
CANADA / JUDGMENT

P.R.M. v. B.J.M.

2012 BCSC 1795

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1795 P.R.M. v. B.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.R.M. v. B.J.M.,

2012 BCSC 1795

Date: 20121203

Docket: E071363

Registry: Vancouver

Between:

P.R.M.,

also known as P.R.L.

Plaintiff

And

B.J.M.

Defendant

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Reasons for Judgment - Part 2 -

Final Property Division, Spousal and Child Support

Counsel for the Plaintiff:

William A. McLachlan

Counsel for the Defendant:

Jeffrey A. Rose, Q.C. and

C. Jane Anderson

Place and Date of Hearing:

Vancouver, B.C.

July 14, 15, 16, 17, 18,

September 4 and December 2, 2008;

New Westminster, B.C.

March 19, 2010, February 3,

December 1 and 2, 2011

Place and Date of Judgment:

Vancouver, B.C.

December 3, 2012

I. Introduction

- [1] The plaintiff, P.R.M. ("the wife"), and the defendant, B.J.M. ("the husband"), are now divorced, after more than 23 years of marriage, pursuant to an order of this Court which took effect on September 19, 2009. They married on August 14, 1983, and separated on November 18, 2006. They have four children.
- [2] Upon the breakdown of the marriage, the wife made claims for a division of family assets, spousal support and child support, including expenses pursuant to s. 7 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] for the children. In reasons to be found at P.R.M. v. B.J.M., 2009 BCSC 1130 ("the prior reasons"), the Court set out the history of the parties' marriage, their roles and financial circumstances during the marriage; made findings as to reliability and credibility on certain evidence relevant to the division of assets and reapportionment; and made decisions as to the characterization, division and reapportionment of certain assets, in addition to granting an order of divorce.
- [3] In these reasons I do not propose to refer to the prior reasons, cited above, except as necessary to deal with the issues now before the Court. Counsel agreed to this case being split in this manner. The protracted nature of these proceedings in their early stages is due to the illness of Mr. Justice Brine, now deceased, who heard the trial in 2008. Any review of these reasons regarding spousal support, child support and s. 7 expenses must include a review of the prior reasons. In addition to evidence at trial, the Court has received further evidence by affidavit from the parties.

- [4] As indicated, the prior reasons were filed on August 19, 2009. On November 23, 2009, counsel for the husband prepared an application to seek a reduction in the value of one of the significant family assets, which had been ordered reapportioned 65 percent to him and 35 percent to the wife, due to the economic downturn. This asset was a private family company called Hudson Principle Investments Ltd. ("HPI"). The same application had previously been brought before Brine J. on December 1, 2008, who declined to deal with it at that time.
- [5] On March 18, 2010, the husband filed his application to permit additional evidence be adduced as to the reduction in value of HPI, to be heard on March 19, 2010, a date previously set for hearing. The wife filed an application to be heard on the same day seeking an adjournment of the husband's application until he provided updated financial statements for a number of companies that figured in the parties' division of assets. Representations were made to the Court but the applications did not proceed. Certain matters have since been dealt with by agreement.
- [6] On February 1, 2011, the wife brought an application to re-open the trial to consider the issue of valuation of HPI, and in particular the income earned by HPI from 2007 to 2010, to be heard with the husband's application. Information regarding this income was not available when the trial commenced before Brine J. on July 14, 2008. The application was served late. The dates of February 3 and 4, 2011 had previously been set for hearing in relation to the husband's application. Neither application was heard because counsel were not ready to proceed. The applications were adjourned to the next available court dates, which were December 1 and 2, 2011. On December 1, 2011, counsel advised that the issues related to the change in value of HPI since the evidence was provided at trial in 2008 had been resolved without the need for further Court involvement. Submissions were made with regards to spousal support, child support and s. 7 expenses for the three younger children of the marriage. The claims in relation to the parties' eldest son were withdrawn by the wife.
- [7] These reasons address the outstanding issues: confirmation of a final division of assets that reflects the division of property and reapportionment of certain family assets as determined in the prior reasons by the filing of a Scott Schedule agreed to by the parties' counsel; spousal support for the wife; and child support and s. 7 expenses for the three younger children of the marriage.
- [8] The Court sent a memorandum to the parties seeking a Scott Schedule on August 22, 2012, and a clarification as to certain figures regarding the husband's income. The Scott Schedule, which is now marked as Exhibit 17 in these proceedings, was received on October 16, 2012. This schedule is marked by the Court as an exhibit with the agreement of counsel. Any review of this matter must also include a review of the affidavits filed on the applications brought after trial.

- [9] At trial there was approximately \$14 million in family assets subject to division, of which the husband received a larger share due to wealth acquired from his family of origin several years before the parties separated. Then the total amount of family assets was reduced somewhat due to the economic downturn.
- [10] With regards to spousal support, child support and s. 7 expenses, each party disputes the income of the other, seeking to make it higher or lower, according to the financial advantage that accrues. The husband seeks to minimize his spousal support obligation while the wife seeks to maximize the spousal support she will receive. They disagree on amounts owed for child support and amounts the other has spent on the children as s. 7 expenses.

II. Background

- [11] The lengthy story of the parties' life together, including the development of their business ventures and the details of their increasingly affluent lifestyle, are set out in the prior reasons. I will assume for the purposes of this judgment that the reader has read those reasons. To be clear, those reasons, and the findings of fact and credibility therein, continue to apply to these reasons.
- [12] The wife is presently 52 years of age and the husband is 55. As noted, they had a lengthy marriage of over 23 years. They separated on November 18, 2006. Both are currently in good health. Throughout the course of their marriage, the husband worked at various business ventures outside the home while the wife assumed a mostly traditional role as a skilled housewife and devoted mother. She also engaged in some limited work outside the home, usually in relation to the family's business interests. In their own distinct way, each of the parties contributed a great deal to their family life and financial security. By the end of their marriage, the parties had come to enjoy a very affluent lifestyle. They have also raised and educated four children, namely:

C.M., a son, born February 1986;

P.M., a daughter, born December 1988; and

A.M. and S.M., twin daughters, born September 1990 ("the twins").

- [13] All the children are in good health and are either pursuing post-secondary education at universities away from the family home or have now possibly completed their post-secondary education. The twins (A.M. and S.M.) lived with the wife after separation in November 2006. The two eldest (C.M. and P.M.) were away at university. The twins were in high school in Vancouver. A.M. and S.M. completed Grade 12 in June 2008, and by September 2008, they were in their first year at the University of Western Ontario. They did not turn 19 years old until September 2009, by which time they had started the second year of university. P.M. was continuing her studies, also at the University of Western Ontario. P.M. is now 23 years old and the twins are 22 years old.

- [14] Given the ages of the children, the husband's application for joint custody, joint guardianship and a shared parenting agreement is abandoned. Sadly, it appears that the husband and the children are estranged. I note that since separation he has paid the bulk of university expenses and thus generously contributed towards their support. The wife has also paid significant expenses for the children since separation. Each disputes the validity of certain expenses paid by the other in terms of an overall accounting of s. 7 expenses. Although the parties no doubt wish for each of their children to become financially independent upon the completion of their university educations, neither parent is seeking that any of the children make a defined financial contribution to their own university expenses from employment during the year.
- [15] Thus, the wife claims retroactive and ongoing child support for the three daughters. The husband seeks credit for the expenses he has paid for the three daughters, and submits that retroactive child support is not payable to the wife, given that for almost the entire time all three daughters were adult children pursuing their post-secondary educations away from home.
- [16] Several paragraphs of the prior reasons set out the details of the parties' business ventures and private companies, and the sources of their incomes post-separation:
- [116] Moving forward, it is useful to be reminded of how these parties conducted their business and financial affairs over the 23 years of their marriage in terms of the histories of HPI and Flashpoint.
- [117] HPI began as Eyes On Campus (the husband's first business when he moved to Vancouver), was then Tiny Holding, then The Marketeers, and finally HPI. In addition to the various investments and accounts held by HPI, HPI owns a 65 per cent interest in the Linmark Partnership, which in turn, owns the commercial property and building where Linmark Publishing resides. In terms of the Alberta nursing home business, both the periodic payments over the years, and the husband's share of the sale proceeds, were injected into either HPI or one of its predecessors (i.e. Tiny Holding).
- [118] At the time of separation in November 2006 both the husband and the wife were the only directors and officers of HPI, with the wife as president and the husband as secretary. He was its sole shareholder. After separation the husband changed the records of HPI to designate himself as its sole director and its president and secretary. It is HPI that is paying each party \$10,000 a month pending resolution of the present litigation.
- [119] Flashpoint began as Eyes On Burrard (originally an offshoot of a business of the wife's father), was then Fraser River Food (which held Mezzaluna), and then became Flashpoint. Flashpoint currently owns Linmark Publishing in its entirety. The husband is the president and a director of Flashpoint and the wife is the secretary and a director. Flashpoint is currently paying each party \$3,086.10 bi-monthly. They are equal shareholders.

[emphasis added]

- [17] The parties each stopped receiving the amount of \$10,000 per month as repayment of the shareholder loan to HPI in July 2010. They continue to split income generated by Linmark Publishing paid via Flashpoint until the remaining outstanding issues, including spousal support, are decided.

III. The Distribution of Assets

- [18] It is useful to set out the portion of the prior reasons that sets out the parties' assets and their value as at the date of trial:
- [63] The parties filed, by agreement, a wall-sized spreadsheet (Exhibit 1) that details the parties' net worth by listing individual assets with an agreed value to be attributed to each. The wife's accountant prepared it with the oversight and approval of the husband's accountant. It lists assets, liabilities, and equity in numbered lines from Line 2 to Line 115, with several lines taken up by headings or totals. On occasion I find it useful when referring to the assets to also make reference to their corresponding line number on Exhibit 1.
- [64] Among its many items, Exhibit 1 lists the assets and liabilities of HPI, including the 65 per cent interest held by HPI in the Linmark Partnership; Flashpoint; Linmark Publishing; the minimal residual holdings of the husband in the two companies related to the Alberta nursing home business (Bernice Holdings and Tri-Mar); and those assets and liabilities held in the names of the parties themselves. It provides separate totals for each company or entity as at the date of separation and the date of trial.
- [65] In final submissions counsel for the wife stated that, apart from one item the husband initially forgot about that is now included, the husband had, through his accountant, answered each and every inquiry or request made of him, and that there is no issue in this case as to the husband not disclosing assets or information relating to their value.
- [66] Thus, the husband and the wife agree that Exhibit 1 contains an exhaustive and accurate listing of and value for each asset and liability, and that it is submitted to the Court for the truth of its contents. I accept that Exhibit 1 is accurate and comprehensive and I find that it establishes the parties' assets and liabilities in the amounts set out.
- [67] The net worth of all assets was, at the time of the trial, slightly in excess of \$14,000,000, at \$14,000,314; whereas in November 2006, at the time of separation, it was \$14,008,228.
- [68] Of particular relevance to the issues before the Court are the following entries on Exhibit 1:

Asset:

Value as of earlier date:

Values as of later date:

HPI

HPI-Liability

Shareholder Loan

Value as of Nov. 30, 2006

\$7,138,399

\$1,163,588

Value as of Mar. 25, 2008

\$6,328,938

\$795,081

Linmark Partnership - 65% interest owned by HPI but a separate entry

Value as of Oct. 31, 2006

\$970,000

Value as of Oct. 31 2007

\$1,294,695

TD US\$ term deposits

Value as of Dec. 4, 2006

\$211,285

"Current"

\$197,160

Canaccord

Value as of Dec. 4, 2006

\$261,800

"Current"

\$260,000

Web Broker Account 901A

Web Broker Account 020E

Value as of Dec. 4, 2006

\$1,359,549

\$17,232

"Current"

\$837,824

\$22,379

- [69] In relation to the above I note that the appraised value of the commercial property and building where Linmark Publishing operates, held by Linmark Partnership, is \$2,985,000, less some partnership debts and losses. The 65 per cent interest in the Linmark Partnership held by HPI is valued at \$1,294,695, as stated in Exhibit 1. Thus, the Linmark Partnership interest is to be considered as part of HPI, but is valued separately (total value of both based on most recent figures: \$7,623,633).
- [70] I also note that the husband agrees that the HPI shareholder loan balance shown above is to be equally divided (Total: \$795,081).
- [71] The four accounts in the husband's name shown above are alleged by him to be "other" or Underhill assets, to which the wife made no contribution. Based on "current" values they total \$1,317,363.
- [72] In relation to the parties' personal real estate holdings, the most recent pre-trial appraisals indicate a value for the Hudson Street property of \$1,775,000; for the Okanagan Falls condo a value of \$425,000; and for the West 16th property a value of \$340,000. These are likely to be non-income producing properties that the wife seeks to retain, except possibly for the West 16th property.
- [73] The value for the West 16th property shown on Exhibit 1 of \$310,000 and held by Flashpoint is, in fact, corrected to \$340,000 to reflect the most recent appraised value, and is correctly described as being held by the wife's company, Truth and Beauty, as opposed to Flashpoint. Truth and Beauty is not particularly relevant to the division of assets, except as it holds the West 16th property and owes HPI a receivable of \$4,077.

[emphasis added]

- [19] At trial the wife sought an equal division of all the assets owned by the parties as family assets, including HPI, which would have resulted in her receiving assets of approximately \$7 million. She sought to retain the Hudson Street property (the former family home), the Okanagan Falls condo, the West 16th Avenue property (her photography studio), several vehicles, an investment account, and her RRSP account. She also sought a compensation order in the amount of \$247,688.41 to compensate her for funds spent by the husband post-separation that depleted a family asset.
- [20] The husband sought to have HPI declared to be an excluded business asset as opposed to a family asset. Alternatively, he sought reapportionment of HPI wholly in his favour in light of the infusion of funds into HPI in 2004 from the sale of his interest in the Alberta nursing home business developed by his family of origin. He also sought to have four investment accounts excluded from a division of family assets. The husband agreed that Flashpoint was a family asset. In his share of the assets the husband sought to retain Linmark Publishing

and the building and property held by the Linmark Partnership via HPI in which the publishing business operates.

[21] In relation to the matters in dispute regarding property the Court ordered the following in the prior reasons:

[181] For these reasons I make the following declarations, findings, and orders:

- HPI is a family asset and its shares are to be reapportioned 65 per cent in favour of the husband and 35 per cent in favour of the wife, except that HPI's 65 per cent interest in the Linmark Partnership, which is valued separately, is to be reapportioned 100 per cent to the husband.
- The husband's four accounts are not family assets and are entirely his.
- The wife is to pay a compensation order to HPI and Flashpoint as appropriate in the total amount of \$173,200.05.
- The husband is to pay a compensation order in the amount of \$50,000 to be set off against the amount that I have found that the wife must pay to HPI.
- The parties are divorced, to take effect 31 days after the date of the filing of these reasons.

IV. Division of Property

[22] Pursuant to the prior reasons, and by further agreement as to the value of certain assets between the parties, Exhibit 17 sets out the value of total assets and each party's share. Therefore, I find that the total value of assets subject to division is \$12,438,878. The husband's share is \$8,528,051, and the wife's share is \$4,030,706.

[23] The assets the wife has received upon property division have less income-generating potential than those retained by the husband. Exhibit 17 lists the real property, the funds, and other property received by the wife, and shows those the husband continues to hold. The wife has received the Hudson Street property, the West 16th Avenue property and the Okanagan Falls condo. A recent appraisal of the Hudson Street property to be retained by the wife indicates that it has an appraised value of \$2,350,000 as of April 30, 2011, as opposed to its stated value at trial of \$1,775,000. She has approximately \$900,000 in cash or invested.

[24] The husband has retained various investments, investment accounts, Linmark Publishing, as well as 100 percent of HPI's 65 percent interest in the Linmark Partnership, which owns the commercial real estate where Linmark Publishing operates. I note that a new appraisal of the interest in this property is increased to \$1,940,250 from the value attributed to it at trial of \$1,294,695.

V. Spousal Support

[25] The wife claims spousal support retroactively and prospectively.

- [26] In my view she has no viable claim for retroactive spousal support and I so find. This is because shortly after separation the wife received funds on a regular basis as an equal share of repayment of the HPI shareholder loan until July 2010 (each party received \$10,000 per month). She also received income via Flashpoint from Linmark Publishing by way of income-splitting with the husband that continues to the present time. In 2009 and 2010 the wife received an annual income from Flashpoint of \$100,800 in this manner.
- [27] I note that both parties have been represented by experienced counsel throughout, and although no one could have anticipated how long this matter has taken to be fully decided, no application for interim spousal support was brought to increase or restructure how funds were paid to the wife.
- [28] The issue is, what amount of spousal support is payable prospectively to the wife by the husband and for what duration, taking into account the compensatory and non-compensatory grounds for support, given the length of the marriage, the roles of the spouses, economic disadvantage to the wife in relation to time out of the work force, her present financial needs and the husband's financial means, and taking into account her share of the division of assets?

VI. The Parties' Positions

- [29] Pursuant to the provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act], the wife seeks spousal support on both a compensatory and non-compensatory basis. Given the length of the marriage and the traditional roles adopted by the parties, she seeks a substantial amount of spousal support for an unlimited duration. In earlier submissions, her counsel made reference to a lump sum award. However, recent submissions do not refer to a lump sum award. I will deal with prospective spousal support in the usual manner, and should the wife seek a lump sum, she may endeavour to negotiate a lump sum amount with the husband. Based on the success of the husband's business and investments, and the fact that the family's lifestyle was supported by spending capital as well as income, the wife seeks to have an income imputed to the husband higher than his stated income.
- [30] Given the significant value (\$4,030,706) of the assets that the wife has received as a result of property division, the husband initially submitted that no spousal support ought to be ordered, or in the alternative, that only a modest award be made in view of the fact that the wife is educated and able to be employed should she so wish. However, in light of the decision of the Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507 [Chutter], he agrees to the payment of spousal support generally in keeping with the Spousal Support Advisory Guidelines [SSAG], but submits that the Court ought to impute income to the wife, both from investments and properties capable of generating income, and an annual amount representative of a basic wage that he submits she is able to earn.

[31] In this regard the husband submits that as a healthy, educated woman with a photography studio and an active interest in photography, the wife, should she wish to work, is capable of earning an income. Furthermore, with all the children away at university or living independently, she will have the time and resources to pursue some form of remunerative employment. Thus, he submits that the Court should impute a modest income to her to reflect her obligations to endeavour to become self-sufficient and to contribute to expenses related to the children. If the Court considers it appropriate, the husband seeks a review by the Court of spousal support in several years to encourage the wife to become financially self-sufficient.

VII. The Parties' Incomes

[32] It is not an easy matter in this case to make determinations of income for the purposes of spousal support (and for the purposes of child support and/or s. 7 expenses), particularly with regard to the husband. I will have regard to information from 2006, 2007, 2008, 2009, 2010 and 2011. Prior to separation in November 2006 the parties were living a much more affluent lifestyle than the total income amounts on their filed income tax returns would suggest (see the prior reasons at paras. 42-57).

A. The Wife's Income

[33] Turning first to the wife, her line 150 income from her filed tax returns is as follows:

2006 - \$122,213

2007 - \$124,732

2008 - \$128,280

2009 - \$122,253

2010 - \$119,543

[34] Of her 2009 income tax return line 150 income, \$100,800 is shown as employment income and represents monies she continued to receive from Linmark Publishing via Flashpoint. The remaining income was comprised of dividend income (\$15,021), interest and other investment income (\$5,194), and other income (\$1,238).

[35] Of her 2010 income tax return line 150 income, \$100,800 is shown as employment income from Flashpoint. The remaining income was comprised of dividend income (\$14,592), interest and other investment income (\$3,310), net partnership income (\$13), and other income (\$526).

[36] In the wife's Form F8, filed February 1, 2011, she indicated a total annual income of \$97,094, and total annual expenses of \$310,644, of which she estimated \$48,000 related to expenses for the three children. It is clear upon review that some of her estimates of expenses are inflated or inaccurate.

- [37] In the husband's examination for discovery conducted on January 12, 2011, the husband indicated that the income that the wife presently receives from Flashpoint will cease when this matter is concluded.
- [38] Submissions on behalf of the husband ask the Court to look at the wife's 2009 tax return as a general guide as to her income. The dividend and interest income that she failed to include in her recent Form F8 ought to be estimated at \$20,000 per year. Further, given her good health and energetic nature, her interest and experience in photography and her photography studio, the Court is asked to impute income from employment to her in the amount of \$25,000 per year. I agree that an annual income of \$25,000 from employment ought to be imputed to the wife on that basis.
- [39] I also agree that it is appropriate to include projected interest income at the rate of 3.5 percent on the sum of \$271,797, which represented a payment (on a without prejudice basis) made on October 21, 2010, arising from the division of property and determination of amounts owed in the prior reasons. This amounts to an additional \$9,513 in anticipated interest income from 2011 on.
- [40] However, counsel for the husband then submits that various amounts of income ought to be attributed to the wife from capital assets she received in the property division, including \$9,000 in rent annually for the condo at Okanagan Falls, which it is submitted could be rented for nine months of the year at \$1,000 per month, resulting in additional income. Alternatively, it is submitted on behalf of the husband that the wife could sell this condo, and using a value of \$421,000 and interest at 3.5 percent, interest income of \$14,735 annually ought to be attributed to her. In a similar vein, the husband suggests that the wife's photography studio on the West 16th Avenue property (valued at \$340,000) ought to result in a further imputation of annual interest income to the wife (also at 3.5 percent) in the amount of \$11,900. Finally, it is submitted that the Court ought to impute a further amount of annual income to the wife as it considers appropriate in relation the parties' former family home on Hudson Street, given that it is larger than the wife needs as the children are all adults and living away from home.
- [41] I reject this approach as a way to inflate the wife's income. In my view, given that the property between the parties has already been divided equally or reapportioned in the husband's favour, it is illogical to dip back in the pool of divided property and speculate that the proceeds from a particular asset (four years after the values provided at trial with exception of a more recent appraisal of the Hudson Street property), if rented or sold by the wife, could generate an income at a particular rate. The same argument could be used to attempt to increase the husband's income by submitting that he ought to sell certain assets or investments and invest the funds in investments with a higher yield.
- [42] To engage in this type of exercise removes any element of finality in terms of division of property and contaminates a proper analysis of income upon which spousal support is to be calculated. The assets the wife received are hers to manage as she will. The same applies to

assets received by the husband. The real property received by the wife is, at present, not income-producing. It will be for her to decide how she will manage her financial affairs. In the future she may decide to sell certain assets and invest the proceeds to generate income, at which point such income may be taken into account in a subsequent application to vary, or upon review, should a review be ordered.

- [43] Therefore, I reject the submissions on behalf of the husband that the wife's income should be increased on the basis of additional income to be imputed to her from assets she received in the division of property.
- [44] I find that for 2009 the wife's Guidelines' income was \$122,253; for 2010 it was \$119,543; and for 2011, assuming she continued to be in receipt of approximately \$100,000 of income from Flashpoint, I fix it at \$155,000, which also assumes receipt of an additional amount of interest income estimated at \$30,000, and takes into account an imputed income of \$25,000 in relation to employment.
- [45] For 2012 I estimate the wife's Guidelines' income to be \$155,000, assuming she continued to receive income from Linmark Publishing via Flashpoint. Once the wife is no longer in receipt of this income, her income will decrease dramatically. Absent this income and without any spousal support, her annual income will be approximately \$55,000, comprised of imputed income of \$25,000, and \$30,000 in interest and income from other sources.

B. The Husband's Income

- [46] I turn now to the matter of the husband's income. As he was during the marriage, the husband is a businessman and an entrepreneur. The property received by the husband upon division includes significant income-producing assets, in particular Linmark Publishing and HPI's interest in the Linmark Partnership, which owns the commercial premises. Linmark Publishing operates in a portion of the building, and the remainder is rented to other tenants. Linmark Publishing is a thriving business.
- [47] The wife claims that the husband's current annual income for spousal support purposes, calculated from figures he provided (in his Affidavit #11, sworn November 28, 2011), is comprised of: \$108,000 from Linmark Publishing; \$120,000 in monthly draws from HPI; and \$272,877 in dividend income from HPI. These amounts total \$500,877. As well, her counsel submits the car allowance of \$9,600 the husband received ought to be included in his income.
- [48] Counsel for the husband submits that the husband's annual income for the purpose of calculating spousal support, child support and s.7 expenses, is a significantly lesser amount.
- [49] The husband's line 150 income amounts from his filed income tax returns are:

2006 - \$114,228

2007 - \$165,484

2008 - \$154,916

2009 - \$75,907

2010 - \$365,246

[50] The husband's 2010 tax return included income of \$108,056 from Linmark (with income-splitting), less than \$5,000 in interest, other income and taxable capital gains, and a net partnership loss of \$40,713. The inclusion of \$272,377 as dividend income in the husband's 2010 tax return resulted in the line 150 income of \$365,246.

[51] In earlier written submissions, counsel for the husband refers to the husband's annual income from Linmark Publishing becoming \$213,461 once income-splitting ceases. To that they add the 2009 amount of \$19,583 in investment income and the vehicle allowance of \$9,600 annually, which results in a total projected annual income of \$242,644.

[52] The underlying theme of the wife's approach to the issue of the husband's income is that the husband is concealing sources of income or misrepresenting how funds available to him are characterized in order to avoid their inclusion into his income. Counsel for the wife has drawn the Court's attention to the significant retained earnings of HPI in particular.

[53] I accept that the husband can control amounts paid to him from retained earnings in HPI and Flashpoint. There is no expert accounting evidence analyzing the accounting records for Linmark Publishing, Flashpoint or HPI with regards to amounts held therein as retained earnings or further repayment of shareholder loans and the issue of the husband's income. It is for the Court to consider the amounts as stated. However, there is no evidence of the husband concealing sources of income or misrepresenting his finances. To the contrary, as in prior reasons I find that the husband has provided fulsome and ongoing financial disclosure.

[54] In the husband's Affidavit #7, sworn January 27, 2011, at para. 12, he deposed the following in relation to his financial situation:

All my sources of income are shown on my T1 2009 tax return and I had the same sources of income in 2010. I have been funding my and our children's expenses from my income and by depleting my capital. At the time of the trial my Hudson Principle Investments Ltd. shareholder loan account was valued at \$797,081 and was divided equally with the Claimant. As at October 31, 2010, my shareholder loan account had decreased to -\$198,250. Attached to this my Affidavit and marked Exhibit "B" is a summary of my HPI shareholder loan account from the General Leger which has been produced. At the trial of this matter, in addition to my HPI shareholder loan account, I had personal assets valued at \$1,317,363, consisting of ... As shown in Schedule B to my Financial Statement sworn December, 2010, which is attached to this my Affidavit and marked Exhibit "C", these assets have now decreased to \$642,499 (U.S. funds at par).

[55] I accept the evidence of the husband as to his income, the HPI shareholder loan account, and the decrease in value of his personal assets.

- [56] I also note in the same affidavit that the husband indicated he overestimated certain expenses in his financial statement sworn December 15, 2010. However, I note the differences were relatively minor in the overall scheme of his annual expenses, which he estimated at \$213,996. Counsel for the wife points to the husband's high annual expenses to support a finding that his income is higher than submitted by his counsel. On the evidence, I find it is far more likely that he has been depleting capital to meet high expenses.
- [57] I will now deal with the points that arise in relation to the various amounts that counsel for the wife submits ought to be included in a calculation of the husband's current income.
- [58] First, I will consider the submission that the monthly draws amounting to \$120,000 annually from HPI taken by the husband constitute income. The record of the HPI shareholder loan account attached to the husband's Affidavit #11 supports the inference that capital loaned to HPI is being repaid to the husband. It is therefore not income, and I decline to include that amount as income for the purposes of determining spousal support.
- [59] I note that HPI has been divided as between the husband and the wife in accordance with the prior reasons. The wife has also already been fully compensated for her interest in the HPI shareholder loan account using the value agreed upon at trial.
- [60] Next, I will address the submission on behalf of the wife that the amount of \$272,377 characterized as dividend income to the husband in 2010 be included as income for the purposes of spousal support. Counsel for the husband submit that: (a) only \$218,300 of that amount is properly characterized as dividend income (Guidelines, Schedule III, Adjustments to Income, s. 5), it being grossed up for tax purposes to \$272,377; and (b) the lesser amount ought not to be considered as income because this amount is described in the husband's #11 Affidavit (at para. 13) as a "non-recurring expense" (Guidelines, s. 17). They submit it represents "paid-out corporate profit after division of family assets."
- [61] Pursuant to s. 5 Schedule III of the Guidelines, with regards to dividends from taxable Canadian corporations, the correct amount to include in a spouse's income is the actual amount of those dividends received by the spouse, in this case the actual dividend income of \$218,300. Pursuant to s. 17 of the Guidelines, this dividend income is properly characterized as a "non-recurring amount" in relation to the husband's income for the last three years in evidence; 2008, 2009 and 2010.
- [62] However, I do not accede to the submission that the amount of \$218,300 is not income because it represents paid-out corporate profit after division of family assets. The acceptance of such a proposition would undermine a fair and reasonable assessment of income for the purposes of child and spousal support and is contrary to what constitutes personal income. This dividend, at its actual as opposed to its taxable amount, is properly characterized as income to the husband in 2010. Using its actual value, I calculate the income of the husband for 2010 to be \$311,169 (\$365,246 - \$54,077, the latter figure representing the difference between the grossed up value and the actual value).

- [63] Accepting that the payment of this dividend in 2010 represented a "fluctuation in income or receipt of a non-recurring amount", using the language of s. 17 of the Guidelines, I find the correct approach is simply to average the husband's income over the years of 2008 - \$154,916, 2009 - \$75,907, and 2010 - \$311,169. This results in an average annual income for those years of \$180,664. I find that this is the fairest determination of the husband's annual Guidelines' income for those years based on s. 17(1) of the Guidelines. These amounts are relevant to the child support and s. 7 expenses. While spousal support is prospective only, the claims for child support and s. 7 expenses are not.
- [64] I may only estimate the husband's Guidelines' income for 2011 and 2012 due to the lack of current information and the fact that I assume he is still income-splitting with the wife pending these reasons that address spousal support. Looking at past amounts and taking into account his projected income once income-splitting with the wife ceases, which will effectively be in 2013, I fix these amounts as \$200,000 for 2011 and \$200,000 for 2012. This is important mainly for the proportionate sharing of s. 7 expenses on a retroactive basis.
- [65] With regards to the husband's projected income based on the information contained in his Affidavit #11, sworn November 28, 2011, I accept the figure of \$242,644 as correct (it being comprised of \$213,461 income from Linmark Publishing once income-splitting ceases, plus an estimated amount of \$19,583 in investment income (based on 2009) and a vehicle allowance of \$9,600 annually.
- [66] The husband, by virtue of his control of HPI, Linmark Publishing and Flashpoint, may control their corporate incomes and retained earnings. Thus, he may also determine his personal income, for which they are the primary sources.
- [67] With regards to attribution of income to the husband from Linmark Publishing (via Flashpoint) and/or HPI, s. 18(1)(a) of the Guidelines applies. It states:
- 18(1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent tax year; or ...
- [68] In the present case, I note that Linmark Publishing, according to the most recent financial statements for the year ended August 31, 2010, shows a "Loss Before Income Taxes" of - \$8,302. For the year ended August 31, 2009, they show a "Loss Before Income Taxes" of - \$7,112. In his Affidavit #7, sworn January 27, 2011, the husband described aspects of the operation of Linmark Publishing, including the need as he perceived it to give his staff a raise after he was no longer income-splitting with the wife, as they had not had a raise in three years. This appears to be entirely reasonable and in keeping with sound business

management. In these circumstances, I do not consider it appropriate to increase the husband's income from Linmark Publishing over and above \$213,461, even taking into account that he will no longer be income-splitting with the wife.

- [69] With regards to HPI, the most recent financial statements are for the year ended October 31, 2010. They show a pre-tax income of \$176,681. For the year ending October 31, 2009, they show a pre-tax income of \$32,333. Prior statements for HPI for year ending October 31, 2008 show a loss of -\$974,512.
- [70] I find, pursuant to s. 18(1)(a) of the Guidelines, having regard to the pre-tax income of HPI for the year ended August 31, 2010, it is appropriate to attribute \$57,356 in income to the husband personally in relation to a determination of his present Guidelines' income, thus increasing his Guidelines' income to \$300,000. I have decided on this amount because it represents approximately a third of the pre-tax income of HPI for the most recent tax year available to the husband. In the absence of any evidence as to competing corporate uses by HPI for these funds, and given that the husband controls HPI and is its sole shareholder, to fail to include this portion of HPI income in the husband's Guidelines' income would result in an artificially low and therefore unfair reflection of the money available to the husband for support purposes.
- [71] I also note the retained earnings in Linmark Publishing (\$347,313 in 2010; \$355,528 in 2009) and in HPI (\$4,577,548 in 2010; \$4,497,992 in 2009). However, particularly with regard to HPI, absent evidence to how those earnings accrued or what they represent in terms of the company's business, I am not satisfied that it is appropriate to use them to significantly increase the husband's Guidelines' income, and I decline to do so. I do, however, impute to him interest at one percent on the 2010 retained earnings of HPI, resulting in the additional amount of \$45,775 to his Guidelines' income, thereby increasing his present total annual Guidelines' income to \$345,775.
- [72] For these reasons, going forward into the future, I find the husband's annual Guidelines' income to be \$345,775.

VIII. The Law regarding Spousal Support

- [73] Section 15.2 of the Divorce Act governs spousal support in this matter. In making an order for spousal support, a court must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):
- (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.
- [74] In considering those factors, the Court must also be alive to the policy objectives behind ordering spousal support set out in s. 15.2(6) of the Divorce Act:

- (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.
- [75] Each of the objectives in s. 15.2(6) must be examined in order to achieve a fair and equitable distribution of resources: *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge] at 850-853.
- [76] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow], the Supreme Court of Canada identified three grounds for entitlement to spousal support: (1) compensatory support, relating primarily to the first two policy objectives set out above; (2) non-compensatory support, relating primarily to the third and fourth objectives above; and (3) contractual support.
- [77] The Court of Appeal decision in *Chutter* was decided after the trial evidence was heard in this case. It supports an award of spousal support even where the division of assets or reapportionment has resulted in the spouse seeking support receiving assets of considerable value. Consideration of the jurisprudence pre-*Chutter* cautions that even where a significant division or reapportionment of assets has benefited a spouse, the Court must not to take an overly narrow approach to the issue of spousal support (*Hodgkinson v. Hodgkinson*, 2006 BCCA 158; *Tedham v. Tedham*, 2005 BCCA 502; *J.W.J. McC. v. T.E.R.*, 2007 BCSC 252; and *MacDonald v. MacDonald*, 2002 BCSC 1453, aff'd 2005 BCCA 23).
- [78] In a number of pre-*Chutter* cases (*Kalenuik v. Kalenuik*, [1996] B.C.J. No. 512 (S.C.); *Laxton v. Coglon*, 2003 BCSC 11, aff'd 2008 BCCA 414; *Montalban v. Montalban*, 2007 BCSC 1266; *Plester v. Plester*, 56 B.C.L.R. (3d) 352 (S.C.)), claims for spousal support were rejected because the objectives of the spousal support contained in the Divorce Act were found to have been met upon the spouse seeking support receiving substantial assets upon property division (in combination with other factual circumstances). In my view, to the extent that those decisions do not encompass a significant post-separation downturn in the ability of the payor spouse to generate income, or significant family debts being attributed to the payor spouse, they may be said to have been overruled by *Chutter*.
- [79] In *Chutter*, as in the present case, the claim for spousal support was advanced on the grounds of compensatory and non-compensatory support, the interaction of which was described by Justice Rowles, writing for the court as follows:

- [49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (Bracklow, at para. 27; Moge, at 852). 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 strik[e] the balance that best achieves justice in the particular case" (Bracklow, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (Moge, at 864).
- [80] Regarding the ground of compensatory support, Rowles J.A. further illustrated the following:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

51 In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added by Rowles J.A.).

- [81] The purpose of compensatory support is therefore to address the economic advantages and disadvantages arising from the marriage as a result of sacrifices and efforts made on account of either spouse for their family that either benefited or caused a detriment to the other spouse. Additionally, the cases instruct that the longer the marriage, the more intertwined the economic and non-economic lives of the parties. In these cases there is therefore a greater presumptive claim that the spouses should enjoy roughly equal standards of living upon the dissolution of the marriage (Moge at para. 84). This addresses the reality that in a

relationship, each spouse has made decisions that "accommodate the economic and non-economic needs of the other", including the way family responsibilities are handled and the way the spouses' respective careers will develop - decisions that can have a "significant impact upon the income earning ability of each at the time of separation": *W. v. W.*, 2005 BCSC 1010, at para. 12.

[82] The ground for non-compensatory support is explained by Rowles J.A. in Chutter as follows:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:

[21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.

[57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis

that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":

I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could meet his stated expenses with the income available to him. After attributing \$800-\$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expenses and, therefore, was not entitled to support.

[58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to Yemchuk as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed Allaire in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).

[83] Even in cases such as *Hodgkinson* (referred to in *Chutter* at paras. 59-60), where the parties divided significant assets and the wife was capable of returning to the work force, the time-limited award of spousal support to the wife on non-compensatory grounds was considered to be "impermissibly narrow" due in part to a failure to consider "the standard of living enjoyed by the parties during the marriage and by the other spouse after the marriage."

[84] In *Chutter*, Rowles J.A. concluded her reasons regarding non-compensatory support with the following:

[61] Finally, I note that in *Fisher v. Fisher*, 2008 ONCA 11, 88 O.R. (3d) 241, the Ontario Court of Appeal recently reiterated the principle that self-sufficiency is a relative concept encompassing more than the ability to meet basic expenses:

53 Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation.

[85] In *Bell v. Bell*, 2009 BCCA 280, the husband brought into the marriage assets of \$4 million and the wife \$35,000. Upon separation they divided assets equally of about \$12 million. He paid spousal support pursuant to their separation agreement but later applied to have the support order reviewed. During this time the wife was making substantial amounts of money from investment income (\$181,564 in 2008 alone). She chose not to seek employment. The husband successfully applied to have his spousal support obligation ended, but this was reversed on appeal. The Court of Appeal stated the following:

[24] It may be that, as the judge said, Ms. Bell has sufficient capital and income to meet her needs and is economically self-sufficient, but she has not, in the absence of spousal support, been compensated for being disadvantaged in terms of her standard of living as a result of

the breakdown of the marriage. It appears to me that, having misapprehended Mr. Bell's income, the judge did not appreciate the extent to which Ms. Bell has been disadvantaged in the loss of the standard of living his income provided and the difference in that regard implicit in their relative incomes now. The intervention of this Court is then justified.

- [86] The disadvantage of Ms. Bell (as misapprehended by the chambers judge) arose from the fact that the husband, post separation, was still making considerably more than the wife. The husband's Guidelines' income was found by the Court of Appeal to be \$649,959, and as such the SSAG were not considered useful in setting a support amount. The Court of Appeal reduced the amount of monthly spousal support payable to the wife by half to \$5,000.
- [87] I note in the recent decision of *Ouellette v. Ouellette*, 2012 BCCA 145, at para. 44, that the Court of Appeal repeated "The fact that the applicant spouse has received significant assets upon the division of family assets is not a bar to spousal support." The Court then cited *Chutter*, repeating that an applicant is not required to encroach on capital to maintain a comparable standard of living, despite the applicant spouse in *Chutter* having received \$4 million in assets upon division of property. In *Ouellette*, the Court of Appeal upheld the trial judge's finding that Mrs. Ouellette was entitled to spousal support.
- [88] It is well accepted in British Columbia that the SSAG may be considered as a guide to the quantum and duration of spousal support, once a determination regarding the entitlement of a spouse to receive support has been made: *Yemchuk v. Yemchuk*, 2005 BCCA 406, paras. 61-70.
- [89] The SSAG contain a ceiling of \$350,000 with regards to the Guidelines' annual income of the payor spouse. Where, as in the present case, the payor spouse's income is close to the ceiling, the formula ranges will often be used to determine the amount of spousal support: *Hosseini v. Kazemi*, 2009 BCSC 502 (income \$351,649); and *Abelson v. Mitra*, 2008 BCSC 1197 (income \$355,000). The ceiling has not been interpreted as an absolute "cap" as spousal support may and often does increase for payor incomes above \$350,000: *Loesch v. Walji*, 2008 BCCA 214; *Denofrio v. Denofrio*, [2009] O.J. No. 3295 (S.C.J.).

IX. Application to the Present Case

- [90] When these parties married in 1983, both were young and neither brought significant assets into the marriage. The wife had a degree in journalism and after marriage worked for a short time as an entry level account executive with an advertising agency until she became pregnant with their first child. Thereafter, she devoted herself to having and raising the couple's four children and managing their home. The husband had a certificate as an optician. During the marriage he was free to pursue his business interests, some of which were successful and some of which were not. The wife had a keen interest in the husband's business interests and participated as she could in what I described in the prior reasons as "The Early Days" of their marriage. In the "Lean Middle Years" the wife contributed to the business ventures in various ways. When money was tight she also worked outside the home

for several months as a retail clerk at a low wage. This employment proved impractical due to the resulting child care costs. Thereafter, in "The "Robust Years", the parties' business fortunes improved as a result of the success of Linmark Publishing and, as of 2003, they started to receive substantial dividend payments from the husband's family's business in Alberta.

- [91] In this marriage the primary role of the husband was to work in business to obtain an income and accumulate assets to the benefit of the family. The parties agreed, either explicitly or implicitly, that the wife's primary role, at least while there were children at home to care for, was as a stay-at-home wife and mother. The parties have raised four healthy and well-educated children. This lengthy marriage of just over 23 years was a traditional one in terms of the roles of the parties.
- [92] The wife devoted the crucial years of her young and middle-age life to roles related to work raising children and managing the family home. She appears to be an energetic woman, interested in photography and travel. While I have found it is appropriate to impute a modest income to her going forward, I also find that the wife, given her education and energy and absent a traditional marriage, was likely to have become a successful business or professional person in her own right had she continued to work outside the home. In terms of the compensatory ground that informs spousal support, I find that she has a significant and enduring claim to spousal support from the husband. She devoted the years critical to her professional aspirations to the family when she otherwise was likely to have advanced in the work force, both monetarily and professionally.
- [93] In terms of non-compensatory ground that informs spousal support, the wife has received at least \$100,000 per year or more since 2007 as the repayment of a shareholder loan from HPI and income from Linmark Publishing via Flashpoint. This level of financial support has been available to her to assist her in maintaining a reasonable standard of living until property and support issues between the parties were determined. Although the Court was not provided with an agreement between the parties to this effect, both testified before Brine J. at trial and have sworn affidavits with reference to these funds. The past needs of the wife in terms of financial support have been met by this arrangement. As previously indicated, I do not regard this as a case where an award of retroactive spousal support is appropriate.
- [94] However, within the context of the non-compensatory ground, it cannot be said, based on the wife's present income-earning potential, that she has a realistic chance of achieving a standard of living comparable to that which she enjoyed in the latter years of her marriage without the receipt of significant ongoing spousal support.
- [95] She has received \$4,030,706 upon asset division and I take that into account. She will have investment income going forward and may choose to dispose of certain assets to increase this amount. Prior to separation the family was enjoying an affluent lifestyle that appeared likely to continue and possibly increase in future years.

- [96] The husband has a continuing ability to earn income for at least the next ten years or much longer, depending on his interests, his motivation, and how he structures his future business endeavours, whereas the wife's income will likely be relatively fixed. She will either choose to forego pursuing regular employment and experience a reduced income due to the income imputed to her, or seek to establish an income from employment that will likely be modest and based on her interest in photography. Either way, given her role in the marriage, its duration, and the fact that she was an at-home mother of four children, she is entitled to an amount of spousal support that takes into consideration, to a reasonable degree, the affluent standard of living that the parties achieved in the later years of their marriage.
- [97] In this determination of spousal support, I take into account the applicable provisions of the Divorce Act, namely the factors set out in s. 15.2(4) and the objectives contained in s. 15.2(6). I have considered both the compensatory and non-compensatory grounds for support and attempt to achieve an appropriate balance between them.
- [98] A SSAG calculation based on the ages of the parties, their 23-year-marriage, an income of \$345,775 for the husband, an income of \$55,000 for the wife once income-splitting has stopped, and without dependent children, results in a range of spousal support payable by the husband to the wife between \$8,360 and \$11,146, with a mid-point of \$9,753. The duration is indefinite with a possible review.
- [99] Considering all the circumstances of this case and the principles and factors in the Divorce Act as discussed above, and the range of spousal support contained in the SSAG, I find that monthly spousal support payable to the wife by the husband is appropriately \$10,000 per month commencing December 1, 2012. The duration for spousal support is indefinite and subject only to the factors to vary as set out in s. 17(4.1) of the Divorce Act. I have considered whether a review after three years ought to be ordered and have decided that will only serve to inject an unnecessary element of uncertainty into what is just and appropriate, and that an application to vary is the correct route to address changes in circumstances.

X. Child Support and Section 7 Expenses

A. Overview

- [100] The wife also seeks child support and s. 7 expenses pursuant to the Guidelines for the three younger children of the marriage, albeit on a different basis for P.M. than for the twins, based on an accurate assessment of the husband's income. She does not seek child support or s. 7 expenses with regards to the eldest child, C.M.
- [101] At present P.M. (born Dec. 1988) is almost 24 years old and the twins (born September 1990) are 22 years old. When the parties separated in November 2006 they were almost 18 years old and 16 years old respectively.

- [102] Although the husband paid the funds to the wife as previously described and has contributed generously to the expenses associated with their post-secondary educations, the wife seeks retroactive and prospective orders with regards to child support and/or s. 7 expenses.
- [103] It is submitted on behalf of the husband that he has paid significant sums for the daughters' post-secondary expenses. This has been acknowledged by the wife. For example, she deposed in her Affidavit #2, sworn March 11, 2010, that the husband paid a total of \$52,000 for these expenses in 2009/2010. In a subsequent affidavit, sworn March 17, 2010, the husband deposed as to additional expenses that he paid for their daughters. He submits that the wife was obviously satisfied with their arrangement as she made no application for interim child support nor raised a claim that the children's needs are not being met. It is further submitted that in this case there is no financial hardship experienced by the wife or the children, and it may not be said that the children's needs have not been met since separation or trial. The husband's position is that a retroactive award of child support will not necessarily improve the lives of the daughters. They have been well provided for. They have not been required to work or obtain student loans to contribute to the cost of their university educations. It is further submitted that if the wife is entitled to a retroactive award of child support pursuant to s. 3 of the Guidelines, then the amount of any such award ought to be off-set against a retroactive award for s. 7 expenses that takes into account the educational expenses he has paid. Finally, the husband submits that given the funds paid to each party after separation were approximately equal (\$10,000 a month tax free from the HPI shareholder loan account until June 2010, and the approximately \$100,000 per year in income from Linmark Publishing via Flashpoint continues to be paid), their incomes until June 2010 have been approximately equal. Thus, the husband submits, s. 7 expenses ought to be shared equally until then at least June 2010. Thereafter, he submits that they ought to be shared by the parties proportionately in relation to their incomes.
- [104] The wife seeks retroactive child support and an award for s. 7 expenses that takes into account amounts that she has paid and an income attributed to the husband that is significantly higher than his income tax line 150 amounts.

B. The Law regarding Child Support and Section 7 Expenses

- [105] Child support orders are based on the Guidelines, the objectives of which are set out in s. 1:
1. The objectives of these Guidelines are
 - (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
 - (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[106] A "child" for the purpose of the Guidelines means "a child of the marriage" (s. 2) which is defined in s. 2(1) of the Divorce Act as follows:

"child of the marriage" means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.

[107] The proper approach to child support orders will depend in large part on the age of the child in question.

[108] Section 3(1) of the Guidelines sets out the approach for children under the age of majority:

- 3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
 - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
 - (b) the amount, if any, determined under section 7.

[109] Section 7 expenses are "special or extraordinary" expenses that may be included in a child support order depending on the necessity of the expense, the best interests of the child, the means of the child, the means of the spouses, and the family's prior spending pattern:

- 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
 - (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
 - (b) that portion of the medical and dental insurance premiums attributable to the child;
 - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

[110] Section 4, which deals with parents with high incomes, may also apply to the circumstances of the case at bar:

4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.

[111] It has been argued before that despite the provisions of the Guidelines, parents of children under the age of majority attending post-secondary education and living away from home for most of the year should not be entitled to table amounts of child support per s. 3(1)(a).

[112] In *Bockhold v. Bockhold*, 2006 BCCA 472, this argument was rejected because s. 3(1) states a clear presumption that the Guidelines will apply to children under the age of majority. The rationale behind the table amounts also remains extant in these circumstances since the parent with whom such children otherwise reside continues to incur many of the expenses of maintaining a household throughout the year in anticipation of the children returning home for holidays.

[113] Furthermore, even if a spouse has an income in excess of \$150,000 in relation to s. 4, it remains that this Court has no discretion to depart from the table amounts set out in the Guidelines when it comes to children under the age of majority: the discretion arises only to award either the usual amount under s. 3(1), that is, the table amounts plus s. 7 expenses, or, if the prior amount is considered unsuitable, to award the table amount related to income of \$150,000, plus any further amount appropriate in the circumstances, and s. 7 expenses, if any.

[114] Section 7 expenses may not be appropriate where children under the age of majority are living away from home to attend university. In *Matwichuk v. Stephenson*, 2007 BCSC 1589 [Matwichuk], for example, the court concluded that it was not reasonable to award s. 7 expenses retroactively, over and above the table amounts, because the analysis of the means, needs and circumstances of the parties did not lead to a finding that the payor parent should pay more than the table amount of support. In that case, the children had a demonstrated ability to contribute to their own expenses, the payor parent was paying support for three children, and the recipient parent was not in a financial position to pay for a share of s. 7 expenses:

54 More importantly though, in this case, considering Mr. Stephenson's income, the number of children for whom he is paying child support, Ms. Matwichuk's income, and the demonstrated abilities of Erin and Kalyn to contribute to their own support, it is not reasonable to award the table amount plus a further amount under s. 7. In other words, the entitlement of adult children (living away from their parents' homes while attending university), to s. 7 expenses, over and above the table amount of child support, does not to me seem appropriate, unless the analysis of the means, needs and circumstances of the parents and children leads to the conclusion that the payor parent should pay more than the table amount of support. That is not the case here.

[emphasis added by N.J. Garson J.]

[115] In other words, while the Court must award the usual Guidelines table amounts in relation to children under the age of majority, it may be that s. 7 expenses will not be appropriate when it comes to children living away from home and attending post-secondary institutions depending on the financial circumstances of the parents and the extent to which the children are able to contribute towards their expenses.

[116] As noted, a "child of the marriage" also includes children the age of majority or over where, by reason of illness, disability or other cause, the child is unable to withdraw from the charge of his or her parents. Adult children pursuing post-secondary education are often found to be unable by reason of "other" causes to withdraw from the charge of their parents, thus remaining children of the marriage: *Martin v. Martin* (1988), 26 B.C.L.R. (2d) 390 (B.C.C.A.).

[117] In determining whether such an adult child is unable to withdraw from the charge of his or her parents, "mere attendance" at an educational institution will not be sufficient: *Ciardullo v. Ciardullo* (1995), 15 R.F.L. (4th) 121 (B.C.S.C.). The determination of whether a child remains a child of the marriage will be fact-specific and the following non-exhaustive list of factors, outlined in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.) [Farden] and approved in *N.(W.P.) v. N.(B.J.)*, 2005 BCCA 7 [N.(W.P.)] at para. 20, should be considered:

- (i) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;

- (ii) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (iii) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (iv) the ability of the child to contribute to his own support through part-time employment;
- (v) the age of the child;
- (vi) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (vii) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (viii) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[118] The onus of proving that a child remains a child of the marriage is on the applicant: *Rebenchuk v. Rebenchuk*, 2007 MBCA 22 [Rebenchuk] at para 26; approved in *Matwichuk*. The burden is not a heavy one when the child is pursuing his or her first level of post-secondary education (*Rebenchuk*), and evidence need not be adduced on each of the *Farden* factors: *N.(W.P.)*.

[119] Once a child the age of majority or over is found to be a "child of the marriage", the Court must turn to s. 3(2) of the Guidelines, which sets out the proper approach to child support in these circumstances:

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

[120] In *N.(W.P.)* Justice Levine, for the Court of Appeal, explained that generally the approach set out in s. 3(2)(b) of the Guidelines is to apply for an adult child attending a post-secondary institution and living away from home. This means that in determining an appropriate amount, the Court is to consider "...the condition, means, needs and other circumstances" of the adult child and their parents.

- [121] In the recent case of *De Beck v. De Beck*, 2012 BCCA 465 [De Beck], Justice D. Smith, for the Court of Appeal, considered the approach to be taken regarding child support for adult children pursuing post-secondary education. D. Smith J.A. considered the comments of Levine J.A. in *N.(W.P.)* and the application of s. 3(2)(b) as set by Justice Martinson in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.) [Wesemann] as follows:
- [55] Justice Levine also discussed the application of s. 3(2)(b) in reference to the decision of Madam Justice Martinson in *Wesemann v. Wesemann* (1999), 49 R.F.L. (4th) 435 (B.C.S.C.). *Wesemann* also involved the issue of how support for an adult child attending school away from home should be calculated. Martinson J. formulated a four-step approach for determining the "appropriate" amount of support for an adult child under s. 3(2). That approach began with the presumptive table amount unless the "usual Guidelines approach was challenged" and found to be inappropriate. Levine J.A. (at para. 39) held that the absence of a challenge to the "usual Guidelines approach" did not preclude consideration of s. 3(2)(b) for determining the appropriate amount of support. She concluded:
- [42] In my opinion, in principle, support for an adult child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b). The "table amount", as noted by Martinson J. in *Wesemann*, contemplates a contribution by the non-custodial parent to the expenses borne by the custodial parent in providing a home for the child. The fact that the "table amount" increases incrementally and not absolutely for additional children supports that interpretation of the intention of the Guidelines. The "table amount" does not contemplate a child's contribution, which is an important factor in considering the amount of support a student requires. [emphasis added by D. Smith J.A.]
- [56] Just as the absence of a challenge to the "usual Guidelines approach" under s. 3(2)(a) should not preclude a consideration of s. 3(2)(b), similarly the fact that an adult child is attending a post-secondary institution while living at home should not in my view foreclose a consideration of the approach under s. 3(2)(a). In each case, the choice between applying s. 3(2)(a) and s. 3(2)(b) will be a discretionary one that will be governed by the circumstances of that case.
- [122] In *De Beck* the Court of Appeal upheld the decision of the chambers judge to award the father s. 3 Guidelines support (s. 3(2)(a)) based on the table amount for two adult children who resided at home with him while pursuing post-secondary education. D. Smith J.A. found:
- [57] In the circumstances of this case, Jennifer's and Laura's dependency on the father has come in the form of them living in his home while they attended a post-secondary school in the same community. Both children have contributed to some of their personal expenses and in part (for Jennifer) and in full (for Laura) to their extraordinary school expenses out of their employment earnings. They were able to do so because they did not have to pay the father room and board. In these circumstances, I am of the view that it was reasonable to award

the father s. 3 Guidelines support for Jennifer and Laura as it represents the mother's contribution to their accommodation and food expenses while they reside with the father and attend school. These circumstances also bear closer resemblance to the circumstances in which the "usual Guidelines approach" is applied than those where the adult child attends school away from home.

[123] Justice D. Smith concluded in De Beck:

[60] There is no single approach to the calculation of Guidelines support for an adult child. The amount of support is what is appropriate in all of the circumstances. In my view the chambers judge made no error in awarding the father s. 3 Guidelines support for Jennifer and Laura while they resided at home, using their employment income to pay for their educational and other expenses.

[124] With regards to s. 7 expenses awarded in relation to adult children, I note in Wesemann (at para. 26) that Martinson J. stated the Court may "choose to apportion the amount payable on a proportionate basis as contemplated by s. 7 of the Guidelines".

[125] I note the following as a summary:

- A support order for a child under the age of majority, even if living away from home for university, will be the applicable table amount (s. 3(1)) plus any amount determined to be appropriate under s. 7. In relation to high-income spouses under s. 4, the table amount can be varied if the Court finds the table amount inappropriate.
- With regards to a child who has reached or is over the age of majority, who is unable to withdraw from his or her parents' charge in accordance with Farden, and living away from home in circumstances departing from those underlying the rationale for the usual Guidelines table amounts approach, the support payable will likely be any amount determined under s. 3(2)(b) having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- However, each case is to be assessed on its own circumstances, and in the event that adult children entitled to support reside at home with one parent, the approach in s. 3(2)(a) of support based on the Guidelines' table amount may be appropriate. Either approach then may include an order for s. 7 expenses to be shared proportionately by the parents based on their Guidelines' incomes.

C. Child Support

[126] The twins, A.M. and S.M., turned 19 years old in September 2009 and their parents separated in November 2006 (December 2006 to September 2009 inclusive is 34 months). They continued to reside with the wife until they went to university in Ontario in September 2008. They attended university in Ontario for four academic years, from September 2008 to April 2012. They also attended a summer session in 2011.

- [127] P.M. turned 18 years old just after the parties separated. She remained under the age of 19 for one further year. At the time of separation in November 2006 she was in her first year of university, also in Ontario. She continued to study there for four academic years, completing her degree in the spring of 2010. She then studied hospitality management at a college in Toronto from September 2010, with her courses anticipated to complete in the spring of 2012.
- [128] As such, pursuant to s. 3(1) of the Guidelines and Bockhold, I find that the husband is obliged to pay child support for three children from December 2006 to December 2007 inclusive, and for two children from January 2008 through September 2009 inclusive, based on his Guidelines' income as previously calculated (namely \$165,484 for 2007; \$180,664 for 2008; and \$180,664 for 2009).
- [129] Section 4 of the Guidelines sets out the considerations for determining child support for a payor with an income over 150,000:
4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is
 - (a) the amount determined under section 3; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.
- [130] According to s. 4(a), the amount determined under s. 3 in the present case is \$88,961. However, I find this amount to be inappropriate (pursuant to s. 4(b)) because of the substantial s. 7 expenses paid by the husband on behalf of the children under the age of majority, each of whom were away from the wife's residence while studying in Ontario at university for significant periods of time.
- [131] Applying s. 4(b)(i), the table amount for the first \$150,000 is \$77,965, and with respect to the balance of the husband's income in excess of \$150,000 I decline to add an additional amount. I note that a court must have "clear and compelling evidence" to depart from the table amount of support, all necessary information before it is in order to determine "inappropriateness" under s. 4, and when considering a budget (or in this case a record of past expenditures) "the unique economic situation of high income earners" must be considered: *Metzner v. Metzner*, 2000 CCA 474. In this case the clear and compelling evidence is that while under the age of majority for one year the twins were away in Ontario

at university, as was P.M., and were being supported by both parents by way of s. 7 expenses.

- [132] It is submitted on behalf of the husband that the wife's claim for retroactive child support ought to fail based on the factors to be considered in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37. In considering the four factors set out by Bastarache J., I am of the view that any delay on the part of the wife in seeking retroactive support may be explained by the protracted nature of these proceedings, the fact that both parties had income and other funds available to them to provide for the children, and both were contributing to s. 7 educational expenses. Neither parent has conducted themselves in a blameworthy manner. The circumstances of the children under the age of majority were such that they were entitled to proper support according to law. The wife had the twins at home for the first two years and was maintaining a home for them. She also maintained a home for the children to return to when not at university in Ontario, which necessarily involved extra expense. No hardship is imposed on the payor parent, in this case the father, by an award of retroactive child support. In my view, a retroactive award is entirely appropriate based on the facts of this case.
- [133] Both the husband and the wife were also obliged to contribute to s. 7 expenses for the twins once they were in university in Ontario and did so. In addition, P.M., the parties' eldest daughter, was in her first year of university in Ontario when the parties separated. She continued with her studies to complete a four-year degree and a two-year course thereafter, and was supported by her parents through the payment of s. 7 expenses.
- [134] On this basis I find that the husband owes the wife \$77,965 in retroactive child support for this period. However, given the amount of s. 7 expenses paid by the husband during the same period, I reduce this amount to \$50,000.
- [135] Once all three of the children attained the age of majority (September 2009) I find that their entitlement to support falls to be determined under s. 3(2)(b), having regard to the condition, means, needs and other circumstances of each child and the financial ability of each spouse to contribute to the support of the child. Given that they were all living away from home to pursue their studies, this is the most appropriate approach in all the circumstances.
- [136] In earlier affidavits the parties agreed that the cost to maintain each child during the academic year in Ontario, including tuition, accommodation, basic living expenses, books and travel, was approximately \$20,000 per year through 2009. From 2010 through 2012 the expenses per child were estimated at \$25,000.

D. Section 7 Expenses

- [137] In terms of s. 7 expenses paid by the parties, counsel for the wife submitted a schedule of the expenses ("the Expense Schedule"), filed December 19, 2011, that set out amounts for each child as paid by each of the parties as agreed to. Several amounts claimed by the husband are disputed by the wife. The husband filed a response on January 17, 2012, and the wife filed a reply to the husband's response on January 27, 2012.
- [138] In determining each party's proportionate share of s. 7 expenses as paid I rely primarily on these documents and the affidavit material filed in support. The evidence in this case that touches on amounts paid for the children is voluminous and scattered throughout years of proceedings and the documents filed in support of subsequent applications. The parties are inclined to dispute many matters. In dealing with s. 7 expenses I have endeavoured to take all relevant material into account. I find, unless expressly stated to the contrary, that each party paid the amounts they claim to have paid or an amount estimated to be close to the claimed amount. I have rounded to the nearest dollar amount. In particular, I accept in this case that the amounts claimed by the wife as "credit card payments" represent living expenses incurred by the three children while pursuing post-secondary education, and as such find that they are legitimate s.7 expenses.
- [139] In the 2006/2007 school year, when the twins were living at home and in Grade 11 and P.M. was in first year university in Ontario, I find that the wife paid \$16,193 and the husband paid \$36,000 in s. 7 expenses. No expenses were contested from this year.
- [140] In the 2007/2008 school year, when the twins were living at home and in Grade 12 and P.M. was in second year university in Ontario, I find that the wife paid \$16,864 and the husband paid \$38,060. No expenses were contested from this school year.
- [141] In the 2008/2009 academic year, when the twins were in first year university in Ontario and P.M. was in third year at the same university, I find that the wife paid \$41,889 and the husband paid \$58,380. No expenses were contested from this school year.
- [142] In the 2009/2010 academic year, when the twins were in second year university in Ontario and P.M. was in her fourth year at the same university, the parties dispute some of the expenses paid in relation to P.M. In particular, I find that the amount the wife claims for tuition of \$4,078.18 represents an amount that she was subsequently reimbursed for by her daughter when P.M. and the husband settled their disagreement and the husband provided a cheque to P.M. for \$18,000 for university expenses (not the \$1,800 amount as listed to the husband's credit in the Expense Schedule). I decline to increase the amount the husband claims to have paid for rental accommodation for P.M. from the amount of \$2,100 as claimed, based on information contained in the wife's Affidavit #2. However, I accept the husband's estimates of hotel and travel costs in the amount of \$1,250 each for the twins. I also find that the husband's estimate of \$13,000 in travel for all children without receipts is likely an over-estimation, and I reduce that amount to \$6,500. Having made these adjustments, for this academic year I find that the wife paid \$47,599 and the husband paid

\$65,900.

- [143] In the 2010/2011 academic year, when the twins were in third year university in Ontario and P.M. was in her first year of college in Toronto, the wife disputes the amount claimed by the husband for four months of accommodation for P.M. in a condo bought by the husband in which P.M. resides, and two amounts of airfare of \$1,300 each for the twins. With regards to the condo, I note that the amount actually claimed by the husband for four months of accommodation for P.M. is \$1,600, which is described as "\$1,100.00 mtge., strata fees, etc. - \$700 from tenant x 4 mo". I have considered the husband's information regarding his purchase of the condo in Toronto, shared by P.M. and a tenant, as contained in his Affidavit #6 (at paras. 10-12), and I find the amount claimed to be entirely appropriate, despite the fact that the husband may secure a financial benefit in the long term from this arrangement. I note that the amount he seeks to claim as a s. 7 expense is very modest, and significantly subsidized by him. I also accept that the husband paid airfare for each of the twins for approximately \$1,300 during this year. Having considered these matters, I find that the wife paid \$34,993 and the husband paid \$45,683 during this academic year.
- [144] In the 2011/2012 academic year, when the twins were in fourth year university in Ontario and P.N. was in her second year of college in Toronto (the Expense Schedule is incorrect when it states she was in her first year), the wife again disputes the amount claimed by the husband for accommodation expenses for P.N. in the Toronto condo (\$3,200 for eight months) and for children's airfare. For the same reasons as stated above, I permit the husband to claim the \$3,200 as a s. 7 expense in relation to P.M.; and with regards to the airfare of \$6,000 he claims without invoices, I reduce that amount to \$4,000. I accept that he spent money on airfares for the children during this academic year, but find that without receipts he is likely to have over-estimated the amount based on the amounts expended by either party in the previous years. With this adjustment, I find that the wife paid \$22,130 and the husband paid \$41,383 during this academic year.
- [145] Over six academic years the wife has paid a total of \$179,668 and the husband has paid \$285,406 in s. 7 expenses.
- [146] In order to determine each party's proportionate share of s. 7 expenses based on their annual income, I have decided that as opposed to trying to divide the expenses for an academic as opposed to a calendar year that I will attribute the expenses from 2006/2007 to the parties' 2007 Guidelines' incomes, those expenses from 2007/2008 to the parties' 2008 Guidelines' incomes, and so on.
- [147] Therefore, with regards to the 2006/2007 academic year and the wife's 2007 Guidelines' income of \$124,732 and the husband's 2007 Guidelines' income of \$165,484 the wife's income was 75% of the husband's. In relation to s. 7 expenses the wife paid \$16,193 and the husband paid \$36,000, and the expenses total \$52,193.

- [148] With regards to the 2007/2008 academic year and the wife's 2008 Guidelines' income of \$128,280 and the husband's 2008 Guidelines' income of \$180,664 (averaged), the wife's income was 71 percent of the husband's. In relation to s. 7 expenses the wife paid \$16,864 and the husband paid \$38,060, and the expenses total \$54,924.
- [149] With regards to the 2008/2009 academic year and the wife's 2009 Guidelines' income of \$122,253 and the husband's 2009 Guidelines' income of \$180,664 (averaged), the wife's income was 67 percent of the husband's. In relation to s. 7 expenses the wife paid \$41,889 and the husband paid \$58,380, and the expenses total \$100,269.
- [150] With regards to the 2009/2010 academic year and the wife's 2010 Guidelines' income of \$119,543 and the husband's 2010 Guidelines' income of \$180,664 (averaged), the wife's income was 66 percent of the husband's. In relation to s. 7 expenses the wife paid \$47,599 and the husband paid \$65,900, and the expenses total \$113,499.
- [151] With regards to the 2010/2011 academic year and the wife's anticipated 2011 Guidelines' income of \$155,000 and the husband's estimated 2011 Guidelines' income of \$200,000, the wife's income was 77.5 percent of the husband's. In relation to s. 7 expenses the wife paid \$34,993 and the husband paid \$45,683, and the expenses total \$80,676.
- [152] With regards to the 2011/2012 academic year and the wife's projected 2012 Guideline's income of \$155,000 (assuming receipt of approximately \$100,000 income from Linmark Publishing, approximately \$30,000 in interest and investment income, and an imputed income of \$25,000) and the husband's estimated 2012 Guidelines' income of \$200,000, the wife's income is 77.5 percent of the husband's. In relation to s. 7 expenses the wife paid \$22,130 and the husband paid \$41,383, and the expenses total \$63,513.
- [153] Given the relatively consistent proportionate difference in the parties' incomes, which averages out to 72 percent, I have decided that the correct approach here is to add up the total s. 7 expenses paid for all years, determine the proportionate shares of each party, and then to compare that amount to the amount actually paid by each party. The total s. 7 expenses from September 2006 to 2012 is \$465,074. The wife paid a total of \$179,668 over these years. However, according to the proportion of income earned, she should only have paid \$168,673.
- [154] Therefore, in relation to retroactive s. 7 expenses concluding with the academic year 2011/2012 I find that the husband owes \$10,995 to the wife.

[155] Future s. 7 expenses should be shared proportionate to the parties' Guidelines' incomes.

XI. Conclusion

[156] For these reasons I make the following declarations, findings, and orders:

- Based on the prior reasons and Exhibit 17, I find that the total value of family assets subject to division is \$12,438,878. The husband's share is \$8,528,051 and the wife's share is \$4,030,706.

- No retroactive spousal support is payable to the wife.
- The wife's Guidelines' incomes are: \$124,732 for 2007; \$128,280 for 2008; \$122,253 for 2009; \$119,543 for 2010; an estimated amount of \$155,000 for 2011; and an estimated amount of \$155,000 for 2012.
- The wife's annual income going forward absent spousal support from the husband or any further income from Flashpoint is set at \$55,000.
- The husband's Guidelines' incomes are: \$165,484 for 2007; \$180,644 for 2008; \$180,664 for 2009; \$180,664 for 2010; an estimated amount of \$200,000 for 2011; and an estimated amount of \$200,000 for 2012.
- Prospectively, the husband's Guidelines' income is \$345,775, and his prospective spousal support obligation is calculated on this amount.
- Monthly spousal support is payable to the wife by the husband in the amount of \$10,000 per month, commencing December 1, 2012, due on the first day of every month thereafter, and continues until further order of the Court. The duration for spousal support is indefinite and subject only to the factors to vary as set out in s. 17(4.1) of the Divorce Act. No review is ordered.
- The husband owes the wife retroactive child support in the amount of \$50,000 for children under the age of majority living at home and away at university (December 2006 up to and including September 2009).
- The husband has paid a total \$285,406 in s. 7 expenses for all three children from separation to spring 2012; and the wife has paid a total of \$179,668 in s. 7 expenses for the same children during the same period.
- The total s. 7 expenses for the three children of the marriage from November 2006 to 2012 is \$465,074. The wife's Guidelines' income averages out over these years to 72 percent of the husband's. The wife paid a total of \$179,668 over these years and the husband paid a total of \$285,406. However, according to the proportion of income earned, she should only have paid \$168,673. Therefore, in relation to retroactive s. 7 expenses concluding with the academic year 2011/2012, I find that the husband owes \$10,995 to the wife.
- Future s. 7 expenses for the children of the marriage are to be shared on a basis proportionate to the parties' Guidelines' incomes.
- The parties wish to make submissions as to costs and are at liberty to set the matter for hearing with Supreme Court Scheduling in New Westminster.

"The Honourable Madam Justice E.A. Arnold-Bailey"

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