. has not been responsive to M.A. or M.R.'s attempts to reach him. In my view, this fact, combined with his unusually extensive work travel and what S.R. terms the "reality" of the parties' situation, points toward giving M.A. final decision making authority.

[80] As Abrioux J. noted in J.E.H., this model may be appropriate if the court is satisfied that the primary custodial parent will in fact consult the other parent. That is the case on the facts before me. M.A. has continued to seek to involve S.R. in parenting decision-making even when he was sometimes not responsive to communications. It is in the best interests of the children that S.R. continue to be involved in this way, even when his travels may prevent him from being physically present in Vancouver. If, however, M.A. is unable to reach S.R. with regard to a parenting decision, or he disagrees with her decision, the final say will rest with M.A., with S.R. having the right to apply to court if he disagrees.

[81] In arriving at this decision, I have kept in mind that these children, and particularly F.R., have special needs. Justice Abrioux alluded to this factor in the above extract, when he held that a parent's understanding of the special needs of a child, such as autism spectrum disorders, is a factor which can be taken into account with respect to the determination of

which parent should have the ultimate decision-making power: J.E.H. at para. 58, citing M.H.K.J. v. K.J.J., 2011 BCSC 1673 at paras. 78-82. Placing final decision-making authority in M.A.'s hands is in line with this factor.

Income Determinations

S.R.'s Income

[82] The proper quantification of S.R.'s past, present, and future income was a central issue in this trial. In coming to a decision on this issue, I was assisted by the Guidelines Income Report for 2023-2024 prepared by the parties' joint expert Derek Sanders. As will be seen below, however, because of the view I have come to as to the fairest determination of S.R.'s income, my decision is not in line with its final conclusions on either of the two scenario's presented.

Legal Principles

- [83] Section 150(1) of the FLA requires that child support be determined in accordance with the Federal Child Support Guidelines, SOR/1997-175 [Guidelines]. The objects of the Guidelines include establishing a fair standard of support for children that ensures they continue to benefit from the financial means of both spouses: Guidelines, s. 1(a). The most current financial information is to be used in applying the Guidelines.
- [84] The starting point for the determination of a party's income is s. 16 of the Guidelines, which provides that subject to ss. 17-20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the payor spouse's T1 General form, as adjusted by Schedule III. Section 16 remains the appropriate starting point, even where as here, a payor spouse receives income from a corporation: *Chandler v. Chandler*, 2024 BCCA 325 at para. 45.
- [85] If the court finds that the determination under s. 16 "would not be the fairest determination", the court may have regard to ss. 17-20 of the Guidelines. Those sections provide, in material part:

Pattern of income

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

Shareholder, director or officer

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

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year;

Imputing income

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

- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax;

Reasonableness of expenses

- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[86] In *Vincent v. Vincent*, 2012 BCCA 186, Justice Huddart set out a three-step process to determine a parent's Guidelines income:

[35] All determinations of child support begin with finding the spouse's Line 150 income [now Line 15000], a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions applies, and, if so, what effect they should be given on the facts of the case.

[36] Section 17 gives the court discretion to deal with the problem of an income which fluctuates from year to year and with non-recurring income or losses such that the determination of a spouse's income under s. 16 is not the fairest determination of that income.

[37] Section 18 provides discretion to deal with the situation where a spouse is in a position to manipulate income in his or her capacity as shareholder, director or officer of a corporation, such that a person's income under s. 16 does not fairly reflect all the money available to that spouse for the payment of child support. It permits the inclusion of pre-tax corporate income and benefits paid to non-arm's length persons.

- [38] Section 19 addresses situations where the spouse's disclosed income does not fairly reflect what should be paid in child support by permitting imputation of income. It permits the imputation of income in a variety of situations, including income which is tax exempt, under-utilized capital investments, and when there is a failure to provide income information.
- [87] The party seeking to impute income bears the onus of showing, on a balance of probabilities, that income should be imputed: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 140.

S.R.'s Position

- [88] S.R.'s primary position, as set out in closing argument, was that the "better measure of his income for support purposes, is what he actually takes out [of M. Inc.], rather than his line 15000 income adjusted under Schedule III."
- [89] The jurisdiction to use this figure -- rather than the respondent's T1 Line 15000 figure (per s. 16), or 50 percent of M. Inc's pre-tax corporate income (per s. 18) -- is found in s. 19(1) of the Guidelines, which sets out the court's general jurisdiction to impute income:

Imputing income

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

- [90] S.R. does not argue that any particular subsection of s. 19 applies in these circumstances.
- [91] S.R. opposes M.A.'s position that the court ought to use s. 18 to pierce the corporate veil in this case on two bases. First, he says that where the payor spouse does not wholly control the corporation, s. 18 has no application. I will return to that position below.
- [92] Second, S.R. points to the "absurd" results of applying s. 18 to the variable revenue that M. Inc. produces year by year. In Mr. Sanders's report at Schedule 25, the last five years of 50 percent pre-tax income for M. Inc. range from a high of \$3,192,500 in 2022, to a low of negative \$30,500 in 2024.
- [93] Underlining the absurdity of this approach, argues S.R., is the fact that an "uncritical" application of the SSAGs to a \$3 million per year income, as in 2022, would yield a monthly spousal support payment of \$120,000, in a year when S.R.'s actual draws from M. Inc. were just over \$498,000. For 2024, S.R. says he could argue that his support obligations are zero based on M. Inc's low income. S.R. strongly resists a resort to s. 17, on the basis that M. Inc's profits are in decline and not simply fluctuating.
- [94] Instead of taking that position, either in the interim hearing before Vos A.J. or at trial, S.R. submits that the amount he takes out each year is the best basis for the assessment of his income.

- [95] For 2024, this number was \$535,457. For 2025, S.R. says this number will be \$300,000 or \$25,000 per month, which is what S.R. and X.M. decided to draw from M. Inc. starting in September 2024. S.R. concedes that a reasonable value for the personal benefit of corporate expenses such as luxury food, travel, and hotel stays must be added back to this number. The resulting number, S.R. says, is \$350,000 for 2025.
- [96] S.R. also argues that the \$300,000 he receives from M. Inc. must not be grossed up, as was done at the interim hearing, because now he is paying his income tax. It must therefore be assumed that he will be using some portion of the \$300,000 to pay his taxes, albeit presumably at the more favourable rates of tax applied to dividend income under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

M.A.'s Position

- [97] M.A. agrees that S.R.'s line 15000 income (as adjusted under Schedule III) is not a true reflection of the income available to him but disagrees as to the appropriate alternative. She argues that instead of using his self-determined "actual draws" from M. Inc. as his available income, the Court should use s. 18 to impute 50 percent of M. Inc's pre-tax earnings to S.R., as he is a 50 percent shareholder of M. Inc.
- [98] In 2022, this number was \$3,290,000. In 2023, it was \$811,000. In 2024, however, it was only \$27,000, M. Inc. having suffered a decrease in revenue. No party has argued that this 2024 number is the appropriate number upon which to base S.R.'s income.
- [99] M.A.'s position is that given the fluctuations in M. Inc's income, the Court ought to apply s. 18, taking into account s. 17, to impute an income to S.R. based on the average of 50 percent of M. Inc's pre-tax earnings for 2022, 2023, and 2024. This number is \$1.376 million.
- [100] M.A. argued that the Court still does not have a complete financial picture of M. Inc. Even if it is accepted that 2024 saw a dip in the corporation's income, this is an entity that made millions in a short timeframe. To have so little to show for it now, says M.A., defies common sense. Given M. Inc.'s fluctuating income, M.A. says this is a "classic case" for the application of the averaging provision of s. 17.
- [101] M.A. argues that the onus is on S.R., as the payor spouse, to prove that the company's pre-tax income is not available to him, citing *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52, leave to appeal to SCC ref'd, [2009] S.C.C.A. No. 135. See also *Quinton v. Kehler*, 2020 BCCA 254 at paras. 83-85.
- [102] Justice Kirkpatrick's decision on the onus test in *Hausmann* was made in the context of a company solely owned and controlled by the payor spouse. In support of her contention that the courts have found pre-tax corporate income available to payor spouses who are not sole shareholders, M.A. referred to two Alberta cases: *Kondics v. Kondics*, 2017 ABQB 493 and *Moors v. Moors*, 2013 ABQB 740. There are, however, also BC cases on this point which I will discuss below.

- [103] With regard to the question of control, M.A. argued that in their evidence, S.R. and X.M. revealed that they had treated M. Inc. as their "personal piggy bank" and that M.A. had on occasion been paid support directly from M. Inc. Both shareholders made frequent withdrawals in the form of shareholder loans, historically in unequal amounts. M.A. argued that there is no evidence that they check in with each other or ask each other for permission before making these kinds of withdrawals. X.M.'s evidence suggested that he was comfortable because he believed that eventually there would be payments to him to equalize the two men's positions.
- [104] M.A.'s alternative position, should the Court not accept that the appropriate number for Guidelines income ought to be based on 50 percent of M. Inc's pre-tax earnings as averaged in 2022, 2023, and 2024, is that I can apply s. 19 to impute income to S.R. on the basis of subsections (g) and (h), which state:

Imputing income

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

- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax;

- [105] M.A. also cites ss. 19(2), with regard to the personal benefit received from S.R.'s extensive business travel, entertainment, and dining costs. That section states:

Reasonableness of expenses

- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

- [106] M.A. points out that S.R. has the onus to show that his expenses are reasonable, citing *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 147, and *Wiebe v. Treissman*, 2017 BCSC 1523 at para. 94. She argues that he has not done so, principally with regard to luxury travel. In cross examination, the Court was led through a number of hotel and restaurant bills for 2022, although no witness gave detailed evidence about such expenses in 2024.
- [107] M.A. argues that a fair add-back amount for the personal benefit of corporate travel is 25 percent of M. Inc.'s total yearly spending on meals, entertainment, and travel, and that this is likely a conservative estimate. She notes that since these expenses are paid out of pre-tax corporate dollars, they must be grossed up for taxes in order to properly reflect the benefit to S.R. for Guidelines income purposes: *Benko v. Benko*, 2024 ABKB 400 at para. 55. Her submission as to the appropriate number here is \$82,000: \$38,000 in expenses plus \$44,000 as a tax gross-up, a number that is taken from the Guidelines Income report of Mr. Sanders.

Mr. Sanders did calculations based on an add-back of \$38,000, as submitted by the claimant, and then opined at Schedule 6 of his report that a sum of \$44,000 should be added as a gross up, at a factor of 115.05% ("tax gross-up factor"). As I understand it, this was a calculation he arrived at based on the marginal tax rate. At a minimum, M.A. urges that if the Court decides to base S.R.'s income on either his s. 16 Line 15000 income or the amount of his actual withdrawals from M. Inc., \$82,000 should be added in.

Analysis

Section 16

[108] *Kowalewich v. Kowalewich*, 2001 BCCA 450, provides some guidance as to how the court ought to assess whether Line 15000 is a fair reflection of a payor spouse's available income under s. 16:

[45] To determine whether "Total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the Guidelines, the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.

[Bold in original.]

[109] S.R.'s Line 15000 income was not available to Vos A.J. at the interim support hearing because he had not yet filed personal income taxes for 2021 or 2022.

[110] S.R.'s income is entirely dividend income from M. Inc. However, the actual dividend declared by M. Inc. each year differs from S.R.'s Line 15000 entries, as Mr. Sanders stated in his evidence. For example, in 2024, S.R.'s T4 declared earnings as at Line 15000 were \$793,000, but his actual dividend was \$575,000 and his actual draw was \$535,457.

[111] \$793,000 is a grossed-up number. This is because corporate income, from which dividends are paid, is taxed at a lower rate than employment income. Therefore, for tax purposes, the actual dividends received are grossed up to arrive at a number roughly equal to the gross employment income that the taxpayer would have needed to earn to end up with a net income of \$575,000. Taxes are then calculated on that amount. The taxes actually paid by the taxpayer are then reduced by the amount of a dividend tax credit. This reduction accounts for, essentially, the portion of the tax on those funds that the corporation has already paid. This is generally understood as the CRA's attempt at "tax integration", meaning that the same amount of tax is paid on the same amount of earnings, whether it is taxed wholly in the taxpayer's hands, or partly in the taxpayer's hands and partly in the hands of the corporation.

[112] Section 16 of the Guidelines provides that a spouse's Line 15000 income is to be adjusted according to Schedule III. That Schedule provides, in part:

Dividends from taxable Canadian corporations

5 Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse.

[113] In final argument, S.R. submitted that s. 5 applies here to replace taxable dividends by actual dividends.

[114] While this does appear to be the intent of the provision, a line of Ontario cases holds that s. 5 of Schedule III is not to be applied where the corporation is controlled by a payor spouse: see e.g. *Austin v. Austin*, [2007] O.J. No. 4283 at para. 24, 2007 CanLII 46719. This is because the intent of the Guidelines is to ensure that parents and children in similar circumstances are treated alike for support purposes. As the Court stated in *Austin*:

[24] If s. 5 of Schedule III of the Guidelines was followed, the husband's income for child support purposes would be much lower than if the income was taken from the corporation as salary. I find that s. 5 of the Schedule III of the Guidelines was intended to apply to a situation where investment income is received as dividends from corporations not controlled by either spouse. Applying s. 5 to the situation before me would undermine the objective set out in s. 1(d) of the Guidelines which states that parents and children in similar circumstances should be treated alike for purposes of child support. Alternately, s. 5 of Schedule III could be used as a first step in the analysis and the amount of income increased under s. 19(1)(h) as a second step to ensure that the amount of income attributed to the shareholder receiving dividend income from a company controlled by him or her, pays a similar amount of child support as the person earning a similar amount as salary.

[25] In the circumstances of this case, I find that s. 18(1) or s. 19(1)(h) of the Federal Child Support Guidelines should be applied and would be a fairer method to determine child support where the corporation is solely controlled by the payor spouse

[115] I will further discuss the nature and extent of S.R.'s control over M. Inc., below.

[116] I find that S.R.'s degree of control over M. Inc.'s distributions of income -- whether as shareholder loans, dividends or otherwise -- makes this case analogous to *Austin*, which I find persuasive. It dictates that either s. 5 of Schedule III not be applied, or that if it is applied and the actual amount of the dividend is used, then ss. 18(1) or 19(1)(h) of the Guidelines should be applied to impute an additional amount to the respondent. This is so that the amount of income attributed to him results in a similar amount of child support as would be paid by a person earning the same amount as salary.

[117] The parties did not make submissions on this point, with only the respondent addressing the question of the application of Schedule III s. 5. He simply submitted that it applied.

[118] The language of Schedule III s. 5 is mandatory but can be overridden by the exercise of the court's discretion in s. 19. This is the "alternate" method for treating dividend income within the control of a payor spouse that the Court sets out at paragraph 24 of *Austin*. I find that it

is the better approach, given the language of the schedule. For a case with facts which go the other way given the payor's lack of ability to control dividend income in any fashion, see *Perdue v. Perdue*, 2014 NBQB 262 at para. 48. In that case, the court considered but declined to use s. 19 to impute any income over and above the actual dividend income received by the payor spouse, where Mr. Purdue was a civil engineer who had purchased a six percent ownership interest in his company through a program contained in his employment agreement.

- [119] The degree of control that S.R. exercised over M. Inc.'s distributions of income will be detailed below as it is also relevant to the question of whether, as M.A. urges, s. 18 can be applied in this case to pierce the corporate veil to impute income to him.
- [120] There is no dispute that a significant add-in is required for the personal benefit of business expenses related to S.R.'s luxury travel, entertainment, and restaurant meals while in Vancouver and abroad. As previously stated, M.A. submits that a fair and conservative estimate of the add-in is 25 percent of M. Inc.'s total spending on meals, travel and entertainment. For 2024, that number is \$38,000, which must be grossed up to account for the fact that these expenditures would have been paid out of after-tax dollars had S.R. been a salaried employee: see *Benko* at paras. 44-58. As stated above, the Sanders Guidelines income report provides that the tax gross-up factor for 2024 is 115.05 percent, and therefore the appropriate amount of the gross-up is \$44,000 (rounded). M.A. submits, and I accept, that the total number to be added once grossed-up is therefore \$82,000. For 2023, the Sanders Guidelines income report provides that 25 percent of M. Inc.'s business expenditure for travel etc. is \$166,000. This too must be grossed up and the Sanders Guidelines income report sets out a tax gross-up factor of 101.72 percent and a gross-up amount of \$169,000. The report thus provides for a total of \$335,000 for this add-in, for 2023.
- [121] While S.R. and X.M. provided some explanation of the need for business travel at the "luxury" level, in the end the Court was left with very little evidence as to how these expenses related to actual business development activities, apart from two conference-type gatherings. Other than these two events, and the locations of M. Inc.'s one client and H. Co., there was no specific evidence to relate most of the various travel destinations, meals, and nightclub visits with particular clients or prospective clients.
- [122] Doing the best I can with the limited information, I accept the claimant's estimates of the add-back of 25 percent of M. Inc.'s total spending for personal benefits of these business expenses, though if anything, I find that this underrepresents the actual totals.
- [123] Consequently, I find that S.R.'s 2024 income under s. 16 of the Guidelines would be \$781,423. This is the grossed-up number of taxable dividends declared on S.R.'s 2024 tax return, adjusted for s. 5 of Schedule III as a first step, with additional income imputed under s. 19(1) (h) to account for this income being received as dividends: see the "alternate" method explained in *Austin* at para. 24.

- [124] To this must be added the personal benefit derived from business expenses. This figure is \$38,000 for 2024, which is \$82,000 once grossed up for taxes. Thus, under s. 16 of the Guidelines, S.R.'s income for 2024 is \$863,423.
- [125] For 2023 S.R.'s s. 16 income is \$219,420. The add-back for 25 percent of M. Inc's total spend on personal/discretionary expenses (travel, meals etc), is \$166,000, as per the Guidelines income report of Mr. Sanders. These numbers must be grossed up as explained above.
- [126] As Huddart J.A. set out in Vincent at para. 35, I am now required to look to ss. 17-20 to determine if any of the exceptions in those provisions apply, and if so, what effect they should have on the facts of this case. I will begin with s. 18.

Section 18

- [127] The Guidelines are not just about actual income, "as a parent directly or indirectly determines it to be". They exist to ensure that a parent with child support obligations meets those obligations fairly and equitably: Kowalewich at para. 42. In the absence of clear evidence to the contrary, a corporation's pre-tax income will be assumed to be available for child support purposes: Hausman at paras. 51-52. This places the onus on the payor spouse to provide evidence that the corporation's pre-tax income is not available to them. In imputing income under s. 18, the court should not lose sight of the legitimate business needs of the corporation but should assess a spouse's allocation of pre-tax corporate income between business and family purposes for fairness, on priorities parents would use in an intact family: Kowalewich at paras. 44, 58-59.
- [128] Section 18 applies to a spouse who wholly controls a corporation, but it also applies to one who shares ownership and control with others: Kowalewich at para. 48. S.R. took the position that because M. Inc. is owned 50/50 by himself and X.M., it was not appropriate to look to s. 18 at all. However, this is simply not what the cases say.
- [129] In Barnes-Morrison v. Kolas, 2024 BCSC 2033, the claimant invoked s. 18 in an interim support application. The Court alluded to the situation where two close friends or family members run a business together and have complete discretion as to what they pay themselves:
- [83] I simply do not accept, for the purposes of the Application, that the respondent has a Guideline income of \$304,078. I reach this conclusion for the following reasons:
- f) The respondent, I find, has the assistance of Sam Kolas [the respondent's brother and long-time business partner] in controlling the "proverbial tap" arising from the Kolas family enterprise whilst his income is under scrutiny in these proceedings. He actually specifically deposes to this as I have highlighted above. The Court is very cognizant of this reality in considering the appropriate determination of Guideline income: See Quinton v. Kehler, 2020 BCCA 254 at para. 65.

- [130] Like the chambers judge in Barnes-Morrison, I ought to be cognizant of this reality in this case as well.
- [131] In *Lux v. Lux*, 2023 BCSC 1435 at para. 227, the Court found that if the payor spouse had "the ability to influence the distribution of funds" then the corporation's pre-tax income should be considered in determining her Guidelines income. The Court looked at the status of the payor spouse as a 50 percent shareholder, the provisions of the Shareholders Agreement which defined "controlling shareholder" as anyone with 50 percent or more, and the history of distributions from the company. See also paras. 231-232 regarding payor's control over the timing and amount of distributions.
- [132] In *Chapman v. Summer*, 2010 BCCA 237 at para. 33, the Court focused on the degree of control the payor spouse held over corporate finances. There, the Court applied s. 18 to find that the payor spouse had money available to him from the company's income because (i) the company held significant funds that were not required to meet the company's needs, and (ii) the payor was in a position to influence the amounts paid out by the company.
- [133] Even when a parent is a minority shareholder, it may be fair to attribute a portion of a corporation's pre-tax income to them: *Jensen v. Jensen*, 2018 BCSC 283. In *Jensen*, the Court also had regard to what cash was required to maintain the profitability of the operating companies.
- [134] The evidence clearly showed that S.R. and X.M. exercised individual discretion in determining the amounts they each drew from the company, often running their expenses through the company and recording it as shareholders loans. There was no evidence of X.M. ever refusing any request by S.R. for funds, and historically S.R. always took more out of the company than his friend. X.M. was content in the knowledge that he would eventually be paid out his 50 percent share.
- [135] In my view, taking this all together and applying the analysis in the above cases, it is plain that S.R. had the ability to influence the amount he was paid by his corporation such that s. 18 can be applied to impute all or some of the pre-tax income of M. Inc. to S.R. for Guidelines purposes. Moreover, he has failed to show that the entirety of M. Inc.'s retained earnings was needed to maintain the enterprise as a going concern, a question on which he bears the onus: see *Hausman* paras. 51-52.
- [136] These two shareholders used retained earnings to fund their draws. The most recent year for which we have figures is 2024, which was a year with low revenues. The Sanders report at Schedule 25 shows pre-tax income from operations at \$35,000. S.R.'s actual draw was a generous \$535,457, evidently funded from retained earnings. If actual draws are an appropriate measure of income, as S.R. argued in relation to 2025, then at the very least the role retained earnings play in determining those draws should be considered.

- [137] The court must be cautious, however, in seeking to attribute retained earnings to a spouse as income under s. 18, which refers to pre-tax earnings and not retained earnings. As the Court noted in Hausman, there are cases where retained earnings have been used as the starting point for determining an amount to attribute to a payor's income with little or no explanation. This might be appropriate, however, if the evidence shows that a company has a past practice of paying out shareholder earnings as dividends in excess of the year's earnings by drawing on reserves. The evidence indicates that M. Inc. had such a practice. This explains S.R.'s 2024 income of over \$500,000, despite corporate earnings of just \$36,000.
- [138] The Guidelines also provide for an averaging mechanism where the income of a payor spouse fluctuates. Section 17 can be applied to s. 18 pre-tax earnings where the court has already determined that it is appropriate to pierce the corporate veil: see M.S. v. M.M., 2015 BCSC 1599 at paras. 254-261. This is a clearer route to a fair s. 18 income determination for S.R., given M. Inc.'s historically fluctuating income.

Section 17

- [139] S.R.'s position is that s. 17 cannot apply because M. Inc.'s income is not fluctuating, but rather in decline. I do not accept this argument. There has been a recent decline in the company's income, but the evidence from both X.M. and S.R. was that the company experienced a similar drop in revenues in the past and built it back up. S.R. testified that he is currently devoting over 60 percent of his time to making the H. Co. partnership profitable in an effort to rebuild revenue. In these circumstances, it is appropriate to view M. Inc.'s earnings as fluctuating.
- [140] While I accept that it is appropriate to look at s. 17 in this case, I do not accept M.A.'s position that 50 percent of M. Inc.'s pre-tax income ought to be ascribed to S.R. as Guidelines income.
- [141] The evidence shows that S.R. has never taken more than \$849,946 in actual draws. Both shareholders testified as to the investment of retained earnings as a hedge against bad times. In this industry, with changing technologies and reliance on a single client, this decision was no doubt prudent. Unfortunately, however, there was no evidence as to what particular amount would be prudent or necessary to retain. Comparing the amounts that the company paid out with the amounts it earned in a given year, to see if a pattern existed, was not particularly illuminating.

Year

Pre-tax earnings

S.R. actual draws

2024

\$36,000

\$535,457

2023

\$948,000

\$612,880

2022

\$6,112,000

\$498,049

- [142] The amounts that M. Inc. paid to S.R. over the past three years, bear no obvious relationship at all to the revenue coming in the door.
- [143] To now base S.R.'s Guidelines income on an average of 50 percent of that revenue does not, in my view, represent a fair determination of the funds available to him, despite the high degree of control he has had over his remuneration. There was no evidence that X.M. ever objected or resisted S.R.'s draws upon company funds, but there was also no year in which S.R. sought to withdraw an amount that was wildly in excess of M. Inc.'s ability to pay, taking into consideration the "cushion" of M. Inc.'s retained earnings. Even in 2024, when the amount drawn was \$535,000 and the income only \$36,000, M. Inc. still held over \$10 million in retained earnings.
- [144] The value of M. Inc. depends upon the "market value of investments" as described in Mr. Sander's business valuation report at Schedule 1. If substantial amounts of these investments are liquidated as "money available" to pay to S.R. as income under s. 18, this value will not simultaneously be available to fund a large payment under property division which, on M.A.'s analysis, has S.R. paying her \$2.296 million. M.A. cannot draw twice on the same fund: the retained earnings are either part of M. Inc.'s value to be divided as family property, or they are a fund from which shareholders are paid out in lean years, a portion of which may be imputed as income.
- [145] M.A. addressed this as the issue of "double dipping" in her argument. Her position is that M. Inc. -- unlike the pension fund at issue in, for example, *Boston v. Boston*, 2001 SCC 43 -- is an income-producing asset. Relying on *M.C.D. v. D.A.D.*, 2017 BCSC 1832 at paras. 104-109, she argues that through its substantial investment in the H. Co. partnership and its other investments, M. Inc. can expect to earn revenue going forward. M.A. will not get the benefit of those future investments coming to fruition, so she argues that it is appropriate to include a positive contingency for them in S.R.'s income.

- [146] In *M.S. v. M.M.* at paras. 272-273, the Court found that it was not double dipping to use the spouse's engineering company's pre-tax income (averaged over three years) to determine Guidelines income and also to divide it as part of the property division. The company was an income-generating personal services company.
- [147] It is not obvious that such is the case here. Although S.R. testified as to the value in M. Inc. being in "X.M. and me", this is not a professional services corporation. Rather, M. Inc. is a somewhat speculative high-tech venture which S.R. and X.M. have managed to make profitable through hard work and business foresight, tapping into lucrative markets and racking up large profits in the past. They hope to do so again, but it is not as sure a thing as income from a dentistry or engineering practice.
- [148] Unfortunately, S.R. did not provide evidence as to the amount of earnings required to be left in M. Inc. to sustain it over the expected period during which the H. Co. partnership is still in development or, if that does not come to fruition, the time required to bring to fruition partnership with a different potential client. Notably, the evidence on the progress and prospects of the H. Co. partnership, and the stage of the other client development work that S.R. pursued all over the world, was very thin.
- [149] It is open to me to impute a percentage of income equal to S.R.'s proportionate interest in the company under s. 18, but it is not required. The court can have regard, for example, to an amount which the payor shows must be set aside for a particular investment that the corporation has made, or an unusual expense, or the purchase of machinery, or any other business purpose which the payor proves requires some portion of the company's income. See for example *Lux* at para. 250.
- [150] While I have found that S.R. has failed to prove that M. Inc. can only afford to pay him \$300,000 per year, I accept the business purpose of retaining some portion of the company's past earnings in light of its historic fluctuations in revenue. I also accept that S.R. and X.M. are continuing to work on the H. Co. partnership, and that the evidence was that previous work on that project had required them to rent computer facilities which used up much of the amount invested in the partnership. I also agree with M.A.'s assessment that M. Inc. would not have made the significant investment it did in this venture had its owners lacked confidence that they would have something to show for it at the end of the day. The evidence on the present status of the product being developed was vague, however, and there was no evidence of the budget or planning for the continued work being done.
- [151] Doing the best I can with the available evidence, I find that 25 percent of M. Inc.'s pre-tax income, as averaged over the past three years, is available to be imputed to S.R. as Guidelines income.

- [152] On M.A.'s calculation, this number is half of \$1,376,000, or \$688,000. In his closing submissions, S.R. sets out 50 percent of M. Inc.'s pre-tax income from the Sanders Report at Schedule 25. Using the average pre-tax income for 2022-2024 from the numbers used in that schedule brings us to \$1,202,833. Half of this, or 25 percent of M. Inc.'s pre-tax income, is \$601,416.
- [153] I accept the numbers as set out in the Sanders report as the most accurate determination. Accordingly, I find that by a combination of ss. 17 and 18, a fair assessment of the income from M. Inc. available to S.R. to be imputed under the Guidelines is \$601,416. This must be treated as a dividend, Schedule III s. 5 applied, and then income imputed under s. 19 as described above at [112] to [116].
- [154] To this amount must be added an amount for the personal benefit of business travel, meals, and entertainment: see *M.T. v. J.S.*, 2023 BCCA 64 at para. 9. I have already accepted that the appropriate number for 2024 is \$38,000 as per "scenario 2" in the Sanders report. For 2023, the same report indicates that the appropriate number is \$166,000. Mr. Sanders also provided figures to gross up these amounts, which I have accepted as accurate: 101.72 percent in 2023, and 115.05 percent in 2024. There was no such determination made by Mr. Sanders for 2022, however, and no "tax gross-up factor" to apply.
- [155] The 2022 financial statements of M. Inc. were in evidence, showing that \$403,359 was spent on travel, meals and entertainment in that year; 25 percent of that amount is roughly \$101,800.
- [156] An average of 25 percent of the amount M. Inc. spent on business travel, meals and entertainment for the three years, is \$102,000. This number must be grossed up for taxes. In the absence of a tax gross-up factor for 2022, I have used the average of the factors applied in 2023 and 2024 in the Sanders report. Thus the total add-in is \$212,160. In my view it is appropriate to use s. 17 to take the average of the past three years of this personal benefit add-back, since it is to be treated as income for the purpose of a Guidelines calculation. I would also find that this amount can be imputed into S.R.'s income under s. 19, which gives the Court a wide latitude to impute income in order to achieve a fair determination of the funds available for support of a payor's family.
- [157] I observe that the Court is not restricted to averaging only the past three years. In an appropriate case, a longer period can be used under the discretion available in s. 19. I find that three years is the appropriate period in this case. It gives some weight to the recent dip in revenues, while still including one year of the "high earning years" between 2020 and 2022. Given M. Inc.'s historical cycle and the time it took to rebuild revenue the last time it suffered a setback, I find that three years is the most appropriate period.

Section 19

- [158] It will already be clear that I do not accept S.R.'s position that I ought to impute to him under s. 19 an income of \$300,000 per year, based on the submission that \$300,000, or \$25,000 per month, is the limit of M. Inc.'s capacity to pay him and that no further funds are available. This assumption is not borne out in the evidence.
- [159] In his direct examination, X.M. testified that he and S.R. were taking \$25,000 out of the company monthly, but that "it varies month by month but around those numbers." Clearly, the \$25,000 number was not a hard and fast limit. When X.M. was then asked how the \$25,000 per month figure was arrived at, he said that it was "based on an estimate of what we need to survive . comfortably." I was not taken to any other evidence showing the details of how S.R. and X.M.'s monthly draws were calculated.
- [160] These two shareholders have not usually paid income taxes on funds as they were drawn. In the last three years, they "knew they would have taxes to pay" but continued their practice of running expenses through the company, recording everything as a "shareholder loan" and squirreling away excess funds in Tesla stocks in order to meet their eventual tax burden and survive the lean times.
- [161] The evidence does not support S.R.'s argument that \$300,000 per year is the limit of what M. Inc. can afford to pay him. \$25,000 per month is a somewhat arbitrary number based, in part, on need. \$25,000 is not even a consistent amount every month, according to X.M.
- [162] S.R. gave evidence that M. Inc. has had ups and downs in the past. At the end of 2016, he detailed a call from the VP of their main client criticizing M. Inc.'s performance. The client subsequently cancelled service orders. S.R. explained that through hard work, by the end of 2017 or beginning of 2018, M. Inc. and the client were working together again, rebuilding and growing the relationship and bringing performance to various different segments of the client's business. S.R. indicated that it was his expectation that the company could recover again. He stated he would never give up. Although it was a tough moment, such downturns had happened in the past and they changed the odds and recovered.
- [163] In light of the 2024 decline, S.R. remains hopeful that the company will recover again, and he is working hard to make this happen. The difference this time seems to be that instead of blithely drawing down on their "shareholder loans" as they wished, he and X.M. have decided to curtail their drawings as they work to improve the fortunes of their company. In the meantime, like X.M., S.R. detailed the company's need to sometimes liquidate investments in order to survive lean times.

- [164] The historical practice of this company is that the two founders, confident in their ability to work hard and make money, "lived large" by spending pre-tax corporate dollars while simultaneously reinvesting some funds to save for a rainy day, ignoring their obligations to the CRA. This is not an appropriate case to impute income based only on an amount that S.R. and X.M. have decided is "enough to survive" during this downturn in the company's fortunes.
- [165] S.R. also argued that while he was not paying taxes at the time of the Vos Order such that a gross-up on actual dividends should be used to arrive at a number for Guidelines purposes, this was no longer the case. Now, he would be paying income tax out of the \$300,000 he and X.M. had determined was all they could draw from the company in 2025. It was not stated whether this \$300,000 would be paid out as a dividend, but I infer that it would given past practice. In any event, given my determination that \$300,000 is not a fair determination of S.R.'s income, I need not assess how it would be treated for Guidelines purposes.

Conclusion on S.R.'s Income

- [166] I find that the fairest method of determining the income available to S.R. for child and spousal support is to impute a portion of M. Inc.'s pre-tax income to S.R. as income under s. 18 of the Guidelines.
- [167] I say this for the following reasons:
- a) the high degree of control exercised by these two shareholders over their company;
 - b) the arbitrary nature of the current arrangement to take draws of approximately \$25,000 per month;
 - c) the lack of an obvious relationship between the income of M. Inc. and the amounts taken by its shareholders as dividends in any given year in the past;
 - d) the company's fluctuating income since its inception;
 - e) the current drive of its shareholders to build back up via a sizeable new partnership; and
 - f) the practice of the company of retaining some portion of its incomes as retained earnings to fund future lean years and tax liabilities as well as draws.
- [168] I find that it is appropriate to average this amount over the past three years. Given the evidence as to the company's past and future intended use of retained income, it is not appropriate to allocate the entirety of S.R.'s 50 percent interest to him as income. Doing the best I can with the evidence presented, I have set the appropriate percentage at 25 percent. This leaves some funds in the company to service their developing investment in the H. Co. partnership or other initiatives.

- [169] S.R.'s Line 15000 income and actual dividends declared, either for taxation or other purposes, are too tied to the historical control that S.R. has been able to exercise over his draws to represent a fair assessment of income that he truly has available to pay support.
- [170] My calculations based on 25 percent of M. Inc's before-tax income, as it is set out in S.R.'s argument (drawn from Schedule 25 of the Sanders business valuation report), indicate that the appropriate number under s. 18 as averaged over the three years from 2022-2024, is \$601,416.
- [171] To this amount must be added an amount to account for the personal benefit of S.R.'s meals, entertainment, and travel in pursuit of additional clients for M. Inc. The average of this amount over the past three years is \$102,000 (rounded). This amount must be grossed up by a tax gross-up factor of 108 percent as explained above.
- [172] While this number is appropriate for 2024 and going forward, it is not appropriate for the ten months from March to December 2023, since in my view a three-year average for 2023 requires a consideration of M. Inc.'s pre-tax income in 2021, which was \$4,853,000 as per the Sanders business valuation report. Twenty-five percent of this number is \$1,159,500. Therefore the three year average for 25 percent of M. Inc.'s pre-tax income for 2021, 2022 and 2023, is \$1,010,916.
- [173] To this must be added the personal benefit of certain business expenses (travel, etc.), which I have found to be 25 percent of M. Inc.'s total spend on these items. Again, drawing from the Sanders valuation report, it would appear that for 2021, the total spend by M. Inc. for these items was \$262,000. The three year average of 25 percent of M. Inc.'s total spend on these items is therefore \$115,500.
- [174] To summarize, S.R.'s imputed income under ss. 17, 18 and 19 for 2024 and going forward is \$601,416, grossed up as per the alternate method described above as in Austin at para. 24 and set out at paras. 112 to 116 above. An additional \$102,000 must be added to this, grossed up by the tax gross-up factor of 108 percent, to account for S.R.'s personal benefit from business expenses, again averaged over the three years from 2022 to 2024. If necessary, I would find that these amounts can also fairly be imputed to S.R. under s. 19 of the Guidelines.
- [175] For the purpose of calculating support for the ten months from March to December 2023, inclusive, the appropriate figure for S.R.'s Guidelines income is an imputed income of \$1,010,916, again treated as per para. 24 of Austin explained earlier. To this must be added \$115,500 for personal benefit of business expenses, grossed up at a factor equal to the average of the appropriate tax gross-up factor of the three years, if known, and if not, at a tax gross-up factor of 108 percent as the best evidence available as to the appropriate calculation of this figure (being the average of the 2023 and 2024 factors taken from the Sanders Guidelines income report).

M.A.'s Income

- [176] M.A. submitted that she did not work during the marriage. She now works as a part-time Pilates instructor. She has a contract to substitute at a local facility for \$45 per hour when instructors are sick. She also teaches classes at a studio in East Vancouver at a pay rate that varies depending on the number of students, but which may be approximately \$35 per hour. At present, she works at the studio approximately three hours per week. Even if she could do so five times per week, she submits that her earnings would only be about \$35,000 annually.
- [177] M.A. also submits that there should be no dispute that she cannot work any more than her current amount at present. She has minimal time away from the children, and not enough time to obtain full-time employment or even regular part-time employment. At trial, her evidence was that she had not yet filed her 2024 taxes. In final argument she submitted that in 2024, she earned "\$5,000 or less" based on the part-time work that she had.
- [178] S.R. argued that given the amount of "leisure time" in her schedule, M.A. ought to be able to earn more than she does. He submitted that an income of \$10,000 per year ought to be imputed to her.
- [179] I do not take the same view as S.R. of M.A.'s "leisure time". To take but one example, F.R., whose significant needs have already been detailed, also suffers from insomnia, waking her mother as early as 3:00 a.m. on some days. Those days then become her "bad days", as she has even more difficulty regulating her emotions, a skill that is necessary if she is to manage basic life skills.
- [180] It is to M.A.'s credit that she has managed to continue to work a few hours outside the home and hopes to do more. In my view, her submission that I ought to impute to her an income of \$5,000 per year is entirely reasonable and I find that this is the appropriate amount of M.A.'s imputed income from 2024 onwards. I find that her 2023 income was \$386.93 as stated in her tax return.

Support Entitlement

Legal Principles

- [181] The parties both presented argument on spousal and child support together, and these reasons will deal with them that way also.
- [182] Section 3(1) of the Guidelines sets out the presumptive rule that unless otherwise provided in the Guidelines, the amount of a child support order will be the amount set out in the applicable table. Where the income of a spouse is over \$150,000, s. 4(a) allows the court to choose to apply the table amount or, if the court considers that amount to be inappropriate, s. 4(b) permits the court to order an amount of child support as follows:

Incomes over \$150,000

- (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
- (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
- (iii) the amount, if any, determined under section 7.

Parties' Positions

- [183] The parties' positions on support were of course grounded in their wildly disparate views of S.R.'s Guidelines income. I have now determined the appropriate amount going forward, which is not in line with either the \$1.3 million argued by M.A., or the \$300,000 argued by S.R.
- [184] M.A. seeks spousal support indefinitely and at the high end of the range. She also submits that either party should be able to request a review of support by delivering a written notice if there is a material change in circumstances, or if either of the children ceases to be eligible for support. M.A. submits that the courts have never really treated \$150,000 as a ceiling for the applicability of the tables and that in any event table support is appropriate here. I agree.
- [185] S.R. submits that given F.R.'s needs, indefinite support is appropriate, but argues it should be at the mid-range, as was found by Associate Judge Vos. The basis for this is the short duration of the marriage, the claimant's young age, and the lack of compensatory factors other than the children's special needs. S.R. also submits that a 75/25 split for s. 7 expenses is appropriate.

Conclusions on Support

- [186] I do not understand M.A. to take objection to the 75/25 split for s. 7 expenses and I find that it is appropriate in this case. I will return to the issue of a cap on nanny fees below.
- [187] I agree with M.A. that indefinite spousal support at the high range as set out in the tables is appropriate here. In the interim support decision in *S.R.M. v. N.G.T.M.*, 2012 BCSC 820 at paras. 49-53, cited by M.A. In *S.R.M.*, the parties had two young children, one of whom was diagnosed with autism at age 2, for which he received therapy from a team of professionals at home and at school. A year later, he was diagnosed with leukemia and required additional intensive treatments, including chemotherapy. Both children had behavioural problems. Like the respondent in this case, the father in *S.R.M.* worked long hours and earned a large income. The mother did not work and had no income. I infer that this was largely because she assumed the "lion's share" of her children's care, which was "at least a

full time job" (paras. 6, 49).

- [188] The Court awarded spousal support at the high end of the range upon application of s. 12.10 of the SSAGs, which provides the court with discretion to vary the duration and amount of spousal support where the parties have a special needs child: at paras. 46-49. I am satisfied that similar considerations apply here. Given F.R. and M.R.'s care requirements, it is unrealistic to expect the claimant to work full-time. I observe that at trial in S.R.M., the court analysed spousal support on a different basis, but there were different factors in play (namely the large increase in the father's earnings and the evidence as to the amount required to sustain the pre-separation standard of living) that are not in issue in this case: see S.R.M. v. N.G.T.M., 2012 BCSC 820.
- [189] Child support will be as per the Guidelines, based on the incomes set out above, until further agreement of the parties or court order. This award is subject to review by either party on the basis of a material change in circumstances. Each year the parties will exchange copies of their respective income tax returns for the previous year, including attachments, not later than 30 days after filing, and will exchange copies of any Notice of Assessment or Reassessment provided by the Canada Revenue Agency, immediately upon receipt. In addition, S.R. is to provide disclosure of M. Inc.'s financial statements on a yearly basis, within 30 days of completion by M. Inc.'s accountants or on such other dates as the parties may agree or the court orders.

Retroactive Support

- [190] M.A. submits that while S.R. satisfied his child support obligations between the date of separation and the Vos Order, he has significantly underpaid spousal support during this period.
- [191] M.A. seeks a retroactive lump sum of the present value of spousal support at the high-end of the range. She says that this totals \$1,474,298 for the period between the date of separation and the date of the Vos Order, based on her estimation of S.R.'s Guidelines income of 50 percent of M. Inc.'s pre-tax earnings in the given years.
- [192] S.R. says that there is no basis for a retroactive support award for the period between the date of separation and February 15, 2023, when the notice of family claim was filed. First, he argues there is no evidence that the claimant gave effective notice that support was inadequate or that she required the respondent's financial information at any time before February 2023, as required by D.B.S. v. S.R.G, 2006 SCC 37. The parties were operating under an agreement that S.R. would simply pay all the expenses for M.A. and the family. M.A. agreed at trial that this amount was about \$450,000 to \$500,000 per year, which S.R. points out she received tax free. The evidence also supported S.R.'s position that M.A. never indicated that this amount was insufficient.

- [193] Second, S.R. argues there is no evidence that the children or the claimant suffered any detriment due to any alleged underpayment of support during this period.
- [194] Third, S.R. says the evidence shows that he met his obligations by "any reasonable measure" during this period, as detailed above. In light of this, he submits that M.A. "received the proportionate benefit intended by operation of the law" during this time.
- [195] In support of this argument, S.R. compared his actual draws on M. Inc. with the amount of support he provided to the claimant for 2020 to 2023. He submits that the parties' informal arrangements were entirely reasonable when one considers the prescribed 60-65 percent proportion of net disposable income (NDI) under the with-child formula.
- [196] I agree with S.R. that the Court ought not to make an order for retroactive spousal support prior to February 2023. The claimant agreed in oral evidence at trial that she had received the equivalent of between \$450,000 to \$500,000 per year during that period, tax free.
- [197] Where the court is satisfied that the parties agreed on an arrangement during this period and that it was sufficient to meet the family's needs, the court may decline to order support: see e.g. *M.A.V. v. J.V.*, 2023 BCSC 1904 at para. 100; *K.S.H. v. S.F.F.*, 2022 BCSC 661 at para. 141; *MacDonald v. MacDonald*, 2025 ABKB 72 at para. 6.
- [198] There was an evidentiary dispute at trial as to the admissibility of the Terpkosh income report for 2020-2023. Given my conclusion above, I need not resolve that question.
- [199] The respondent also says that he has overpaid support by \$260,000 under the Vos Order for the period between April 2024 until the date of trial. He submits that this amount should be credited to him and set off against any obligation he might owe in division of property, either as "a determination of retroactive support and set off" or because it would be significantly unfair not to take the overpayment into account when dividing family property. This position was based on his view that his Guidelines income should be his actual draws taken every year. It was not clear to me whether he viewed these figures as subject to grossing up or whether he treated them as dividend income under the SSAG methodology. In any event, I have already held that this is not the appropriate basis by which to arrive at the fairest measure of his Guidelines income and so I find that this overpayment has not occurred.
- [200] I have already addressed the issue of the support due for the last ten months of 2023.
- [201] With the benefit of these reasons, the parties will be able to set off the amounts already paid to determine the amounts still owed in the period from March 1, 2023 to the present. In particular, S.R. may have both overpaid and underpaid in the period following the Vos Order. I have refrained from attempting to do this arithmetic for the parties, who are both represented by able counsel.

Section 7 Expenses

Parties' Positions

[202] There is no significant dispute in this matter that the children require significant special expenses. The parties have shared the following expenses (76.6 percent paid by S.R. and 24.4 percent paid by M.A.):

- a) a full-time nanny and additional childcare on weekends; and
- b) expenses for school fees and behavioural interventions.

[203] The following funding is paid by various agencies directly to the children's service providers:

- a) \$6,000/month from the Autism Funding Unit for each child;
- b) \$5,000/year for F.R. from the At Home Program; and
- c) \$344.63/month for respite care for F.R.

[204] I have already found that the 75/25 split agreed to by the parties is appropriate. The only remaining issue in dispute is whether there should be a cap on nanny expenses. Despite the fact that he provides only sporadic assistance with the care and upbringing of his son, and minimal assistance with the care of his daughter, S.R. argues that nanny expenses ought to be capped at \$6,000 per month. M.A. disagrees.

[205] S.R. argues that \$6,000 is a very generous amount for nanny expenses relative to the parties' means, citing M.A.V. at paras. 105, 112. He also says that cost certainty on this point will ensure the fairness of the resulting spousal support calculation, given the interdependency of spousal support and s. 7 expenses.

[206] S.R. also asks the Court to consider the fact that he has eschewed an argument that the nanny expense is not a s. 7 expense, an argument which he says might have been available to him: see e.g., J.A.T.P. v. H.M., 2023 BCSC 1484 at paras. 145-147.

[207] I have had regard to the fact that S.R. is not making this argument. I view J.A.T.P. as distinguishable in any event. In that case, the parties' one child did not have any special needs, and the claimant was able to work but had opted not to: J.A.P.T. at paras. 9, 147. Those are not the circumstances here.

Analysis

[208] Per the interim order of Vos A.J., approximately \$6,000 per month was to be spent on a full-time nanny, and additional part-time nanny care on evenings and/or weekends. There was no evidence before me that this amount was insufficient or that M.A. was seeking additional nanny hours over and above this amount.

- [209] When S.R. exercises his brief parenting time with his daughter, a nanny is invariably present. Presumably, this is due to the challenges of caring for F.R. and the need, which no one has disputed, for F.R. to be closely supervised for her own safety. Given his own admission that he relies on a nanny to help him care for F.R., it is curious that S.R. is also arguing that nanny fees ought to be limited, something that would invariably limit the number of hours the parties could use a nanny's services.
- [210] If M.A. were to work more hours, as S.R. is arguing she should, there would need to be additional care arranged for the children, with an attendant cost. In light of these circumstances, I find that a cap on nanny expenses is neither required nor appropriate. Although she does not work many hours outside the home at this time, there is no evidence that M.A. is using an excess of nanny time for frivolous reasons or reasons not associated with the proper care and supervision of the children while she works, or takes brief periods of respite, or spends time with one child at a time.
- [211] That is not to say that M.A. is entitled to unlimited nanny support. However, on the evidence, this is not what has occurred, nor is there any indication that it is likely to occur or that M.A. has ever taken advantage of nanny hours.

Life Insurance as Security for Support Obligations

- [212] M.A. argues that if S.R. were to die, the family would collapse. She seeks an order that S.R.'s support obligations continue after his death as a debt of his estate. She seeks an order that S.R. take out a life insurance policy in the amount of \$5 million, naming her as beneficiary, as security for child and spousal support from now until it is agreed or ordered that S.R. no longer has support obligations. M.A. cites s. 170 of the FLA, s. 15.2(1) of the DA, and s. 12 of the Guidelines, as authority for this order.
- [213] S.R. takes the position that this court has no jurisdiction to make such an order where the parties do not already have life insurance in place, citing s. 170 of the FLA, *R.M. v. N.M.*, 2014 BCSC 1755 at paras. 214-215, and *M.P.M. v. A.C.M.*, 2022 BCSC 122 at para. 100.
- [214] I agree that s. 170 does not provide the authority for M.A.'s Life Insurance order: see in particular *M.P.M.* at para. 100.
- [215] However, M.A. also brings her claim under the DA. The court does have authority to make such an order under that Act: see *Quinton v. Kehler*, 2020 BCCA 254 at para. 72. There, the Court of Appeal specifically endorsed the reasons of Justice Kelleher, who found that although he had the discretion to make such an order pursuant to s. 15.1(4), it ought not to be made in the circumstances before him: see *R.E.Q. v. G.J.K.*, 2019 BCSC 1116 at paras. 134-150, rev'd on other grounds.
- [216] Security for support obligations should only be ordered on the basis of evidence showing them to be necessary: *Waters v. Conrod*, 2007 BCCA 230 at paras. 32-38; *Sarro v. Sarro*, 2011 BCSC 1010 at para. 50. Relevant considerations include whether:

- a) the payor is in ill health;
- b) the recipient spouse is entirely reliant on support or is in "extremely necessitous circumstances";
- c) the payor has complied with previous support orders or is in arrears; and
- d) the Family Maintenance Enforcement Program (FMEP) is adequate to ensure payments are made.

See *R.W.W. v. L.M.B.*, 2024 BCSC 94 at paras. 181-182, citing Quinton; *R.E.Q.* It is clear from this review of the cases that no one factor is determinative. The court must assess the overall circumstances in context, in deciding or declining to make such an order.

[217] In *R.W.W.*, the trial judge accepted the payor's evidence that she intended to meet her support obligations now and in the future. FMEP was involved in that case, and the payor was young and in good health. The Court found:

[183] Having considered the circumstances before me, and the authorities cited above, I am satisfied that I should not exercise my discretion by ordering the respondent to obtain life insurance that would name the claimant as her beneficiary in order to ensure child support payments. The respondent has paid her child support as required by FMEP for some years now, and she asserts that she intends to meet her child support obligations now and in the future. I accept her testimony, and expect this will not be an issue any longer. Furthermore, both parents are in good health and capable of earning a good living for themselves and their Children. If either party is concerned about the future, either is free to obtain their own life insurance.

[218] I decline to order that S.R. take out and pay for a life insurance policy as security for his support obligations. I do so reluctantly, as I view the weighing of the factors here as close to the line.

[219] S.R. has imperfectly complied with support orders in the past. Though, as I will address below, there are explanations for some of these failures, it remains that S.R. unilaterally reduced the amount payable under the Vos Order. My refusal, at the end of trial, to make a further interim adjustment provides some explanation for the past three months, but not for the time between September 2024, when an application for a variation was contemplated but not proceeded with, and today.

[220] S.R. is young and there is no evidence he is in anything but good health. As I have observed elsewhere, he takes his obligations to his children seriously. Should any of these factors change, or should there be further non-compliance with court orders in the wake of the certainty provided by this judgment, M.A. will be at liberty to apply to vary this aspect of my decision on an application based on a material change in circumstances.

- [221] In very broad summary, then, child support to M.R. and F.R. will be as per the Guidelines, with S.R.'s imputed income set at \$1,010,916, for the period from March 1 to December 31 2023, and \$601,416 thereafter. A further component to S.R.'s income is an add-back for the personal benefit of certain business expenses, of \$115,500 in 2023, and \$102,000 thereafter, in both cases grossed up for taxes as provided above.
- [222] Spousal support will be at the high range as provided in the tables. Section 7 expenses will be paid for 75 percent by S.R. and 25 percent by M.A. There will be no cap on nanny fees. There will be no order for life insurance to secure these payments, but M.A. has liberty to apply for a variation of that aspect of my order on a material change of circumstances or any further failures of documentary disclosure by S.R. The parties will share their tax information yearly as provided above, and S.R. will also provide financial disclosure regarding M. Inc. on a yearly basis. Either party may apply for variation of the support orders based on a material change in circumstances.

Property Division

Legal Principles

- [223] The division of family property is governed by Part 5 of the FLA. This case is a "pre-existing proceeding" as that term is defined in the Family Law Amendment Act, 2023, S.B.C. 2023, c. 12, s. 24(1), and must therefore be decided based on the FLA as it stood before the 2023 amendments.
- [224] Upon separation, each spouse is presumptively entitled to an undivided half interest in all family property and is equally responsible for family debt unless equal division would be significantly unfair: FLA, ss. 81, 95(1).
- [225] Family property is defined in s. 84 as follows:

Family property

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.

[226] Section 85 sets out the categories of assets known as excluded property. Relevant to this matter is s. 85(1)(a), "property acquired by a spouse before the relationship between the spouses began." As set out in s. 84(2)(g), the amount by which excluded property has increased in value since the relationship began is classified as family property.

[227] Family debt is also shared equally. Section 86 provides that family debt includes all financial obligations incurred by a spouse during the relationship and after the date of separation, if incurred for the purpose of maintaining family property.

[228] The value of family property must be based on fair market value, determined as of the date of the hearing, subject to agreement or as otherwise ordered: FLA, s. 87; D.Z. v. M.Z., 2022 BCSC 706 at para. 152. Generally speaking, valuing family property or debt as of a date other than the date of trial effectively amounts to a reapportionment, which requires a finding under s. 95 of the FLA that an equal division would result in significant unfairness: Kumagai v. Campbell Estate, 2018 BCCA 24 at para. 76.

- [229] As previously stated, the court may order unequal division of family property and/or family debt if equal division would be significantly unfair: FLA, s. 95(1). The threshold for finding significant unfairness is high. The unfairness must be compelling or meaningful, having regard to the factors set out in s. 95(2): Remmem v. Remmem, 2014 BCSC 1552 at para. 44; Singh v. Singh, 2020 BCCA 21 at para. 134.
- [230] Under s. 95(2), in determining whether to order an unequal division of family property and debt, the court may consider various factors including:
- (a) the duration of the relationship between the spouses;
 - (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.
- [231] "Any other factor" in s. 95(2)(i) has been interpreted to be limited to factors that relate to the economic characteristics of a spousal relationship: see Singh at paras. 136-140. Such factors include the existence of undisclosed assets, the costs of bankruptcy, a party's motivations for entering bankruptcy, and the impact of bankruptcy on the value of an asset: Singh at para. 140.

Uncontested Matters

- [232] The parties agree that S.R.'s automobile is a family asset worth \$150,000. S.R. also holds funds in two investment accounts which were derived in part from an excluded asset. The equal division of these items is not contentious although, as will be set out below, the respondent seeks a bifurcation of the equal division process so that the advances paid to the claimant can be set off against these liquid, less risky assets.
- [233] S.R. came into the relationship owning 50 percent of the shares of the predecessor company to M. Inc. When the parties relocated from Québec to BC, the corporate structure changed, and M. Inc. was created. S.R. submitted that M. Inc. and its predecessor company should be treated as the same company for the purposes of this asset valuation. Thus, S.R. claims that his pre-relationship interest in M. Inc. / its predecessor, in the amount of \$200,000, is excluded property. I did not understand M.A. to take issue with this position, and I accept it.

The Joint Expert

- [234] The parties jointly retained Derek Sanders, a business valuator, to prepare a valuation report for M. Inc. Mr. Sanders appeared at trial and was examined by both counsel. He initially produced a draft business valuation in October of 2024. The parties agreed that he would update his report, and his 2024 update was provided in April 2025, shortly before the trial began.
- [235] Complicating this valuation was the late-breaking disclosure of a partnership between M. Inc. and H. Co., in which M. Inc. has invested a total of \$3.6 million USD. This investment was disclosed on M. Inc's balance sheet as a "prepaid expense" in the amount of \$4.32 million CAD.
- [236] Mr. Sanders testified that characterizing the investment in that way was unusual. It was his sense that the accountant was not entirely sure what to do with this amount, but because it was an incurred expense, the accountant wanted to record it. Mr. Sanders added that it could have been called "investment in partnership" or "advance to partnership" or some other title.
- [237] Mr. Sanders also testified as to other elements of this prepaid expense, including travel, meetings, and development of IT. He stated that there was not necessarily a direct future benefit associated with this line item, and it is unclear what the investment in this partnership would lead to. Given the lack of information, Mr. Sanders testified that he was instructed to assume that the value of those investments recorded as prepaid expenses was the amount recorded on the financial statements - essentially, the money that was spent. He testified that if there turned out to be value in these ventures, it would impact his valuation and there would also be tax consequences.

- [238] Mr. Sanders did not receive copies of M. Inc.'s central securities registers and so was unable to independently verify X.M. and S.R.'s 50/50 ownership. He included in a footnote a balance owing from S.R. to M. Inc. of \$2.526 million. He explained that it is common in an owner-managed business for draws to be taken throughout the year and then to decide how to account for these draws at the end of the year. Typically, the draws will get cleared through issuance of a dividend, or salary, or bonus.
- [239] Under CRA guidelines, business owners are not meant to keep a balance owing to a corporation for multiple fiscal years. Because this amount was owed by S.R. to the company at the valuation date, Mr. Sanders made the assumption that it would be repaid and was therefore an asset to the company and a personal liability to the shareholder(s). I observe that it was X.M.'s evidence that the shareholders are not planning to pay M. Inc. back the amounts of their shareholders loans. Instead, he testified that they are planning to issue a dividend to offset against the loans, and pay the taxes owed.
- [240] Also, part of M. Inc.'s total value was a portfolio of Tesla stock which had lost some of its value between Mr. Sanders valuation date of December 31, 2024, and the date of trial.

The Claimant's Position

- [241] M.A. argues that the valuation of M. Inc. has been made more difficult by what she terms a "history of non-disclosure". In particular, she points to the \$3.6 million partnership with H. Co., an investment funded in part with family property, and a venture which continues to occupy the majority of S.R.'s working hours. The evidence on this point is not entirely clear. X.M. says that 50-60 percent of S.R.'s time is spent on the H. Co. partnership. S.R. testified that it is more than that amount of time, although at discovery in June of 2024, he detailed his day-to-day work as having to do a great deal with servicing M. Inc.'s other existing client, meeting with subcontractors, planning new features, following up on service level agreements, etc.
- [242] In any event, M.A. points to the surprising lack of evidence of, for example, expected profits, due diligence performed, or any other documents which would assist in proving the current value of this investment or the funds invested in it. M.A.'s position is that S.R. is attempting to defeat her claim to profits arising from these endeavors and to funnel money out of M. Inc. in order to claim that his company is floundering.
- [243] M.A.'s position is that M. Inc. should be divided equally but for a reapportionment of corporate tax debts which she says is equal to \$850,000.
- [244] M.A. submits that on a fair reading, the value of M. Inc. is \$6.3 million. This is the "high" value set out in Mr. Sander's report at page 2. His "low" value is \$5.45 million.
- [245] As I understand her position, M.A. does not object to taking the value of the shareholder's loan as of the date of separation into account but argues that the repercussions arising out of further increases to this loan post-separation ought not to be laid at her feet, and that

therefore the loan should be counted as an asset to the company because there is no indication it will not be paid back. M.A. also argues that in treating millions of dollars of corporate withdrawals as shareholder loans and avoiding taxes for years, S.R. has created massive tax liabilities which ought not to be shared equally with her.

[246] Under s. 86 of the FLA, S.R.'s tax debt is not family debt. To characterize it as such, argues M.A., would require S.R. to show "significant unfairness" under s. 95(2).

[247] This is not a tenable position, says M.A., for the following reasons:

- a) The vast accumulation of tax debt was avoidable. S.R. controlled the financial management of the business throughout the parties' marriage and his years of CRA non-compliance were unilateral, willful, and hidden.
- b) M.A. had no control over M. Inc.'s corporate structure or tax filings and she reasonably relied on S.R. to manage the family's financial affairs lawfully and competently.
- c) The funds M.A. benefited from were used to pay for housing, food, childcare, and s. 7 expenses - the equivalent of child support. Had S.R. properly characterized the payments as child support, they would have been received by M.A. tax free. Now S.R. is asking her to bear the burden of his financial mismanagement.
- d) S.R. benefited from the improper structure. He withdrew funds from M. Inc. as shareholder loans, did not pay tax, and spent the money on lavish living. It would be profoundly unfair to saddle M.A. with the consequences.
- e) Requiring M.A. to assume half of a tax debt created solely through S.R.'s unilateral actions would be significantly unfair. M.A. was financially dependent during the marriage. She remains the primary caregiver to the parties' high-needs children. She should not be burdened with debt arising from conduct she did not control.

[248] M.A. submits that the appropriate valuation date for the parties' tax debt is the date of separation, citing *Finch v. Finch*, 2018 ONSC 5575.

[249] In summary, in arguing for unequal division with regard to M. Inc.'s corporate taxes owing, M.A. points to:

- a) S.R.'s financial mismanagement and dissipation;
- b) lack of disclosure and unclean hands in the sense that there is "no real way to determine whether he has disclosed all assets";
- c) transfer of \$260,000 to the children's accounts after the s. 91 financial restraining order while simultaneously claiming an exclusion for those funds; and
- d) traveling first class while claiming financial ruin.

[250] She also submits that she has no realistic capacity to assume the tax burdens or rebuild the family wealth allegedly lost through S.R.'s conduct because she bears the bulk of the parenting responsibilities. Her ability to provide a stable home for the children hinges on a fair division of property and freedom from catastrophic tax debt. Given that S.R. comes to court to attempt to divide M. Inc. while the large investment in the H. Co. partnership is in its "seedling" stage and while standing to reap the eventual benefits, M.A. says that this is a textbook case for applying s. 95 to reapportion all the tax liability to S.R. That is, it is M.A.'s position is that the unpaid corporate taxes owed by M. Inc. should be reapportioned so that they do not impact the value of her 50 percent share of S.R.'s interest in the company. The amount she argues should be re-allocated back to her share of M. Inc. is \$850,000.

[251] The parties agreed at trial that the value of the Tesla shares in the Sanders report should be adjusted. Sanders used the 180-day moving average price as at the valuation date in 2024. Adjusting this value to be the value of the shares as at the date of trial was termed "normalizing TSLA" in the parties' calculations.

[252] Beginning with \$6.3 million as Mr. Sander's "high" fair market value for S.R.'s shares in M. Inc, and after taking into account the value of the TSLA shares as of the date of trial, less the \$906,030 of shareholder loans at the date of separation, leaves an amount of \$6,212,500. After taking into account distributive tax (a taxable gain of 50 percent and latent personal tax at 53.50 percent), this leaves a net value of \$3,644,620 for S.R.'s 50 percent of the M. Inc. shares, on M.A.'s calculation.

[253] M.A. does not agree with S.R.'s position that the \$200,000 in advances paid to her ought to be set off only against the liquid assets.

[254] The final picture M.A. urges for property division is therefore:

50 percent of M. Inc. shares (Sanders "high") \$6,300,000

Normalize TSLA (\$937,500)

Reapportion corporate tax liability to S.R. \$850,000

Subtotal 6,212,500

Shareholder amount owing on date of separation (\$906,036)

Latent personal tax (\$1,661,843.75)

Net value of 50 percent of M. Inc. shares \$3,644,620.25

Porche \$150,000

TD Direct Investing July 2024 \$915,604.51

Total \$4,710,224.76

50 percent \$2,355,112.38

Less advance (\$200,000)

Net amount owing to M.A. \$2,155,112.38

The Respondent's Position

[255] S.R. also relies on Mr. Sanders' valuation for the 50 percent interest in M. Inc., but starts with \$5,875,000, a number halfway between Mr. Sanders' high and low estimates, which he terms the "mid-range" in his written submissions.

[256] S.R. submits that from this amount ought to be deducted the entire shareholders loan of \$2,530,000, rather than the amount as of the date of separation because M.A. benefitted from these funds.

[257] S.R. submits, however, that from that number must also be subtracted:

- a) The net value of 50 percent of S.R.'s interest in the company after tax in 2014, which is an excluded asset.
- b) The latent tax cost to S.R. at those two points in time (2014 and 2024) to realize the value of his interest into personal cash. S.R. has calculated the number halfway between the high and low estimates for the latent tax calculation: \$1,575,000 for 2024, and \$35,000 for 2014. S.R. says it is appropriate to price in the latent tax to ensure equality of treatment in the division of assets, citing *Sanai v. Mahmoud*, 2017 BCCA 155 at para. 32.
- c) S.R. also argues that three additional "risk factors" should be taken into account.
 - i. First, the dip in value of the Tesla shares. At trial, the parties agreed on an appropriate calculation for the value of those shares as of the date of trial, should the court wish to use that value. As will be set out below, I have held that that it is indeed the appropriate valuation date for those shares. I would have preferred to see a more careful evaluation of this but doing the best I can with the evidence presented, I agree with the parties' calculation which they have termed "normalization of TSLA".
 - ii. Second, a possible payment of \$1.47 million in interest and penalties, which the CRA may or may not levy, depending upon the outcome of the voluntary disclosure program under which M. Inc. belatedly filed its corporate income tax returns.
 - iii. Third, the company's partnership investment in H. Co., which S.R. posits may be worth nothing.

[258] Applying the first of these factors to S.R.'s starting place, the resulting submission is:

50 percent of M. Inc. shares \$5,875,000

Normalize TSLA (\$937,500)

Subtotal \$4,937,500

Less entire shareholder loan (\$2,530,000)

Minus latent personal tax on taxable gain (\$1,320,781)

Net amount owing to [party] \$1,086,719

- [259] I note that subtracting \$675,000 for the "CRA risk" described at subparagraph 245(c)(ii) above, changes the latent tax: the net amount when the "CRA risk" is subtracted is \$592,281.
- [260] Finally, valuing the H. Co. partnership at \$0 results in a net loss of (\$448,235).
- [261] S.R.'s calculations above do not include the liquid assets - the luxury car and investments which S.R. moved from one investment account into two equal investment accounts in the name of the children in the wake of the s. 91 order on or around July 29, 2024. The total amount invested in both accounts was \$439,056 as of April 1, 2025.
- [262] S.R. also submits that \$175,540 of this amount is excluded property as it is the initial value of the investment that he brought into the marriage.[2] Therefore, S.R. submits it should be excluded under s. 85(1)(a) or (g) of the FLA.
- [263] S.R.'s position is that the total amount of family property in these "liquid assets" is therefore \$413,516, half of which is \$206,758. S.R. argues that these assets should be considered separately from M. Inc. because, unlike the car and the investments, M. Inc. is illiquid, risky, and uncertain given the unanswered tax questions. He cites D.Z. v. M.Z., supra, as an example of a court dealing with assets in separate categories. His position is that the \$200,000 advance equalization payment ought to be deducted from the total of these "liquid assets", leaving an equalization payment from the respondent to the claimant of \$6,758.
- [264] Setting that off against his final bottom line of (\$448,235), has the claimant owing S.R. \$441,477.

Analysis

Latent Tax

- [265] S.R. submitted that, based on Sanai, latent tax should be deducted from the value of his shares of M. Inc. Mr. Sanders prepared a report, entitled "Distributive Taxes on Notional Sale of [M. Inc.]" in which he detailed estimates of the estimated tax on a notional disposition of the company on various valuation dates. The amounts of this tax using a 2024 valuation date range from a low of \$1,460,000 to a high of \$1,690,000.

- [266] I did not understand M.A. to take issue with this, but I note that in *Sea v. He*, 2024 BCCA 161 at para. 85 [Sea BCCA] the Court emphasized that a variety of outcomes is possible where potential latent tax issues are in play. In *Sanai*, the Court ordered a deduction for latent taxes where the evidence supported that outcome, while in the earlier case of *Ouellette v. Ouellette*, 2012 BCCA 145 at para. 32, the trial judge was held not to have erred in failing to take the "hypothetical and speculative" disposition costs into account.
- [267] In the recent decision of *Dignard v. Dignard*, 2025 BCCA 43, Justice Horsman, writing for our Court of Appeal, endorsed the following summary of principles from the decision of Justice Savage, as he then was, in *McKenzie v. McKenzie*, 2015 BCSC 241 at para. 8:
- (1) where there is sufficient evidence to satisfy the Court of tax consequences or other costs inherent in a compensation order the Court should take these into account in setting the compensation amount;
 - (2) the onus is on the payor to provide the trial judge with the necessary evidence of the tax consequences arising from the division of assets or other consequences of having to acquire the funds to pay the payee;
 - (3) there is no absolute rule as to how the compensation order might be calculated, depending, as it does, on the type of assets to divided, timing, the parties involved and other orders in the action;
 - (4) the matter should be considered as of the date of trial, not as of the date the matter comes back before the court; and
 - (5) the overriding principle is fairness.
- [268] These principles were also relied on in *Sea BCCA* at para. 21.
- [269] While there was an expert report calculating the distributive taxes on a notional sale of M. Inc., there was no evidence that such a disposition was likely to occur. Further, S.R.'s evidence at trial was that he continues to spend more than 60 percent of his time developing the partnership with H. Co. He is determined to work hard to recoup some value there and rebuild his reputation with H. Co., the management of which is a personal friend or connection of S.R.'s. It would seem unlikely that S.R. would sell his shares in M. Inc.
- [270] It must still be considered, however, that the funds for an equalization payment "'have to come from somewhere'": *Sea BCCA* at para. 91. As the Court stated in *Sea BCCA*:
- [84] As pointed out by the trial judge in P.T. No. 3, contingent tax liabilities are challenging to address. If they are deducted from the value of an asset but do not materialize for a very long time or at all, the party holding the asset with the contingent tax liability will be advantaged to the detriment of the other party. On the other hand, if they are not deducted from the value of an asset but do materialize in the near to medium term, the tables turn and the party holding the asset with the contingent tax liability will be disadvantaged to the

benefit of the other party. In the search for equality and fairness, much will turn on the judge's view of what the future holds.

[Emphasis in original.]

- [271] The source of the payment in this case depends very much on the result of my decision on the value of M. Inc., and my view of what the future holds. Where it is unclear when or in what amount taxes will be exigible, an allowance may not be appropriate: *Sea BCCA* at para. 86, citing with approval on this point *Sea v. He*, 2022 BCSC 2169 at para. 155 (trial reasons).
- [272] In this case, I decline to make such an allowance. The compensation payment to M.A. is just over \$1 million. This is a significant sum. There is no matrimonial home in this case: the value of M. Inc. is the parties' principal asset.
- [273] The weight of the evidence at trial was that S.R. and X.M. continue to work hard to make M. Inc. a success. I view it as highly unlikely that S.R. would sell his interest in the company at this point. Indeed, that outcome is directly contrary to his oral evidence. I view it as much more likely that S.R. will draw on his remaining liquid assets, such as his luxury automobile and investment accounts, to satisfy this payment.

Shareholders Loan

- [274] M.A. argues that the entire amount of S.R.'s shareholder's loan should be included as an asset to the company because there is no evidence that it is not going to be paid back. She agrees that the value of the loan as of the date of separation, which was \$906,036, ought to be deducted from M. Inc.'s value.
- [275] S.R. argues that the entire \$2.5 million ought to be discounted from the value of M. Inc. because the evidence is that the shareholders loans are not going to be paid back. They were funds taken by the two shareholders as income, though not properly drawn as dividends or paid out as income. The two shareholders are normalizing that situation now, but there is no indication that they intend on paying those sums back. X.M. has taken less over the years but eventually expects to receive an equal amount to S.R.
- [276] I agree with S.R. I find that the entire amount of the shareholder's loan should be shown as a debit to M. Inc. On M.A.'s view of matters, the amount of the shareholder's loan ought to have been properly paid to S.R. as a dividend and the associated taxes paid. However, if this had occurred, the amount of the shareholder's loan would not form part of the value of the company now in any event, and so it ought not to be considered as an asset of the company.

Tax Debts

- [277] S.R. seeks to set off his personal income tax debts of \$172,503 for 2021 to 2023 against the value of M. Inc. He recognizes that these debts arose after separation and therefore do not qualify as family debt under s. 86(a). S.R. argues, however, that they may be shared either under s. 86(b), which provides that family debt includes financial obligations occurred by a spouse after the date of separation "if incurred for the purpose of maintaining family property". Alternatively, he says that they can be shared under s. 95.
- [278] S.R. cites *Stein v. Stein*, 2008 SCC 35, where the tax debt in issue crystallized after separation, and the Court found that it was shareable because both parties benefited from it during the marriage. *Stein* was decided under the now repealed FRA, which did not include a section equivalent to s. 86 regarding family debt. S.R. argues that s. 86(b) is a codification of *Stein*. He also submits that the rationale in *Stein* does not indicate that it ought to be limited to cases in which the benefit (of the postponement of tax payments) was shared during the marriage.
- [279] Finally, S.R. points to *MacDonald v. MacDonald*, 2025 ABKB 72 at paras. 177-189, which is an example of a tax debt which arose almost exclusively from the non-payment of taxes on large dividends after separation. The Court concluded that the parties were jointly responsible for the tax debt because it was applied to various family purposes. However, the father was solely liable for the accrued penalties and interest because it had been his responsibility to pay the taxes, and he had not done so.
- [280] M.A. submits that where one party is powerless to do anything about tax debts, they ought not to share in them: *T.T. v. J.M.H.*, 2014 BCSC 451 at para. 106. She also says that post-separation debt is not family property, citing *Schneider v. Owers*, 2019 BCSC 528. She says that her sharing the tax debts created post-separation by S.R.'s serious financial mismanagement would result in significant unfairness for the following reasons:
- a) the vast accumulation of tax debt was avoidable;
 - b) she had no control over the corporate structure or tax filings;
 - c) the withdrawals made should have been largely categorised as child support which is tax free in the hands of the recipient;
 - d) S.R. benefited from the improper structure, avoiding personal tax by enjoying a high standard of living; and
 - e) it would be unfair to burden M.A. with half of a tax debt created solely through S.R.'s unilateral actions.

- [281] As S.R. observed, the benefit to the parties from the funds subject to the tax at issue in Stein accrued during the marriage, not afterwards. In *Johnson v. Johnson*, 2009 BCSC 1374 at para. 27, Justice Meiklem held that the tax payable on a dividend -- which was declared after separation in order to offset a shareholder's loan that had been used for family purposes -- was properly considered a family debt. Also in that case, the funds had been used by the family pre-separation.
- [282] In *Johnson*, the payor spouse was able to show that the funds in question were used for family purposes. In *Mallen v. Mallen*, [1992] B.C.J. No. 648, 1992 CanLII 4034 (C.A.), Justice Gibbs (concurring in the result) looked at whether the tax represented a debt incurred to maintain the family, finding:
- [87] There was ample evidence before the trial judge in the November 1988 hearing in this case from which he could conclude that the money which should have been paid on account of income tax was expended for family purposes.
- [283] These cases were decided before s. 86(b) of the FLA was created. That section uses the words "for the purpose of maintaining family property." As the Court observed in *Neely* at para. 61, no finding that the parties benefitted from the liability is necessary to determine that the debt is a family debt. In any event, there is insufficient evidence to show that the entirety of the 2021-2023 income tax debt was incurred on income which entirely went to M.A. and the children. In order for s. 86(b) to apply on its plain wording, there must be some link between the debt and family property which is being maintained. Such a link was not shown to exist here.
- [284] There remains s. 95 as S.R.'s alternative basis for the consideration of these debts. That is the section that provides for unequal division of family property in the event of significant unfairness.
- [285] I do not find that it would be significantly unfair for S.R. to pay his own personal taxes in the amount of \$172,503 for 2021-2023, a period following separation. On the evidence, there was no doubt that M.A. had no knowledge of the income tax situation or any ability to ensure that S.R.'s personal taxes were paid. She may have assumed that they were. If anything, it would be unfair to burden her now with this debt.
- [286] I also do not accept that M. Inc.'s corporate taxes payable ought to be re-allocated to S.R. such that M.A. would receive a higher portion of M. Inc.'s value. These taxes ought to have been paid as a routine matter, and would never have formed part of M. Inc.'s value. I decline, however, to apply a contingency for possible penalties and interest. Those amounts, if incurred, will be incurred post-separation and post-trial. For the reasons outlined by M.A. principally related to her lack of control over M. Inc. and its finances, I do not find it to be "significantly unfair" that those amounts be laid at the feet of M. Inc. going forward and S.R., if they arise.

Summary of Conclusions on Property Division

[287] On balance, I agree that the mid-range in the Sanders report is an appropriate valuation for M. Inc. The corporate taxes owing ought to be taken into account as per the Sanders report. S.R.'s personal taxes owing are not a family debt. Distributive taxes on a possible sale of S.R.'s interest in M. Inc. are too speculative and I decline to make an allowance for them. The entire amount of the shareholder's loan should be shown as a debit to M. Inc.

[288] In summary, the division of family property in this matter is as follows:

S.R.'s Assets:

50 percent of M. Inc. shares (Sanders mid-range) \$5,875,000

Normalize TSLA (\$937,500)

Subtotal \$4,937,500

Less S.R. shareholders' loan (\$2,530,000)

\$2,407,500

Porche \$ 150,000

TD Direct Investing as at Apr 1 2025 \$ 439,056

Subtotal \$2,996,556

Less Excluded Assets:

2014 value of M. Inc. (\$160,000)

Investment accounts valued at US\$140,000 (\$175,540)

Total \$2,661,016

50 percent \$1,330,508

Less advance (\$200,000)

Net amount owing to M.A. \$1,130,508

[289] The amount owing from S.R. to M.A. is thus \$1,130,508.

Fines

[290] M.A. applies for an order that a fine ought to be levied against S.R. under one or more of ss. 212, 213, 222, and 230 of the FLA for breaches of disclosure orders and orders generally.

[291] M.A. made a similar submission before Associate Judge Vos, who stated in his reasons indexed as M.M.A. v. S.M.A.R., 2024 BCSC 552:

- [58] Although it is regrettable that he was not able to make arrangements for timely production of information for this litigation, it is to some extent understandable. The respondent was the sole source of funds for himself, the claimant and their Children, and there were challenges with respect to the business of the company that required attention. The claimant has not established that the respondent's conduct rose to the level requiring a fine. Nevertheless, it is hoped that this process has instilled in the parties the need to deal with matters relating to this litigation in a timely manner.
- [292] Clearly these hopes were unduly optimistic. After the date of the Vos Order, S.R. committed the following failings, which I am referencing here in summary form:
- a) late disclosure of documents ordered in the May 3, 2024, trial management conference before Associate Judge Harper;
 - b) multiple late payment(s) of support;
 - c) short payments, including the unilateral reduction of support amounts in February 2025;
 - d) the precipitous movement of funds into two joint investment accounts in the names of the children, between July 26-29, 2024;
 - e) drawing \$100,000 USD to pay debts on July 29, 2024, resulting in a surplus in his American Express account.
- [293] S.R. has acknowledged and explained (or attempted to explain) many of these difficulties. He resists M.A.'s attempts to paint him as purposefully setting out to breach orders of this court.
- [294] With regard to the late disclosure of documents, as Associate Justice Vos found, I too find that though disheartening, the difficulty with document disclosure does not rise to the level necessary for the sanction of a fine and can be dealt with in costs. I have left open the question of late payment of support, given that M.A. has brought a post-trial application covering this same ground, which has been adjourned.
- [295] With respect to breach of orders generally, however, in the wake of the order of Associate Judge Bilawich on or around July 29, 2024, S.R. took active steps to thwart the operation of the s. 91 financial restraining order by moving funds out of his accounts and into the accounts in the joint names of himself and his children. In this regard, a fine under s. 230(2)(b)(iii) in the amount of \$5,000 is appropriate.

Divorce

- [296] The requirements for an order of divorce have been met. The parties have been living separate and apart for over five years, there are no prospects of reconciliation and no evidence of collusion, and the needs of the children have been adequately provided for. The order for divorce shall take effect 31 days from the date of these reasons.

Costs

[297] If either party wishes to make submissions on costs, they may do so in writing per a schedule to be agreed upon between counsel, or they may arrange a brief hearing through Scheduling. In any event, either option is to be completed within 60 days of the release of these reasons, failing which each party shall bear their own costs.

"Lawn J."

[1] The order says 23.5 percent to the claimant, and 76.6 percent to the respondent, which would not add up to 100 percent. Presumably it ought to have been 76.5 percent.

[2] This number was initially stated in the trial record (in S.R.'s F8 dated April 1, 2025), to be an amount of just over \$140,000, but this was later clarified to be in US dollars. The respondent provided the Canadian conversion figure at trial.

Source & reproduction note

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

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/14/2025BCSC1476.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/m-m-a-v-s-m-a-r-2025>

Prepared on 29 October 2026 · Esheria