
CANADA / JUDGMENT

Mahannah v. Mahannah

2012 BCSC 403

COURT

Supreme Court of British Columbia

DECIDED

21 March 2012

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2012 BCSC 403 Mahannah v. Mahannah

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mahannah v. Mahannah,

2012 BCSC 403

Date: 20120321

Docket: E081723

Registry: Vancouver

Between:

Michael Bernard Mahannah

Claimant

And

Kelly Dawn Mahannah

Respondent

Corrected Judgment: Paragraphs 137, 144, and 176(d) of the judgment were amended on May 4, 2012

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Claimant:

R. Craig Neville

Counsel for the Respondent:

Paul Daltrop

Place and Date of Trial:

Vancouver, B.C.

August 2-5, 8-11, 2011

Place and Date of Judgment:

Vancouver, B.C.

March 21, 2012

Introduction

- [1] The claimant, Michael Mahannah, and the respondent, Kelly Mahannah, were married on June 16, 1984. They have three children together: a daughter, Kathleen born in August 1987; a son, Connor, born in January 1990; and a second daughter, Laurel, born in February 1994. Mr. Mahannah and Ms. Mahannah separated on March 1, 2006.
- [2] Mr. Mahannah now seeks an order for divorce, which Ms. Mahannah does not oppose. The parties are agreed that Connor and Laurel are children of the marriage, and that Kathleen (who graduated from university in the spring of 2010) ceased to be a child of the marriage at the end of 2009. Since separation, Mr. Mahannah and Ms. Mahannah have had a shared custody arrangement with respect to their children, and Connor and Laurel currently live with both parents, in one month blocks. Given their age, no custody order is required for either Laurel or Connor. Mr. Mahannah has proposed a guardianship order on the Joyce model, which Ms. Mahannah does not oppose.
- [3] Mr. Mahannah and Ms. Mahannah agree that an equal division of family assets is appropriate. They have agreed on the value of real property and certain other family assets, and how those assets should be allocated or divided. However, they do not agree on the value of the shares of the family holding company, Mahannah Ventures Ltd. ("MVL"). They agree that distributions each has received through inheritance are not family assets. However, they disagree concerning whether a significant amount of cash in bank accounts Mr. Mahannah opened after separation should be subject to equal division as family assets. As of trial, and net of distributions Mr. Mahannah received from his late father's estate, there was about \$310,400 in these accounts. Mr. Mahannah says that each party should retain, free of claims from the other, the contents in his or her bank accounts. Ms. Mahannah says that the money in Mr. Mahannah's accounts (other than the inheritance money) is a family asset, and subject to division.
- [4] With respect to the shares in MVL, Mr. Mahannah says that, rather than an in specie division, a compensation order under s. 66(2)(c) of the Family Relations Act, R.S.B.C. 1996, c. 128, should be made, whereby he would pay compensation to Ms. Mahannah to acquire her shares. He proposes that he would make a substantial lump sum payment to Ms. Mahannah

within fourteen days of the court's order, and that the balance owing (reflecting the court's conclusion concerning the value of the MVL shares) would be paid over seven years. For her part, Ms. Mahannah says that an in specie division would be satisfactory. However, if a compensation order is to be made, Ms. Mahannah says that, since there will be assets available to Mr. Mahannah that would allow him to raise funds to pay her out, any order should require Mr. Mahannah to do so over a much shorter period (for example, three months), than what he proposes.

- [5] The parties disagree concerning the amount of child support payable. Mr. Mahannah says that, beginning in calendar 2009, income should be imputed to Ms. Mahannah, taking her annual income from about \$53,000 to about \$95,000. Ms. Mahannah says no income should be imputed to her. She says that, after taking into account s. 9 of the Federal Child Support Guidelines (the "Guidelines") dealing with shared custody, Mr. Mahannah should pay support of \$5,983 per month, beginning August 1, 2011. Ms. Mahannah says further that Mr. Mahannah should be ordered to pay child support retroactive to March 2006, in the sum of \$84,000. Mr. Mahannah says he has met his obligations concerning child support, and that no order should be made requiring him to pay retroactive child support.
- [6] Ms. Mahannah says that she is entitled to spousal support, on both compensatory and non-compensatory grounds, and to retroactive support. She says that, going forward, income of about \$53,000 should be attributed to her, and, based on Mr. Mahannah's 2011 income, she should receive indefinite monthly spousal support of approximately \$11,600. Ms. Mahannah says this is at the mid-range of calculations under the Spousal Support Advisory Guidelines (the "SSAG"). Ms. Mahannah also seeks retroactive spousal support of \$250,000. Ms. Mahannah says no income should be imputed to her for purposes of spousal support.
- [7] Mr. Mahannah says Ms. Mahannah has no basis for support on compensatory grounds. He does not dispute entitlement based on need, but says that such a claim must be time-limited. Moreover, any support must reflect income that should be imputed to Ms. Mahannah. Mr. Mahannah says that an appropriate order would see Ms. Mahannah receive spousal support of \$5,000 per month beginning in August 2011, and that spousal support should terminate absolutely on June 30, 2015. Mr. Mahannah says that there is no basis to order retroactive spousal support.
- [8] I will first set out relevant background concerning the parties, their family and Mr. Mahannah's business. I will next deal with property division, including the identification, valuation and division of family assets, and Mr. Mahannah's request for a compensation order in relation to the shares of MVL. Then I will turn to matters relating to child and spousal support. Finally, I will deal with the divorce.

Background

- [9] Mr. Mahannah was born in December 1957, and is now 54. His background is in engineering. Mr. Mahannah is currently the president and CEO of Olympic International Agencies Ltd. ("OIA"), which he joined in 1985. He has enjoyed, and continues to enjoy, a successful career there. OIA carries on business designing and supplying heating, ventilation and air-conditioning (HVAC) systems. One of OIA's relatively recent, large projects was the HVAC system in the Olympic Athletes' Village in Vancouver.
- [10] Ms. Mahannah was born in February 1960, and is now 52. While in high school, Ms. Mahannah won both academic and athletic awards. In particular, she demonstrated a high degree of skill and ability in the sport of volleyball. Ms. Mahannah attended the University of British Columbia on scholarship and was on the varsity volleyball team.
- [11] Ms. Mahannah graduated from UBC in 1983 with a Bachelor of Science in Pharmacy. Ms. Mahannah's oldest sibling is a medical doctor, and Ms. Mahannah was keeping her career options open. After graduation, Ms. Mahannah applied for a one-year pharmacy residency, a much sought-after position, but was not accepted. She then worked for a year at Children's Hospital, as a dispensing pharmacist. In 1984 (the year she and Mr. Mahannah married), Ms. Mahannah again applied for a residency, and this time was accepted at St. Paul's Hospital. The purpose of the residency was to train to be a hospital pharmacist. A hospital pharmacist (as distinct from a community or dispensing pharmacist) works in a hospital setting, and works directly with doctors and patients. A pharmacist who has completed a residency is able to perform a wider range of activities than one who has not.
- [12] Ms. Mahannah completed her residency in 1985, and continued working full-time at St. Paul's Hospital. According to Ms. Mahannah, there is a two-year doctoral program available for pharmacists, leading to a Pharm.D. degree. Having the degree broadens a pharmacist's background and allows the pharmacist to run clinical studies; it increases job satisfaction and offers higher pay. Ms. Mahannah has considered pursuing the degree, but has never done so.
- [13] Ms. Mahannah worked full-time until Kathleen was born in 1987. She took a 12-month maternity leave, and then returned to work full-time (including day, evening and "graveyard" shifts) for another two years. The family hired a nanny, "Doreen," to assist with child care. However, Ms. Mahannah concluded that she wanted to be able to spend more time at home. At the time, there were no part-time positions within the hospital. However Ms. Mahannah spear-headed a committee that was instrumental in convincing management at St. Paul's Hospital that part-time positions should be made available. By the time Kathleen was about 2 years old, Ms. Mahannah (with Mr. Mahannah's support) moved to a permanent part-time position, .75 of a full-time equivalent ("FTE").

- [14] When Connor was born in January 1990, Ms. Mahannah took a six-month maternity leave, and then returned to her part-time position. After Laurel was born in February 1994, Ms. Mahannah reduced her hours to .6 FTE. Ms. Mahannah did this so that she would have more time to be home with the Mahannahs' children, but still pursue her career as a pharmacist. About 10 years ago, because of her seniority, Ms. Mahannah was able to organize her work schedule so that she worked three days per week, and one weekend a month.
- [15] Prior to separation, the Mahannah family lived very comfortably, although not lavishly. They took family vacations to Ms. Mahannah's family's cottage in Saskatchewan; they would go to Whistler at Spring Break. Ms. Mahannah recalled that she and Mr. Mahannah would go to Mexico or Hawaii, and also went there as family. Ms. Mahannah recalled accompanying Mr. Mahannah on business trips to Italy, Jamaica, Mexico, Spain and France. As of 2005, the gross combined family income was in the range of about \$300,000. At trial, Ms. Mahannah testified that she believed the annual gross family income, pre-separation, was in the \$600,000-range; however, she was mistaken.
- [16] When Kathleen was about a year old, the family purchased a house ("Tempe Knoll") in North Vancouver. Ms. Mahannah has continued to live there since the parties' separation. The family had paid help to assist with child care and running the household. Doreen worked for the family for about seven years. The nanny/housekeeper hired in 2000 ("Pilar") ceased to function as a "nanny" in about 2005 (by which time Laurel was 12) and moved into the role of housekeeper. She has continued to work part-time for Ms. Mahannah, performing housekeeping duties at Tempe Knoll, and also works occasionally for Mr. Mahannah.
- [17] Both parents were very involved in their children's activities. All three Mahannah children were gifted athletes, the girls in volleyball and Connor in soccer. Ms. Mahannah was on the school's parent council for about 15 years and was a very successful fund-raiser. Ms. Mahannah also made good use of her considerable talents as a volleyball player. Throughout the marriage and after the parties' separation, Ms. Mahannah has been very active as a volleyball coach, in both the school and club settings, a pursuit she has found very rewarding.
- [18] While they were married, both Mr. Mahannah and Ms. Mahannah became involved with an organization known as "Landmark Education," which Mr. Mahannah described as an organization involved in personal development. Mr. Mahannah has worked for Landmark for a number of years as a paid seminar leader. In each of 2009 and 2010, for example, he was paid a total of about \$20,000 (before taxes) for about ten hours of work per week. Ms. Mahannah volunteered her time and attended seminars, and she continues to do so. For example, in her Form F8 financial statement sworn on July 28, 2011 (her "July 2011 Financial Statement"), she includes in her budget, under "Education," \$1,500 per year for "Landmark courses" and \$1,000 per year for "travel for seminar training."

- [19] When the parties separated in March 2006, they decided it would be best for the children if Mr. Mahannah moved out of Tempe Knoll, which he did. Mr. Mahannah borrowed \$130,000 from his father to assist him to purchase a town house on Ross Road, also in North Vancouver, which was close to the former matrimonial home and to the children's schools. By the summer of 2006, Ms. Mahannah and Mr. Mahannah had reached an arrangement whereby the children were able to spend equal time with each parent, initially one week on, one week off; then two weeks; and finally expanding to the current arrangement of a month at a time.
- [20] MVL was set up in the 1990s, as part of a tax plan to reorganize OIA. The plan (which has been devised by OIA's and MVL's long-time accountant, Richard McCallum) involved each of the existing individual shareholders (including Mr. Mahannah) forming holding companies. The shareholder and the shareholder's spouse would then subscribe for shares in the holding company. As part of this plan, Mr. Mahannah sold his shares in OIA to MVL, and, as consideration for the sale, received preferred shares in MVL. Mr. Mahannah and Ms. Mahannah were issued and hold an equal number of MVL common shares. Mr. Mahannah holds voting shares, while Ms. Mahannah's shares are non-voting.
- [21] When the parties separated in March 2006, MVL owned 50% of the shares in OIA.
- [22] In 2007 and 2008, Mr. Mahannah took steps to reorganize the ownership of OIA and related companies in what I will call the "Olympic Group" of companies. These companies currently include Olympic Controls Inc. ("Controls"), Olympic International Services Agency Ltd. ("Service") and Scott Springfield Mfg. Inc. ("SSM"). Service and SSM are wholly owned subsidiaries of OIA. Controls is currently owned 50% by Mr. Dan Mackay, 33% by Mr. Mahannah and 17% by MVL.
- [23] In the fall of 2007, Mr. Mahannah and his former business partner, Dennis Roberge (and their respective holding companies), entered into a comprehensive share sale agreement whereby (among other things) Mr. Roberge sold his interest in OIA and Service, and Mr. Mahannah sold his interest in Olympic International Limited ("OIL"). In connection with those transactions, Mr. Mahannah called on Mr. Gary Mynett, an experienced chartered accountant and chartered business valuator, to assist and provide advice in connection with the valuation of the business interests being purchased and sold.
- [24] In October 2007, Mr. Mahannah deposited the proceeds - \$700,000 - from the sale of his shares in OIL, to the credit of the MVL shareholders' account. This was the last deposit to the account, up to the time of trial. Mr. Mahannah controlled the account. The evidence discloses that, after October 2007, money was paid out of this account to (among other things) pay down the mortgages on both Tempe Knoll and Ross Road. By March 2009, the Tempe Knoll mortgage had been paid out in full. Ross Road is also mortgage-free. Funds were withdrawn from the account to make contributions to both Mr. Mahannah's and Ms. Mahannah's RRSPs, and in 2008 and 2009 for Ms. Mahannah to pay expenses, among other things. In January 2010, \$100,000 was paid out of this account to Ms. Mahannah. I treat the

payment of this \$100,000 in particular as an advance to Ms. Mahannah of her share of the family assets.

[25] In the spring of 2008, a small number of senior OIA employees (including Mr. John Clancy, a key sales representative) purchased shares in OIA, thereby acquiring an ownership interest in the business. Mr. Mahannah explained that the nature and success of OIA's business was highly dependent on relationships between its sales representatives (such as Mr. Clancy) and the manufacturers, and it made business sense for the sales representatives to have an ownership interest in the company. Again, Mr. Mahannah called on Mr. Mynett to provide assistance and advice in connection with the preparation of a shareholders' agreement (the "2008 Shareholders Agreement") that the parties (and their respective holding companies, including MVL) and OIA entered into in April 2008. As Mr. Mahannah explained, the idea was to make it easy for a new shareholder to buy in, but also easy for an employee to retire and get out. Mr. Mahannah explained that the business objective was to create solid working relationships among the shareholders. He wanted to ensure OIA's longevity and also to treat everyone fairly. Mr. Mynett was retained because the agreement needed to deal with how to establish the value in the company when someone wanted to buy or sell shares.

[26] Mr. Mynett created a letter dated December 20, 2007 (incorporated as a schedule to the 2008 Shareholders Agreement) setting out a series of valuation principles pursuant to which shares in OIA would be valued, both when they were being acquired, and when they were being sold. In the letter, Mr. Mynett described various valuation principles and terms. Mr. Mynett attached to his letter a number of schedules showing the application of the principles to a valuation of the company as at August 31, 2007, which resulted in a value of \$8.0 million. While the intention was to have people come into and leave the company at fair market value, Mr. Mynett cautioned in his letter that:

the resulting value will not necessarily be "fair market value", which has a very specific definition. As such, we recommend that the valuation clause of the shareholders' agreement not refer to the value as "fair market value".

[27] In the 2008 Shareholders' Agreement, "Share Value" is defined to mean:

... for any Shares [i.e., shares in the capital of OIA], that value as determined in accordance with the principles outlined in the letter from Blair Mackay Mynett Valuations Inc. to [OIA] dated December 20, 2007, a copy of which is attached as Schedule A, provided that in undertaking any such valuation the following principles shall apply:

- (i) the valuation date shall be as at the end of the most recently completed fiscal year prior to the date of the event triggering the Shares to be issued, repurchased, redeemed or transferred;
- (ii) the valuation shall be determined using the consolidated financial statements for the Olympic Group [defined to mean OIA, SSM and Service], reviewed or audited by an independent firm of Chartered Accountants;

(iii) the valuation shall take into account the projected earnings for the two fiscal year ends after the valuation date, as approved by the Board [of OIA];

...

(vi) the range of multiples to be used in the valuation shall be between 2 and 4.

[28] The 2008 Shareholders Agreement includes express terms concerning events of default. One of the events of default occurs when "a Principal ceases to Control its Holding Company." "Control" is defined as follows:

"Control", with respect to the relationship with a Person, means:

(i) if that Person is a corporation, the holding (other than by way of security) of securities of that Person to which are attached more than 50% of the votes that may be cast for the election of directors and those votes are sufficient, if exercised, to elect a majority of the board of directors;

...

Mr. Mahannah is the "Principal" of MVL.

[29] The 2008 Shareholders Agreement provides further (section 8.3) that, on the occurrence of an event of default, OIA would have the option to purchase the defaulting shareholder's interest (including shares in OIA) for an amount equal to the Share Value and the dollar amount of the shareholder's loans, less a discount of 20%. The purchase price would be paid one-sixth on closing and the balance in five equal annual instalments, subject to OIA's right to invoke a deferral provision (section 9.5).

[30] Currently, MVL holds 320 (or 79%) of the issued and outstanding shares of OIA. It acquired Mr. Clancy's interest in OIA when Mr. Clancy left the company in 2009. Mr. Mahannah testified that Mr. Clancy had been a big part of sales for OIA. In 2008, Mr. Clancy had been responsible for about \$10 million in sales, and he also maintained the relationship with a key manufacturer (Whelan). OIA's contracts with manufacturers can be cancelled on 30 days' notice, and when Mr. Clancy left OIA, Whelan cancelled. Mr. Clancy is now in a position where he can compete with OIA for business, creating a risk for company.

[31] Mr. Mahannah has, with the assistance and support of OIA's sales and management teams, very successfully managed OIA's business over a number of years. Despite the loss of Mr. Clancy, in its fiscal year ending December 31, 2010, OIA had gross revenue of approximately \$28 million, with a gross profit margin of 24.2%. Forecast revenue for 2011 was approximately \$33 million.

[32] After she and Mr. Mahannah separated, Ms. Mahannah continued to work part-time, .6 FTE. In March 2011, she took up a new position, moving from a hospital setting to a clinic, although her employer remained the same. Ms. Mahannah worked slightly reduced hours (.5 FTE), two days a week and one weekend a month. However, as of trial, Ms. Mahannah

expected she would shortly be returning to three days a week and one weekend a month. Ms. Mahannah is currently paid \$49.00 per hour for a 20 hour week. She has 25 years' seniority, and has not lost any seniority as a result of working part-time, rather than full-time.

- [33] Ms. Mahannah has not sought full-time employment since the separation, and she has no intention of seeking full-time employment in the near future. Ms. Mahannah explained that, since she volunteers about 30 hours a week on average, she does not have any more time available for paid employment. Moreover, Ms. Mahannah indicated that she now feels that she has more free time for travel. For example, in the six months prior to trial, Ms. Mahannah had spent six days in Paris and four weeks in Greece. She had travelled to Los Angeles in connection with Landmark, and spent a couple of days in Las Vegas. In November 2010, she spent six days in London, England. I contrast this with Mr. Mahannah's evidence concerning his vacations in the last two years. He testified that he took a one week holiday in July 2011, taking a motorcycle trip to Wyoming. In the summer of 2010, he took a five day bike trip to the Kootenays. While he was sure that he took another vacation, he was unable to recall it.
- [34] Ms. Mahannah could not say whether or not, since she and Mr. Mahannah separated, there had been any full-time hospital pharmacist positions available because she had not looked for any. According to Ms. Mahannah, her current skill-set is somewhat narrow in that her speciality is haemo-dialysis, which she has been doing for the past ten years. However, since separation, she has not taken any professional development courses with a view to upgrading or broadening her skills. Rather, Ms. Mahannah looks on her involvement with Landmark as a form of education. In the first seven months of 2011, Ms. Mahannah estimated she was spending between 20 to 25 hours a week on average preparing for and leading a Landmark seminar, all of which was unpaid.
- [35] Since March 2006, both Mr. Mahannah and Ms. Mahannah have received an inheritance following the death of a parent.
- [36] Mr. Mahannah's father died in 2008. The estate was divided equally among Mr. Mahannah and his five siblings, with the \$130,000 Ross Road loan being treated as an advance on Mr. Mahannah's share of his inheritance. In October 2008, Mr. Mahannah opened a separate bank account (the "Inheritance Account"), and deposited his share of the distributions from the estate that were made from time to time into that account. Up to trial, the total distributions deposited to the Account were \$383,869. Mr. Mahannah also deposited life insurance proceeds (paid out following the death of Mr. Mahannah's father) of \$15,000.
- [37] In addition, Mr. Mahannah deposited to the Inheritance Account the sum of \$160,000, representing 50% of commissions he earned in 2009 as part of his compensation from OIA. Mr. Mahannah paid the remaining 50% to Ms. Mahannah, and Ms. Mahannah acknowledged receiving \$160,000. Mr. Mahannah also deposited a dividend paid out of the MVL Shareholders' Account January 2011 in the amount of \$84,412 to the Inheritance Account.

The same amount was paid to Ms. Mahannah, also in January 2011. Thus, according to Mr. Mahannah, the Inheritance Account consisted of money he received from his inheritance (including the life insurance proceeds), and his share of money that had been split equally with Ms. Mahannah. I find this description to be accurate. As of June 16, 2011, the Inheritance Account had a balance of \$587,630.

- [38] According to his F8 financial statement sworn June 29, 2011 (his "June 2011 Financial Statement"), Mr. Mahannah had three other bank accounts with HSBC (a savings account, a chequing account and a tax-free savings account), which had a total balance of \$91,500. If the bank statement (rather than the amount in his June 2011 Financial Statement) is used for the chequing account, the total balance (rounded) is \$122,200.
- [39] Ms. Mahannah lost her mother in about June 2009. She inherited 25% of her mother's estate.
- [40] Ms. Mahannah received about \$250,000 in total from her mother's estate. I conclude that Ms. Mahannah received most of this money in 2010. Moreover, in December 2009, she received the \$160,000 as her share of Mr. Mahannah's commission income, and (as I noted above) Ms. Mahannah received a further \$100,000 in January 2010, paid out of the MVL Shareholder Account. Out of about \$510,000, little or nothing was left as of trial.
- [41] Ms. Mahannah explained how, generally, she spent the money. She gave each of the Mahannah children \$3,000, and gave some money to Pilar (her housekeeper), apparently as a gift. She paid off some personal debt, and bought some jewellery. Ms. Mahannah said that, in 2010, she felt freer to do more travelling, which she did. She paid for a graduation trip to Spain for Kathleen, and for trips for Connor and Laurel. She took two trips with friends (including spending seventeen days in Greece), and estimated the cost of each at between \$7,500 and \$10,000. She covered her friends' expenses.
- [42] There is some additional evidence concerning Ms. Mahannah's spending patterns in 2010. Ms. Mahannah explained that she had taken a Landmark seminar on excellence. As a result, she wanted to improve her record keeping and also wanted assistance with budgeting and keeping track of expenses, going forward. She then hired an individual - Julie Beverage - to help her with that project. Ms. Mahannah testified that she gave Ms. Beverage access to all of her bank and credit card account information, and all receipts. Ms. Mahannah instructed Ms. Beverage to do overall tracking of her expenses, then come up with a way that Ms. Mahannah could see what she was spending. During the trial, Ms. Mahannah identified a document (Ex. 81) as a paper copy (about 180 pages) of the record Ms. Beverage created, based on the information Ms. Mahannah provided to her and their discussions. During her testimony, Ms. Mahannah identified a variety of problems she perceived with the record. Nevertheless, she testified that she used the record to help her complete her July 2011 Financial Statement.

- [43] Exhibit 81 covers the period from January to November 2010. It indicates expenses to the end of November 2010 of \$318,794, and average monthly expenses (including legal expenses of about \$5,848) of \$26,566. Ms. Mahannah's monthly expenses (including legal expenses) in her July 2011 Financial Statement are \$25,203. I think this confirms that Ms. Mahannah had sufficient confidence in the contents of Ex. 81 to use it to assist her in completing a document (her Financial Statement) that was being made under oath.
- [44] In the "Personal" section of her July 2011 Financial Statement, Ms. Mahannah lists monthly expenses that include \$1,800 for clothing, \$168 for "Starbucks/Delany's Coffee," and \$250 for cosmetic dermatology. At the budget presented in her July 2011 Financial Statement, Ms. Mahannah is consuming over 100% of the family's combined gross income pre-separation. I conclude that this budget is based on what Ms. Mahannah was spending during a year when she had a great deal of extra cash and (from her actions) felt free to spend as she wished, without any thought of saving. However, 2010 was an exceptional year. It should not be used as a model going forward.
- [45] Exhibit 81 also includes a "budget idea," where the proposed monthly expenses are shown as \$10,770. Ms. Mahannah never accepted this "idea." She explained that a budget could not be done with just 11 months, and that it was necessary to look at trends over a longer period. Moreover, in Ms. Mahannah's view, Ms. Beverage's suggestions about budgeting were not based on knowledge of family income over an extended period. I think a better explanation is that Ms. Mahannah was unwilling to curtail her spending, and preferred a much more lavish lifestyle than would be available on a more modest (and more realistic) budget, or than would have been available on the pre-separation family income. Ms. Mahannah's monthly budget in her financial statement completed in August 2009 was \$16,766 (a slight increase over the budget in her 2008 financial statement). This is still a generous monthly budget (at a time when there were still three children of the marriage), but it is much closer to the "idea" presented by Ms. Beverage than the budget in Ms. Mahannah's July 2011 Financial Statement.
- [46] According to her July 2011 Financial Statement, Ms. Mahannah had about \$4,200 in her bank accounts. She also had about \$9,600 in a GIC, which was the balance remaining from an advance of \$50,000 she had received from the MVL Shareholder Account in April 2011.
- [47] I turn then to the parties' children.
- [48] When Mr. Mahannah and Ms. Mahannah separated in 2006, Kathleen was enrolled at Capilano University. She transferred to the University of Toronto in the fall of 2007, where she had an athletic scholarship. Kathleen returned to B.C. for summer breaks. In the summer of 2009, she took a one-month course at Oxford and otherwise did not work. I do not know what employment income Kathleen might have earned while she was in university. Mr. Mahannah's evidence was to the effect that he asked Kathleen to set up a budget for her expenses at university. According to Mr. Mahannah, Kathleen produced a detailed budget, which Mr. Mahannah accepted, and he paid those costs directly to Kathleen.

without any contribution from Ms. Mahannah.

- [49] Kathleen graduated with a degree in kinesiology and physical education from the University of Toronto in April 2010. Kathleen returned to B.C. following graduation, and, as of the trial, was working 4 days a week and taking courses with a view to possibly pursuing a career as a naturopath.
- [50] As of trial, Connor had completed three years at Capilano University (where he had an academic scholarship) and planned to transfer to the University of British Columbia to complete his degree. Mr. Mahannah testified that Connor has expenses for such things as school fees, books and parking. Connor would come to Mr. Mahannah with requests for help to pay these, and Mr. Mahannah would either pay or reimburse Connor. According to his parents, Connor has earned money during his summers off, working in construction and landscaping. Neither parent tendered evidence concerning Connor's earnings or his actual or anticipated expenses.
- [51] Laurel started Grade 12 in September 2011. She is one of the top volleyball players at her school. According to her parents, she has plans to attend Capilano University when she graduates.

Property Division

- [52] Pursuant to s. 56 of the FRA, Mr. Mahannah and Ms. Mahannah are each entitled to an undivided one-half interest in each family asset upon the occurrence of a triggering event. In this case, as of trial, there had been no declaration under s. 57 that the parties have no reasonable prospect of reconciliation, although the evidence at trial established that conclusively. Counsel did not ask for a s. 57 declaration to be made either at the start or the conclusion of the trial. Thus, the triggering event will be the divorce order. Obviously, there is a significant gap - indeed, years - between when the parties separated, and the pronouncement of that order. Potential family assets (which I will describe in more detail below) have been dealt with during that period.
- [53] I do not agree with Mr. Daltrop's submission that Mr. Mahannah and Ms. Mahannah continued, after separation and up to trial, to operate as a single economic unit. Rather, in my view, they simply did not ignore the realities that they remained parents of three children in a shared custody arrangement, that they remained shareholders in MVL, and that significant assets (e.g., Tempe Knoll and Ross Road) were family assets or potential family assets. That, for example, Mr. Mahannah and Ms. Mahannah continued to maintain a joint bank account was a matter of convenience. Mr. Mahannah deposited income (net of tax) he received from Landmark to that account, as spousal support for Ms. Mahannah. Otherwise, Mr. Mahannah did not use the account after the parties separated.
- [54] "Family asset" is defined in sections 58 and 59 of the FRA:

58 (1) Subject to section 59, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting subsection (2), the definition of family asset includes the following:

(a) if a corporation or trust owns property that would be a family asset if owned by a spouse,

(i) a share in the corporation,

...

(c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;

(d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;

...

...

59 (1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 58(3)(e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

Section 60 of the FRA provides that the onus is on the spouse opposing a claim under s. 56 to prove that the property in question is not ordinarily used for a family purpose.

[55] There is a presumption of an equal division of family assets (see FRA, s. 56). The court can only reapportion assets if it finds that equal division would be unfair having regard to the factors listed in s. 65 of the FRA.

[56] To give effect to its decision on use or division of assets, the court may also make orders under s. 66 of the FRA, which provides:

66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.

(2) Without limiting subsection (1), the court may do one or more of the following in an order under this section:

(a) declare the ownership of or right of possession to property;

- (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
- (c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;
- (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;

. . .

- (f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property . . .

- (a) Identification and valuation of assets

[57] I will deal first with items about which there is no serious disagreement.

- (i) RRSPs, pensions, real property, motor vehicles

[58] Mr. Mahannah and Ms. Mahannah each have RRSPs. As of trial, the value of Mr. Mahannah's RRSP was \$763,453, and the value of Ms. Mahannah's was \$60,405. Ms. Mahannah has a pension under the St. Paul's Hospital Municipal Pension Plan which was valued at \$57,851 in her July 2011 Financial Statement.

[59] There is also no real dispute that the following assets are family assets, and basic agreement on values:

Asset

Agreed Value as of Trial

Tempe Knoll

\$1,025,000

Ross Road

\$605,000

2003 Infinity (Ms. Mahannah's car)

\$12,000 to \$15,000

2001 Acura MDX (registered to Mr. Mahannah)

\$8,000

- [60] In 2008, Mr. Mahannah purchased a 2007 Victory motorcycle. In his June 2011 Financial Statement, Mr. Mahannah estimated its value at \$10,000. Ms. Mahannah did not contest this valuation, and Mr. Mahannah did not argue the motorcycle should not be considered a family asset.
- [61] Although the parties have agreed on the value of Ross Road, Mr. Mahannah's position is that the loan of \$130,000 he received from his father should be deducted from that value. Ms. Mahannah says there should be no deduction.
- [62] In my view, Mr. Mahannah's position is the correct one. The parties agreed that neither would make any claim against the inheritance of the other. I think that this reflected their mutual recognition of the fact that the inheritances were not ordinarily used for family purposes, and were not family assets. Certainly Ms. Mahannah never treated her inheritance as a family asset in which Mr. Mahannah had any interest; rather she spent the money on whatever she pleased. I accept Mr. Mahannah's evidence (which was never seriously challenged) that he received a loan from his father of \$130,000 when Ross Road was purchased, and that this was treated as an advance on his share of the father's estate. Failing to deduct the loan from the value of Ross Road places Mr. Mahannah in the position where \$130,000 of his inheritance becomes subject to a claim by Ms. Mahannah on the division of family assets. The value of Ross Road subject to division is, therefore, \$475,000.

(ii) Business assets and bank accounts

- [63] I turn then to assets about which there are more serious disputes. I will deal first with the business assets. I will then deal with money in Mr. Mahannah's bank accounts, excluding the deposits made as a result of distributions from Mr. Mahannah's father's estate.
- [64] As I noted above, Mr. Mahannah and Ms. Mahannah each hold an equal number of common shares in MVL. Mr. Mahannah holds voting shares; Ms. Mahannah holds non-voting shares. In addition, Mr. Mahannah holds all of the issued and outstanding preferred shares in MVL. As I also noted above, between them, Mr. Mahannah and MVL own 50% of the shares of Controls, with Mr. Mahannah personally owning 33% and MVL owning 17%.
- [65] There is no dispute that all of the shares of MVL (and, in turn, its interest in OIA and Controls), and Mr. Mahannah's shares in Controls are family assets. However, the parties do not agree on the value of these assets.
- [66] Mr. Mahannah's position is that MVL's shares should be valued at \$4,972,848, with the result that a half interest is \$2,486,424. With respect to the value of MVL's interest in OIA, Mr. Mahannah relies on the opinion evidence of Mr. Mynett.
- [67] Mr. Mynett calculated the value of 100% of the OIA shares as of June 30, 2011, applying the definition of "Share Value" in the 2008 Shareholders Agreement. Mr. Mynett was not asked to, and did not, value the MVL shares, the MVL shareholder loan, or Mr. Mahannah's interest in Controls.

[68] In his report dated August 2, 2011, Mr. Mynett calculated the "Share Value" as at June 30, 2011, at between \$5,785,000 and \$6,119,000, with a mid-point of \$5,950,000. Based on these figures (in particular, the mid-point), the Share Value of 79% of OIA's shares would be \$4,700,500. In arriving at his calculation, Mr. Mynett assumed that OIA had disposed of its shares in Service, and he therefore attributed zero value to Service. However, his assumption was incorrect: Service's assets - not the shares - had been sold.

[69] On the other hand, Ms. Mahannah's position is that the MVL shares (including MVL's interest in OIA and Controls) should be valued at \$7,100,000, with the result that a half interest is \$3,550,000. She relies on the opinion evidence of Ms. Patti Daum, who (like Mr. Mynett) is a chartered accountant and chartered business valuator.

[70] In her report dated July 28, 2011, Ms. Daum calculates the fair market value of MVL's shares (including both its interest in OIA and in Controls), the shareholder loan in MVL and Mr. Mahannah's shares in Controls as follows:

Asset

Value

MVL shares

\$7,100,000 (midpoint)

MVL shareholder loan

\$38,348

Controls shares

\$234,000

[71] Ms. Daum values MVL's investment in OIA at between a low of \$6,517,000 and a high of \$6,975,000. (The mid-point would be \$6,746,000, compared with Mr. Mynett's mid-point of \$5,950,000). In her calculations, she attributes about \$300,000 in value to OIA's interest in Service. Ms. Daum values MVL's investment in Controls at \$117,000. She explains (p. 2 of her report) that her calculation of

. . . fair market value in a notional market must be differentiated from the concept of price. . . . [T]he price at which a sale of the companies might take place may be higher or lower than the notional fair market value calculated herein.

Therefore, while our conclusion is suitable for notional valuation purposes, the values determined in this report may not be an appropriate asking price if the shares were actually exposed to the market for sale.

- [72] There is no valuation from anyone of Mr. Mahannah's preferred shares in MVL, separate from the valuation of the whole of the MVL shares found in Ms. Daum's reports. I was not advised whether they have a redemption value, for example. Moreover, Ms. Daum did not say that any additional value should be attributed to Mr. Mahannah's common shares (as compared with Ms. Mahannah's) because they were voting, rather than non-voting shares.
- [73] The difference in the valuations is relevant because Mr. Mahannah is asking the Court to make a compensation order with respect to the MVL shares, permitting him to purchase Ms. Mahannah's interest in MVL, rather than order an in specie division of the shares.
- [74] Mr. Neville, on behalf of Mr. Mahannah, submits that I should accept Mr. Mynett's calculation of the value of the OIA shares, in preference to Ms. Daum's. He says that Mr. Mynett's calculations reflect a "real life" approach, based as it is on the formula approved by OIA's shareholders. This formula was intended to provide a means to determine share value in a fair and reasonable way for existing and new OIA shareholders. Moreover, it was adopted in April 2008 by individuals who were very familiar with OIA, namely, senior employees. Mr. Neville argues that the "Share Value" formula used by Mr. Mynett has been tested in the market place, and that the results of that testing (for example, none of the OIA minority shareholders chose to expand their ownership in the company, although each had the opportunity to do so) demonstrate that the OIA shares are not undervalued, based on Mr. Mynett's calculation.
- [75] Mr. Neville argues that, on the other hand, Ms. Daum's calculation of "notional fair market value" of the OIA shares has never been tested in the market place, and, in Mr. Neville's submission, it flies in the face of the real life experience of OIA's shareholders. Mr. Neville submits that, not only is Ms. Daum's calculation of value well above the "real market" price, but it fails to take into account that none of the existing shareholders was prepared to acquire additional shares at a value less than Ms. Daum's calculation; that the company lost a key sales representative (Mr. Clancy), who is now free to compete against OIA for business; and that OIA's business is heavily dependent on the personal relationships between OIA's sales representatives and manufacturers. Mr. Neville argues that it would be unjust to accept Ms. Daum's calculation of value, which he terms "speculative," in preference to a valuation resulting from the application of a formula negotiated by six arms-length business people, with knowledge of the industry.
- [76] On behalf of Ms. Mahannah, Mr. Daltrop argues that Ms. Daum's valuation of the OIA shares should be preferred over Mr. Mynett's. He asserts that Ms. Daum's valuation reflects fair market value, while Mr. Mynett's valuation does not reflect fair market value at all. I think that this submission goes too far. Ms. Daum's valuation is described as "notional" fair market value, and Mr. Mynett explained that the formula set out in his December 2007 letter was intended to achieve fair market value, although his letter cautioned that this was not necessarily the result and the term (which has a specific meaning for business valuers) should not be used in the Shareholders Agreement. Nevertheless, Mr. Daltrop submits that Ms. Daum's report reflects the value of the OIA shares in the open market, whereas Mr.

Mynett's report reflects the value among Mr. Mahannah and the OIA minority shareholders, a small and unique market. He notes as well that Mr. Mynett's calculation relies on a five-year rolling average, including two years of projected earnings. However, the projections were provided by Mr. Mahannah, who is not independent.

- [77] It is quite correct that Mr. Mahannah is not independent. However, he is knowledgeable - very knowledgeable - about the business, and I do not think that there are reasonable grounds to attack Mr. Mahannah's projections as overly pessimistic and created with a view to depress the value of the OIA shares. Rather, I would describe the projections as realistic, and (at least) moderately optimistic.
- [78] I have concluded that the fair value of the OIA shares is probably somewhere between the conclusions reached by Mr. Mynett and Ms. Daum. Mr. Mynett's approach has been tested to some degree "in the market," and it was designed to operate in a real-life situation where OIA shares were to be bought and sold. For those reasons, I prefer Mr. Mynett's approach to Ms. Daum's. The particular market may well be small and unique, but the members are highly knowledgeable about the business. However, Mr. Mynett attributed no value to Service, based on a mistake about the facts. Thus, the only opinion evidence I have concerning Service is Ms. Daum's. I conclude that the fair value of 100% of the OIA shares is \$6,250,000. In arriving at this figure, I accept Mr. Mynett's valuation and use his calculation of the mid-point (\$5,950,000). I then add \$300,000 to account for the value of Service, which is missing from Mr. Mynett's calculation. 79% is \$4,937,500.
- [79] I accept Ms. Daum's valuation of MVL's interest in Controls: \$117,000.
- [80] This results in a fair value of the MVL shares of \$5,054,500, which I will round up to \$5,055,000. Based on my comments above, I conclude that this is the fair value of the MVL common shares.
- [81] I accept Ms. Daum's valuation for Mr. Mahannah's Controls shares (\$234,000) and the MVL shareholder loan (\$38,348).
- [82] I turn then to the money in Mr. Mahannah's personal accounts with HSBC Bank. In addition to the money in the Inheritance Account, Mr. Mahannah had three other accounts: a savings account, with a balance according to Mr. Mahannah's June 2011 Financial Statement of \$70,000; a tax-free savings account, with a balance according to Mr. Mahannah's June 2011 Financial Statement of \$14,000; and a chequing account, with a balance according to the bank statement in evidence of approximately \$38,200. The total of all three accounts was \$122,200. The evidence concerning the use of these three accounts - whether any was ordinarily used for a family purpose - is inconclusive. I find these accounts are potential family assets.
- [83] I reach a different conclusion concerning the Inheritance Account, and, specifically, the money in that account over and above the deposits resulting from distributions from Mr. Mahannah's father's estate (and the life insurance proceeds).

- [84] Mr. Mahannah opened the Inheritance Account in October 2008. The first deposit to the account was made in on November 19, 2008, and was the first distribution Mr. Mahannah received from his father's estate. Mr. Mahannah was scrupulous about his use of the Inheritance Account, and scrupulous to avoid using the account for any family purpose. Virtually without exception, the only credits to the account are interest and funds Mr. Mahannah received as his father's beneficiary and there are no debits. The exceptions are assets that have already been divided equally between Mr. Mahannah and Ms. Mahannah.
- [85] The first exception occurs in December 2009. Mr. Mahannah deposited \$160,000 to the Inheritance Account. The evidence is undisputed that this represented 50% of commissions paid to him by OIA in 2009, and that Ms. Mahannah received \$160,000, representing the other 50%. I find that a potential family asset (Mr. Mahannah's commission earnings) was divided at that time, and divided equally between Mr. Mahannah and Ms. Mahannah. Mr. Mahannah's share, which remains in the Inheritance Account, should not be divided again.
- [86] The second exception occurs in January 2011. Mr. Mahannah deposited \$84,412 to the Inheritance Account. This represented 50% of a dividend income of \$168,823 received by MVL from OIA and paid out to MVL's shareholders, Mr. Mahannah and Ms. Mahannah. The other 50% was paid to Ms. Mahannah, also in January 2011. Again, I find that the dividend was a potential family asset, that, in January 2011 was divided equally between Mr. Mahannah and Ms. Mahannah. Mr. Mahannah's share, which remains in the Inheritance Account, should not be divided again.
- [87] In summary, with respect to the Inheritance Account, I conclude that it is not a family asset, and therefore is not subject to division. The bulk of the money in the account represents funds Mr. Mahannah received as a beneficiary of his father's estate. The remainder represents potential family assets that were equally divided between Mr. Mahannah and Ms. Mahannah, and Mr. Mahannah's share should not be subject to further division.
- [88] Ms. Mahannah does not dispute that her TD accounts are family assets.

(iii) Conclusion on valuation

- [89] In summary, the family assets and their value is as follows:

Asset

Value

Tempe Knoll

\$1,025,000

Ross Road (net of loan from Mr. Mahannah's father)

\$475,000

Mr. Mahannah's RRSP

\$763,453

Ms. Mahannah's RRSP

\$60,405

Ms. Mahannah's pension

\$57,851

2001 Acura

\$8,000

2003 Infiniti

\$12,000

2007 Victory Motorcycle

\$10,000

HSBC Bank Accounts (net; excluding the Inheritance Account)

\$122,200

TD Accounts (Ms. Mahannah)

\$4,195

MVL Shares

\$5,055,000

MVL Shareholder Loan account

\$38,438

Controls Shares

\$234,000

Total:

\$7,865,542.00

Round to: \$7,865,000.00

[90] An equal division would leave each party with assets of \$3,932,500.

(b) Division of assets

[91] Household furnishings have already been satisfactorily divided between Mr. Mahannah and Ms. Mahannah.

- [92] The parties agree that the RRSPs are to be divided equally, using the spousal rollover provisions of the Income Tax Act. I so order.
- [93] I order that Ms. Mahannah's pension be divided pursuant to Part 6 of the FRA.
- [94] I order that the 2001 Acura be sold and the proceeds divided equally. The parties are at liberty to sell the car to one of their children, should they agree to do so.
- [95] Ms. Mahannah will retain Tempe Knoll, the 2003 Infiniti and the money in the TD accounts, free of any claim by Mr. Mahannah.
- [96] Mr. Mahannah will retain Ross Road, the Victory Motorcycle and the money in the three HSBC accounts, free of any claim by Ms. Mahannah.
- [97] As I noted above, Mr. Mahannah proposes that he would acquire Ms. Mahannah's interest in MVL and pay her compensation pursuant to an order under FRA s. 66(2)(c). Ms. Mahannah and Mr. Mahannah each own 50% of the common shares. The only difference between the classes of shares is that Mr. Mahannah's shares are voting shares. Otherwise, there was no suggestion that, in terms of economic rights (to dividends, e.g.), non-voting shares are different or inferior in any way from voting shares.
- [98] Based on Mr. Daltrop's submissions, I conclude that what Ms. Mahannah means by an in specie division of the MVL shares is that:
- (a) she and Mr. Mahannah would transfer to one another 50% of the common shares owned by each. Ms. Mahannah would still own 50% of the common shares, but 25% of those shares would be voting shares; Mr. Mahannah would still own 50% of the common shares, but 25% of his shares would be non-voting; and
 - (b) Mr. Mahannah would transfer to Ms. Mahannah 50% of his preferred shares.
- [99] One of the problems with this kind of in specie division, which would see Mr. Mahannah lose voting control within MVL, arises from the terms of the 2008 Shareholders Agreement whereby loss of control over a holding company (in this case, Mr. Mahannah's loss of control over MVL) constitutes an event of default under the Agreement. Mr. Daltrop, on behalf of Ms. Mahannah, argues in effect that I should simply ignore these provisions, since Mr. Mahannah did not consult with Ms. Mahannah in any way in respect of them. However, I do not think making an in specie division that potentially places MVL in default of the 2008 Shareholders Agreement, and obligated to sell its shares in OIA at a 20% discount, is in either party's interest, particularly since there is no evidence that the economic value of the voting common shares is any different from the non-voting common shares.
- [100] In his submissions, Mr. Neville argues that a compensation order is appropriate in respect of the MVL shares because of a lack of trust between Mr. Mahannah and Ms. Mahannah in relation to MVL's affairs. Mr. Neville argues further that MVL's share structure would not lend itself to effective management, and says that Ms. Mahannah's willingness to forbear would not last past pronouncement of a judgment, given her very significant financial

desires and spending habits post-separation. He argues that deadlock would be the order of the day, and that the harm that deadlock would engender is potentially incalculable.

- [101] However, I do not think the evidence is consistent with Ms. Mahannah demonstrating any lack of trust in Mr. Mahannah's willingness or ability to run the affairs of MVL in a manner that respects the rights of both of them, as the holders of the common shares. That is how he has in fact run MVL. Further, in my view the current share structure (whereby Mr. Mahannah controls the company through his voting shares) does lend itself to effective management, something that has been demonstrated over the years since the parties separated. Maintaining that share structure avoids the spectre of deadlock.
- [102] Another - significant - problem with the compensation order Mr. Mahannah is proposing is that it requires Ms. Mahannah to wait for years before receiving full compensation for giving up her rights now. Mr. Mahannah asserts that he does not have the means to pay compensation sooner than what he is proposing, although Ms. Mahannah does not fully accept that this is so. However, Mr. Mahannah's evidence concerning his inability to borrow, and his need to have payment terms extending over a period of years, distinguishes this case from *Smith v. Smith*, 2008 BCCA 245, 83 B.C.L.R. (4th) 102. Based on his own evidence, a hardship would be visited on Mr. Mahannah if a compensation order were to be made, and he does not currently have the means to satisfy a compensation order except over a period of years. Moreover, MVL is not a personal services company, unlike the corporate asset in issue in *Smith*. Rather, MVL's primary asset is its interest in OIA, an operating business with other shareholders who have a stake in its continued operation, success and profitability.
- [103] I conclude, therefore, that the compensation order proposed by Mr. Mahannah in respect of the MVL shares is not appropriate in this case. Each of Mr. Mahannah and Ms. Mahannah already own an equal number of common shares. Those shares have equal rights, apart from the voting rights attached to Mr. Mahannah's shares. No additional value was attributed to Mr. Mahannah's shares resulting from voting rights being attached to them. Therefore, I order that each party will retain the common shares in MVL currently held by him or her, free of all claims by the other party.
- [104] There may be some nominal value attached to Mr. Mahannah's voting shares. I fix this at \$100. No value was placed on Mr. Mahannah's preferred shares in MVL. I fix the value of those shares at \$1,000. Mr. Mahannah will retain his preferred shares in MVL free of all claims by Ms. Mahannah.
- [105] The MVL shareholder loan will be divided equally.

[106] I have reached a different conclusion concerning Mr. Mahannah's shares in Controls, and conclude (particularly since 50% of the shares are owned by one of Mr. Mahannah's business colleagues) that an in specie division of this asset would not be appropriate. Mr. Mahannah should be placed in a position where he can deal with this asset free from potential interference from Ms. Mahannah. Mr. Mahannah will retain his shares in Controls, free of all claims by Ms. Mahannah.

[107] In summary, with respect to the family assets that are being allocated to each party, free of any claims by the other party, the division and values are as follows:

Asset

Mr. Mahannah

Ms. Mahannah

Tempe Knoll

\$1,025,000

Ross Road

\$475,000

2003 Infiniti

\$12,000

Victory Motorcycle

\$10,000

HSBC Accounts

\$122,200

TD Accounts

\$4,195

MVL non-voting shares

\$2,527,500

MVL Voting shares

\$2,527,600

MVL Preferred shares

\$1,000

Controls shares

\$234,000

Totals:

\$3,369,800

\$3,568,795

[108] To equalize the division, Ms. Mahannah will be ordered to pay \$99,447.50 to Mr. Mahannah.

Child and Spousal Support

[109] Determination of the parties' incomes, and the support payments actually made, should be relatively straightforward, since basic facts (e.g., what was Mr. Mahannah's line 150 income, and what was Ms. Mahannah's) should be uncontroversial. In her evidence, Ms. Mahannah acknowledged Mr. Mahannah as someone who kept impeccable records. This is an apt description in my view, and I have concluded that Mr. Mahannah is an accurate and reliable record-keeper.

[110] Despite that, I found controversy in unexpected places.

[111] For example, in closing submissions, both Mr. Neville and Mr. Daltrop provided me with calculations that showed that Mr. Mahannah had overpaid support for the period 2006 to 2008, although they did not agree on the amount of the overpayment. For 2010, Mr. Neville showed income for Mr. Mahannah for purposes of child support of \$464,564, while Mr. Daltrop showed \$404,786. This difference was the result of Mr. Neville attributing a dividend as paid one-half to Mr. Mahannah and one-half to Ms. Mahannah, while Mr. Daltrop treated 100% of the dividend as paid to Mr. Mahannah. There were a number of other examples. Unfortunately, these differences limited the usefulness of the calculations, including software calculations, provided by counsel.

[112] As of trial, there was no court order concerning the payment of child support. In his statement of claim filed May 16, 2008, Mr. Mahannah sought an order for child support. In her counterclaim filed August 10, 2009, Ms. Mahannah sought an order for child support. Neither made any claim for retroactive support, retroactive to the date of separation. Once Kathleen left home to attend the University of Toronto in September 2007, support for her probably should have been calculated based on s. 3(2)(b) of the Guidelines, rather than a combination of the tables plus s. 7 expenses (see, e.g., *Neufeld v. Neufeld*, 2005 BCCA 7, para. 42). However, this was not the approach taken by either of the parties at trial and the calculations of child support were based on the table amounts.

[113] Under s. 15(1) of the Guidelines (and subject to s. 15(2), which is not relevant here), a spouse's annual income is determined in accordance with sections 16 to 20 of the Guidelines. Section 16 sets out the primary method for determining income, essentially using the sources of income set out under "Total Income" (line 150) in the T1 income tax form, making the necessary adjustments in accordance with Schedule III. Section 17(1) provides that:

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

[114] Section 19 allows the court to impute "such amount of income to a spouse as it considers appropriate in the circumstances," including where the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse (see s. 19(1)(a)).

(a) Line 150 Income

[115] I find that Mr. Mahannah's and Ms. Mahannah's line 150 income, adjusted in accordance with Schedule III of the Guidelines, is as follows, for the years 2006 to 2011:

Year

Mr. Mahannah

Ms. Mahannah

2006

\$251,534

\$48,149

2007

\$241,120

\$56,035

2008

\$229,535

\$53,469

2009

\$998,326

\$46,463

2010

\$465,001

\$47,343

2011 (est.)

\$465,001

\$47,343

[116] I arrive at Mr. Mahannah's 2009 income by subtracting his motor vehicle expenses (\$6,567) from his line 150 income of \$1,004,893. His 2009 income is much higher than his income in the previous three years as well as his income in the years following. It reflects that 2009 was an unusual, and unusually profitable, year for OIA. However, Mr. Mahannah did not argue that determination of his income for that year under s. 16 would not be the fairest determination of that income.

[117] Mr. Mahannah's 2010 income is his line 150 income (\$531,651), adjusted to reflect the actual amount of the dividend received (\$60,500) and minus his motor vehicle expenses (\$6,150).

[118] I have used the same amount for 2011. This is consistent with what Mr. Mahannah indicated in his June 2011 F8 financial statement for his 2011 income, although whether another dividend would be payable and paid in 2011 was unknown as of trial.

(b) Should income be imputed to Ms. Mahannah?

[119] A party's income, as reported on her income tax returns, is not necessarily the appropriate amounts for purposes of child support, however.

[120] Ms. Mahannah says that her obligations with respect to child support should be based on her line 150 income. On the other hand, Mr. Mahannah says that substantially higher income - equivalent to at least income from a full-time position - should be imputed to her, beginning with the calendar year 2009.

[121] The basic principles are not in dispute. They are set out, for example, in *Watts v. Willie*, 2004 BCCA 600, 8 R.F.L. (6th) 456, at para. 16 (per Donald J.A.):

[16] In *Donovan v. Donovan*, (2000), 190 D.L.R. (4th) 696, 2000 MBCA 80, Madam Justice Steel gave the judgment of the court and wrote at para. 21:

The following guidelines may be considered when determining whether to impute income. (See Dr. Julien D. Payne, *Imputing Income*, "Determination of Income, Disclosure of Income," *Child Support in Canada*, Danrab Inc., August 3, 1999.)

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (Van Gool v. Van Gool, (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[122] The question under s. 19(1)(a) of the Guidelines is whether the payor spouse has demonstrated an intention to be underemployed, with the result that the children do not benefit from the payor's potential earning capacity: see *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 (at paras. 18 and following). By way of example, a parent who chooses to work less than a regular work week must justify that choice by the needs of the children or suffer the loss personally. She cannot effectively transfer part of the cost of that choice to her children.

[123] As the Court noted in *McCaffrey v. Paleolog*, 2011 BCCA 378 at para. 49, "a desire simply to stay home with children is not sufficient to invoke the exception in s. 19(1)(a). There must be evidence of needs of a child which require the parent to remain home and unavailable for employment." In my view, a desire to pursue personal development, leisure activities and travel is not sufficient to invoke the exception in s. 19(1)(a).

[124] Here, the evidence simply does not support the conclusion that, since the parties separated in March 2006, the needs of any of the Mahannah children required Ms. Mahannah to work reduced hours, particularly where Mr. Mahannah and Ms. Mahannah had a shared parenting arrangement, and Ms. Mahannah had paid help to manage and run her household. Rather, I conclude that working less than full-time was Ms. Mahannah's personal choice. She preferred to do this, so that she had time free to pursue other activities: coaching volleyball, attending Landmark seminars and (more recently)

travelling. Ms. Mahannah claims that, currently, she is limited in the types of pharmacy-related services she is able to provide and thus her employment opportunities are limited. However, since the parties separated, Ms. Mahannah has taken no steps to upgrade her current skills and qualifications, or even to investigate what might be involved. Rather than pursue professional development activities or go back to school, Ms. Mahannah preferred to spend her time attending seminars and volunteering with Landmark, which she describes as a "form of education." This is her choice, but her children should not be made to bear the cost.

[125] While she asserted that there are very few openings in the Lower Mainland for full-time pharmacists, since separation, Ms. Mahannah has taken no steps to investigate whether full-time work is available within a hospital setting, explaining that she is not looking for full-time work. In my view, by the end of 2008, Ms. Mahannah ought to have taken reasonable steps towards ensuring that she was not under-employed. Instead, up to the date of trial, she has done nothing. A parent cannot avoid child support obligations by a self-induced reduction of income. I find that it is appropriate in this case to impute income to Ms. Mahannah, beginning in 2009. Her children are entitled to benefit from her true earning potential, which, I find, exceeds her actual income.

[126] Mr. Neville (on behalf of Mr. Mahannah) submits that total income of \$95,000 should be imputed to Ms. Mahannah. This approximates the full-time equivalent of Ms. Mahannah's current part-time income. I agree. I impute an annual income to Ms. Mahannah of \$95,000 for purposes of child support, beginning with the calendar year 2009.

(c) Child Support

[127] There is no dispute that s. 9 of the Guidelines applies here. Section 9 provides that, where there is shared custody:

... the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[128] In *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, the Supreme Court of Canada clarified the approach to be taken in the application of s. 9. A simple set-off is the starting point and not the end point of the analysis. Nevertheless, neither Mr. Mahannah nor Ms. Mahannah argues that the result produced by setting off the table amounts payable by each of them is inappropriate, having regard to the factors set out in s. 9 of the Guidelines. I conclude that, in the circumstances of this family, the amount of child support produced by setting off the table amounts payable by each parent is appropriate, in view of the factors set out in s. 9.

[129] Mr. Mahannah says that he made the following child support payments:

Year

Table Support (after set-off)

Additional Support ("Money for kids' expenses")

Total

2006

0

\$1,850

\$1,850

2007

\$46,131

\$14,031

\$60,162

2008

\$57,092

\$11,909

\$69,001

2009

\$50,750

\$32,470

\$83,220

2010

\$52,680

\$21,703

\$74,383

2011 (to June)

\$26,340

\$2,022

\$28,362

[130] In her calculations of child support paid and payable, Ms. Mahannah does not give Mr. Mahannah any credit for any amount in the "Additional Support" column.

[131] Ms. Mahannah agrees with the amounts shown in the "Table Support" column for 2007 and 2008, and agrees that, in paying these amounts (and excluding the additional amounts Mr. Mahannah paid) Mr. Mahannah has paid child support as required under the Guidelines for those two years. I find that, for 2007 and 2008, Mr. Mahannah has satisfied his obligations under the Guidelines in respect of child support.

[132] Ms. Mahannah says that support paid in 2009 was \$59,750, which is \$9,000 more than the "Table support" amount Mr. Mahannah says that he paid. I find that Mr. Mahannah's figure (\$50,750) is the correct one. However, based on Mr. Mahannah's income in 2009, and Ms. Mahannah's imputed income, and based on where the three Mahannah children were living during the year, the table support payable under the Guidelines is as follows:

Location of children

Support payable by Mr. Mahannah

Support payable by Ms. Mahannah

Offset

2009 "Shortfall"

Kathleen in Toronto for 8 months and North Vancouver (home) for 4 months; Connor and Laurel at home for 12 months

\$15,902 per month for 4 months for 3 children totalling \$63,608

\$12,411 per month for 8 months for 2 children totalling \$99,288

Grand total: \$162,896

\$1,793 per month for 4 months for 3 children totalling \$7,172

\$1,380 per month for 8 months for 2 children totalling \$11,040

Grand total: \$18,212

\$144,684

\$93,934

[133] Ms. Mahannah says that in 2010, Mr. Mahannah paid child support of \$57,985. However, again I find that Mr. Mahannah's figure (\$52,680) is correct. Based on Mr. Mahannah's income and Ms. Mahannah's imputed income, the table support payable under the Guidelines for two children (Connor and Laurel) is:

Mr. Mahannah

Ms. Mahannah

Offset (payable by Mr. Mahannah)

2010 "Shortfall"

\$2,061 plus \$3843 = \$5,904 per month totalling \$70,848 for 12 months

\$1,380 per month for 12 months, totalling \$16,560

\$4,524 per month totalling \$54,288

\$1,608

[134] For 2011, based on my conclusion that Mr. Mahannah's income will be essentially the same as his 2010 income, and imputing income of \$95,000 to Ms. Mahannah, the table support payable under the Guidelines for two children is \$4,524 payable by Mr. Mahannah. Up to the end of June, Mr. Mahannah had paid \$26,340, or \$4,390 per month. This results in a shortfall to the end of June of \$804, before dealing with the "Additional Support."

[135] I conclude that Mr. Mahannah in fact paid the additional amounts shown under the column "Additional Support (Money for kids' expenses)" in para. 129 above. Mr. Mahannah has demonstrated that he is a reliable and accurate record-keeper. Ms. Mahannah never seriously challenged the fact of the payments being made, although she did not accept that Mr. Mahannah should receive credit for them as payments of child support. However, Mr. Mahannah's evidence concerning his arrangements with Kathleen to pay expenses based on her budget and concerning his arrangements with Connor was essentially unchallenged. Based on Mr. Mahannah's evidence concerning the payments, I conclude that the amounts shown under "Additional Support" should be treated as payments by Mr. Mahannah on account of his obligation to pay child support. After giving Mr. Mahannah credit for these payments, there is no shortfall for 2010 or 2011, and the shortfall for 2009 is reduced to \$61,464.

[136] At trial, Ms. Mahannah advanced a claim for child support retroactive to the date of separation, on the basis that, as of that date, Mr. Mahannah had effective notice of his obligation to pay support. However, apart from saying that retroactive support should be paid, and setting out calculations of what he considered should be paid, Mr. Daltrop did little to explain why retroactive support should be ordered here, or to justify such an order.

[137] Mr. Neville pointed out that such a claim had never been pleaded. He noted as well that, for example, Ms. Mahannah has had exclusive occupancy of the matrimonial home, and that this can be a factor to be taken into account in the exercise of the court's discretion in relation to a claim for retroactive support. Among other things, Mr. Neville submitted that the needs of the Mahannah children have been and continue to be met. He argues in effect that the children would get no discernible benefit from an award of retroactive support, and

such an award would simply constitute either a redistribution of capital or spousal support in the guise of child support.

- [138] The leading case on retroactive support is *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231. The factors that the court will consider in exercising its discretion in making a retroactive child support order include: the circumstances surrounding the delay, the payor parent's conduct, the child's circumstances and any hardship caused by a retroactive award. See *D.B.S.*, paras. 100 and following, and para. 133. The parental obligation to support a child or children of the marriage, like the children's concomitant right to support, exists independently of any statute or court order: see *D.B.S.*, at para. 54.
- [139] As I noted above (and as Mr. Neville pointed out), Ms. Mahannah did not make any claim for retroactive support in her counterclaim. While not determinative, this factor is significant because of its connection to the question of whether there is unfairness in making a retroactive award. There was no evidence that Ms. Mahannah was ever actively discouraged by Mr. Mahannah from pursuing an application for child support, and, indeed, it was Mr. Mahannah who took the initiative to file legal proceedings and then to move the proceedings forward. In that light, Ms. Mahannah did not provide any satisfactory explanation for not making this claim until trial. I have found that Mr. Mahannah should receive credit for both the table support and additional support paid by him, and I do not consider there is anything in his conduct that should be categorized as blameworthy. There is no evidence that the Mahannah children suffered any financial hardship or diminished standard of living. I think the fact that Ms. Mahannah was not motivated to make any effort to pursue full-time work is consistent with the conclusion that her circumstances and those of the Mahannah children remained comfortable relative to the marital standard of living, based on the support being paid by Mr. Mahannah after separation. Taking all of those factors into account, I conclude Mr. Mahannah should not be ordered to pay child support, retroactive to separation in March 2006.
- [140] I have reached a different conclusion with respect to support for 2009. Mr. Mahannah did not pay child support in accordance with his Guideline income for that year. Certainly, by August 2009, child support was a live issue based on both sets of pleadings. I do not think that payment of the "shortfall" amount from 2009 would represent a hardship for Mr. Mahannah, and the Mahannah children could and would benefit from the additional support. I order that Mr. Mahannah pay retroactive child support, fixed in the sum of \$61,000, for the calendar year 2009.
- [141] With respect to the period beginning August 1, 2011, I order that, for Connor and Laurel, so long as each remains a child of the marriage, child support be paid, based on Guideline incomes of \$465,001 for Mr. Mahannah and \$95,000 (imputed) to Ms. Mahannah, applying a set-off under s. 9 of the Guidelines. I will leave counsel to do the calculations. Income of \$95,000 will continue to be imputed to Ms. Mahannah so long as Connor and Laurel (or either of them) remain children of the marriage, with liberty to apply if there is a material change in Ms. Mahannah's circumstances relating to her capacity for full-time employment.

I direct that updated income information be exchanged annually, and that any necessary adjustments to the amount of child support be made based on that updated income information, so that, going forward, child support is being paid at the level set out in the Guidelines and in accordance with the Guidelines. I will leave counsel to agree on dates for the exchange and for any necessary change in the amount of support payable, with liberty to apply if they cannot agree.

[142] At the conclusion of the trial, I was asked to and made an interim order essentially in these terms: based on Guideline incomes of \$464,500 for Mr. Mahannah and \$156,000 for Ms. Mahannah, Mr. Mahannah pay Ms. Mahannah \$5,899 per month for Connor and Ms. Mahannah pay Mr. Mahannah \$2,133 per month for Laurel beginning August 1, 2011. The set-off amount would be \$3,766. Each of Mr. Mahannah and Ms. Mahannah are entitled to receive credit for amounts paid under the interim order. Again, I will leave counsel to do the calculations of any under-payment or over-payment.

[143] Section 7 expenses for Connor and Laurel will be payable in proportion to the parties' Guideline incomes set out in para. 141 above.

[144] Beginning January 1, 2012, child support will be payable according to the 2011 table amounts, rather than the 2006 table amounts. Either party has leave to seek an order in respect of Connor that support should be payable under s. 3(2)(b) of the Guidelines, rather than under s. 3(2)(a).

(d) Spousal Support

[145] The objectives of a spousal support order are set out in the Divorce Act, s. 15.2(6) which provides that:

An order . . . 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.

[146] Moreover, under s. 15.2(4) of the Divorce Act, courts must

. . . take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[147] Compensatory support primarily relates to the first two objectives, while non-compensatory support primarily relates to the third and fourth objectives: see *Chutter v. Chutter*, 2008 BCCA 507, 86 B.C.L.R. (4th) 233, at para. 47. A court is not called upon to decide on one basis for support to the exclusion of the other but rather to apply the relevant factors and strike the balance that best achieves justice in the particular case: see *Chutter*, at para. 49.

[148] In determining whether a spouse has been economically disadvantaged as a result of the marriage or its breakdown, the fact that the spouse pursued a career and was employed outside the home does not necessarily preclude entitlement to support on compensatory grounds: see *Chutter*, at para. 71.

[149] Both compensatory and non-compensatory support, particularly in longer marriages (such as this one), take into account the marital standard of living and the parties' post-separation standard of living: see *Chutter*, at paras. 52-58, 61 and 88.

[150] Ms. Mahannah advanced her claim for spousal support in her counterclaim filed August 10, 2009. She made no claim for support retroactive to March 2006. Ms. Mahannah says she is entitled to indefinite spousal support on both compensatory and non-compensatory grounds.

[151] Mr. Mahannah in effect concedes an entitlement to support on non-compensatory grounds, but not otherwise.

[152] I have concluded that Ms. Mahannah is entitled to spousal support. The Mahannahs had been married almost 22 years when they separated. They enjoyed a comfortable life-style on a joint gross income of about \$300,000. Ms. Mahannah is not capable of achieving or sustaining something roughly equivalent to the marital standard of living without support. It would be going too far to say that Ms. Mahannah sacrificed her career for the family, particularly since the Mahannahs had paid help - nannies and housekeepers - from shortly after the birth of their first child. However, while Ms. Mahannah did not give up her career as a pharmacist, she took on the role as the "at home" parent when the parties' children were young and adjusted her work schedule to part-time to accommodate that role. Mr. Mahannah was able to devote himself to building OIA's business, which he has done very successfully. Ms. Mahannah made some economic sacrifices so that she could devote time and effort to raising the parties' children.

[153] I turn then to quantum.

- [154] Ms. Mahannah says that she should receive monthly support of between \$9,227 (low) and \$12,837 (high), with a mid-range of \$11,618. These amounts are based on software calculations using the SSAG, and assuming guideline incomes of \$529,916 for Mr. Mahannah and \$53,000 for Ms. Mahannah.
- [155] Mr. Mahannah says that he should pay spousal support of \$5,000 per month. He says that spousal support should be based on an annual income for Ms. Mahannah of between \$110,000 and \$115,000, and an annual income for him of \$400,000. He says further it should be time-limited.
- [156] I will first address whether income (and if so, what amount) should be imputed to Ms. Mahannah for purposes of spousal support.
- [157] No one provided me with authority for the proposition that the same principles governing imputing income for purposes of child support ought to apply in respect of spousal support, although that is, in effect, the argument being advanced by Mr. Neville on behalf of Mr. Mahannah. A spouse does not have a duty to establish self-sufficiency: see *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at paras. 26-27. However, the authorities require a spouse to make reasonable efforts to become self-sufficient, and failure to do this can be taken into account in determining the appropriate quantum and duration of spousal support: see *Tedham v. Tedham*, 2005 BCCA 502, 47 B.C.L.R. (4th) 254. Ms. Mahannah is an intelligent, highly-qualified professional with 25 years seniority as a hospital pharmacist. She is not in the position of having to begin looking for work after many years out of the work force, or be re-trained for a new career.
- [158] I find that Ms. Mahannah should be afforded a reasonable period, after the parties' separation, to, if necessary, upgrade her skills, pursue appropriate professional development and look for full-time work. I am not satisfied that, if she had pursued obtaining full-time employment with any reasonable amount of effort, Ms. Mahannah nevertheless would have encountered failure. However, I find that her efforts towards self-sufficiency after separation have been less than whole-hearted. Indeed, I would describe them as non-existent. Since the parties separated, Ms. Mahannah has not even gone so far as to make inquiries about full-time positions. She has chosen to spend her time - and substantial time - in non-income earning activities and vacations. To move towards self-sufficiency, Ms. Mahannah (like most individuals with full-time jobs, including Mr. Mahannah) will simply have to schedule her leisure activities - such as volleyball coaching, travel and her engagement in Landmark activities - around paid work. I have concluded that, beginning in 2009, income roughly equivalent to income from a full-time position as a pharmacist - in other words, \$95,000 annually - should be imputed to her.
- [159] Although both parties provided me with software calculations using the SSAG, they were based on assumptions about income that I have not accepted. For example, Ms. Mahannah's calculations imputed no income to her. Mr. Mahannah's argument that spousal support should be at the low end of the range was based in part on the assumption that Ms.

Mahannah would be receiving significant income as a result of a compensation order for her interest in MVL, and I have concluded such an order should not be made. Mr. Mahannah's calculations imputed more income to Ms. Mahannah than I have found appropriate. In addition, Ms. Mahannah seeks to have spousal support calculated under the SSAG based on Mr. Mahannah's actual income. However, since Mr. Mahannah's income is above \$350,000, the formulas under the SSAG no longer automatically apply to the determination of the quantum of support, although they may be helpful: see Chutter, at para. 104.

- [160] Applying the "with child" formula to Mr. Mahannah's estimated 2011 income of \$465,001 and Ms. Mahannah's imputed income of \$95,000 yields a range of between \$7,199 (low) and \$9,649 (high), with a mid-point of \$8,472. This gives Ms. Mahannah the full-benefit of the increase in Mr. Mahannah's income post-separation. Applying the formula to a notional income for Mr. Mahannah of \$350,000 and Ms. Mahannah's imputed income of \$95,000 yields a range of between \$4,460 (low) and \$6,387 (high), with a mid-point of \$5,423. At \$350,000, Ms. Mahannah would still receive some benefit from the increase in Mr. Mahannah's income post-separation.
- [161] Mr. Daltrop cites *E. (Y.J.) v. R. (Y.N.)*, 2007 BCSC 509, at paras. 87-100 and *Teja v. Dhanda*, 2009 BCCA 198, at paras. 15-18 in support of his argument that the full amount of Mr. Mahannah's income should be used in calculating spousal support. However, in the first case, the debate was not really about the calculation of the payor-husband's income or the application of the SSAG; it was about imputing income to the recipient-wife (see para. 98). In *Teja*, the whole of the payor-husband's income was included for the purposes of child support (see para. 15). Again, there was no real debate about whether it should also be included for purposes of spousal support.
- [162] I have concluded that spousal support should be based on an income for Mr. Mahannah of \$465,001. This is his adjusted 2010 income, and his projected 2011 income. It allows Ms. Mahannah to benefit from the post-separation increase in Mr. Mahannah's income. However, I think that is appropriate since (and despite the corporate re-organizations that have taken place since separation) Mr. Mahannah continues the career he was engaged in at the time of separation. While it is higher, it is not substantially higher than the "sustainable" income figure of \$400,000 that Mr. Neville put forward in argument.
- [163] Ms. Mahannah's monthly expenses, as disclosed by her July 2011 Financial statement, are based on a life-style far beyond anything that could have been supported by the joint family income prior to separation. In my view, they are far beyond what is reasonable, and, in fixing quantum, I give them very little weight.
- [164] I conclude that the quantum of spousal support that is fair to both parties is \$7,200 per month, payable by Mr. Mahannah to Ms. Mahannah. This is at the low end of the range, based on the incomes. However, it is still considerably above the high end of the range produced when a notional income of \$350,000 is attributed to Mr. Mahannah. In addition, I

do not think that support should be set at level where Ms. Mahannah continues to feel disinclined to pursue full-time work. In my view, setting support at the low end of the range should provide encouragement to Ms. Mahannah to move toward self-sufficiency. Based on the length of the marriage, support will be indefinite. "Indefinite" support is not, however, "permanent" support.

- [165] I turn then to Ms. Mahannah's claim for retroactive spousal support, retroactive to the date of separation.
- [166] Similar considerations to those applicable in the context of child support are also relevant to deciding the suitability of a retroactive award of spousal support: the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, as Mr. Justice Cromwell explained in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, at paras. 207-209:
- [207] . . . in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.
- [208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. . . . With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support [citation omitted]. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support [reference omitted].
- [209] Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *D.B.S.*, at paras. 100-103).

[167] Cromwell J. concluded that the trial judge was correct in making the order for support effective the date on which the proceedings seeking relief had been commenced. He wrote, at para. 210:

... Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations. Ms. Kerr diligently pursued her claim to trial and that being the case, there is little need to provide further incentives for her or others in her position to proceed with more diligence.

[168] However, discussing the factors relevant to the date of a support order, Cromwell J. commented, at para. 212:

[212] ... The focus of concern about conduct must be on conduct broadly relevant to the support obligation, for example, concealing assets or failing to make appropriate disclosure: D.B.S., at para. 106. Consideration of the circumstances of the spouse seeking support, by analogy to the D.B.S. analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of D.B.S. may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in D.B.S. emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

[169] In the light of the relevant factors, I find there is no basis to award Ms. Mahannah support retroactive to the date of separation. Although Mr. Daltrop argues that I should find Mr. Mahannah had "effective" notice as of that date, I do not think that argument can survive alongside Ms. Mahannah's counterclaim, where no claim was in fact made for retroactive support. Ms. Mahannah did not provide any satisfactory explanation for the failure to include a claim for retroactive support in her counterclaim, and, in my view, she advanced no reasonable excuse for waiting until trial to advance her claim.

[170] Should then an order for spousal support be made effective as of August 2009, when Ms. Mahannah did, through her pleadings, give clear notice she was advancing a claim for spousal support?

[171] Looking first at conduct, I do not think Mr. Mahannah's conduct relevant to the support obligation can be described as blameworthy. There was no concealing of assets or failing to make appropriate disclosure. Rather, Mr. Mahannah's conduct is consistent with that of someone who is fully prepared to have the issues resolved, either by agreement or court

order, and is prepared to take the steps necessary to achieve that result. On the other hand, I find little to indicate that Ms. Mahannah (unlike Ms. Kerr) was pursuing her claims diligently.

- [172] Ms. Mahannah could, perhaps, be said to demonstrate need at the time support should have been paid (i.e., after her counterclaim was filed). For example, she currently has few cash assets, and her main assets after the property division will be her interest in Tempe Knoll and her interest in MVL. However, Ms. Mahannah's own conduct after she and Mr. Mahannah separated is equivocal. To the extent she felt need, it did not rise to the level where she felt compelled or even encouraged to look for full-time work. Rather, she never felt the need to do this. Particularly in 2010, she was spending her capital (the payments of \$160,000 and \$100,000 she received) at a breath-taking rate. However, I do not think this was a consequence of Ms. Mahannah being in need. Rather, by 2010, she had money (including her inheritance) to indulge her wants and desires, and that is what she did. Ms. Mahannah's pattern of spending in 2010 seems to me to be inconsistent with the proposition that she was experiencing hardship as a result of a failure on Mr. Mahannah's part to pay her spousal support. Despite this, I find that, in the period beginning August 2009, Ms. Mahannah has demonstrated some need for support, over and above what Mr. Mahannah was paying her.
- [173] In 2009, 2010 and 2011, Mr. Mahannah paid the after-tax income he received from his work with Landmark to Ms. Mahannah. The amounts were \$15,184 in both 2009 and 2010, and an estimated \$7,592 in 2011 (to the end of June). I find that the parties treated these payments as payments of spousal support. Moreover, at the conclusion of the trial, Mr. Daltrop requested that I make an interim order concerning spousal support. I ordered Mr. Mahannah to pay spousal support, on an interim basis, of \$7,600 per month commencing August 1, 2011.
- [174] At \$7,200 per month beginning September 2009 (the month after Ms. Mahannah filed her counterclaim) to July 2011, potential retroactive support would be \$165,600. After giving Mr. Mahannah credit for the payments of his Landmark income, the balance is approximately \$127,600. Taking into account the absence of any blameworthy conduct on Mr. Mahannah's part, the absence of evidence concerning Ms. Mahannah's pursuit of her own claim and the extent to which her personal conduct is inconsistent with need, I conclude that an award of \$50,000 by way of spousal support, retroactive to September 2009 and up to and including July 2011, is appropriate and fair to both parties. The overpayment by Mr. Mahannah beginning August 1, 2011 (\$400 per month) can be credited against this amount. The monthly payments of \$7,200 will begin April 1, 2012.

Divorce

[175] I am satisfied that all the requirements of the Divorce Act have been met and Mr. Mahannah and Ms. Mahannah are entitled to an order for divorce. I make that order, which will be effective 31 days from the date of these Reasons.

Summary

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

- (a) subject to s. 12 of the Divorce Act, Mr. Mahannah and Ms. Mahannah, who were married at Vancouver, B.C. on June 16, 1984 are divorced from each other, such divorce to take effect on the 31st day after the date of this order;
- (b) Mr. Mahannah and Ms. Mahannah have joint guardianship of Connor and Laurel, according to the Joyce model, and Connor and Laurel will reside with each parent on an equal basis;
- (c) For the period beginning August 1, 2011, I order that child support be paid for Connor and Lauren based on Guideline incomes of \$465,001 for Mr. Mahannah and \$95,000 (imputed) for Ms. Mahannah, and applying a set-off under s. 9. I leave counsel to do the calculations. Mr. Mahannah and Ms. Mahannah are entitled to receive credit for amounts paid under the interim order pronounced August 11, 2011. Section 7 expenses will be payable in proportion to the Guideline incomes set out above;
- (d) Beginning January 1, 2012, child support will be payable according to the 2011 table amounts, rather than the 2006 table amounts. I have made directions above concerning updating income information and making adjustments to the child support payable as a result;
- (e) Either party has leave to seek an order that support for Connor should be payable under s. 3(2)(b) of the Guidelines, rather than s. 3(2)(a);
- (f) Mr. Mahannah pay to Ms. Mahannah retroactive child support for 2009, fixed in the sum of \$61,000. The remainder of Ms. Mahannah's claims for retroactive child support are dismissed;
- (g) Mr. Mahannah pay spousal support to Ms. Mahannah in the sum of \$7,200 per month;
- (h) With respect to Ms. Mahannah's claim for retroactive spousal support, I order that Mr. Mahannah pay Ms. Mahannah the sum of \$50,000 in satisfaction of her claim for the period beginning September 1, 2009 and up to and including July 2011. Overpayments made by Mr. Mahannah pursuant to the interim order pronounced August 11, 2011 can be credited against this amount, and, commencing April 1, 2012, the spousal support payment is reduced to \$7,200 per month. The remainder of Ms. Mahannah's claim for retroactive spousal support is dismissed; and

- (i) Family assets will be divided and allocated as set out in these reasons. To equalize the division, Ms. Mahannah will pay compensation of \$99,447.50 to Mr. Mahannah.

[177] If the parties are unable to agree on costs, I direct that counsel, within 30 days of the date of these reasons, take steps to request a date for a hearing before me to speak to costs.

____ "Adair J." _____

The Honourable Madam Justice Adair

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Prepared on 29 October 2026 · Esheria