
CANADA / JUDGMENT

M.T. v. J.S.

2020 BCSC 203

COURT

Supreme Court of British Columbia

DECIDED

14 February 2020

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2020 BCSC 203 M.T. v. J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.T. v. J.S.,

2020 BCSC 203

Date: 20200214

Docket: E173352

Registry: Vancouver

Between:

M.T., also known as M.S.

Claimant

And

J.S., also known J.W.S., and S.H. Ltd.

Respondents

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Claimant:

P. Daltrop

L.A. Cruickshank

Counsel for the Respondents:

P.M. Daykin, Q.C.

E.C. Walker

Place and Dates of Trial:

Vancouver, B.C.

May 27-31, June 3-7, and 12, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 14, 2020

1. introduction

[1] This is a contested family law dispute.

[2] In these reasons, when I refer to J.S., I will refer him as the respondent. When I refer to the corporate respondent, S.H. Ltd., I will refer it to as "Holdco". Unless otherwise stated, a reference to the parties is to the claimant and the respondent.

[3] The parties' relationship began in 1998. In early 2000, they married and in late 2000, their first child, C1, was born. In 2002, their second child, C2, was born. On November 4, 2017, the parties separated.

[4] The claimant has two children from her previous marriage. The children were 7 and 10 years old when she married the respondent.

[5] C1 (19 years of age) and C2 (17 years of age) are still children of the marriage and their emotional well-being is properly identified by the claimant and the respondent as of signal importance. The two children from the claimant's previous marriage are now 29 and 26 years old and are doing well in their chosen careers.

[6] The parties gave all four children the same love and affection.

[7] C1 has completed his first year at the University of Western Ontario.

[8] C2 has completed Grade 11 at Collingwood School, a private school in West Vancouver ("Collingwood").

[9] During their relationship, the respondent, with the help of the claimant, established a very profitable business selling residential real estate, primarily in West Vancouver, BC.

[10] As respondent's counsel describes in his closing submissions:

both parties testified that, during the marriage, they worked together as a very successful team, combining their considerable talents and working together to run a business, raise their children, and to buy, renovate and sell successive houses. As a result of those combined efforts they lived well, enjoyed a generous standard of living, and amassed significant capital.

[11] The issues before the Court are the exercise of significant parenting decisions, counselling, spousal support, child support, "section 7 expenses", the division of family property, and the division of family debt, among other financial matters.

2. background

[12] The claimant and the respondent are 58 and 51 years old respectively.

[13] The claimant was first married in 1983 and was divorced in 1997.

[14] The claimant and the respondent met while working as realtors. The claimant obtained her real estate licence in 1990 and the respondent obtained his real estate licence in 1993.

[15] In 1997, the respondent incorporated a company that he used for his real estate business ("Opco").

[16] In 2007, the respondent incorporated Holdco. In 2012, as part of a reorganization, Opco became a wholly-owned subsidiary of Holdco.

[17] In 2013, a United States company was incorporated (U.S. Co.) with all of the shares in its capital held by Holdco. The current corporate structure is shown as Schedule "A" to these reasons. The claimant and the respondent are, in essence, equal shareholders. At trial, neither party asserted that the preferred shares had any significant value.

[18] In February 2014, the respondent suffered a critical illness. He has recovered to the extent possible from his illness. After his recovery, the respondent was able to resume selling real estate as he had in the past.

[19] Approximately ten years earlier, the respondent had purchased a long-term disability insurance policy and a critical illness insurance policy. The respondent paid the premiums.

[20] At the claimant's suggestion, the respondent, in addition to making a claim for long-term disability, claimed under the critical illness policy. The insurer challenged the critical illness claim. After counsel was retained and pleadings filed, the claim was settled for \$500,000. This sum has given rise to whether it should be viewed as "excluded property" as defined under the Family Law Act, S.B.C. 2011, c. 25 [FLA].

[21] In July 2017, the parties sold their then residence on Roseberry Avenue in West Vancouver. They then moved to a home on Craigend Road in West Vancouver ("Craigend"). The respondent had entered into a one-year lease for \$9,500 per month for Craigend.

[22] Shortly later, in August 2017, they purchased another home on Westmount Road in West Vancouver (the "Westmount Road home").

- [23] In September 2017, the parties moved into the Westmount Road home. As a family, they lived at Craigend for approximately six weeks.
- [24] On November 4, 2017, the parties separated. In the two or three months prior to separation, the respondent had first expressed his unhappiness to the claimant but would then vacillate by expressing his love for her.
- [25] The respondent's wish to separate came as a shock and surprise to the claimant. Although I did not hear directly from C1 and C2, it is not challenged that each of them was similarly shocked and surprised. Less than a year prior to separation, the respondent had arranged to have himself and his family to be portrayed favourably in a locally distributed magazine as part of his marketing efforts.
- [26] Immediately after separation, the respondent lived at Craigend for four months until he was able to convince the landlord to allow, at some cost, the one year lease to be terminated. The respondent then rented an apartment.
- [27] The parties agree that the Westmount Road home should be sold but with the sale postponed to the Spring of 2020 in order that C2 may complete high school before having to move.
- [28] At the time of trial, the claimant had "re-licensed" her real estate licence, had taken courses to upgrade her knowledge, had moved her licence to another realty company, and planned to become an active realtor as of September 2019.

3. issues

[29] The following key issues must be addressed:

- a) under the Federal Child Support Guidelines, S.O.R./97-175 [FCSG], the respondent's available income ("Guideline Income");
- b) a formula for determining the respondent's future Guideline Income;
- c) spousal support;
- d) child support;
- e) s. 7 special and extraordinary expenses;
- f) retroactive child support, spousal support, and "s. 7 special expenses";
- g) the exercise of significant parenting decisions;
- h) counselling for the parties and C1 and C2;
- i) the categorization of the proceeds from the critical illness policy;
- j) property division; and
- k) security for child and spousal support.

4. respondent's Guideline income

- [30] From a reading of the FCSG, it is apparent that the computation of income under the FCSG relies, with possible adjustment, on the computation of income for income tax purposes.
- [31] As a starting point for income tax purposes, income from a business is based on profit which is determined under ordinary commercial or accounting principles: Income Tax Act, R.S.C. 1985 (5th Supp.) [ITA], s. 9; and *Dominion Taxicab Assn. v. Minister of National Revenue*, [1954] S.C.R. 82 at 85.
- [32] Section 18(1)(a) of the FCSG gives the Court the discretion to not use "Total income" in a spouse's T1 General income tax form ("Line 150 income") where a spouse is a shareholder, director, or officer of a corporation and the Line 150 income "does not fairly reflect all the money available to the spouse for the payment of child support". The Court may include, in determining the spouse's income, "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".
- [33] I find that the overall financial picture may only be readily seen and currently available income determined by including Holdco and Opco in the analysis. Otherwise, unfairness may result for the claimant and the parties' two children where the salary (and other forms of remuneration) and the dividends the respondent may receive from Holdco and Opco are less than the currently available income for the year from Opco (and Holdco). Similarly, in years where the respondent receives a greater amount of salary (or other forms of remuneration) and dividends than currently available income, unfairness would result for the respondent because the support payments would not be tied closely to currently available income. Accordingly, I find that the respondent's income should be determined under s. 18(1)(a) of the FCSG.
- [34] With the business of Opco (and Holdco) almost entirely representing the respondent's personal efforts, the use of pre-tax income is the appropriate approach.
- [35] In considering the pre-tax income approach, I have taken into account the theory of integration and its workings in practice. In brief terms, the theory of integration is that an amount earned by a person indirectly through a corporation should result in the same amount of tax (corporate and personal) as would be the case if the amount had been earned directly by the individual. In practice, the theory of integration may not always work in this exact manner as a result in variations of corporate and personal tax rates (including provincial tax rates).
- [36] At trial, the evidence of the two accountants who testified as witnesses, Ms. C. Reichgeld, C.P.A., and Mr. C. Buckley, C.P.A., and the expert report of Mr. H. Woolley, C.P.A. received as expert evidence at trial, support a finding that relying on the theory of integration with the current tax rates is a fair and proper approach. I recognize that, as between years, there may be some timing differences, but with a low interest rate environment and the annual adjustment of child support and spousal support, I do not see unfairness arising.

- [37] Mr. Buckley was the accountant for the parties and their corporations for many years. After separation, Ms. Reichgeld became the claimant's accountant. Mr. Buckley continued in his role for the respondent and the related corporations.
- [38] To calculate available income, the approach I have followed is to start with Opco's pre-tax income and then add to it (a) any salary or management fee paid to the respondent by Opco; and (b) any salary or management fee paid to a non arm's-length party (including the claimant) by Opco.
- [39] The claimant and respondent generally agree that the foregoing approach is appropriate. The approach is consistent with s. 18 of the FCSG and key judicial authority: Kowalewich v. Kowalewich, 2001 BCCA 450; Hausmann v. Klukas, 2009 BCCA 32.
- [40] Respondent's counsel's calculation of the respondent's available income for previous years was:
- Fiscal year 2016
- \$2,895,868
- Fiscal year 2017
- \$965,262
- Fiscal year 2018
- \$646,165
- [41] Opco's (and Holdco's) year end is August 31. At the time of trial, it was projected that the available income for fiscal year 2019 would be approximately \$580,000.
- [42] The claimant differs with the respondent as to whether available income should be averaged over several years and whether amounts should be added back as personal benefits to the respondent that have been borne by Opco (or Holdco).
- [43] The claimant argued that an average of available income for fiscal years 2016, 2017, and 2018 be used, or in the alternative, for fiscal years 2017, 2018, and 2019 (projected) be used. Using the first average (with add-backs), claimant's counsel calculated the total monthly support payable by the respondent to the claimant to be \$63,605 (\$43,880 spousal support and \$19,725 child support, with child support subject to review on C1 turning 19 years of age). Using the second average (with add-backs), claimant's counsel calculated the total monthly support payable by the respondent to the claimant to be \$32,793 (\$22,062 spousal support and \$10,731 child support, with child support subject to review on C1 turning 19 years of age). The foregoing amounts do not include the respondent's share of "s. 7 special expenses".
- [44] The annual support payable by the respondent would be \$763,260 or, in the alternative, \$393,516 respectively (without the respondent's share of s. 7 special expenses).

- [45] With respect, even the claimant's alternative claim is not realistic, having regard to the respondent's currently available income.
- [46] It is not disputed that the respondent's income has dropped dramatically for reasons beyond his control. Since 2016, the West Vancouver real estate market has fallen in both the number of sales and house prices.
- [47] The respondent has not intentionally reduced his income nor has he tried to hide income. The respondent has also made proper and full disclosure of his assets.
- [48] In similar circumstances of a dramatic fall in income without a reasonable prospect of near term recovery, a happily married and financially prudent couple would adjust to the new economic reality by budgeting according to the actual currently available income.
- [49] In *Harras v. Lhotka*, 2016 BCCA 246, Justice Garson, writing for our Court of Appeal, cited with approval the observation of Justice Fenlon (then sitting in this Court) in *de Bruijn v. de Bruijn*, 2011 BCSC 1546:
- [32] Lower courts have often considered averaging more appropriate in cases where income fluctuates. For example, in *de Bruijn v. de Bruijn*, 2011 BCSC 1546, Fenlon J. (as she then was), refused to average income where the respondent's income showed a pattern of decline over the preceding four years. At para. 35, she said the following:

With respect, I do not accept Ms. de Bruijn's submission that Mr. de Bruijn's income should be fixed at an average of his 2008, 2009 and 2010 earnings under s. 17(1) of the Guidelines. This is not a situation in which Mr. de Bruijn's income regularly fluctuates up and down. For the past four years his income has been in decline. To ignore that reality and base his support obligations on a number greater than his current earnings would, in my view, be unjust. [Emphasis added by Garson J.A.]

- [50] I find that child and spousal support should be based on the respondent's currently available income and not reflect income for fiscal years prior to 2019.
- [51] The claimant also argues that one-half of the expenses deducted by Opco in computing its income related to meals and entertainment, cell phones, and the respondent's vehicle should be added back for the purposes of computing his currently available income.
- [52] Section 19(1)(g) of the FCSG provides that a court may impute income "as it considers appropriate in the circumstances" where "the spouse unreasonably deducts expenses from income".
- [53] Section 19(2) of the FCSG provides that for the purpose of s. 19(1)(g) "the reasonableness of an expense is not solely governed by whether the deduction is permitted by the Income Tax Act".
- [54] For the seven month period ending March 31, 2019 and projected to August 31, 2019, the relevant expenses deducted and projected were:

March 31, 2019

August 31, 2019 Projected

Meals and Entertainment

\$22,476

\$38,536

Utilities

\$3,106

\$5,324

Vehicle

\$24,849

\$42,596

- [55] A bookworm rarely makes for a good real estate agent. A successful real estate agent must be seen and known in the community. Consistent with this premise, the respondent advertised Opco using a picture of himself on the outside signs on buses, on a billboard on West Georgia Street that would be seen by West Vancouver residents on their way to work, and, in the early years of the respondent's career, on the back cover of the Yellow Pages (when such still existed). The respondent arranged for the Yellow Pages to be delivered face down.
- [56] For many successful sales people, personal life and business life blend. Friends and acquaintances become clients and a client may become an acquaintance or friend. A connection may be made during a round of golf or over a meal.
- [57] In her examination-in-chief, the claimant testified as to the importance of the respondent's public image, including driving "beautiful cars" and wearing "designer clothes". The claimant readily recognized the respondent's talents as a marketer and as a real estate agent.
- [58] In cross-examination, the claimant willingly acknowledged that the respondent worked, so to speak, all hours of the day and any day of the week. She also readily acknowledged that the claimant and the respondent built a significant network of contacts and referrals in West Vancouver with friendships resulting in clients and clients becoming friends.
- [59] The respondent designated those meals and entertainment expenses which he viewed as business-related on the associated receipt (or credit card statement). The meals and entertainment expenses he claimed as business-related and deductible in computing Opco's income were vetted by Opco's external bookkeeper and spot-checked by Mr. Buckley (the respondent's long-time accountant).

- [60] One-half of the respondent's Capilano Golf Club ("Capilano") and Hollyburn Country Club ("Hollyburn") expenses were deducted as business expenses in computing Opco's income.
- [61] Ninety percent of the respondent's vehicle expenses were deducted in computing Opco's income.
- [62] Ninety percent of the respondent's cell phone charges were also deducted in computing Opco's income.
- [63] The claimant argued that the respondent had the onus to demonstrate that the business expenses were not personal expenses and were reasonable.
- [64] In written submissions, the claimant stated:

Mr. Buckley testified that 90% of the Respondent's cell phone and 100% of his vehicle lease expenses are deducted on the financial statements of the company as business expenses, and that 50% of his Capilano and Hollyburn expenses are deducted as meals and entertainment. He further testified that if the Respondent ate at a restaurant in Vancouver, he assumed the expense was a business expense.

The Respondent did not provide any vehicle logs, call logs, or receipts, chits, or credit card invoices with his handwriting on them to indicate how he was allocating business versus personal expenses.

The Respondent did not provide any evidence about how his use of Capilano and Hollyburn were business-related. Rather, his evidence was that he enjoyed golf and had previously been a member of Seymour Golf Club and ultimately made the switch to Capilano. His discovery evidence, read in at trial, revealed that if he discussed work while golfing, he would typically write it off as a business expense. Again, no chits or receipts were provided to determine what the actual process might look like, and who the Respondent might be golfing with such that he considered it a business expense.

- [65] With respect to vehicle expenses, Mr. Buckley testified that 90% of the respondent's vehicle expenses (and not 100%) were deducted for accounting purposes. As noted, with respect to meals and entertainment expenses, the respondent would designate such expenses as either business or personal.
- [66] As a general observation, it is not surprising that the percentage of both vehicle expenses and meals and entertainment expenses incurred for business purposes, would be much higher than those of say, a medical doctor, who practices through a medical services corporation: *Wiebe v. Treissman*, 2017 BCSC 1523.

- [67] Under the ITA, no deduction in respect of an outlay or expense may be made in computing income from a business "except to the extent that it was made or incurred by the taxpayer for the purpose of gaining or producing income from the business": ITA, s. 18(1)(a). Further, as a general limitation, a deduction is only allowed "to the extent that the outlay was reasonable in the circumstances": ITA, s. 67(1).
- [68] With respect to meal and entertainment expenses and vehicle expenses, the ITA limits the amount or the percentage that may be deducted. For meals and entertainment, only 50% of such an expense may be deducted in computing taxable income even though the expense may be made or incurred for the purpose of gaining or producing income: ITA, s. 67.1(1).
- [69] In the case at bar, there were the necessary receipts (or statements) with a method, (acceptable to Mr. Buckley), by which the respondent contemporaneously classified an expense as a business or personal expense (subject to any further comment by Mr. Buckley). Ms. Reichgeld testified that it is not unusual for the principal of a business to mark on a chit or credit card statement the purpose of a particular expense.
- [70] It was not put to the respondent that he improperly certified the relevant tax returns or claimed expenses that he did not believe were made for the purpose of gaining or producing income. Tax evasion is a serious allegation which goes to both an individual's personal reputation and business reputation. Any such assertion should have been squarely put to the respondent in order to maintain such an assertion.
- [71] The ITA limitations should also not be allowed to distort the calculation of available income. For example, it may be reasonable to deduct a \$50 meal as a business expense for accounting purposes but under the ITA, only \$25 may be deducted in computing taxable income. With such said, the currently available income is, nevertheless, \$50 less and not \$25 less than it would have been. The \$25 non-deductible portion (for tax purposes) of the \$50 should also be deducted in computing currently available income in order to calculate properly the currently available income. Section 19(2) of the FCSG is not engaged.
- [72] An example of an unreasonable deduction would be where the ITA allows a 100% capital cost allowance for, say, a new computer, which under depreciation rules for accounting purposes would be written-off over a four-year depreciable life. In other words, the fact that the ITA permits a deduction which is not represented by economic reality will not make an unreasonable deduction reasonable.
- [73] I have considered that the respondent, in his January 22, 2018 affidavit, estimated \$50,000 in personal benefits as a "guess" and in his April 4, 2019 affidavit (Form 8 Financial Statement), estimated a personal \$25,000 benefit dividend from corporate expenses.

- [74] In cross-examination, the respondent testified that he relied on Mr. Buckley with respect to allocation of personal expenses. As noted, there was a procedure by which the respondent would record an expense as corporate or personal. These would then be provided to the external bookkeeper for Opco (and Holdco) and then further reviewed and spot-checked by Mr. Buckley.
- [75] Again, it was not put to the respondent that he was attempting to evade tax. I find that the add-back of \$50,000 or \$25,000 is not justified. I am not satisfied that the procedure employed resulted in personal expenses being claimed as business expenses for either accounting or tax purposes.
- [76] I will not make any add-back for the purposes of computing currently available income.
- [77] In order to determine the claimant's currently available income, the claimant's Line 150 income will be used.
- [78] The requisite information to determine the parties' respective Guideline Incomes will follow the approach respondent's counsel set forth in a draft order provided as part of the respondent's closing argument. I have considered respondent's counsel's approach and find it to be appropriate other than I have changed the exchange of information date from April 30 to May 31 for each year and for certainty would add language to ensure that the appropriate information and calculations related to Holdco or any other corporation that the respondent controls (in addition to Opco) are included. The relevant provisions of the draft order read:
43. Not later than [May 31] in each year commencing in 2020, the parties shall exchange, through their respective accountants, their Income Information as defined below and the Respondent shall provide to the Claimant, through his accountant, a calculation of his Available Income as calculated below.
44. The Claimant's Income Information shall include:
- a. Her T-1 personal income tax return for the prior taxation year;
 - b. If the Claimant controls a corporation, the financial statements and corporate tax return for any such corporation for the prior fiscal year.
45. The Respondent's Income Information shall include:
- a. His personal income tax return for the prior taxation year;
 - b. The financial statements and corporate income tax return for [Opco] for the prior fiscal year; and
 - c. The amount of salary paid to any non-arm's length person by [Opco] in the prior fiscal year.
46. The Respondent's Available Income shall be the sum of:

- a. The pre-tax income of [Opco] in the prior fiscal year;
 - b. The management salary paid by [Opco] to the Respondent in the prior fiscal year; and
 - c. Any salary paid by [Opco] to any non-arm's length person in the prior fiscal year.
47. The Claimant's Available Income shall be her Line 150 Total Income for the prior taxation year, adjusted in accordance with Schedule III of the Child Support Guidelines, less the spousal support paid to her by the Respondent.
- [79] There will be an automatic annual adjustment to child support and spousal support on July 1 of each year using the respondent's available income from the prior fiscal year (August 31) of Opco (Holdco or other controlled corporation) and the claimant's Line 150 income for the past taxation year (December 31). As discussed later below, the low-range figure provided under the Spousal Support Advisory Guidelines [SSAG] will be used and adjusted for the number of children of the marriage. Further, I have set forth events or circumstances where either party may request a review.
- [80] For the current year, if the available income is less than \$580,000 the figure of \$580,000 will still be used. The \$580,000 was derived from for the seven-month period ending March 31, 2019. The trial was in May and June 2019. By June 2019, I am satisfied that the respondent would have had greater financial visibility as to the projected available income and the claimant may have budgeted her finances on the \$580,000 figure.
- [81] In sum, the respondent's available income for 2020 will be the currently available income calculated based on the actual (not projected) figures for August 31, 2019 but in any event not less than \$580,000. For subsequent years, the respondent's available income will be based on the actual figures for the prior fiscal year of Opco (Holdco).
5. spousal support
- [82] The claimant is entitled to spousal support on both a compensatory and non-compensatory basis: *Chutter v. Chutter*, 2008 BCCA 507, paras 50-61.
- [83] The respondent concedes that the claimant is entitled to spousal support and that, at this time, its duration should not be fixed. At this time, the respondent does not seek that income be imputed to the claimant.
- [84] Claimant's counsel asked that I find that the claimant (and C1 and C2) was devastated by the parties' separation. While I find that the claimant (and C1 and C2) was shocked, surprised, and undoubtedly hurt by the separation, I do not find the shock, surprise, and hurt would serve to prolong or aggravate the need for spousal support: *FLA*, s. 166. There was little evidence provided to support the finding the claimant seeks.
- [85] As noted, a financially prudent couple would adjust to the new economic reality by budgeting according to the currently available income (\$580,000).

- [86] As discussed below under child support, the respondent's estimate of s. 7 special expenses is approximately \$72,000 per year. With C1 in his second year of university and C2 at Collingwood in Grade 12, the s. 7 special expenses were not changed by C1 turning 19 years of age this past December. As discussed in detail further below, under the FCSG, child support would decrease from approximately \$7,200 per month to approximately \$4,700 per month with C1 turning 19 years of age.
- [87] Respondent's counsel submitted that starting January 1, 2020, the respondent should pay \$12,000 per month in spousal support (approximately \$500 below the SSAG low range) subject to the further annual adjustment using the SSAG low range following the exchange of the requisite tax information. Respondent's counsel argued that the net disposable income would be roughly equal for the parties. I agree with this approach and will adopt it other than I will order that the greater of \$12,500 per month and the low-range SSAG monthly amount will be used for 2020.
- [88] For the period from July 1, 2019 to December 31, 2019, I find that the monthly spousal support should be at \$10,000. The \$10,000 figure recognizes that the respondent for these months is required to pay greater child support of approximately \$2,500 (\$7,200 - \$4,700) while at the same time having a lower monthly amount of net disposable income.
- [89] I will also order that either party may apply for a review (see *Jendruck v. Jendruck*, 2014 BCCA 320 at paras. 30 to 33) after May 31 and before July 1 of the year following the year in which any of the following occurs:
- a) the respondent's available income is \$350,000 or less;
 - b) the respondent's available income is \$1,000,000 or greater;
 - c) C1 and C2 are each no longer a child of the marriage;
 - d) the claimant turns 65 years of age; and
 - e) the respondent turns 65 years of age.
- [90] Where applicable, the review will include child support.
6. child support and "S. 7 Special expenses"
- [91] The engaged provisions of the FCSG are ss. 3(1), 3(2), 7(1), 7(1.1), and 7(2), which read:
- Presumptive rule
- 3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

- (b) the amount, if any, determined under section 7.

Child the age of majority or over

- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Special or extraordinary expenses

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

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

Definition of "extraordinary expenses"

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

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

- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
- (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
- (ii) the nature and number of the educational programs and extracurricular activities,
- (iii) any special needs and talents of the child or children,
- (iv) the overall cost of the programs and activities, and
- (v) any other similar factor that the court considers relevant.

Sharing of expense

- (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[Emphasis added.]

[92] The claimant seeks s. 7 special expenses in proportion to the parties' respective available incomes. The claimant identifies the following types of expenses as s. 7 special expenses:

- a. Copeman clinic fees in respect of counselling for the children;
- b. Medical, dental, orthodontic, counseling and any other necessary, health-related expenses, net of coverage;
- c. Collingwood tuition and trip fees whether for academic trips or sports-related trips;
- d. Hollyburn fees;
- e. C1 and C2's vehicle expenses;
- f. Tutoring; and
- g. Post-secondary expenses including tuition, fees, books, rent, living expenses, and flights for the children's first undergraduate degrees.

[93] The respondent's draft order sets forth the respondent's proposed treatment of child support and s. 7 special expenses. With my change of the adjustment date from June 1 to July 1 of each year, the relevant paragraphs read:

- 11. Commencing [July 1, 2019] and continuing until December 31, 2020, the Respondent will pay child support to the Claimant of \$7,233 per month for the Children, being the Guideline Table Amount for 2 Children based on a Guideline Income of \$580,000.

12. Commencing on January 1, 2020 and continuing until the adjustment required by paragraph [45 or 48, which ever method is adopted] is effected, the Respondent will pay child support to the Claimant of \$4,710 per month, being the Guideline Table Amount for 1 Child based on a Guideline Income of \$580,000.
13. Commencing January 1, 2020, the Respondent shall not pay child support for to the Claimant for [C1], but [C1's] requirements shall be met as special or extraordinary expenses under s. 7 of the Guidelines as provided for herein.
14. Commencing July 1, 2019, the parties will be responsible for the Children's special or extraordinary expenses under s. 7 of the Guidelines in the following proportions:

The Claimant 25%

The Respondent 75%

15. The Children's special or extraordinary expenses under s. 7 of the Guidelines are the following, provided that such expenses have been approved in advance by both parties:
 - a. the Children's portion of membership fees at Copeman Health Care Clinic;
 - b. medical and dental expenses not covered by health care plans or already included in the Copeman fees
 - c. [C2's] tuition at Collingwood School;
 - d. Tutoring;
 - e. Post-secondary educational tuition fees and books, in pursuance of a first post-secondary degree;
 - f. such other expenses as the Claimant and Respondent may agree in writing, or the court may order.
 16. For any Child that attains the age of 19 that is living away from home while attending post-secondary studies, the special expenses described in sub-paragraph 15(e) hereof shall be expanded to include:
 - a. Residence and meal plan, or if the child is living off-campus, rental expense and groceries; and
 - b. Return air travel to and from university and home, for not more than four trips per year.
- [94] As with spousal support, I will order that the available income used for August 31, 2019 will, in any event, not be less than \$580,000.
- [95] The respondent estimates the current s. 7 special expenses to be:
- a) Collingwood tuition:

\$25,000

b) University for C1:

\$30,000

c) Tutoring:

\$12,000

d) Copeman Clinic:

\$5,000

\$72,000

[96] The main differences between the parties relate to whether the Hollyburn charges, trip fees related to the Collingwood, and vehicle expenses for the two boys, should be considered as s. 7 special expenses. The formula for the sharing of s. 7 special expenses is also in dispute. The claimant says the sharing should be based on the parties' respective incomes. The respondent says that s. 7 special expenses should be split 75/25 in the claimant's favour.

[97] The fact that C1 reached the age of majority this past December also gives rise as to the applicable provision under the FCSG.

[98] With respect to the applicable FCSG provision of an adult child attending a post-secondary institution, in *W.P.N. v. B.J.N.*, 2005 BCCA 7, Justice Levine, writing for our Court of Appeal, stated:

[42] In my opinion, in principle, support for an adult child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b). The "table amount", as noted by Martinson J. in *Wesemann* [*v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.)], contemplates a contribution by the non-custodial parent to the expenses borne by the custodial parent in providing a home for the child. The fact that the "table amount" increases incrementally and not absolutely for additional children supports that interpretation of the intention of the Guidelines. The "table amount" does not contemplate a child's contribution, which is an important factor in considering the amount of support a student requires.

[99] In the case at bar, I see no reason to depart from the general principle that, where a child of the marriage is of the age of majority and is living away from home attending a post-secondary institution, child support should be determined under s. 3(2)(b) of the FCSG. Accordingly, I adopt the relevant provisions of the respondent's proposed draft order with respect to a child of the marriage who is of the age of majority and is living away from home attending a post-secondary institution. C1 is also capable of contributing to his education and living costs.

- [100] In her written submission, the claimant submits with respect to the Hollyburn charges and the vehicle expenses:
39. In respect of the Hollyburn fees, the parties and their children became members of club during their relationship and this was an expense that the family agreed to incur. There is no reason that should not continue post-separation as a section 7 expense.
40. In respect of the Children's vehicle, the evidence is that the parties had discussed and agreed to obtain a vehicle for [C1]. The Respondent ultimately decided on the timing of obtaining the vehicle, taking the Children to pick it out the day after the parties announced their separation. The vehicle is an Audi. Rather than leasing the vehicle as the parties did with all of their other vehicles, the Respondent financed it. He then stopped making the payments in early 2018, and the dealership threatened to repossess the car. The Claimant ultimately negotiated with the dealership and took over the payments to prevent the vehicle from being repossessed. Given the parties' agreement during their relationship to incur this expense, there is no reason why that agreement could not continue post-separation as a section 7 expense.
- [101] With respect to the Hollyburn charges, the Collingwood trip fees, and vehicle expenses for C1 and C2, the claimant has not satisfied the Court as to the "necessity" of these expenses in relation to the best interests of either boy. Further, as noted, the current means of the parties do not readily support the funding of any of these expenses through ordered support payments.
- [102] With respect to the Audi, the car was purchased as a new car very shortly after the parties separated.
- [103] The respondent's failure to make the finance payments was the result of various financial institutions taking a restrictive interpretation of a consent order under which the parties agreed not to deal with assets in issue between them "except for the payment of ordinary living expenses and the legal fees of this litigation".
- [104] The monthly financing payment for the Audi is \$896.80.
- [105] The purchase of the Audi was improvident and was one of many expenses resulting in the parties living beyond their means. In her April 17, 2018 reasons addressing interim spousal support, Master Muir observed:
- [49] In the circumstances, I have concluded that I should make an order for interim spousal support and allow the parties to decide which expenses, other than those for the former family home, they will have to sacrifice in order for them to live in the reality of a reduced income and the increased expenses that separation brings.

- [106] Each party has a history of being generous to each of their children. If the claimant wishes to continue to fund the Audi financing payments, she may do so but may need to sacrifice in other areas. On June 6, 2018, the claimant entered into a financing agreement for the Audi. I cannot accept that financing payments on a luxury car is a necessary expense falling within s. 7 special expenses of the FCSG.
- [107] In my view, the best interests of each of C1 and C2 would be served by an honest discussion with each of them as to the "reality of a reduced income", even though \$580,000 in available income is a significant income by any standard. The new reality reflects the currently soured real estate market.
- [108] Section 7 special expenses will be shared 75/25 in the claimant's favour.
7. retroactive spousal support, child support, and s. 7 special expenses
- [109] The claimant also sought retroactive spousal support and child support of \$29,008 and retroactive s. 7 special expenses of \$18,686.
- [110] The retroactive spousal support and child support arise from the claimant's assertion that the respondent has greater available income based on the sought add-backs to the respondent's income. As noted, the asserted add-backs are not justified. Accordingly, there is no basis for retroactive child support or spousal support.
- [111] With respect to retroactive s. 7 special expenses of \$18,686, the claimant provided a schedule of the expenses she viewed as s. 7 special expenses for the months of April 2018 to May 2019 (inclusive). Based on the respondent being responsible for 72.75% of s. 7 expenses (in accordance with Master Muir's April 17, 2018 Order), the claimant calculated the respondent's share to be \$48,686.71, of which the respondent had paid \$30,000 on account, resulting in a balance of \$18,686.71.
- [112] A significant portion of the total expenses the claimant viewed as s. 7 special expenses related to Hollyburn charges (including a personal exercise program of \$52.50 per session) and the Audi.
- [113] The total Hollyburn charges and expenses and Audi expenses of which the claimant asks the respondent to share as s. 7 special expenses over this 13-month period were \$5,042.78 and \$8,936.96 respectively.
- [114] As noted, I do not see the "necessity" of either the Hollyburn charges or the Audi expenses.
- [115] During the period of April 2018 to May 2019, in relation to his actual available income, the respondent also overpaid significantly child support and spousal support. The interim child support and spousal support paid during that period was based on the respondent having an annual income of \$1,010,914. The respondent's actual available income for fiscal year 2018 was \$646,615 and \$580,000 (projected) for fiscal year 2019.
- [116] I will not make a retroactive award regarding s. 7 special expenses.

8. exercise of significant parenting decisions

[117] The parties agree that each of them should be C2's guardian and the primary residence of C2 should be at the claimant's residence (when not attending a post-secondary institution). C1 is now of the age of majority.

[118] With respect to parenting responsibilities (s. 41 of the FLA), the claimant wishes to be able to make the final decision in the event the parties are unable to agree.

[119] The legislative presumption is that parenting responsibilities are shared: FLA, ss. 41 to 43.

[120] For the most part, the claimant and respondent have agreed on any significant decision involving either boy. Also, having regard to the age of C2 and the fact that he is readily capable of expressing his views to the parties, in the event the parties are unable to agree, they will be liberty to apply to court.

[121] I will also order that neither party will cause a significant expense to be incurred (\$500 or greater) without the prior consent of the other where the party wishes to be reimbursed in part or in full for the expense by the other party.

9. counselling

[122] The respondent also seeks an order requiring C2 to attend counselling for the purpose of restoring the relationship between the respondent and C2. Each boy has been meeting with a counsellor.

[123] It is not disputed that prior to the parties' separation, the respondent and each boy enjoyed a warm, loving, and close relationship. Since separation, the relationship the respondent had with each boy has suffered significantly.

[124] The claimant recognizes that it is in the best interests of each boy that the relationship each boy had with their father be restored.

[125] I will not order that C2 attend counselling (as noted, C1 is now 19). C2 is old enough to decide on his own. I understand that the claimant has and will continue to encourage each boy to attend counselling with the goal of restoring each boy's relationship with their father.

10. critical illness - \$500,000 payout

[126] In 2005, the respondent purchased critical illness recovery insurance.

[127] The policy was issued in the respondent's name. The respondent testified that he paid the premiums for the policy. The respondent's payment of premiums was consistent with the policy being in his name. The policy was never assigned to either Opco or Holdco.

[128] In 2014, the respondent suffered a critical illness. He subsequently recovered to the extent possible.

- [129] As noted, the respondent made a claim under the critical illness policy. His claim was denied. After retaining counsel, the respondent's claim was settled for \$500,000 and this amount was paid to him in August 2016.
- [130] Shortly after the respondent received the \$500,000, the respondent advanced those funds to Holdco. In September 2016, these funds were used to help fund, along with an approximately \$1,100,000 mortgage, the purchase of a property by Holdco in Whistler (the "Whistler Property").
- [131] The parties and their boys subsequently used the Whistler Property as a recreational vacation property. The respondent paid Holdco \$5,000 per month for the use of the Whistler Property.
- [132] In February 2019, Holdco sold the Whistler Property.
- [133] The respondent submits that the \$500,000 is excluded property and therefore should not be divided between the parties.
- [134] The claimant submits that the funds do not fall within the definition of excluded property and therefore should be divided equally. In the alternative, the claimant submits that, even if the \$500,000 was excluded property at the time the respondent received the funds, the respondent used those funds to purchase the family's recreational property and clearly intended to use the funds for a family purpose.
- [135] Excluded property is set out at s. 85 of the FLA. The relevant portion is as follows:
- 85 (1) The following is excluded from family property:
- (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- [136] Section 85(2) provides that the party claiming that the property is excluded is responsible for demonstrating that the property is excluded property.
- [137] In *Shih v. Shih*, 2017 BCCA 37 at para. 42, our Court of Appeal set out the test for establishing a claim to excluded property under s. 85. Justice Kirkpatrick stated:
- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.

- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [138] Although excluded property includes property derived from excluded property, it may become family property in various circumstances. In *Venables v. Venables*, 2019 BCCA 281, our Court of Appeal summarized the relevant law as follows:
- [95] What emerges from these authorities, of relevance to the current appeal, is the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement it is to remain excluded property, then it will become family property: *V.J.F.* at paras. 74-79; *Namdarpour [v. Vahman]*, 2019 BCCA 153] at para. 46.
- [139] In other words, the question becomes whether the respondent intended for the property to become family property in the circumstances.
- [140] I find that in first instance, under s. 85(1)(d) of the FLA, the \$500,000 critical illness insurance proceeds constituted "excluded property". The language of the policy is clear that the policy was not with respect to property and was not to compensate for "loss to both spouses" or "lost income of a spouse".
- [141] However, I am satisfied that the respondent intended for the property to become family property when he transferred the critical illness insurance proceeds of \$500,000 to Holdco and Holdco then used the funds to help fund the purchase of the Whistler Property.
- [142] As of the date of separation, the Whistler Property was owned by Holdco with the claimant and the respondent each having a 50% participating equity interest in the share capital of Holdco. The shareholdings in the capital of Holdco with Opco as a wholly-owned subsidiary is a typical corporate structure for many families through which income is earned or investments are made.
- [143] The respondent did not state or document an intention to keep the funds separate when he received the critical illness settlement funds, when he subsequently advanced the funds to Holdco, or when Holdco purchased the Whistler Property.

[144] I find that the respondent intended the \$500,000 critical illness insurance proceeds to become part of the "communal pot" of family property: *Pisarski v. Piesik*, 2019 BCCA 129. The respondent has not satisfied his onus to demonstrate the \$500,000 critical illness insurance proceeds were excluded property as of the date of separation: FLA, s. 85(2); *Pisarski*, para. 24.

[145] In sum, the \$500,000 critical illness insurance proceeds is not excluded property and will, accordingly, be divided as family property.

11. property division

[146] The parties have held assets personally and also, at least notionally, through Holdco (and U.S. Co.). Two of the current such investments are the "Squamish LP" and the "Elizabeth LP" which I will describe later below.

[147] The Whistler Property and an investment property known as "Bellevue" were owned by Holdco as of the date of the parties' separation and have subsequently been sold. In addition, there was a savings account with Canadian Imperial Bank of Commerce ("CIBC") and a Canaccord Investment account owned by Holdco.

[148] The net proceeds from the sale of the Whistler Property, the majority of the net proceeds from the sale of Bellevue, and the funds from the Canaccord account have been distributed to the parties. The CIBC savings account has also been distributed to the respondent.

[149] In total from Holdco, approximately \$1,245,000 has been distributed to the claimant and approximately \$1,785,000 has been distributed to the respondent.

[150] The respondent has subsequently advanced sums approximately equal to the distribution into Holdco by either using savings or portions of the distribution he received. The claimant has not advanced sums to Holdco. As a result, there is significant tax liability associated with the distributions to the claimant that will need to be addressed. Ms. Reichgeld estimated the tax liability to be approximately \$388,000.

[151] The parties have also divided a Royal Bank of Canada U.S. dollar account held personally and the net proceeds from the sale of their Roseberry residence (owned personally). In this regard, the approximate total amount the parties each received was \$370,000.

[152] The parties are presumptively entitled to a one-half interest in all family property and similarly responsible for all family debt: FLA, s. 81(a) and (b).

[153] Generally, family property is to be valued as of the date of trial based on its fair market value: FLA, s. 87.

[154] The claimant argues that the greater distribution of approximately \$540,000 (\$1,785,000 - \$1,245,000) to the respondent than to the claimant represents significant unfairness warranting an unequal division of family property in her favour: FLA, s. 95; *Kumagi v. Campbell Estate*, 2018 BCCA 24, para. 83-84.

- [155] I am satisfied that the respondent had to advance a significant portion of the distributions he received to Holdco in order to fund Holdco and Opco's operations.
- [156] With hindsight, it is also apparent that the spousal support and child support the respondent has paid significantly exceeded what he would have paid on his actual available income. Mr. Daykin, Q.C. estimated the overpayment to be \$199,962 (before a discount for the corresponding tax deduction). I have reviewed Mr. Daykin, Q.C.'s calculation and adopted it as a reasonable "ballpark" estimate.
- [157] Finally, neither party made a concerted effort to curtail their personal expenditures having regard to "the reality of a reduced income and the increased expenses that separation brings", as Master Muir observed.
- [158] In sum, I do not find significant unfairness arising from the distributions to the parties and, accordingly, will not depart from an equal division of family property and family debt.
- [159] The parties agree with respect to the division of certain of the family properties, including:
- a) the Westmount Road home will be listed for sale late this Spring (in order that C2's Grade 12 year is not disrupted);
 - b) the Registered Retirement Savings Plan accounts each of the parties hold will be equalized by way of a spousal rollover;
 - c) each party will keep their respective Tax-Free Savings Accounts (the respective balances are close to equal); and
 - d) a personally held investment "At Nature's Door" will be sold with the net proceeds divided equally.
- [160] In broad terms, I will be ordering that the claimant transfer her shares in the capital of Holdco to the respondent using a spousal rollover. After dividing the remaining properties (other than three), there will be a balance owing by the respondent to the claimant of \$16,151. This adjustment will be funded from the respondent's share of the net proceeds from the sale of the Westmount Road home. The Westmount Road home had, at the time of trial, a value of approximately \$5,250,000 with an approximately \$665,000 mortgage. As further described below, there are three further properties which will be sold and when sold, I have addressed the division of proceeds.
- [161] I reject the possible use of a "butterfly" transaction because of the complexity involved and the real possibility for creating conflict.
- [162] I will also order that, in addressing the tax liability in relation to the claimant's distributions from Holdco that, where possible, favourable tax accounts (such as the capital dividend account) will be used to her maximum advantage.

- [163] Finally, before considering the division of family property and family debt, three items must be addressed. First, as noted, I have found the \$500,000 in critical illness insurance proceeds to be family property which were invested through Holdco for the indirect benefit of each party (to help fund Holdco's acquisition of the Whistler Property). To the extent that one-half of the \$500,000 is distributed to the claimant from Holdco, tax may be exigible. The critical illness insurance proceeds will be part of the computation of the appropriate division.
- [164] Second, the respondent argues that his Capilano membership should not be considered because its fair market value is nil. He paid \$95,000 to join Capilano. The respondent submits that because the membership is not transferrable or subject to a refund (in whole or in part), its fair market value is nil.
- [165] With respect, I reject the respondent's submission. It would go against the purpose of the FLA if otherwise family property (say, \$95,000) would not be subject to division as family property as a result of a purchase of a non-transferrable membership. The fact remains that a person wishing to join Capilano would need to pay \$95,000. Accordingly, in my computations of the appropriate division of family property and debt, I will use the \$95,000 figure.
- [166] Third, the claimant asks that a life insurance policy held by the respondent with the respondent as the insured should be used to secure the respondent's spousal support, child support, and s. 7 special expenses calculations. The life insurance is with Empire Life and is for \$4,000,000 and has a current cash surrender value of approximately \$114,000. The respondent agrees that the Empire Life insurance policy may be used as security. The respondent however, argues that the claimant should not share in the cash surrender value (50% of \$114,000 or \$57,000) because the Empire Life insurance policy will be used as security for the support payments with the respondent making all of the requisite payments under the policy.
- [167] As noted, the total amount of insurance policy under the Empire Life is \$4,000,000. The claimant says that she is not asking the respondent to maintain the cash surrender value of the policy but only the life insurance portion of the policy.
- [168] I will divide the cash surrender value as the claimant seeks. The policy was acquired before separation and, accordingly, is family property. If the parties had remained happily married and the respondent predeceased the claimant, the claimant as the designated beneficiary would have received \$4,000,000. In the event the respondent now predeceases the claimant, the claimant may receive only that amount necessary to fund future spousal support, child support, and s. 7 special expenses which may be considerably less than \$4,000,000 depending on the then circumstances.

[169] As noted, several assets have already been divided equally between the parties or the parties have agreed to do so. The remaining assets (and liabilities) that must be addressed are:

Claimant - Personal

RBC account 9031

\$35,788.00

RBC account 0788

\$144,070.00

CIBC account 2319

\$1,171,837.00

Sub-total

\$1,351,695.00

Tax estimate

(\$388,131.46)

Adjusted total

\$963,563.54

Claimant - Holdco (Opco and US Co.)

Holdings Squamish pre-sale

If and when

Holdings Squamish LP

If and when

Holdings USA Elizabeth LP

If and when

Adjusted total

(TBD)

Claimant's Total (to be adjusted)

\$963,583.54

Respondent - Personal

Motorcycle

\$11,000.00

RBC account 9049

\$15,223.00

Canaccord account 9MB-1

\$207,542.00

RBC Direct Investing 425-1-0

\$11,842.00

Ind All Life Insurance 2457

\$85,376.00

Empire Life Insurance

\$114,000.00

Capilano Golf

\$95,000.00

Scotiabank LOC 46-26

(\$264,687.00)

Sub-total

\$275,296.00

Tax estimate

(\$0.00)

Adjusted total

\$275,296.00

Respondent - Holdco (Opco + US Co)

Reality CIBC 1140

\$208,748.00

Realty Jarvis Canaccord

\$14,252.00

Realty artwork

\$23,265.00

Holdings LePoidevin Canaccord

\$179,432.00

Holdings Whistler proceeds, RBC 2

\$715,000.00

Holdings Canaccord 872A-1

\$19,892.00

Holdings Squamish pre-sale

If and when

Holdings Squamish LP

If and when

Holdings USA Elizabeth LP

If and when

Sub-total

\$1,160,589.00

Tax estimate

(\$440,000.00)

Adjusted Total

\$720,589.00

Respondent's Total (to be adjusted)

\$995,885.00

[170] With respect to the foregoing assets for division, several explanations are necessary.

[171] First, the Scotiabank line of credit in the respondent's name was used to fund Holdco's investment in the Performing Equity (Squamish) Limited Partnership ("Squamish LP"). Squamish LP is a limited partnership engaged in the construction and sale of a condominium project in Squamish. Holdco's cost of its limited partnership units was \$250,000.

[172] Holdco also separately placed an \$18,995 deposit for the purchase of one of the proposed Squamish LP condominium units. The project was set to complete this past August. At the time of trial, neither party had a reasonable sense as to the fair market value of Holdco's limited partnership interest nor the fair market value of the pre-sale contract.

- [173] Second, in a similar vein, U.S. Co. made an investment as a limited partner in a U.S. limited partnership, E.G. Elizabeth LP ("Elizabeth LP"), formed to develop and manage an apartment complex in Dallas, Texas.
- [174] At the time of trial, the cost to U.S. Co. of its Elizabeth LP investment was \$365,820. At trial, neither party had a reasonable sense as to the fair market value of this investment. There had been a recent cash call and several emails in evidence which reflected difficulties in either renting units or sustaining reasonable margins.
- [175] Third, the \$388,131 tax estimate relating to the claimant's \$1,351,695 was prepared by the respondent's counsel based on various assumptions and calculations by Ms. Reichgeld (which also had various assumptions). Chief among the assumptions is the balance of Holdco's capital dividend account and available eligible dividends.
- [176] The \$440,000 tax estimate for the respondent is my extrapolation from the tax estimate for the claimant.
- [177] In short, the tax calculations are generally illustrative only and can give no more than a ballpark sense of the potential associated tax.
- [178] In estimating the respondent's tax estimate, I have taken into account that he may not have the advantage of a positive balance in the capital dividend account or that the dividend may be an eligible dividend. That said, offsetting matters, the respondent may choose to retain the corporate assets without distributing all or any portion of them to himself for possibly many years.
- [179] Excluding Squamish LP, the pre-sale Squamish condominium, and the Elizabeth LP, I will order the respondent to pay the claimant to equalize \$16,151. $((\$995,885 - \$963,583) \div 2)$.
- [180] Upon the sale of the Squamish LP, the Squamish pre-sale condominium, or the Elizabeth LP, within 90 days, one-half of the net proceeds of the sale of the particular property will be paid to the claimant. To the extent the subject sale may give rise to an addition to Holdco's capital dividend account, such amount will be taken into account in the claimant's favour in a reasonable manner to increase the amount she is otherwise entitled to receive.
- [181] The foregoing is subject to either party making representations within 90 days of these reasons as to the necessary steps and filings that may be required to facilitate the property division having regard to commercial, corporate, and tax aspects.

12. SECURITY FOR CHILD SUPPORT AND SPOUSAL SUPPORT

- [182] As security for child support, spousal support, and s. 7 expenses, I have reviewed and will adopt the respondent's proposal in his draft order using the Empire Life policy except that the percentage will be 66 2/3% until C2's 23rd birthday and 33 1/3% after C2's 23rd birthday.

13. DIVORCE

[183] I am willing to order the sought divorce at this time. During legal argument, there was a comment that the timing of the divorce order may need to be postponed for tax reasons. I will be guided by the parties as to the timing of the divorce order. I will make the necessary order when I receive the divorce order for my approval.

[184] As is common practice, and my preferred practice in many cases, the divorce order may be separated from the other relief ordered.

14. other MATTERS

[185] Except for paragraphs 3 and 4 of the December 21, 2018 order made by Master Cameron, all previous interim orders are of no further force or effect.

[186] If there is any matter I have overlooked or I can otherwise assist the parties in, I ask counsel to schedule a 55 minute 9:00 a.m. hearing before me.

15. COSTS

[187] Within 60 days of these reasons, I ask that if either party wishes to address costs, to contact Scheduling to schedule a 55 minute 9:00 a.m. hearing before me.

"Funt J."

Schedule "A"

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