

CANADA / JUDGMENT

M.T. v. J.S.

2023 BCSC 604

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 604 M.T. v. J.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.T. v. J.S.,

2023 BCSC 604

Date: 20230417

Docket: E173352

Registry: Vancouver

Between:

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

Claimant

And

J.S., also known as J.W.S

and S.H. Ltd.

Respondents

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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P. M. Daykin, K.C.

Place and Date of Hearing:

Vancouver, B.C.

November 7, 2022

Place and Date of Written Submissions:

Vancouver, B.C.

February 16 and 22, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 17, 2023

INTRODUCTION

- [1] This is a high conflict family matter. In mid-2019, the parties proceeded to trial before Justice Funt to address many issues.
- [2] In February 2020, Funt J. issued reasons for judgement: *M.T. v. J.S.*, 2020 BCSC 203 [Trial Reasons] which resulted in a Final Order dated February 14, 2020. The Final Order included a number of orders regarding child support for the two remaining children of the marriage and also, spousal support in favour of the Claimant wife, M.T.
- [3] On August 10, 2022, the Claimant and the Respondent husband, J.S., filed cross-applications, seeking a variety of orders relating to ongoing and retroactive child and spousal support. At that time, the Claimant had appealed a number of issues in the Final Order relating to child and spousal support. When these cross-applications were heard, the appeal had been heard, but not decided.
- [4] On February 10, 2023, the appeal reasons were issued: *M.T. v. J.S.*, 2023 BCCA 64 [Appeal Reasons]. As was relevant to these applications, the court allowed the appeal to the extent of increasing the Respondent's 2019 Federal Child Support Guidelines, SOR/97-175 [Guidelines] income and slightly altered the basis for any review of the support ordered in the Final Order.
- [5] On February 14, 2023, this Court asked counsel whether the Appeal Reasons affected the issues before the Court and counsel provided further written submissions addressing that matter.
- [6] As such, the issues now to be decided are:
 - (a) the appropriateness of ongoing child support for the eldest son (C1);

- (b) the terms of child support for the younger son (C2) under the Guidelines; and
- (c) retroactive and prospective spousal support levels for the Claimant.

BACKGROUND FACTS

- [7] The parties had a 19-year relationship. At the time of the trial, the two remaining children of the marriage were the parties' sons, who I will refer to as C1 and C2, as Funt J. did in the Trial Reasons.
- [8] During their relationship, the parties established a very profitable business selling real estate, primarily in the West Vancouver market. In the Trial Reasons (paras. 9-10), the parties were described as working as a team, although the Respondent was the "face" of the enterprise, in that he was the person whose profile was marketed to attract business.
- [9] The parties were very successful in their business efforts. The companies they incorporated generated substantial incomes over their years of marriage. In addition, they amassed considerable assets. As a result, the family enjoyed a very affluent and luxurious lifestyle.
- [10] In November 2017, the parties separated. At the time of trial, the Claimant was 58 years old and the Respondent was 51 years old.
- [11] The Trial Reasons provided for an equal division of the family assets (para. 158). As a result of the asset division exercise, each party received a distribution of approximately \$3.8 million.
- [12] In the Trial Reasons, Funt J.'s observation about the parties' continuing high expenditures have some relevance on these applications:
- [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"
- [13] At the time of the trial, the Respondent was continuing with the real estate business that had been developed by the parties, albeit without the support of the Claimant. Also, by that time, the Claimant had taken steps to regain her status as a realtor: Trial Reasons at para. 28.

TRIAL REASONS / FINAL ORDER

- [14] The Trial Reasons, the Final Order and the Appeal Reasons, as they relate to the Respondent's Guidelines income and child and spousal support payable by him, are relevant here.

Respondent's Guidelines Income

- [15] The calculation of the Respondent's Guidelines income at trial proved to be an exercise involving considerable detail and complexity given the corporate structure of the parties' business operations: Trial Reasons at paras. 30-81.
- [16] In addition, the fluctuations in the real estate market were considered by the Court in assessing the Respondent's income. The Respondent sets out the net family income for the years leading up to the time of trial, as follows:
- 2014 - \$2,383,098;
- 2015 - \$1,854,543;
- 2016 - \$2,895,868;
- 2017 - \$965,262;
- 2018 - \$646,165.
- [17] By the time of trial in 2019, Funt J. noted that the Respondent's income had continued to drop: Trial Reasons at paras. 40, 46.
- [18] In the Final Order, Funt J. found the Claimant's Guidelines income to be zero.
- [19] In para. 34 of the Final Order, the Respondent's "Available Income" was to include the pre-tax income of "Opco", the name of a company used for the Respondent's real estate business, and management fees, salary or non-arms' length salaries paid by Opco. Funt J. found that the Respondent's 2019 income was no less than \$580,000, which was the Guidelines income to be used for the next year, with an annual adjustment to be made on July 1, 2020: Trial Reasons at para. 80.
- [20] On appeal, the court found that the Respondent's 2019 Guidelines income should have been higher, i.e. \$623,000, and also increased in later years to account for the payment of certain personal expenses: Appeal Reasons at para. 17.
- [21] The ups and downs of the real estate market from 2019 to the present continue to factor into the parties' approach to the issue of the Respondent's Guidelines income.
- [22] In the usual fashion, the Final Order provided for ongoing financial disclosure by the parties by May of the following year and, based on any changes in income levels, an automatic adjustment of Guidelines incomes commencing in July of that year:
36. Commencing on July 1 of each year commencing in 2020, the amount of child and spousal support payable by the Respondent to the Claimant shall be adjusted so that:

- a. The amount of child support payable by the Respondent to the Claimant conforms to the Guideline amount for the number of children for whom base child support is payable pursuant to this Order, applying the Respondent's Available Income for the prior fiscal year; and
- b. The amount of spousal support payable by the Respondent to the Claimant will be the low-range figure set out in the formula provided by the Spousal Support Advisory Guidelines, applying the Claimant's Available Income and the Respondent's Available Income respectively, and taking into account each party's proportionate responsibility for s. 7 expenses.

Child Support

- [23] At the time of the trial, C1 was 19 years of age and attending Western University (the "University") where he had completed his first year of studies.
- [24] In the Final Order, Funt J. provided that the respondent would pay ordinary child support for C1 only until December 2019 (paras. 9-10). In the Trial Reasons at para. 99, Funt J. reasoned that it was appropriate to stop regular child support after that date since C1 was of the age of majority and living away from home attending the University and capable of contributing to his education and living costs. The Final Order (para. 11) did require that the Respondent continue to contribute to s. 7 expenses for C1 based on a 75/25 sharing in the Claimant's favour.
- [25] On appeal, the Claimant sought an order that the Respondent pay regular child support for C1 during the summer months when he was home from the University and living with her in West Vancouver. She also sought a reduced amount even while C1 was away at University to assist her in maintaining a home for him. These arguments were rejected and the court did not disturb the child support payable for C1 in accordance with the Final Order: Appeal Reasons at paras. 33-37.
- [26] With respect to C2, the Final Order required the Respondent to pay ordinary child support for him, along with certain special expenses (paras. 10, 12).
- [27] At para. 13 of the Final Order, Funt J. specified the special or extraordinary expenses that were to be shared, including certain medical expenses, tutoring, post-secondary tuition fees and books for a "first degree" and other expenses as may be agreed. In addition, at para. 14 of the Final Order, Funt J. ordered that, if the child was over 19 and living away from home while attending post-secondary studies, the special expenses would include a residence and meal plan or, if the child was living off-campus, rental expenses and groceries, and in either scenario, air travel to and from home for not more than four trips per year.

Spousal Support

- [28] Funt J. addressed spousal support at paras. 82-90 of the Trial Reasons. He found that the Claimant was entitled to support on both a compensatory and non-compensatory basis and on an indeterminate basis.
- [29] Based on the Respondent's 2019 Guidelines income of \$580,000, he ordered a monthly support amount of \$10,000 to December 2019, recognizing the continuing payment of monthly child support for C1 during that time (Final Order, para. 27). Commencing January 2020 and until the date of the next adjustment in July 2020, the Respondent was ordered to pay spousal support of the greater of \$12,500 or the low-range of the Spousal Support Advisory Guidelines [SSAG] (Trial Reasons, para. 87), although para. 28 of the Final Order specified \$12,500 per month, presumably being greater than the low-range of the SSAG at the time the order was made.
- [30] On appeal, the Claimant argued that Funt J. should have ordered spousal support at the high-end of the SSAG. In the result, the court considered that Funt J. was well aware of the nature and strength of the Claimant's claim for support and found no reason to question the discretionary decision of Funt J. as to whether to use the SSAG ranges in the Respondent's case and what point on the range was chosen: Appeal Reasons at paras. 23-27. At para. 24, the court noted that Funt J. had:
- adopted the low end of the range in part because he viewed it as roughly equalizing the means available to each household, but the support ordered was not a 50/50 allocation.
- [31] At para. 89 of the Trial Reasons, Funt J. also ordered that any party may seek a review of spousal support payable by the Respondent in certain circumstances.
- [32] This review provision in the Final Order at para. 37 was also challenged by the Claimant on appeal. The court agreed that some adjustments to the review provision were required, stating:
- [43] In the present case, the judge was faced with a case in which:
- a) the respondent's income was highly variable and uncertain;
 - b) the children were nearing the age of majority;
 - c) the pre-trial litigation had been acrimonious and expensive; and
 - d) he was being asked by counsel to make orders that would reduce further conflict.
- [44] Because the respondent's income had fluctuated widely in the past, it could be argued on an application to vary that those fluctuations were in the contemplation of the parties at the time the order was made. That could work to the disadvantage of either party--the low end of the SSAG range could well be inappropriate if the respondent's income fell below \$350,000, leaving the appellant with too little, and could be too high, arguably, if the respondent's income greatly exceeded \$1 million. In these circumstances, it does not seem

to me that the review provisions were unreasonable.

[45] Having said that, I agree with the appellant that the age of 65 is not a valid proxy for retirement for these parties. I also agree that future reviews should be limited to quantum only. The appellant has already proved entitlement to compensatory and non-compensatory support, and the judge has determined that duration of support should be indefinite. That is not to say that an application to vary may not be made in future if there is a change in circumstances, but it does mean that the scope of a review is limited to quantum.

[Underline emphasis added, italics in original.]

[33] Accordingly, the Appeal Reasons at para. 46 stated that the review provision in para. 37 of the Final Order, as amended, now provides:

Each year following the exchange of income information on May 31, provided application is made by July 1, either party may apply for a review of quantum of spousal support if any of the following has occurred in the prior year:

- 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; and
- d) either party retires.

POST-TRIAL ADJUSTMENTS

[34] In accordance with the Final Order, in May 2021, the parties exchanged financial information regarding their respective incomes and they then did the necessary calculations to adjust the Guidelines incomes pursuant to para. 36 of the Final Order.

[35] As a result, adjustments were made in July 2021, based on disclosed 2020 Guidelines incomes of \$416,667 for the Respondent and \$46,159 for the Claimant. It should be noted that the Respondent's income was based on the fiscal 2020 figures which ended in September 2020.

[36] This 2020 income adjustment was agreed to by the parties and memorialized in a Consent Order granted December 9, 2021 (the "2021 Order"), and resulted in a monthly child support payment of \$3,436 for C2 (plus s. 7 expenses) and spousal support of \$6,946 for the Claimant for the period from July 2021-June 2022. In addition, as a result of this continued downward trend in the Respondent's Guidelines income, the Claimant was required to repay \$41,328 to the Respondent representing an overpayment of child and spousal support amounts from July-December 2021.

[37] The next adjustment required under the Final Order gave rise to these cross-applications.

- [38] In May 2022, the parties exchanged their 2021 financial income information and documentation, for the purpose of calculating the required support from July 2022-June 2023. The parties agree that the Respondent's Available Income for 2021, as required under para. 34 of the Final Order, is \$2,075,286 (however, this amount was changed to \$2,135,944, as explained in para. 44 below).
- [39] This significant increase in the Respondent's income - from \$416,667 in 2020 to over \$2 million in fiscal 2021 - is not tied to any particular time frame or transactions. However, I find that the significant increase in business could only have occurred beginning in late 2020 owing to the upswing in the real estate market at that time, and is only now being reckoned with in the context of the parties' financial obligations that arise from the Final Order.
- [40] On June 22, 2022, the Respondent gave notice to the Claimant that he intended to seek a review of both child and spousal support pursuant to para. 37(b) of the Final Order; namely, that his right to seek a review was triggered by the fact that his Guidelines income was over \$1 million.
- [41] The parties then agreed on a timeline for the exchange of application materials. Despite their intention to have the matter heard in September 2022, no judge was available and the hearing was only scheduled some months later before me.
- [42] Pending a decision on these cross-applications, the parties agreed, on an interim and "without prejudice" basis, that the Respondent would increase the support payments payable to the Claimant. Commencing July 1, 2022, the Respondent:
- a) increased child support for C2 from \$3,436 per month (based on the s. 3(2)(a) Guidelines amount for an income of \$416,667) to \$7,986 per month (the s. 3(2)(a) Guidelines amount for an income of \$1 million); and
 - b) the Respondent increased spousal support for the Claimant from \$6,946 per month (based on the low-range of the SSAG applicable to an income of \$412,772) to \$22,419 per month (based on the low-range applicable to an income of \$1 million).

GUIDELINES INCOMES

- [43] The parties agree that the Claimant's 2021 Guidelines income is \$32,548.
- [44] The Claimant says that the Respondent's 2021 Guidelines income should be established at \$2,135,944 (originally \$2,075,286, as supported by the May 2022 disclosure, but increased in accordance with the Appeal Reasons). The Respondent does not dispute the calculation of his Available Income under the Final Order at this amount; however, the Respondent argues that a more nuanced assessment of his income and future prospects is appropriate, particularly in light of the review provision relating to spousal support.

- [45] The Respondent anticipates that his fiscal 2022 (ending August 31, 2022) income may not be as high as 2021, but will still be higher than the "down" years of 2019 (\$623,000) and 2020 (\$416,667). He also anticipates that his fiscal 2023 (commencing September 1, 2022) will be the beginning of a "down" real estate market.
- [46] As noted by both Funt J. and the Court of Appeal, the Respondent highlights the large variability of his income over the years, again arising from the vagaries of and changes in the real estate market. He summarizes his income over eight years (2014-2021) as follows: a three-year average of approximately \$975,000 (2019-2021); a five-year average of approximately \$850,000 (2017-2021); and an eight-year average of approximately \$1,380,000 (2014-2021).

CHILD SUPPORT

- [47] The issues affect both sons.
- [48] Since January 2020, the Respondent has been paying regular child support for C2 (again, \$3,436 to June 2022 and \$7,986 on an interim "without prejudice" basis thereafter).
- [49] In addition, since July 2019, the Respondent has been paying his share of special and extraordinary expenses for both children in accordance with paras. 12-14 of the Final Order and even beyond. He summarized his contributions in the latter respect as follows:
- a) The s. 7 expenses totalled \$192,936. Of this amount, the Respondent paid \$144,702.59, or 75% of the s. 7 expenses, as required under the Final Order (para. 12). Since both children were at the University, this included: tuition, the cost of their rental accommodation in London, Ontario (including at some points over the summer months); monthly cash allowances of \$1,200; airfare; tutoring and fraternity costs;
 - b) The entire amount of both children's cellular telephone bills, private health clinic fees and membership fees at Capilano golf club; and
 - c) All monthly payments required to pay off secondary credit cards for each child, said to typically average about \$800 per month on each card (C1 stopped using his card after January 2022).
- [50] It appears that, at the time of the trial, the Respondent's relationship with both children had deteriorated and he had little direct contact with them (Trial Reasons at para. 123). This situation unfortunately persists to this time. The Respondent describes that he last saw his sons in summer 2020, other than a chance and brief encounter with C2 in summer 2022.

C1

- [51] The Respondent seeks an order that, effective July 1, 2022, C1 is no longer a child of the marriage.

- [52] C1 was born in December 2000 and he is now 22 years old. At the time of these applications in August 2022, C1 had graduated from the University and he had obtained an unpaid internship at a commercial real estate company in Toronto, Ontario.
- [53] Section 2(1) of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 defines a "child of the marriage" in (b) as someone who, like C1, is over the age of majority and under the parents' charge, but who is also "unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life".
- [54] There is no doubt that pursuit of a post-secondary education can qualify as an "other cause", as discussed in *W.P.N. v. B.J.N.*, 2005 BCCA 7 [W.P.N.]. This authority was cited in the Trial Reasons at para. 98 and led Funt J. to conclude that further support for C1 was properly determined under s. 3(2)(b) of the Guidelines, and that his needs could be met by the Respondent's contribution to an expansive list of s. 7 expenses.
- [55] In *W.P.N.* at para. 38, Justice Levine reproduced the four-step test for determining the "appropriate" amount of child support under s. 3(2) of the Guidelines, as set out in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.). Step one was to ask if the child came within the definition of "child of the marriage" under the Divorce Act. If they did not, no further consideration need be made as to whether the table amount or another amount is appropriate under s. 3(2).
- [56] There is a presumption that, once a child reaches the age of majority, the child is no longer a child of the marriage, and the parent seeking support bears the burden of proving otherwise: *Forrest v. Aerin*, 2022 BCCA 184 at para. 100, citing *Dring v. Gheyle*, 2018 BCCA 435.
- [57] C1 is now both over the age of majority and is no longer seeking any further educational pursuits. Post August 2022, C1 was completing certain courses toward obtaining his real estate license. I am advised that, in October 2022, C1 completed his examinations and is now working full-time. The Respondent cited *Wence v. Wence*, 2015 BCSC 2616 at para. 78, where that child remained a child of the marriage even after completing his first degree, as he was unable to work due to health concerns. I agree that C1's situation is distinguishable.
- [58] The Claimant frames her request for a continuation of support for C1 as being necessary since C1's choice of employment is such that his remuneration is commission based and, at the time of the applications, he had no income. This is said to constitute an "other cause" to justify the continuation of the Respondent's obligation to contribute to some special expenses for him. The Claimant points to the fact that the parties similarly supported their other children while they were working to attain a measure of financial independence.
- [59] As the court stated in *Forrest* at para. 106:

The fact that an adult child is not pursuing his education does not, however, necessarily mean that he does not remain a child for the purpose of child support.

[60] The Claimant refers to *Forrest*, where the court discussed potential child support over a "transition" or "grace" period to allow a child, previously supported by their parents, to become financially independent. The court distinguished the facts in *Jackson v. Jackson*, 2021 ONSC 2614 where the consequences of the pandemic justified ongoing support for a short time. The court in *Forrest* stated:

[109] The decision in *Jackson* is distinguishable. In *Jackson*, the 21-year-old daughter was graduating from college at the end of June 2021, and the issue was whether or not there should be a transition period to become financially independent of her parents. On the facts of that case, the court ordered a three-month transition period in part because of the economic uncertainty caused by the pandemic. Notwithstanding the pandemic, it has long been accepted that courts may provide a grace period for children who have reached the age of majority and are not attending post-secondary education to make the transition to become financially independent of their parents: *Hartshorne* 2010 BCCA at para. 76.

[Emphasis added.]

[61] The Claimant argues that support for C1 is appropriate for a further short duration in order to provide their son with the financial resources to weather the period of time before his first sales commissions arrive. In the Claimant's financial statement dated August 26, 2022, she presented a budget of \$7,679 per month.

[62] Both parents wish C1 well on his road to a satisfying and remunerative career in real estate, essentially following in their footsteps. In my view, given the significant financial resources available particularly from the Respondent, I consider that it is appropriate to require ongoing child support in the form of s. 7 expenses to be payable by the Respondent during a transition period. I conclude that a further six month period, from July-December 2022, is reasonable in all the circumstances.

[63] However, I do not accept that the Claimant's proposed budget for C1 is reasonable. The proposed expenses include the Hollyburn Country Club membership, which is highly questionable given that the country club is in Vancouver and C1 lives in Toronto and, by all accounts, he means to settle there permanently. Travel and airfare costs of over \$1,200 per month are, in my view, excessive.

[64] In conclusion, I consider it reasonable to require the Respondent to continue to contribute to C1's special expenses from July-December 2022. Those expenses will include those that the Respondent was paying until earlier in 2022, being his share of C1's rent and a monthly cash allowance of \$1,200, and will also include the cost of the commercial real estate courses in the summer 2020 and the cost of the online counselling sessions between C1 and the Respondent over that time. The Respondent will also continue to pay all of C1's cellular phone charges and private health clinic fees over that time.

- [65] I agree with the Respondent that, if he chooses to further support his son beyond December 2022, or for other expenses, that will be his decision and not a requirement under a court order. In that regard, if any further support is to be discussed and agreed upon, the Respondent can engage directly with C1.

C2

- [66] C2 was born in August 2002. At the time of the trial, C2 was 16 years old and attending high school in West Vancouver. In June 2020, C2 completed high school.
- [67] C2 commenced studies at the University in fall 2020. Unfortunately, due to the pandemic, classes were held virtually and C2 remained in the Claimant's home. The Claimant describes that C2 struggled with this learning environment. In August 2022, C2 was 20 years old. At the time of these applications (in the 2022/2023 school year), C2 is in his third year at the University and he is living in off-campus rental accommodation, as the University has returned to in-person classes. However, the Claimant states that C2's struggles with the academic program have persisted and he is only taking three courses per semester since he has been put on academic probation.
- [68] The Respondent concedes that C2 remains a child of the marriage and should receive continuing support from him. However, the Respondent says that, effective July 1, 2022, payment of regular child support for C2 under s. 3(2)(a) of the Guidelines is inappropriate and that an approach under s. 3(2)(b) is in order. The Respondent says that the appropriate child support for C2 is the same as what Funt J. ordered for C1, namely only the payment of special and extraordinary expenses, in accordance with paras. 13-14 of the Final Order.
- [69] In support, the Respondent refers to the comments in the Appeal Reasons which upheld that approach:
- [34] The special expenses for C1 included \$30,000 for C1's educational and living expenses while at university. If the judge had ordered the respondent to pay the appellant base child support for C1 throughout the year, as well as his proportionate share of C1's living expenses at university under s. 7, the respondent would have been paying for the same thing twice.
- [70] Accordingly, the Respondent seeks to vary para. 1(a) of the 2021 Order and para. 36(a) of the Final Order so that support is payable by him for C2 in the same manner as it was payable for C1 while he was attending the University. In addition, the Respondent seeks an order that his contribution to C2's educational and living expenses in the future be paid directly to C2, or the University, rather than to the Claimant.
- [71] The Claimant seeks to continue the payment of regular monthly child support for C2, but that it be increased to reflect the Respondent's 2021 Available Income of \$2,135,944, retroactive to July 1, 2022. The table amount indicates a monthly payment of \$16,846. In addition, the Claimant seeks to continue the Respondent's contributions to the s. 7 expenses, in accordance with the Final Order.

- [72] In the alternative, the Claimant seeks support throughout the year with some form of "hybrid" order that would include reduced regular child support during the University months and/or full support only for the summer months. Essentially, she advances the same arguments on appeal as she did in relation to C1 (Appeal Reasons at para. 32), with the added proviso that the Respondent's financial ability to contribute to C2's child support is now substantially higher than before.
- [73] I agree that, although C2 was still in high school when the Final Order was pronounced, it was contemplated that C2 would follow in his brother's footsteps in pursuing a post-secondary education. In fact, para. 13 of the Final Order refers to various expenses (including post-secondary tuition and books) of the "Children". The Final Order similarly considered that C2 would attend post-secondary education away from home in para. 14, referring to "any Child".
- [74] In addition, I agree with the Respondent that there are sufficient material changes in circumstances relating to C2 that justify a revisiting of his child support obligations now, in accordance with s. 14 of the Guidelines. Those circumstances include those relating to C2 in that: in August 2021, C2 reached the age of majority; C2 has graduated from high school and is now undertaking his third year of post-secondary studies; and, C2 is living in Ontario during the school year. Further, there has of course been a significant change in the means of the Respondent in terms of his significant increase in income for 2021.
- [75] The first question is whether the table amount is inappropriate. In the Respondent's case, the table amount would result in a monthly support payment of \$16,846 from July 2022 based on his 2021 income.
- [76] The case law confirms that the choice between the table amount in s. 3(2)(a) or the needs and circumstance-based approach in s. 3(2)(b) is a matter of the Court's discretion. However, in the past, where there are adult children attending university, the court has generally found that the determination of child support ought to be undertaken under s. 3(2)(b) (W.P.N. at para. 42). This approach is evident in other authorities cited by the Respondent where the adult child was not only pursuing post-secondary education but also living away from home (Wesemann at paras. 30-31; McCabe v. McCabe, 2008 BCCA 187 at paras. 45-46; Schreiber v. Schreiber, 2013 BCSC 2509 at paras. 28-29; Vo v. Vo, 2015 BCSC 467 at paras. 163-164).
- [77] The Respondent also refers to the more recent formulation of the approach to the question under s. 3(2) in McClement v. McClement, 2017 BCCA 416:
- [12] In sum, the choice between the two sections is discretionary and determined by the particular circumstances of each case and there is no specific requirement formally to challenge relying on s. 3(2)(a) before a judge can consider whether it is inappropriate to apply that subsection rather than s. 3(2)(b) and or vice versa. The view taken by this Court is that the burden of proof rests with each party in the ordinary manner to persuade the court which of the two sections is the appropriate one to apply in the particular circumstances

before the court. There are of course factors that tend to support the appropriateness of relying on one section rather than another and which guide the exercise of a judge's discretion. For example, the more closely the circumstances of the adult child resemble those of a minor child living at home, the less likely it is that the approach found in s. 3(2)(a) will be determined to be inappropriate. Each case will depend on its facts. In the result, the appellant has not demonstrated any error in principle in the judge's exercise of discretion to make an order under s. 3(2)(b).

- [78] Like Funt J., whose decision in this respect was not disturbed by the Court of Appeal, I conclude that child support for C2 under the table amount is inappropriate. There is no reason to depart from the general principle that ongoing support for C2 should be determined under s. 3(2)(b) of the Guidelines, given the circumstances here.
- [79] The question then is, what is the appropriate amount given the condition, means, needs and other circumstances of C2 and the financial ability of the parties to contribute to his support?
- [80] The Respondent's first position is that support for C2 should mirror that which was ordered for C1 in the Final Order, in terms of an expansive list of s. 7 expenses to be paid. In the alternative, if some monthly amount of regular child support is to continue to be paid to the Claimant for C2, he takes the position that any monthly sum must be on a budget-based analysis of what is "appropriate" under s. 3(2)(b). The Respondent submits that, if a monthly sum must be paid, it should be modest, and replace the "cash budget" of \$1,200 per month for food and utilities in the s. 7 arrangement.
- [81] As with C1, the Claimant has provided a budget for C2 that she prepared in August 2022. They include monthly expenses of \$6,571 for a total yearly expense of \$78,852. Many of the expenses (rent, food, tutoring, airfare and health care costs) are already included in the s. 7 expenses set out in paras. 13-14 of the Final Order.
- [82] I agree with the Respondent that other expenses claimed by the Claimant for C2 - such as those relating to a vehicle - are highly questionable as there is no evidence that C2 needs a vehicle in Ontario for his schooling. The amount claimed for an allowance (\$600 per month) is also arguably covered by the credit card that the Respondent provides, outside of the requirements in the Final Order, as was noted in the Appeal Reasons at para. 35. Finally, there is no explanation as to why C2 requires a large budgeted amount of \$416 per month for travel to "Queens, Montreal, Toronto".
- [83] Effective July 1, 2022, I consider the following to be appropriate arrangements for C2's support, consistent with the previous arrangements for C1, whether under the Final Order or otherwise as arranged between the parties:

- a) The Respondent will continue to contribute to C2's s. 7 expenses outlined in paras. 13-14 of the Final Order, being the actual costs of tuition, books, rent, tutoring, airfare to and from the University and Vancouver for not more than four trips per year, and health care costs (whether at Copeman Health Care Clinic or expenses not covered by any plan);
 - b) The Respondent will continue to contribute toward a monthly cash allowance for C2 for such items as food, utilities, and general living expenses, although that amount will be increased to \$1,400 per month, given recent cost of living increases, not to include the summer months if C2 is home from University;
 - c) The Respondent will continue to pay C2's cellular phone bills;
 - d) The Respondent will continue to provide C2 with access to a credit card for payment of other general expenses, as he has done in the past;
 - e) During the summer months when C2 is home from University, the Respondent will continue to pay C2's cellular phone bills and also, provide access to the secondary credit card, as before.
- [84] Given that I have determined the appropriate support for C2 under s. 3(2)(b) of the Guidelines, it is not necessary to consider the Respondent's alternate argument to ground support under s. 4(b) of the Guidelines (where his income is over \$150,000).
- [85] The Respondent also seeks an order that he may pay his portion of C2's s. 7 expenses either to C2 or the University in order to sustain or re-establish a psychological connection with C2. The Respondent relies on *Wesemann* where the father sought to pay child support to his son who was attending university away from home. At paras. 79-83, the Court considered it appropriate to allow such direct payments, which the father saw as a means to re-establish their relationship. Further, in *Schreiber* at para. 32, the Court also ordered direct payments to the child, although both parents agreed that was appropriate, which is not the case here.
- [86] As in *Wesemann* (para. 81), I do not have the views of C2 as to this proposed arrangement.
- [87] Nevertheless, I accept the Claimant's assertion that C2 remains in a vulnerable position and that he continues to deal with the fallout of his parent's marriage even after all these years following the separation. This has affected C2's ability to focus on his studies, which both parents agree is a priority. While all concerned no doubt hope that father and son will make some progress in repairing their relationship in the future, I do not consider it beneficial for C2, and perhaps harmful to him, to require that he engage directly with the Respondent on these financial issues.
- [88] I order that para. 36(a) of the Final Order and para. 1(a) of the 2021 Order be varied to reflect, effective July 1, 2022, these revised child support obligations for C2.

SPOUSAL SUPPORT REVIEW

- [89] The Respondent applies for a review of his obligation to pay spousal support under para. 37(b) of the Final Order (as revised on appeal), as triggered by the fact that his 2021 Available Income exceeded \$1 million. As stated in the case authorities, the Respondent is not required to show a change in circumstances to trigger such a review.
- [90] In the Appeal Reasons, the court indicated that it is important to circumscribe the scope of any review in this case, so as to only allow for a review of quantum: para. 45. This is what the Respondent seeks to review.
- [91] In addition, the court stated that the review provision was granted in part due to the fact that the Respondent's income was "highly variable and uncertain" (Appeal Reasons at para. 43). As the Appeal Reasons noted in para. 44, a review was reasonable if the Respondent's income exceeded \$1 million, particularly since a strict application of even the low-end of the SSAG at that level could arguably lead to an award that is too high.
- [92] This is exactly the argument advanced by the Respondent here.

Right of Review

- [93] The Claimant argues that the Respondent is not entitled to seek a review of spousal support under para. 37 of the Final Order, since that provision required that the party apply for any review by July 1.
- [94] In my view, this argument is highly technical and, to accept it in these circumstances, would be allowing form to triumph over substance.
- [95] The fact of the matter is that, on June 22, 2022, before the deadline, the Respondent gave notice to the Claimant of his intention to seek a review, with the reasonable proposal that the filing and delivery of materials be delayed until August 2022 to allow the parties to discuss a possible a settlement of the issue. That is exactly what later occurred in that the parties exchanged offers although no settlement was achieved. In that event, the parties had agreed on the delivery of application materials by August 10, 2022, which is when both notices of application were filed.
- [96] Since the Claimant, through her counsel, agreed to these procedures and the delay in filing materials, I do not consider that she can fairly advance such an argument at this time.
- [97] It is also noteworthy that, while the Claimant seeks "enforcement" of the adjustment process under para. 36(b) of the Final Order, in reality her submissions also amount to seeking a review of the spousal support amount beyond implementing the adjustment process under that provision, in that she seeks an amount in the mid-range of the SSAG, rather than in the low-range of the SSAG as allowed in in para. 36(b).

Position of the Parties

- [98] The Respondent seeks an order that, effective July 1, 2022, he pay \$20,000 per month for spousal support, with no fixed duration, subject only to a material change in circumstances. In other words, the Respondent seeks to depart from the yearly adjustment process under para. 36(b) of the Final Order.
- [99] In her application materials, the Claimant was seeking an order of monthly spousal support of \$49,923, retroactive to July 1, 2022. This was the low-range SSAG figure based on the Respondent's original 2021 Available Income and assuming base child support for C2 and s. 7 expenses for both children.
- [100] In the Claimant's written submissions following the appeal, she now seeks spousal support in the mid-range of the SSAG, based on the Respondent's adjusted 2021 Available Income of \$2,135,944. She has now provided updated DivorceMate calculations based on that income that, assuming payment of s. 7 expenses only for C2 (as I have ordered), results in the following SSAG ranges: low - \$49,094; mid - \$57,276; high - \$65,459.
- [101] The Respondent says that this monthly spousal support award, even at the low-range of the SSAG, would be "absurd".

Statutory Framework and Case Authorities

- [102] The Divorce Act provides in s. 15.2(4) that the factors to be considered in granting a spousal support order are the "condition, means, needs, and other circumstances of each spouse". The statutory objectives of a spousal support order are set out in s. 15.2(6):
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [103] The SSAG have application to the task before the Court on this application. The Spousal Support Advisory Guidelines: The Revised User's Guide (Ottawa: Department of Justice, 2016), Chapter 11, indicates that a \$350,000 ceiling applies such that the SSAG formula is no longer presumptively to be applied for incomes above that level. However, the ceiling is not

an absolute or hard cap and the court may exercise its discretion to order spousal support in the SSAG range even with higher incomes (*Devathasan v. Devathasan*, 2019 BCSC 661 [Devathasan 2019] at para. 337).

- [104] In each case, the court is required to consider the specific circumstances that apply, having regard to relevant factors and the objectives of spousal support under the Divorce Act (*Devathasan v. Devathasan*, 2017 BCSC 1010 [Devathasan 2017] at para. 140). In addition to those factors referenced in s. 15.2(6) of the Divorce Act, factors for consideration include the payee's needs, the standard of living during the marriage, the parties' post-separation standard of living, the disparity of the parties' incomes and earning capacity, the division of assets and the parties' stated current expenses (*T.N. v. J.C.N.*, 2015 BCSC 439 at para. 178 as cited in *Devathasan 2019* at para. 349).
- [105] In the Spousal Support Advisory Guidelines: The Revised User's Guide, the authors note at Chapter 11(b) that interim outcomes are more likely to fall within the formula range, in order to maintain the status quo pending trial (citing *Cork v. Cork*, 2013 ONSC 2788). For example, this was the case in *Devathasan 2017* at para. 149.
- [106] The parties have provided a substantial number of case authorities which consider payor spouses with very high incomes. For the sake of brevity, I will only refer to the following which I consider to be more relevant, as they contain final (not interim) spousal support orders:
- a) *W.H. v. I.R.*, 2012 BCSC 1483: A \$2 million income (para. 146) resulted in \$13,500 monthly spousal support payments (para. 155), although the seven-year relationship was of a shorter term than the 19-year relationship in this case;
 - b) *S.G. v. K. G.*, 2012 BCSC 1937: A \$1,256,000 income (para. 162) led to \$15,000 monthly spousal support payments (para. 159), in addition to child support (para. 124);
 - c) *Hathaway v. Hathaway*, 2014 BCCA 310: A \$1 million income (para. 20) resulted in \$24,124 monthly spousal support payments, which was in the mid-range of the SSAG (para. 20). The respondent was also required to pay child support (para. 20);
 - d) *T.N.*: A \$982,626 income (para. 114) led to \$23,500 spousal support payments each month, which was in the mid-range of the SSAG (para. 179). The respondent also had to pay child support (para. 202);
 - e) *H.S.S. v. S.H.D.*, 2016 BCSC 1300 [H.S.S. BCSC]: A \$3,615,286 income (para. 357) resulted in \$40,000 spousal support payments each month (para. 435). This was overturned on appeal and sent back for a retrial: *H.S.S. v. S.H.D.*, 2018 BCCA 199 [H.S.S. BCCA], as the court found that the trial judge disregarded the compensatory aspect of the spouse's entitlement to spousal support (para. 129). Leave to appeal to the Supreme Court of Canada was dismissed in *H.S.S. v. S.H.D.*, 38246 (7 February 2019);

- f) P.K.M. v. J.D.M., 2019 BCSC 625: A \$2,080,530 income led to \$18,341 spousal support payments, which was at the high point of the SSAG, and the respondent was also required to pay child support (paras. 94 and 97); and
- g) Devathasan 2019: Lump sum support was awarded on the basis of a \$3,102,000 income (para. 348) in the equivalent amount of \$70,000 per month, which was just below the mid-range of the SSAG, and awarded post-property division (para. 375).

Discussion

- [107] The Claimant's approach to this issue has largely been one that invites me, as the reviewing judge, to reconsider the entire relationship of the parties in terms of fashioning an appropriate award for spousal support. She refers to the history of the couple and their joint efforts to build the real estate business that the Respondent now operates on his own.
- [108] The Claimant describes her compensatory claim as "very strong", and thus supporting a high support amount and particularly, supporting a move to the mid-range of the SSAG.
- [109] The difficulty with this approach is that Funt J. has already undertaken this analysis and more importantly, he has done so in the context of a full evidentiary record at trial. I am satisfied that Funt J. fully considered the matter before concluding that the Claimant was entitled to support on the low range of the SSAG on both a compensatory and non-compensatory basis. He did not describe her entitlement in terms of whether it was "very strong" or not, but he can be presumed to have considered her significant contributions and the nature and strength of her claim in coming to his decision to order \$12,500 per month starting in January 2020, again based on an income of \$580,000: Appeal Reasons at para. 23-24.
- [110] In any event, I do not see that the Respondent is arguing that I should ignore the Claimant's basis for entitlement, as found at trial. I agree that the Claimant's entitlement to spousal support continues on both bases. In particular, I consider that the Claimant's entitlement to compensatory spousal support is far from spent in the circumstances. The case law has stated that a compensatory award remains in place until compensation has been achieved: H.S.S. BCCA at para. 125; Rozen v. Rozen, 2016 BCCA 303 at para. 35.
- [111] There is no dispute that, pre-separation, the family was very affluent and enjoyed a very affluent lifestyle. As the many case authorities state, an objective of spousal support is to allow the respective spouses to maintain the same standard of living as they did pre-separation, to the extent possible.
- [112] At the time of the trial, however, the family income, which to that time had been very high (in excess of \$1.5 million each year), had plummeted substantially. The result of facing these "lean" years in the 2017-2019 period led to the spousal support amounts ordered by Funt J., with his references to the family having to reckon with the new financial reality that came with this reduced income. This reduced income was also, of course, accompanied by

the reality that the Respondent's income was needed to support not one family, but two separate households.

- [113] As stated above, the Respondent's 2019 adjusted Available Income was \$623,000 and his 2020 Available Income (yet to be adjusted per the appeal) was \$416,667. This further decreased income for 2020, which was applied for support from July 2021-July 2022, further exacerbated the financial situation of the parties and led to further financial reckoning, particularly for the Claimant, when her child and spousal support were reduced.
- [114] As I alluded to above, the only reasonable inference is that the real estate market was improving by late 2020, which led to the Respondent's dramatic increase in income for his fiscal 2021 (ending in August).
- [115] By 2021, the Claimant was very aware that this was the case and that the Respondent's 2021 income was expected to increase. This was a source of some frustration for the Claimant, who at that time was facing, as of July 2021, reduced support amounts based on the 2020 income. The Claimant points to the correspondence from the Respondent's counsel on November 15, 2021, aiming to assuage that frustration:

To the extent that [J.S.'s] income after August 31, 2020, has increased, [M.T.] will reap the benefit of that during the July 2022 adjustments based on 2021 income information. In the same way that [J.S.] was required to keep paying based on his 2019 income information despite the fact that his 2020 was not performing at the same level, he is as of July 2021 entitled to a reduction of his obligation until the next adjustment. That certainty is the benefit of the formula under the Funt Order.

- [116] I also find that the Respondent also took full advantage of this increase in his 2021 income, which he would have known would not be fully reckoned with until July 2022. His August 2022 financial statement bears this out, in that retained earnings from his companies had increased from approximately \$635,000 (October 2021) to approximately \$1.22 million (August 2022).
- [117] Much of the Claimant's focus on this review has been on the respective lifestyles of the parties post-trial and their respective financial circumstances as they have changed since the trial, as was the case in *Jordan v. Jordan*, 2011 BCCA 518 at paras. 42-43.
- [118] The Claimant has provided a detailed analysis of her and the Respondent's respective lifestyles post-trial. She claims that her lifestyle does not come close to what she enjoyed during the marriage, while the Respondent lives a very luxurious lifestyle and one even well beyond what he enjoyed in their marriage.
- [119] The Claimant says that her fortunes have been diminished since trial. She refers to having to spend significant amounts for legal and accounting services, largely arising from the disentangling of her involvement in the corporations involving the Respondent after trial (although I would assume the Respondent shared the overall costs).

- [120] The Claimant also refers to her substantial need since the time of trial. After the family home was sold, she purchased an expensive townhouse in West Vancouver. The Claimant refers to having incurred significant debt since trial and incurring more personal debt and use of her capital from December 2021-August 2022 to support C1, C2 and herself. The Claimant asserts that she still cannot afford to support herself in a manner that is commensurate with the parties' standard of living during the marriage. She refers to her total unsecured debts owing as of August 2022 as just shy of \$720,000, an increase of about \$620,000 since her last financial statement in September 2021.
- [121] To the contrary, the Claimant points out that the Respondent continues to live in what she describes as a lavish lifestyle. Like the Claimant, he has purchased a residence in West Vancouver, although arguably a more exclusive property since it is on the waterfront. He is also renovating this property with a substantial increase in borrowings to accomplish that task, in addition to renting a condominium in the Coal Harbour area for \$8,300 per month. By late 2021, the Respondent's net worth was approximately \$2.5 million compared to approximately \$2 million for the Claimant. By August 2022, the Respondent's net worth was approximately \$4.4 million compared to approximately \$4.1 million for the Claimant (using real estate assessment values).
- [122] The Claimant also points to the fact that the Respondent has purchased properties in Whistler and various boats, and that he takes extravagant international vacations. His financial statement simply refers to "personal chattels and household furnishings" as "unascertained". The Whistler properties and his various boats are not listed in his financial statement since they are held by his holding company.
- [123] The Claimant's monthly budget is about \$38,859 per month for herself and the children, or \$466,313 annually (net of tax). She points out that, from spousal support and child support, her gross income for last year was in the range of \$160,000. The Claimant has had to take out a \$382,000 loan to pay her expenses. She continues to be primarily responsible for the well-being of the children and all expenses not covered by the Respondent's contributions under s. 7, including those at Hollyburn Country Club, vehicle expenses and trips for the children out of Canada.
- [124] In August 2022, the Respondent claimed fixed monthly expenses of \$137,260 (including the increased spousal and child support payments) plus variable expenses of \$10,554, for a total monthly expense of \$147,814.
- [125] The Respondent takes aim at the Claimant's budget and says that many expenses are either not appropriate or excessive. He says that a more reasonable monthly expense would be approximately \$19,600. The Respondent then says that his proposed monthly payment of \$20,000 would "interact" well with this revised budget in that it would net the Claimant \$13,000 per month in addition to her own earnings.

[126] The Claimant has made reasonable efforts to become self-supporting but, understandably, she has only made modest gains. Given her age (now 61) and late return to the real estate profession, I certainly do not expect her to make significant gains into the future, and certainly not anywhere near the success in the market that the Respondent continues to enjoy. The Claimant states:

While the Claimant has been working diligently as a realtor to supplement her spousal support income, the reality is that she is not in a position at her age to be able to achieve the kind of reputation and branding that the parties built over their two-decade relationship. The parties devoted all of their resources and efforts to building the Respondent's self-named real estate company over their 20-year relationship. The Claimant will never be in a position to reap the benefits of those efforts, resources and sacrifices except by way of spousal support payments.

[127] It bears repeating that Funt J. confirmed the Claimant's entitlement to spousal support on both a needs basis and also a compensatory basis. The Claimant was a licensed realtor also, but the parties decided that she would subordinate her career to raise the children, while also directly and indirectly assisting and supporting the Respondent in his career over their long marriage. I accept the Claimant's submissions, as confirmed at trial, that she and the Respondent were together a "team" who jointly made efforts toward the success of the family and the family business.

[128] In *Myers v. Myers*, [1995] B.C.J. No 2300 (C.A.), Justice Finch spoke of the "needs" basis for spousal support as driven by the circumstances of the parties. He stated:

[10] As to the contention that the wife failed to establish any "needs" within the meaning of s. 15(5) of the Act, counsel suggests an interpretation of the section which, in my respectful view, is not supportable. "Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[129] In *Yemchuk v. Yemchuk*, 2005 BCCA 406, the court further discussed the "needs" basis for spousal support:

[49] In considering the concept of "need" in the context of a long-term marriage involving a sharing of resources, I am satisfied that it should take into account the relative standards of living of the spouses following the marriage breakdown. In many cases, like this one, where the parties have relatively modest assets at their disposal and no realistic prospect of increasing those assets given their retirement (and pending retirement), it is often not possible to replicate the standard of living enjoyed by the parties when they were living together. The most a support order can do is to attempt to alleviate a significant disparity in their relative standards of living following marriage breakdown.

- [50] While equalization of the standards of living of the parties is not a stated objective of spousal support, in long-term marriages in which the parties have approached their roles as a partnership where each contributed their various resources, both economic and non-economic, to the relationship, equality of standard of living (which is not the same as equality of income) may well be the just result. (I leave aside those cases in which the parties, or one of them, are wealthy, since other considerations may apply.)
- [130] In my view, the Respondent completely misses the mark in terms of addressing the Claimant's ongoing basis for spousal support based on need. I agree that many aspects of the Claimant's lifestyle cannot be said to be wanting. She lives in a luxury home and has substantial investments, for example. However, when viewed in its totality, I am satisfied that the parties' economic circumstances and standard of living have widened and are likely only to widen further, leading quickly to unequal standards of living. This factor must be considered, particularly in light of the parties' available incomes at this time: *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 75.
- [131] In addition, in my view, it is not appropriate, as the Respondent asserts, to take a surgical approach to the Claimant's budget and pronounce it appropriate in that it will provide her with a "comfortable" amount of spending for discretionary items. Such an approach does not accord with the basis for spousal support in terms of assessing "need" in the context of the particular circumstances. These circumstances include the parties' previous lifestyle, the Claimant's need to maintain the assets she received on property division and her efforts to regain work in the real estate industry.
- [132] It also does not accord with the basic principles of spousal support to consign the Claimant to a lesser lifestyle simply because the Respondent wishes to do so. The Respondent has sufficient income to support both of them in an affluent lifestyle (*Redpath v. Redpath*, 2006 BCCA 338 at para. 42). Nor is it appropriate to require the Claimant to encroach on her capital or take out loans to maintain that lifestyle, as she is presently doing (*Chutter v. Chutter*, 2008 BCCA 507 at para. 90; *McKenzie v. McKenzie*, 2014 BCCA 381 at para. 108; *T.N.* at para. 162).
- [133] I also wholeheartedly reject the Respondent's contention that the Claimant did not suffer any economic hardship arising from the breakdown of the marriage. It is emphatically the case that she lost her only source of income as a result and she will never regain success in the real estate industry as she might have done if she had not sacrificed her own ambitions in place of supporting those of the Respondent.
- [134] There is also the matter of compensatory support.
- [135] It has been stated many times that, the longer the marriage, the more intertwined the economic and non-economic lives of the parties become (*W. v. W.*, 2005 BCSC 1010 at para. 11; *T.N.* at para. 146). As the Claimant argues, compensatory support arises not only from the sacrifices the recipient spouse has endured with respect to her own earning potential by reason of assuming primary child care and household responsibilities, but also from the

increase in earning potential, and future trajectory of earning potential, that has been conferred through these family arrangements on the payor spouse (Macdonald v. Macdonald, 2005 BCCA 23 at para. 17).

[136] This was discussed in W.:

[14] It is sometimes argued that the disadvantage to the primary parent is off-set by the advantage that person receives by obtaining a share of the assets accumulated. In my respectful view this approach does not take into account how the advantages and disadvantages can arise based on the roles spouses play.

[15] Raising children is a round the clock endeavour. The primary income earner is in a position to earn money to accumulate assets often in large part because that person is relieved of many aspects of that 24 hour a day job. When the relationship ends, it is not just the secondary earner who receives assets. The primary earner also receives a share, often half, of the assets.

[16] Therefore, in a typical case, the primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher income earning ability because of full participation in the work force, substantially unencumbered by child care responsibilities. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse often does not have the same income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award.

[Emphasis added.]

[137] The issue of sharing post-separation increases in income was discussed in H.S.S. BCSC where Justice Dardi stated:

[417] The extent to which I should take into account Mr. S.'s increases in income after separation is a fact-driven analysis. Applying the principles summarized in Judd v. Judd, 2010 BCSC 153 and S.R.M. v. N.G.T.M., 2014 BCSC 442, I conclude that it would be inequitable if Ms. D. were not able to share, to some extent, in the increase in Mr. S.'s income. Ms. D.'s assumption of the primary childcare responsibilities before and after separation indirectly contributed in some measure to Mr. S.'s ability to earn an increased income post-separation.

[138] In H.S.S. BCCA, the court found that Dardi J. had failed to recognize that the post-separation earnings had been created during the relationship, including through the direct and indirect contributions by the wife in the context of compensatory support:

[110] The concern with the above is that in her comment on Ms. D.'s indirect contributions to the accumulation of wealth by Mr. S. after separation, the judge did not recognize that Mr. S.'s post-separation exceptional earnings were built on the base created during cohabitation, and that the greatest contribution of Ms. D. to his wealth creation during cohabitation was

her assumption of primary, and comprehensive, parenting responsibilities. The reasons for judgment, further, reflect neither the increase in Ms. D.'s responsibilities with the expanding needs of the second child, nor the attendant continuing freedom given to Mr. S. to advance his legal career after separation while Ms. D. continued to deploy her efforts to the family.

- [139] However, in this case, the Claimant's efforts went well beyond those of simply freeing up the Respondent's time to pursue his real estate career. Here, the Claimant states, consistent with Funt J. describing the parties as a "team", that she spent significant time directly and indirectly creating and building the success of the Respondent's "brand" although he was always the "face" of their efforts. She was completely involved in the marketing, networking, sales and overall work that resulted in the success of the business.
- [140] It was this joint effort, along with the Claimant's task as primary caregiver of the children, that created this success of the business which very directly drove the substantial financial fortunes of the family. In this sense, the Respondent's income over the years of their marriage can only be described as having been earned by both of them, whether directly or indirectly. It is upon this resulting income stream that the Claimant staked her own financial success and financial security.
- [141] I agree with the Claimant's counsel that the purpose of compensatory support is to ensure that the sacrifices made by the Claimant over a 19-year marriage, which in the past, and currently, contributed to the Respondent's substantial earnings, must be shared in an equitable manner to recognize and compensate her for those sacrifices and the benefits that the Respondent now enjoys.
- [142] Turning to the issue of quantum of spousal support, as I have discussed above, the parties are far apart in terms of what amount is equitable.
- [143] The Respondent has advanced a number of arguments toward seeking to downplay the significant increase in his 2021 Available Income. In the first instance, he suggests that the 3/5/8 year averages of his income point to levels ranging from \$850,000-\$1.38 million. This approach, needless to say, takes advantage of the lower incomes from 2017-2020. Secondly, the Respondent suggests that his income for fiscal 2022 (ending August 2022) may not be as high as it was in 2021, but will still be higher than in 2019-2020. He confidently predicts that his fiscal 2023 (from September 2022 to August 2023) will be the beginning of a "down" market.
- [144] With respect, I am not inclined to base the Claimant's entitlement to spousal support on predictions relating to the real estate market. As many people are aware, the market is often difficult to accurately predict given a variety of factors that can influence it, and many pundits disagree on the future direction of market trends. I acknowledge the Respondent's expertise in the real estate field, but it is worth noting that the Claimant, who also has expertise in the field, does not support his predictions.

- [145] In addition, as the Claimant points out, the Respondent continues to have a substantial amount of listings.
- [146] I acknowledge the Respondent's argument that the level of spousal support should be set in the context of providing him with a "work incentive" to ensure that he continues to work hard at his very demanding and competitive profession (S.G. at para. 161; T.N. at para. 178). In that vein, I am satisfied that the Respondent enjoys his luxurious lifestyle as much as the Claimant and that he will continue in his efforts to the best of his ability. In the competitive world of real estate, one in which the Respondent has thrived, such continuous efforts are usually seen as necessary.
- [147] Having considered all of the foregoing, I exercise my discretion and order the Respondent to pay \$49,000 per month in spousal support, effective July 2022, subject to the annual adjustment and review process as set out below at para. 155. This amount is, of course, at the low-end of the SSAG, and is consistent to the approach taken by Funt J. in the Trial Reasons.
- [148] I agree with the Claimant that the Respondent's current position regarding the level of spousal support would be very unfair in all the circumstances.
- [149] The Claimant points out that the Respondent wanted strict enforcement of the Final Order for support amounts as his income was reduced in 2019-2020. No mention was made of income averages or predictions of the market improving at that time. In reality, the Claimant had no choice but to abide by the downturn in the market and, like the Respondent, she has had to adjust her lifestyle and spending habits as a result.
- [150] Given that the real estate market has recovered to some extent and the Respondent's 2021 income has substantially increased, I see no reason to deprive the Claimant of the return to good fortunes that are being reaped in the real estate market. Essentially, just as the Claimant has abided by the consequences of the downward trend in the market, she is equally entitled to benefit from the upward trend in the market. The Respondent continues to benefit - now again at significant levels - from her contributions during the marriage.
- [151] As the Respondent's counsel stated in his November 15, 2021 email, it was this certainty of result created by para. 36(b) of the Final Order - i.e. the pegging of spousal support to the actual income - that allowed the Claimant to bear the downs in the Respondent's income levels, as she could take comfort in the knowledge that there would eventually be ups as well.

Future Adjustments

- [152] The Respondent sought an order to end the annual adjustment of spousal support under the Final Order and fix an amount for spousal support at \$20,000, subject only to a material change in circumstances. He also initially sought an order to set the duration for a period of 10 years, which was later withdrawn.

- [153] I do not question the right of the Respondent to seek this review under the terms of the Final Order. However, before the notices of application were filed, the parties had only grappled with one adjustment in July 2021, based on 2020 incomes. Clearly, the driving force behind the review was the substantial increase in his 2021 income, which by all accounts was a very dramatic increase but not unprecedented in the parties' history.
- [154] Both Funt J. and the Court of Appeal described the Respondent's income as highly variable and uncertain. That is indeed the case, but in my view, that is simply the nature of the real estate market and the reality that the parties have borne in their joint efforts in making a living in that space. They have enjoyed the upward and downward forces of the market and they have done so for a long time.
- [155] In any event, I do not consider that this level of increase should disrupt the normal adjustment process that the parties envisaged at the time of the trial, as ordered by Funt J.
- [156] I see no unfairness in the terms of the Final Order to peg the support levels based on actual incomes. It is obviously the case that there is a lag in recognizing the changes in income levels. This is simply the result of the usual provision that relies on actual income levels before setting the support to begin the following year. In that case, it behooves the parties to recognize this reality in terms of their forward planning as the support levels may not match the actual income at the time of payment.
- [157] I have not accepted the Respondent's submissions toward ending the annual adjustment process under the Final Order. Having said that, I was not asked to delete the review provision in para. 37 of the Final Order, as amended by the Appeal Reasons, and that remains intact. However, I sincerely hope that the parties do not embark on serial or yearly review applications based on the four remaining events that may trigger a review.
- [158] The parties may wish to consider an agreement that would allow a review based on future changes in income, not in absolute dollar terms, but in relative terms as representing a percentage increase or decrease. This approach may be attractive to the parties to reduce the significant legal costs that both have no doubt borne since the trial.

TRADE SHEETS

- [159] The Claimant seeks an order that the Respondent produce his trade deal sheet records listing his commissions from September 1, 2018 to September 1, 2022. She says that these documents will provide objective confirmation of the Respondent's representations regarding his income and will assist her to determine whether these records should be produced going forward for future adjustments and reviews.
- [160] Frankly, I see no need to require these records in terms of the Respondent's past income. The Respondent's 2019 income was set by the Final Order, as adjusted on appeal. In addition, his 2020 income was agreed upon and used to settle the support amounts for July 2021-July 2022.

- [161] Finally, as the Respondent points out, the Claimant's proposed figure for the Respondent's 2021 income was agreed to and was the foundation upon which this review took place.
- [162] The Claimant's request is made in the context of her suspicions that the Respondent is not accurately reporting his income. This issue clearly has the prospect of adding to the conflict in what the court described as "acrimonious and expensive": Appeal Reasons at para. 43.
- [163] To assist in diffusing any further litigation between the parties, I will order that the Respondent produce his trade sheets from September 1, 2021 to September 1, 2022. These will presumably support the income figures that the Respondent will report in terms of his fiscal 2022 income - which will be used for the purpose of setting support levels for July 2023-June 2024.

COSTS

- [164] The Claimant has been substantially successful on the various applications. She is awarded her costs on the basis of ordinary difficulty.

"Fitzpatrick J."

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