

CANADA / JUDGMENT

Price v. Price

2020 BCSC 1558

COURT

Supreme Court of British Columbia

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2020 BCSC 1558 Price v. Price IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Price v. Price, 2020 BCSC 1558 Date: 20201022 Docket: E161226 Registry: Vancouver Between: Alan Edward Price Claimant And Leah Elaine Price also known as Leah Price Respondent Before: The Honourable Mr. Justice Veenstra Reasons for Judgment Counsel for the Claimant: A.L. Perry Counsel for the Respondent: N. Allen Place and Dates of Trial: Vancouver, B.C. August 17-21, 24-25 and 27-28, 2020 Written Submissions from the Claimant: August 31, 2020 Written Submissions from the Respondent: September 2, 2020 Place and Date of Judgment: Vancouver, B.C. October 22, 2020 Table of Contents I. INTRODUCTION.. 4 II. BACKGROUND.. 4 A. The Parties' Histories. 4 B. The Relationship and Employment History. 5 C. The Children.. 6 D. Breakdown of the Relationship. 7 E. Post-Separation.. 8 III. CREDIBILITY AND RELIABILITY OF EVIDENCE.. 9 IV. ISSUES.. 10 V. LENGTH OF RELATIONSHIP.. 11 A. A Marriage-Like Relationship. 11

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- [1] The claimant, Alan Price, and the respondent, Leah Price, were married on August 10, 1996, having previously cohabited for over a year. They have two children: a son, A.A.P., born in September 2002, and a daughter, A.Z.P., born in January 2007.
- [2] To their great credit, the parties were able to resolve parenting issues by agreement. I was presented, at the commencement of the trial, with a 15-page consent order (the "Consent Parenting Order") dealing with those matters, which has since been entered.
- [3] Both parties seek orders for divorce, division of property, and in respect of support. The parties agree, in principle, that property should be divided equally and that the claimant should pay both spousal and child support; however, there are some significant differences--particularly as to a claim for excluded property and as to the imputation of income for purposes of support calculations. II. BACKGROUND A. The Parties' Histories
- [4] The respondent was born in 1965. She graduated from UBC in 1988 with a Bachelor of Education degree with a focus on elementary education and teaching English as a second language ("ESL"). After a year working at a hospital in Vancouver, she spent a year teaching in a public elementary school in northern British Columbia--taking advantage of a government program that would help her pay down her student loan while teaching in a rural community. She then spent six months enjoying the warmer climate of Mexico before returning to work as a substitute teacher in Vancouver and Surrey in early 1991.
- [5] The respondent subsequently taught English in Taiwan from 1991 to 1993, paying off her student loan and saving a small amount of money. In the fall of 1993, she returned to Vancouver to teach at Harbourside College, an ESL school for adults.

- [6] The claimant was born in 1967. He commenced studies at UBC in the fall of 1985 and graduated in 1991 with a Bachelor's degree in computer science. He was in the second cohort of the UBC computer science co-op program, which interspersed work and school terms and extended the time required to complete the degree. At the time, there were many more co-op positions than co-op students. As a result, his co-op work was well-paid--with monthly pay ranging from \$2,400 to \$4,000.
- [7] After completing his degree, the claimant travelled for some 18 months, starting in Europe and ending up in India, Pakistan, Nepal, and Thailand. He was able to find work in some of the countries he visited to help fund his travels. In 1993, he began working in the technology industry for Radical Entertainment--at the time, a fairly new company based in Vancouver.
- B. The Relationship and Employment History
- [8] Both parties registered for a Spanish language course in September 1994. They first spoke after class on September 29, 1994. Over the next month, they proceeded through a "pre-relationship" period. They attended a Halloween party together and thereafter embarked on a romantic relationship. They travelled to Mexico after Christmas and returned in early to mid-January 1995. They began living together on February 1, 1995 and became engaged on February 17, 1995.
- [9] In November 1994, a recruiter for an English language training firm in Japan approached the respondent. The claimant agreed to go with her, and the two of them departed for Japan in March 1995. Once there, the claimant found employment with a business, D.E. Shaw, where he was able to use his technology expertise.
- [10] The parties were married in Gibsons, B.C. on August 10, 1996. They then returned to Japan for several more months, finally leaving in March 1997. Before returning to Canada, they spent over five months travelling in Singapore, Indonesia, Malaysia, Thailand, India, and various countries in Europe. Once back in Vancouver, the respondent found work in the ESL program of a Vancouver tourism college and provided some one-on-one ESL training to individuals. By the beginning of 1998, the claimant found work in the technology industry with Rockwell Systems, which subsequently became known as Dynapro.
- [11] In July 1998, the parties purchased a home in the Point Grey neighbourhood of Vancouver. The respondent also began part-time studies at the Vancouver Community College in the fashion arts program. Upon completing that program in 2000, she obtained various part-time work within the fashion industry over the next two years.
- [12] In 2000, the claimant obtained employment with Electronic Arts as a software engineer. He worked for that company for over a decade, becoming Chief Technology Officer ("CTO") at the end of 2006 and earning steadily increasing salaries until his position was terminated in 2011. Electronic Arts also had a robust bonus program that increased the family income. The mortgage taken out to purchase the family home was paid off relatively quickly. The parties also began a pattern of accumulating assets in non-registered investment accounts, RSPs and TFSA's, as well as RESPs and RDSPs for the benefit of their children.

- [13] The claimant's employment with Electronic Arts was terminated in January 2011. He negotiated a severance package that was paid out over 12 months, including medical coverage for his family over that time. In July 2011, he incorporated a company (Digidoo) to explore some game software that he was looking at developing, but this company did not become profitable. The claimant also explored performing consulting work while he continued to look for work. In March 2012, he secured employment with a start-up company known as Grantoo LLC ("Grantoo"), with his new position starting in April 2012. His title was the same--Chief Technology Officer. While the income was much lower than he had earned at Electronic Arts, the company had potential for growth, and his pay nearly doubled over the nearly six years he worked for the company. C. The Children
- [14] A.A.P. was born in September 2002. Although the respondent had anticipated returning to work a few months later, it became clear to her that was impractical.
- [15] A.Z.P. was born in January 2007. Within a few months, A.Z.P. was diagnosed with Prader-Willi syndrome, a complex genetic condition that affects many parts of the body. The diagnosis required the family to, among other things, take special care with respect to matters such as diet and exercise and develop strategies to deal with A.Z.P.'s various cognitive impairments.
- [16] A.A.P. also had special needs, which became more apparent as he reached elementary school age. His diagnoses included ADHD, anxiety, and some behavioural disorders. In about 2009-2010, on the recommendation of medical professionals, he was placed in voluntary foster care with specialized caregivers for a period of time. He attended a special educational program at the Alderwood Family Treatment Centre for grades 4 and 5, and public school for grades 6 and 7. In the spring of 2014, he switched to a specialized boarding school, which he attended until January 2015. A.A.P spent the bulk of his high school years in various special programs in Vancouver public high schools, and he graduated in June 2020. D. Breakdown of the Relationship
- [17] Issues in the relationship between the parties were apparent by 2015. The respondent gave evidence that in August 2015, she asked the claimant if they could have a serious conversation about their relationship on questions like did the claimant still want to be married to her and if so, "how are we going to fix things". In September 2015, an email was inadvertently sent to the claimant from which he concluded that the respondent had been having an affair. The claimant's evidence was that, shortly after receiving this email, he became convinced that the parties needed to separate. The respondent's evidence was that, for six to eight months, they had discussions about whether to reconcile. The parties began sessions with collaborative counsellors in October 2015 and each retained lawyers in November 2015.

- [18] Ultimately, the parties agreed, at the beginning of May 2016, to sell their home, and the sale of the house closed on May 30, 2016. The claimant moved to a new residence on about May 15, 2016, and the respondent, having negotiated an extended possession date, moved out of the house at the end of July 2016. Up to the end of May 2016, the parties continued to pay all family expenses from joint bank accounts and credit cards. Over the course of May and June 2016, the parties established separate banking arrangements. E. Post-Separation
- [19] Various issues arose over the next four years. While the claimant has made support payments every month, the amounts of such payments varied substantially until December 2018, when an order setting interim support payments was made and remained in effect until trial. The parties have had equal parenting time with respect to A.Z.P., but parenting time with A.A.P. has varied as A.A.P. expressed different wishes at different times.
- [20] The proper educational programming for A.Z.P. was an early issue. She had initially attended public schools, but the respondent believed firmly that A.Z.P. should be home-schooled in association with a distributed learning program. Beginning at some point in September 2016, A.Z.P.'s education has involved several hours each week at the Vancouver Learning Centre ("VLC"), combined with many hours of one-on-one sessions with the respondent. As it was explained to me, A.Z.P. has good long-term memory but poor short-term memory. In order to help her learn new concepts and skills, the respondent works on repetitive learning to the point that those concepts and skills become part of A.Z.P.'s long-term memory. Since the fall of 2016, the respondent has provided full-time instruction to A.Z.P., coordinated her distributed learning program, and coordinated the paperwork required to maintain funding for that program. The Consent Parenting Order provides that this will continue moving forward.
- [21] The claimant, as part of senior management of Grantoo, was involved in various discussions related to the sale of the company from 2015 onward. By January 2017, it was apparent that Grantoo was going to be bought out and there would no longer be a role for the claimant after the sale. He looked for new work, and in February 2018, he began working with Vision Critical as its CTO. This was an established company, and the claimant's salary was higher than any of his previous salaries. His position with Vision Critical lasted until November 2019, when a new CEO brought in his own executive team and eliminated any remaining senior management roles from Vancouver. The claimant was paid severance until May 2020, after which he received the Canada Emergency Response Benefit ("CERB") for a few months. At the time of trial, he had signed a six-month employment contract with another new technology company, anticipated to commence after trial. III. CREDIBILITY AND RELIABILITY OF EVIDENCE
- [22] For the most part, I found both parties credible. It became clear that the claimant had, throughout their relationship, taken care of nearly all financial matters, with the respondent paying little attention to such issues. In addition, while both parties were clearly loving parents who cared deeply about each child, it was clear that the respondent has been immersed in dealing with her children's issues since the birth of A.A.P. The claimant, while

a devoted father who is determined to spend time and maintain relationships with each child, has necessarily dedicated significant time over the years to the demands of his employment.

- [23] The respondent, during her direct examination, made reference to having reviewed several journals, calendars, and letters in preparing to give evidence. Counsel for the claimant noted that no such documents had been listed or produced, and as the trial adjourned for the weekend the respondent was asked to produce them. A package of those documents was, by consent, put into evidence on the Monday morning, and the respondent gave evidence with respect to them both in the conclusion of her direct examination and in cross-examination. The documents were extremely helpful--particularly in establishing the timeline of the first few years of the parties' relationship. It was unfortunate that the claimant did not have the benefit of those documents when preparing and giving his evidence. The evidence he gave without having reviewed the documents was generally consistent with the documents, although they helped fix specific dates to events. The fact that his evidence was so consistent, despite not having had access to the documents the respondent had, supported his credibility.
- [24] I have a slight concern with the way the respondent described events from October 1994 to February 1995 relating to the initial stages of the parties' relationship. In particular, she described October 31 as an "anniversary" that was celebrated, whereas February 1 was simply a "date that [the claimant] gave up his apartment". The respondent had, before giving that evidence, reviewed the calendar that was subsequently produced. The calendar describes February 1 as the "Living in Sin Anniversary" and February 17 as the "Living in Semi-Sin Anniversary". It does not describe October 31 as an anniversary. For the most part, I was of the view that the respondent was doing her best to recall events - but this one matter left me with a nagging concern as to some aspects of her evidence.
- [25] As well, I found that the respondent gave responses during her direct examination that were lengthy, detailed, and eloquent, and demonstrated a fair degree of certainty. However, she had difficulty answering a number of the questions put to her on cross-examination and her tone lacked the same certainty. This may simply reflect how she prepared for her testimony, but it left me less confident as to her recollection--particularly of events further in the past.
- [26] Many of the conflicts between the parties related more to the legal characterization of events rather than the underlying facts. Many of the major factual disputes relate to events in the distant past. Where necessary, I have made findings on contested facts primarily through reference to contemporaneous documents, surrounding circumstances, and my confidence in the specific answers given by each of the parties. IV. ISSUES
- [27] This trial involved both claims and counterclaims, with competing positions advanced by the parties on several issues. The key issues, in the order they will be dealt with, are:
- (a) A determination of the start and end dates of the relationship;

- (b) A disputed claim for excluded assets;
- (c) Child and spousal support, including:
 - i. determination of the claimant's income for purposes of prospective support calculations; ii. the basis for entitlement to spousal support; and iii. entitlement to and calculation of retroactive support.
- (d) Special expenses;
- (e) A requirement to maintain term life insurance as security for ongoing support obligations; and
- (f) A review of support obligations in 2026. V. LENGTH OF RELATIONSHIP

[28] The parties disagreed as to both the start date and the end date of their relationship. A. A Marriage-Like Relationship

1. Positions of the Parties

[29] The respondent argued that the parties' marriage-like relationship commenced in at least January 1995, if not sooner. The claimant argued that the start of a marriage-like relationship was on February 1, 1995. Initially, the claimant had suggested a March 1, 1995 date, based on that being the date that the notice given to his landlord expired and he no longer had access to his former apartment. Once the 1995 calendar was produced, the claimant took the position that the relevant date was February 1.

2. Material Facts

[30] The two calendars produced mid-trial by the respondent helped assign dates to and elucidate the significance of key dates in the evolution of their relationship. The first was faxed to her by the claimant in November 1994, and the second was given by the respondent to the claimant in February 1995 and annotated. The events include:

- (1) September 29, 1994: first words spoken between them;
- (2) October 31, 1994: Halloween party; identified as the start of a relationship and first night spent together, and thereafter, many nights spent at each others' apartments;
- (3) November 25, 1994: trip to Roberts Creek B&B, at which the parties "consummate their relationship" (the phrase used by the respondent);
- (4) In about November 1994: the respondent had been recruited to work for a language training program in Japan. At some point over the next several weeks, it was decided that the claimant would travel to Japan with her;
- (5) December 26, 1994: the parties took an approximately two-week trip to Mexico;

- (6) January 1995: the parties decided to move in together, and the claimant gave notice to his landlord;
- (7) February 1, 1995: the claimant moved into the respondent's apartment; date identified on the calendar as the parties' "Living In Sin Anniversary";
- (8) February 17, 1995: the parties became engaged; and
- (9) February 28, 1995: lease of claimant's apartment ended pursuant to notice given in January, 1995. The claimant's evidence was that the landlord insisted on a full calendar month's notice of termination.

3. Applicable Law

[31] Section 3(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides that:

- (3) A relationship between spouses begins on the earlier of the following:
 - (a) the date on which they began to live together in a marriage-like relationship;
 - (b) the date of their marriage.

[32] The applicable legal principles were summarized in *Dey v Blackett*, 2018 BCSC 244:

[192] The determination of whether a relationship was marriage-like requires a "holistic approach", in which all of the relevant factors are considered and weighed, but none of them are treated as being determinative of the question: *Austin v. Goerz*, 2007 BCCA 586 at paras. 58 and 62.

[193] While a "checklist" approach to this question is not appropriate, it can still be helpful during the analysis to consider the presence or absence of commonly-accepted "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship": *Weber v. Leclerc*, 2015 BCCA 492 at para. 25. A frequently-cited authority has identified these indicators as including "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple": *M. v. H.*, [1999] 2 S.C.R. 3 at para. 59, citing *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 at para. 16 (Ont. Dist. Ct.).

[195] The intentions of the parties, particularly whether they saw the relationship as being "of a lengthy, indeterminate duration", will be important to the determination of whether the relationship was marriage-like. However, evidence of their intentions must be tested against objective evidence of their lifestyle and interactions, which will provide direct guidance on the nature of the relationship: *Weber*, at paras. 23, 24. In other words, "subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such": *Takacs v. Gallo* (1998), 48 B.C.L.R. (3d) 265 (C.A.) leave to appeal to SCC ref'd, [1998] S.C.C.A. No. 238, at para. 53.

[196] In weighing the various factors, it is also an error to give undue emphasis to the future plans of a couple, in contrast to the current realities of their respective situations: Takacs at para. 58.

[33] The claimant relied on the judgment in *C.P. v. K.W.A.*, 2018 BCSC 332, in which the evidence indicated that the parties had decided to live together in May 2003, began to look for shared accommodation that month and ultimately moved into a shared apartment on June 30, 2003. The court concluded that "even though they had decided to live together at an earlier date, the parties actually began to live together on June 30, 2003": *C.P.* at para. 35. Thus, the court held that the marriage-like relationship started on June 30.

4. Analysis

[34] It appears from the evidence that there was discussion of travelling to Japan together as early as November 1994. It also appears that significant discussions in January 1995 led to the decision to live together--which the parties began to do on February 1, 1995. In the context of this case, I find that the use of the phrase "living in sin" in connection with the February 1 anniversary references the parties' living together in a committed, marriage-like relationship from and after that date. The fact that it is marked on the calendar and celebrated as an anniversary confirms that finding. I conclude that both the intentions and the actions of the parties came together on that date so as to fulfill the requirements of the legal test.

[35] Thus, I find that for purposes of s. 3 of the FLA, the parties commenced to live together in a marriage-like relationship on February 1, 1995. B. Date of Separation

1. Positions of the Parties

[36] The claimant argued that the date of separation was either October 1 or November 1, 2015--based on discussions and correspondence in the weeks following the email correspondence of September 24, 2015. The respondent argued that the date of separation was in late May 2016--being the time at which the claimant had moved out of the family home and the parties were taking steps to close their joint accounts, cancel shared credit cards, and establish individual banking arrangements.

2. Material Facts

[37] The claimant gave evidence that he formed a fixed intention to separate within a fairly short time after he received and read the respondent's email mistakenly sent to him on September 24, 2015.

[38] Beginning in October, the parties engaged in a collaborative counselling process with respect to their relationship. The claimant's evidence was that, during one of these sessions in early November, he advised the respondent that he wished to separate. The respondent's evidence was that these sessions were "with a view (I believed) to reconciliation" and that the parties went back and forth numerous times about whether they wanted to reconcile or

not. The claimant acknowledged that there was communication about reconciliation, but said that "for me it was always no".

- [39] In November 2015, each of the parties retained a lawyer. The respondent's evidence was that she saw a lawyer's business card at the house, and that her counsellor advised her that if the claimant had retained a lawyer then she should too. It appears that each of the parties initially retained a "collaborative" family lawyer on the understanding that if they were not able to resolve matters by agreement, they would each have to retain new counsel.
- [40] On November 29, 2015, the claimant wrote a lengthy email to the respondent, including a detailed discussion about his views as to what each child required in terms of education. In it, he stated: Change is going to happen for this family over the next year. I will not have the same job come March (and probably earlier). Right now I am suspecting I will need to find a new job rather than something happening with the company. Location-wise, given the realities of divorce and the money situation, it is highly likely we won't be living in exactly the same location (just hold on here . . . and read what I am saying below). This I don't know for sure. [discussion about locations and schooling options] These are the kind of decisions we are going to need to make together in the future while being apart. Managing the present and future of our children together. This is something we can do. [Emphasis added.]
- [41] At some point, the claimant insisted on the implementation of a "parenting plan", by which he and the respondent would take turns caring for the children in the evenings, and the parent not "on duty" would sleep in the downstairs bedroom. This lasted only a short time.
- [42] I note that there was evidence that, as far back as 2002, the claimant had frequently slept in a downstairs guest room, as he found it difficult to go back to sleep if awoken during the night (which occurred regularly once they had children). While sleeping in a separate bedroom may, in many cases, be an indicator of steps taken toward separation, in the particular circumstances of this case it is not.
- [43] In early 2016, the parties obtained an appraisal of their home. The exact date of the appraisal was not in evidence, other than the fact that it was early in the year. The claimant was of the view that the appraisal was obtained with a view to selling the house. The respondent was of the view that an appraisal would permit her to negotiate terms on which she could pay rent to the claimant and keep the children in the house.
- [44] In about March 2016, the collaborative process ended and each of the parties retained new lawyers. It appears that, on March 11, 2016, the claimant paid a retainer to the lawyer who eventually commenced this action.
- [45] On April 6, 2016, the claimant wrote another lengthy email to the respondent, which included the following: I have thought hard about your proposal to reconcile, and am going to have to decline. For the first time in a long time I know where I need to go with my life, where I want to grow, and I know I am going to need to be separated from you to do this. I truly believe you too will have greater opportunities to grow and be happy without me at this

time. Perhaps some time in the future, if our growth has taken us not too far in different directions, we could consider a reconciliation but for now I don't see the possibility. It is clear we need to have two separate homes we can share with our children. The email went on to discuss the reasons why the claimant was of the view that the respondent's proposal to rent the house from the claimant was not feasible, and he asserted that the house must be sold.

- [46] On April 22, 2016, the claimant filed the notice of family claim in this proceeding. However, the document was not served on the respondent, nor did she become aware of it, until nearly a year later.
- [47] The house was listed for sale in the spring of 2016. However, the respondent was reluctant to agree to sell it. The parties received a very good offer to purchase the house in the latter part of April, 2016. Ultimately, on or about May 1, 2016, the respondent agreed to sell the house upon the claimant agreeing to certain terms--in particular, that the claimant would move out of the house by May 15 and that the possession date under the Contract of Purchase and Sale would be the end of July 2016.
- [48] Over the next few weeks, the parties established independent banking relationships and the pre-existing joint accounts were closed.
- [49] On June 1, 2016, the claimant made an initial support payment of \$2,350 by way of direct deposit to the respondent's account.

3. Applicable Law

- [50] Section 8(3) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) provides that: Calculation of period of separation
- (3) For the purposes of paragraph (2)(a),
- (a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and
- (b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.
- [51] Section 3(4) of the FLA provides that: For the purposes of this Act,
- (a) spouses may be separated despite continuing to live in the same residence, and
- (b) the court may consider, as evidence of separation,

- (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.
- [52] The applicable legal principles were summarized in *Nearing v Sauer*, 2015 BCSC 58 at paras. 54-56:
- [54] It is clear that a meeting of the minds on the intention to separate is not required. A physical separation, combined with one party's intention to live separate and apart, is sufficient: *Dhillon v. Dhillon*, [1998] B.C.J. No. 823 (C.A.). Based on the evidence, I am satisfied that the claimant formed the intention to live separate and apart from the respondent well before he left the home in August 2009. This however does not end the matter. The case law also requires that the spouse who wishes to separate take action consistent with that intention.
- [55] The respondent relies on the case of *J.L.L. v. G.A.L.*, 2010 MBQB 39, at para. 4, where the court quoted with approval these comments from *Field v. McLaren*, 2009 MBQB 118:
- [10] Certainly I accept it is settled law that the intention of one party to separate may be sufficient to sever the relationship. Judged objectively though there must be evidence that an intention to separate was not only held, but was communicated to the other party and acted upon. The person desiring to separate must act in a way consistent with an intention to separate. [Emphasis added.]
- [56] In *Sachdeva v. Sachdeva*, 2013 BCSC 313 [Sachdeva], this Court took a similar approach, relying primarily on *Rose v. Guiguet*, 2008 BCSC 1225, where Madam Justice Dorgan looked at both the husband's intention to live separate and apart and his actions. Typically when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: *Sachdeva* at para. 87. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive: *Newth v. Booth*, 2011 BCSC 317 at para. 17. [Emphasis in the original.]
- [53] In *H.S.S. v S.H.D.*, 2016 BCSC 1300 at paras. 42-43, Justice Dardi described the court's task as:
- [42] to assess objectively, on the totality of the evidence, whether one spouse held a settled intention to separate and communicated that intention through his or her conduct to the other spouse. An express statement is only one of the factors for consideration in what is necessarily a contextual analysis.

- [43] The Ontario Court of Appeal in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), held, in the context of a common law relationship, that a relationship has come to an end "when either party regards it as being at an end, and by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one": at 432. This statement was cited with approval by the Supreme Court of Canada in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para. 42.
- [54] In *S.A.H. v. I.B.L.*, 2018 BCSC 544 at para. 55, Justice Shergill set out a series of questions, providing a test to be applied in such circumstances:
1. Did at least one spouse have the intention to separate?
 2. Was the intention to separate communicated to the other spouse?
 3. Was the intention to separate acted upon? In other words, using generally accepted characteristics of marriage, did one or both spouses take action that is consistent with the separation, such as:
 - a. changing how they behaved with each other in public; and
 - b. changing how they behaved with each other in private.
 4. Analysis
- [55] Up to mid-May 2016, the parties continued to live in the family home and behaved in many ways as they had prior to September 2015. The respondent's evidence was that there were intermittent discussions about fixing and continuing with their relationship from September 2015 until the house was sold. The claimant's evidence was that he was determined from and after some point in the fall of 2015 to decline any entreaties toward a continuation of the relationship.
- [56] The claimant's November 29, 2015 email indicated a desire for the parties to live separate and apart in the future. However, in the context of overall events throughout that period, I cannot conclude that by that date the claimant had not only "unequivocally" or "convincingly" demonstrated that his intention to separate was a fixed one, but also taken action in that regard.
- [57] I see his April 6, 2016 email as putting to rest any notion that the relationship might continue; any suggestion of a future reconciliation in that email was clearly highly conditional and far in the future. However, the fact that this put the idea of reconciliation to rest is not determinative. If the test for separation was met at an earlier date, and there was no actual reconciliation, then the April 6 email would not require that the test be met yet again.
- [58] Ultimately, I accept that the claimant had a fixed intention to separate by the end of 2015. I see the obtaining of the appraisal in early 2016, in the particular circumstances of this case, as concrete action towards separation. That conclusion is reinforced by the parties' distinct

intentions as to the results of the appraisal. The claimant, as noted above, saw it as an important first step in getting the house sold so that the parties could have their own separate residences. The respondent's evidence (that she viewed the appraisal as a step towards a rental arrangement) helps put the obtaining of the appraisal into context, and makes clear her understanding by that time that the claimant was determined to move ahead with the parties living separately.

[59] Unfortunately, the appraisal itself was not put into evidence, and no specific date was given as to when it was commissioned. However, knowing that the house was listed for sale by April 2016 and that the claimant had retained his litigation counsel by March 11, 2016, I would fix March 1, 2016 as the date of separation. From that day onward, although the parties continued to live in the same house for a further 10 weeks, they were separated. VI. PROPERTY DIVISION

[60] The parties generally agreed that the family assets should be divided equally. In fact, many of the assets have already been divided between the parties. As no issue arises with respect to the bulk of those assets, I will focus on the assets in dispute.

[61] The claimant seeks to exclude the following assets, which he claims that he held before the relationship:

- (1) A Retirement Savings Plan ("RSP") that was established prior to the relationship, as well as funds contributed to the RSP in February 1995, a matter of days after the commencement of the relationship, using money saved before the relationship; and
- (2) An investment account holding funds inherited from his grandmother several years before the relationship, and used to acquire the family home.

[62] The respondent disputes both the existence and the quantum of such assets at the start of the relationship. The respondent also asserts that (a) the inheritance funds, even if they existed at the start of the relationship, cannot be traced into the house; and (b) even if the claim is established, the presumption of advancement applies such that the benefit of the inheritance funds is deemed to be a gift to the respondent. A. Material Facts

[63] The claimant gave detailed evidence about his pattern of saving and spending funds. He said that he first opened a bank account in about 1980, at which time he was 13 years old and working part-time at two stores that his uncle owned. The claimant's evidence was that he received scholarships of about \$3,000 per year while at university. He also gave evidence that he earned between \$2,400 and \$4,000 per month during co-op work terms. For all of these reasons, the claimant said that he was able to fund his university education through scholarships and earnings.

[64] The claimant also gave evidence that in approximately 1987, he received an inheritance of £78,000 from his grandmother in England. When that money arrived, it was converted to Canadian dollars. The claimant's recollection was that the exchange rate at the time was approximately 2.4 to 2.5 Canadian dollars to the British pound. As a result, the funds

received equated to approximately \$187,000. The claimant's evidence was that he deposited the inheritance into an investment account at his local branch of the TD Bank. His evidence was that he left those funds untouched, and paid for any travel or other activities using monies earned through employment. The claimant's evidence was that he initially invested the funds in guaranteed income certificates (GICs); however, due to unsatisfactory returns and on the advice of his investment advisor, he invested in mutual funds instead.

- [65] After graduating from university in 1991, the claimant travelled for about 18 months. His evidence was that he worked from time to time in foreign countries to fund his travels--including for several months in India. On his return to Canada in 1993, he began working for Radical Entertainment.
- [66] The claimant was unable to produce financial documents from 1987 to 1993. His evidence was that, to the extent those documents remained, they were discarded during a major cleaning out of the basement in late 2014 and early 2015. The claimant was able to locate and produce his notices of assessment and some T3, T4, and T5 slips for his tax returns beginning in 1994, and investment account and RSP statements beginning September 30, 1997. The information shown in those documents will be discussed below.
- [67] As set out above, the parties commenced to live in a marriage-like relationship on February 1, 1995. The claimant's recollection was that he advised the respondent early in their relationship that he had an inheritance from his grandmother in England, which he held in various investments. The respondent's evidence was that they discussed an inheritance very early in the relationship; the discussion related primarily to two stools that the claimant had received, but she was also told that there had been some money as well. Her evidence was that the claimant did not tell her how much money there was and did not indicate that he still had any of it. Her evidence was that she assumed that the money was long gone and did not make any further inquiries. She commented as well that he seemed to live very modestly, in a small apartment without fancy furniture--not the way you would expect someone to live if they had a sizeable inheritance.
- [68] The claimant produced RSP receipts from 1994 and 1995 tax returns indicating that, in February 1995, he made four RSP contributions totalling \$17,229. The claimant's evidence was that these funds were from savings that he had accumulated over the past several months of his employment. His evidence was that there was a small amount of money in his RSP account before those deposits and that, by the end of February, the total value was probably about \$22,000 (i.e., \$17,229 from contributions in February 1995 and just under \$5,000 from previous contributions). His evidence was that he has never taken any money out of an RSP, but that the investments did not do well while he was in Japan, which he said explained why the market value as of September 1997 was only \$20,824.
- [69] The claimant paid for the trip the parties took to Mexico commencing on December 26, 1995. The claimant also paid for their flights to Asia and for the costs of their trip in March 1995 to Thailand and Korea before they arrived in Japan. The evidence indicated that they

were nearly out of cash when they arrived in Japan. The claimant said that he had pretty much exhausted his chequing account by this time, but that in accordance with his long-standing practice, he was determined not to touch the inheritance funds invested in mutual funds. The respondent, on the other hand, pointed to this as further evidence supporting her assumption that the inheritance had been depleted.

- [70] The parties both gave evidence as to their earnings in Japan. The claimant's evidence was that his annual salary at D.E. Shaw, which was paid in Japanese Yen, was equivalent in May 1995 to approximately \$90,000 plus a bonus of approximately \$10,000. However, because of devaluation of the Yen by approximately 30% within about four months of their arrival in Japan, the value of his overall compensation was reduced to approximately \$70,000 per year. The claimant's evidence was that the respondent earned approximately \$40,000 per year initially, but after devaluation of the Yen, it was subsequently equivalent to approximately \$28,000.
- [71] The respondent's evidence was that the claimant earned \$90,000 to \$100,000 per annum while they were in Japan. Her initial position paid only about a third of that (roughly \$30,000), but in the fall of 1995, she found a full-time position at a Catholic girls school in Tokyo that paid approximately \$45,000 a year. Her evidence was that she does not recall whether the Yen fell in value while they were in Japan--that was not something she followed. Her evidence was that they were not required to pay any tax during their first year in Japan and that the tax rate during the balance of their time there was only 5%. Her evidence was that they lived on her salary and saved all of the claimant's earnings so they could buy a house when they returned to Vancouver. Both parties gave evidence that, once the claimant began working for D.E. Shaw, the company paid the rent for their apartment in Tokyo.
- [72] The parties had different evidence on whether it was expensive to live in Japan. The claimant emphasized the substantial cost of living there as well as the costs incurred by the parties in their various travels. The respondent's evidence was that, with the rent covered, their other expenses were not substantial; they could eat cheaply in Japan and were often driven by friends to places they were visiting. The respondent did, however, write to a friend in Vancouver in May 1995 commenting that "[the claimant] was really bummed when we first got here, because it was a lot more expensive than we'd imagined "
- [73] The parties had differing recollections on the extent to which they travelled while living in Japan. The claimant recalled multiple trips to Vancouver, Thailand, Hong Kong, and England. The claimant also recalled multiple trips around Japan, including expensive travels by bullet train, and that the respondent had travelled to Mexico. The respondent's evidence was that the claimant only returned to Vancouver once, that their trips around Japan were not expensive, and that her trip to Mexico was on a voucher.
- [74] The respondent's evidence was that the costs of their wedding in August 1996 were mostly covered by cash wedding gifts.

- [75] The claimant's evidence was that their 1997 trip back to Vancouver--returning via Singapore, Indonesia, Malaysia, India, and various countries in Europe over the course of five to six months--cost in the range of \$30,000. The undisputed evidence was that the parties paid for the costs of that trip using monies earned in Japan--some of which were withdrawn by bank card from the claimant's Citibank account and some of which were converted into traveller's cheques before they left.
- [76] The first investment account statements produced were from September 1997. The first of these--dated September 30, 1997--showed that as of the beginning of September 1997, the non-registered investment account contained mutual funds valued at \$210,676 and cash of \$81,005, for a total of \$291,681. The statement also showed a wire transfer of \$26,413.74 on September 18, 1997 from Japan into the claimant's TD investment account, bringing the account balance to over \$300,000. The claimant's recollection was that the wire transfer represented monies earned in Japan that his employer had held back until Japanese tax issues were resolved. A separate statement for the RSP showed that the value of the RSP account as of September 30, 1997 was \$20,824.
- [77] When the parties returned to Vancouver, they purchased a Honda Civic for approximately \$15,000 and paid a small deposit on a pre-sale condominium. When the condominium project did not proceed as anticipated, they changed plans and ultimately purchased the family home in Point Grey in July 1998, using just over \$264,000 from the TD investment account and a \$110,000 mortgage. The funds from the TD investment account took the form of two cheques processed on June 12, 1998 and July 24, 1998, for \$50,000 and \$214,128.49, respectively. A few days before the June 12, 1998 cheque, the claimant's non-registered investments were transferred from a TD Evergreen account in his name alone to a TD Paramount account that was in the names of both the claimant and the respondent.
- [78] The mortgage was paid off within a few years, and the property was subject to no financial charges at the time of separation. Its value increased substantially during the time it was owned by the parties. B. Positions of the Parties
- [79] The claimant's position was that the parties had limited net savings from their time in Tokyo other than the \$26,413.74 that was wired to the TD account in September 1997 and the \$15,000 that they used to purchase the Honda Civic. His evidence was that the respondent's pay did not cover all of their expenses and that while some money was sent to a chequing account in Canada, that account was used for expenses as well, including the wedding and their travels in 1997. The claimant prepared calculations that estimated the claimant's net income in Japan after tax (with a 25% tax rate) as approximately \$110,000, and the respondent's total income in Japan after tax (with a 20% tax rate) as approximately \$50,000. The claimant submits that the total of \$160,000 was primarily used to cover their living and travel costs from March 1995 to March 1997 plus the cost of roughly \$30,000 for their round-the-world trip in 1997. The claimant argues that the fact that only about \$41,000 remained from these earnings makes sense.

[80] The respondent's position was that most if not all of the funds in the TD Evergreen account in September 1997 represent their savings from nearly two years working in Japan. As noted above, the respondent asserts that the parties used her salary for living costs while the claimant's salary of \$100,000, which she asserts was taxed only after the first year and only at a 5% rate, was saved and transferred to Canada. While she did not provide calculations like the claimant, I infer that her argument is that 22 months at \$100,000 per annum, less 5% tax on the second year, would give rise to a net income for the claimant of approximately \$179,000. Her evidence did not explain the difference between that number and the \$291,000 in the investment account as of the beginning of September 1997.

[81] The respondent also argues that:

- (1) because some \$68,000 remained in the investment account after funding the purchase of the home, any tracing of funds has not been adequately proved; and
- (2) any exclusion was lost when the claimant transferred the investment funds into a joint account, and then into a house that was held in joint tenancy, by virtue of the presumption of advancement.

[82] Thus, there appear to be three main issues with respect to the excluded assets claim:

- (1) whether the claimant has met the evidentiary burden of establishing the existence of the inheritance funds and RSP as property acquired prior to the relationship;
- (2) whether the inheritance funds can be traced into the family home; and
- (3) whether the presumption of advancement operates to defeat the claim. C. Excluded Property - Evidentiary Burden

1. Applicable Law

[83] Section 81(b) of the FLA provides that: Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[84] Section 84(1) provides that: Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
- (i) property that is owned by at least one spouse, or (ii) a beneficial interest of at least one spouse in property;

[85] Section 85 provides that:

- (1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
 - (b) inheritances to a spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[86] Section 84(2)(g) explicitly includes in family property:

- (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or (ii) the excluded property was acquired.
- Thus, excluded property claims are limited to the value of the original exclusion.

[87] The underlying purpose of the excluded property regime was explained in *C.M. v. N.L.*, 2020 BCSC 3 at para. 169: The excluded property regime under the FLA allows spouses to keep as theirs property that they bring into the relationship, if that property still exists or can be traced to other property at separation (*Yousefian v. Jafarmadar*, 2018 BCSC 855 at para. 23). An interest in excluded property is limited to the value of the property as at cohabitation or as at the date that it is received but does not provide an interest in that specific value should the value diminish (*C.P. v. K.W.A.*, 2018 BCSC 332 at para. 100). Excluded property claims are limited to the value of the original exclusion (*Zellweger* at para. 37). The excluded property regime was intended to make the law simpler, clearer, easier to apply, and fairer (*Shih v. Shih*, 2017 BCCA 37 at para. 45). Fairness underlies the whole of the exclusion regime (*Zellweger* at paras. 57 and 60.).

[88] The effect of these provisions was summarized in *Pisarski v Piesik*, 2019 BCCA 129 at para. 22: The definition of "family property" in s. 84 establishes a communal pot from which only excluded property, defined under s. 85, is removed. The definition of "family property" is very broad: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 8. Section 85 provides that certain classes of property, including property acquired by a spouse before the relationship began, are excluded from the definition of family property. The categorization of property as family property or excluded property is significant as each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common.

[89] Justice Kirkpatrick clarified the evidentiary burden on a party seeking to establish an excluded property claim in *Shih v Shih*, 2017 BCCA 37 at paras. 41-44:

[41] The inherent challenge which confronts litigants under the FLA is that in many relationships of any significant length, documents will have been destroyed and memories dimmed. A legal standard that demands mathematical certainty or precision risks defeating legitimate claims.

- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.
- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [90] Justice Choi provided further background in C.P. at paras. 92-93:
- [92] When the excluded property model was promulgated in the FLA, the purpose was, in part, to align with people's notion of fairness. At para. 45 of Shih, Kirkpatrick J.A. referred to the case of P.G. v. D.G., 2015 BCSC 1454 at para. 76, which considered the policy behind the reform of family law legislation in BC:
- [45] In P.G. v. D.G., 2015 BCSC 1454, Madam Justice Fenlon (as she then was) discussed the purpose of the excluded property model of the FLA and emphasized the need to fit with parties' expectations of fairness.
- [76] ... In the British Columbia Ministry of Attorney General's White Paper on Family Relations Act Reform: Proposals for a new Family Law Act, (2010), online: <<http://www.ag.gov.bc.ca/legislation/shareddocs/fra/Family-Law-White-Paper.pdf>> the reason for introducing an excluded property regime was described as follows (at 81): The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subjected to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre-relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship.
- [93] The new model places the onus on the party seeking an exclusion to prove with clear evidence that property is excluded. However, this exercise was not meant to be overly complicated or burdensome. The objectives of the new model must be considered together with the reality that many parties will co-mingle excluded property with family property over time, including using excluded property to purchase other property or refinancing excluded property to purchase other property. The court must also consider evidentiary difficulties inherent in family law actions, as the Court of Appeal noted in Shih. Where documents are less than complete, the credibility and reliability of the parties' and other witness' testimony will become critical in the overall assessment. [Emphasis in the original.]

2. Analysis

- [91] In this case, the claimant's evidence relates to an inheritance received in the 1980s and investments held in the early to mid-1990s. The claimant's evidence is that documents were discarded some time ago and that he has been unsuccessful in locating banking records and other relevant documents dating back to that time period. I accept that evidence.
- [92] That leaves the court to scrutinize the evidence to determine whether it is clear, cogent, and credible, and establishes the existence of the excluded property on a balance of probabilities.
- [93] The claimant's evidence with respect to his RSP contributions consists of (a) receipts showing \$17,229 in RSP contributions in February 1995, the source of which he says was income earned prior to February 1995; (b) an RSP account statement from September 1997 showing an account balance of \$20,824; (c) his recollection that prior to February 1995 he had made some prior smaller contributions totalling just under \$5,000, and had never withdrawn funds from an RSP; and (d) his general recollection that his RSP account balance at the end of February 1995 was probably closer to \$22,000 but market returns were not good during the 30 months that followed.
- [94] This evidence as a whole provides a solid foundation for the claim. That said, given how far in the past these transactions occurred, the very general nature of the claimant's evidence on rates of return from that time period, and the likelihood that, even in a time of poor returns, there would have been some growth in an RSP between February 1995 and September 1997, I am reluctant to accept the claimant's assertion as to a \$22,000 valuation as of February, 1995. I conclude that the claimant has proven on a balance of probabilities an excluded property claim of \$20,000 from his RSP (i.e., a pre-February 1995 RSP value of approximately \$2,771, plus the \$17,229 shown on receipts as being contributed in February 1995 from pre-relationship savings).
- [95] With respect to the claim concerning the claimant's inheritance from 1987, the respondent in her evidence acknowledged being told by the claimant at the start of their relationship that he had received an inheritance. The fact that such a discussion occurred is not disputed. However, the respondent says that she assumed that the inheritance had been dissipated before they met. She also understood that money earned in Japan was sent to the claimant's account in Vancouver and assumed that to be the source of the funds in the TD investment account.
- [96] The claimant's evidence is that he invested the inheritance monies with the TD Bank--initially in GICs and later, when the available return on GICs decreased, in mutual funds. Thus, the \$187,000 that he received increased over time to roughly \$291,000 in 1997 as reflected on the first available account statement in September 1997.

- [97] Other available documentary evidence includes the claimant's notices of assessment from 1994 to 1997 and tax slips from 1994 to 1996. The T5 slip for each year shows three Canada Savings Bonds valued at \$500 each, which the claimant testified were gifts from a relative that were added to the investment account on maturity. In addition, the T3 slip for each year (and in one case a further T5 slip) reflects a mix of returns from various TD mutual funds (income, dividends, capital gains and foreign income). Those numbers are summarized below. For comparison purposes, the difference between line 150 (total income including investments) and employment income is also shown: Year Total Return from T3 & T5 slips Line 150 less Employment Income 1994 \$2,333 \$1,767 1995 \$2,609 \$2,690 1996 \$10,500 \$10,113 1997 \$7,720 The difference between the two 1994 numbers is unusual. I assume that this was related to the different tax treatment of the investment returns. For 1997, there were no T3 or T5 slips attached to the income tax return. Given the claimant's evidence that he was unemployed on returning to British Columbia until the beginning of 1998, I assume that the amount in line 150 was primarily comprised of investment income.
- [98] Assuming for purposes of analysis that there was a consistent amount of \$270,000 in the investment account, these numbers would reflect returns of:
- (a) 1994 - 0.65% to 0.86%
 - (b) 1995 - 0.97%
 - (c) 1996 - 3.9%
 - (d) 1997 - 2.9%
- [99] I recognize that rates of return on investments like mutual funds will vary. Even in light of that, those rates of return seem low to me--particularly the rates from 1994 and 1995. I was presented with no evidence as to the available returns during the relevant time period on funds of the sort the claimant had invested in. I am required to do what I can to analyze this claim based on the evidence placed before the court.
- [100] The fact is that \$291,000 was in the TD investment account at the beginning of September 1997. That is significantly more than the parties could reasonably have saved while in Japan even on the respondent's recollection, which I see as overly optimistic. Having considered the evidence with respect to the income earned in Japan, while I do not accept that the full amount in the investment account could have been saved during the 22 months the parties both worked in Japan, I do conclude that there should have been some savings in addition to the September 1997 wire transfer of \$26,413.74 and the money used to purchase the Honda Civic.

[101] I accept the claimant's evidence that he received an inheritance, that he invested it with the TD Bank, and that it was substantial. His evidence is more reliable than that of the respondent--who paid little attention to financial matters and whose evidence was substantially based on assumptions. I recognize, however, that the claimant's evidence was based on his recollection of amounts and exchange rates from 25 to 33 years in the past.

[102] Having considered the reliability of the claimant's evidence and his onus to prove his claim on a balance of probabilities with clear and cogent evidence, I find that the claimant has established on that standard that he held, prior to February 1, 1995, investments valued at \$200,000 in his TD investment account. D. Tracing of Excluded Property

1. Applicable Law

[103] As noted above, s. 85(1)(g) of the FLA includes, within excluded property, property that is "derived from" other excluded property. It appears that this phrase allows a more flexible approach to identifying excluded property than would the formal rules of tracing that are applied in commercial and trust cases: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 59; C.P. at para. 95; C.M. at para. 173. As Justice Dillon noted in C.M. at para. 174, "[w]hile the onus is on the party seeking exclusion to prove with clear and cogent evidence that property is excluded, the tracing exercise is not meant to be overly complicated or burdensome".

[104] Justice Choi stated the following in C.P. at para.97:

[97] In the case at bar, both parties contemplate a precise and mathematical tracing that runs against the object of an excluded property regime. If, as Shih notes, the object is to balance ease, clarity, and simplicity with fairness, the tracing methods that the parties borrow from contract law and commercial disputes are not appropriate. It would make for a departure from the simplicity and clarity that underlie the excluded property regime.

[105] Justice Choi also noted, at para. 99, that tracing is less complicated where an asset has appreciated in value:

[99] Tracing excluded property can be a relatively simple exercise when excluded property commingles with other property in an asset that appreciates in value. In such cases, the value of the excluded property at cohabitation can often be deducted in full from the value of the currently held property.

[106] Justice Dillon explained the linking methodology in C.M. at para. 173:

[173] The court in Shih approved of wording used by the trial judge that where it is asserted that excluded property has changed character, each "link in the chain" required to trace the property into the currently owned asset must be established (Shih at para.39). The "link" methodology implies a common sense approach to tracing so that if there is sufficient linkage between an excluded asset and an asset existing as at separation, then the character of an asset as excluded remains (*Wolfe v. Wolfe*, (2003), 43 R.F.L. (5th) 223 at para. 51).

2. Analysis

- [107] There is no issue of tracing of the RSP accounts. The claimant's evidence was that he has never withdrawn from his RSP accounts. His RSP account at the time of separation had a value much greater than the \$20,000 from 1995.
- [108] Tracing of the TD investment amount is more challenging. The account statements--which are available only from September 1997 onward--indicate that in mid-September the claimant's investment account received the \$26,413.74 wired from Japan. The parties agree that this was money earned during the parties' time in Japan. The account appears to have remained more or less static over the next few months, other than some minor investment returns, until June 1998 when the funds were placed in the new TD Paramount account. This account was in the parties' joint names. Within a short time thereafter, the parties withdrew a total of \$264,128.48 to purchase their new home. After those withdrawals, \$68,771 remained in the TD Paramount account.
- [109] A question arises whether a portion of the \$200,000 of excluded assets should be traced to the \$68,771 remaining in the TD Paramount account rather than into the home. The claimant has, since 2016, attributed the full amount of his excluded asset claim to the funds used to purchase the family home and presented his case on that basis. A portion of the family home sale proceeds was set aside to secure the claim. Investment account statements between June 1998 and December 2016 were not adduced in evidence. That said, there was no evidence that the joint investment accounts were depleted in that interim period. Rather, there was evidence of a pattern of accumulating assets and retiring debt as quickly as it could reasonably be done. The value of the joint non-registered investment account in December 2016 was over \$400,000 (not including the separate accounts that were set up to hold the proceeds from the sale of the family home in 2016). The parties agree that this investment account should be split 50/50.
- [110] I see no basis to conclude that a portion of the excluded assets should have been traced into the investment account rather than the house, and no basis to conclude that the claim would have been defeated if presented on that basis. In my view, it would be inconsistent with the purpose of the excluded asset provisions to argue that the claim can be defeated because a different set of assets should have been pursued. There is no compelling reason not to trace the excluded assets into the family home.
- [111] In the circumstances, and given the flexible approach to tracing identified in *C.P.*, I conclude that the \$200,000 in excluded investments can be traced into the family home. There is a clear link from the investment accounts held by the claimant pre-relationship to the TD Paramount account and, from there, into the family home. The family home increased substantially in value from its acquisition in 1998 until its sale in 2016. This is a case where the excluded property has co-mingled with other property in an asset that appreciates in value, which allows the value of the excluded property to be recognized in full.
- ### E. Presumption of Advancement

1. Applicable Law

- [112] The FLA was enacted in 2011 and came into force in March 2013. Thereafter, two lines of authority developed as to whether, in the context of gratuitous transfers of excluded property from one spouse to the other or from one spouse to joint tenancy, the presumption of advancement continued to apply. Justice Fleming discussed the evolution of these conflicting authorities in detail in *McManus v. McManus*, 2019 BCSC 123 at paras. 27-49. In particular, she noted at paras. 32-33 that the Court of Appeal in *V.J.F. v S.K.W.*, 2016 BCCA 186 at paras. 74-77, determined that the FLA builds on existing common law and equitable principles relating to property and does not simply replace them. In the absence of a clear statement abolishing it, the presumption of advancement continues to apply under the FLA.
- [113] Justice Voith reviewed the implications of the presumption of advancement in detail in *H.C.F. v. D.T.F.*, 2017 BCSC 1226 at paras. 99-174. He commented in the course of that review that the presumption of advancement reflects societal attitudes from the distant past. It appears that it applies to a voluntary transfer from a married husband to his wife, but not to a transfer from wife to husband: *H.C.F.* at para. 110. It appears that it does not apply to a voluntary transfer as between common-law spouses, nor does it apply to a transfer as between legally married same-sex spouses: *H.C.F.* at paras. 129-30. Thus the application of the presumption of advancement in the context of the FLA would allow "an anachronistic legal principle to continue in the context of legislation that was intended to recognize and reflect the broader and changed nature of relationships in present day society": *H.C.F.* at para. 150. Justice Voith also concluded that the presumption of advancement cannot be reconciled with the FLA's property regime in a way that is harmonious and consistent with its stated and intended objectives: *H.C.F.* at para. 174. [See also the comments of Fleming J. in *McManus* at para. 50.]
- [114] The Court of Appeal has not, despite the commentary from this court, reconsidered the applicability of the presumption of advancement under the FLA. Instead, the Court of Appeal, in a series of judgments in 2019, directed trial courts to focus on discerning the intent of parties in cases where the presumption of advancement is raised. *Namdarpour v. Vahman*, 2019 BCCA 153, at paras. 33-35 and 40 summarizes the current state of the law:
- [33] Although the presumption of advancement continues to apply under the FLA, I would not overemphasize the role of evidentiary presumptions in the current property division scheme for a number of reasons, including the apparent context in which the presumption has its origins (the sometimes anachronistic notions of economic dependence), in contrast to contemporary circumstances.
- [34] In *Zhu v. Li*, 2009 BCCA 128, leave to appeal ref'd, [2009] S.C.C.A. No. 241, Madam Justice Neilson observed that the presumption of advancement has been rendered less significant in the context of property division in the "contemporary matrimonial context". She said:

- [51] there is considerable support for the view that the presumption of advancement has lost its force in the contemporary matrimonial context. The editors of *Waters' Law of Trusts* describe its origins in the 18th century, rooted in the assumption that when a husband or father transfers an asset to his wife or child, his intention is to make a gift due to the donee's financial dependence on him and the reasonable expectation that the donee would share in his estate. They observe that this premise has lost its persuasiveness in contemporary society, to the point that the presumption of advancement has been eliminated by express legislation in the majority of Canadian provinces and territories. While it has not been abolished in British Columbia, they say that legislation dealing with the division of matrimonial property has "reduced the presumption to no significance": D.W.M. Waters, Q.C., Mark R. Gillen, & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 377-381.
- [35] The Supreme Court of Canada considered the presumption of advancement in *Pecore*, in the context of a contest between children over whether funds in a joint account should form part of an estate. The Court explained that regardless of the legal burden, the trial judge's role is to ascertain the transferor's actual intention. The presumption of advancement will determine the result only when evidence of the transferor's intent is unavailable or unpersuasive.
- [40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.
- [115] The court in *Venables v. Venables*, 2019 BCCA 281 at para. 95 arrived at a similar conclusion:
- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: *V.J.F.* at paras. 74-79; *Namdarpour* at para. 46.
- [116] As explained in *McManus* at para. 51, it is particularly difficult to discern intention in cases involving a voluntary transfer that pre-dates the coming into force of the FLA:

[51] Leaving aside the question of whether or how considering intention can be reconciled with a meaningful interpretation of excluded property and family property, there are practical issues to be recognized. In my view, placing weight on the notion a spouse actually intended to gift their excluded property, in particular, but also perhaps a joint tenancy, is artificial when dealing with transactions that occurred prior to the FLA. The concept of excluded property did not exist in British Columbia until it was enacted. Under the previous legislation, the Family Relations Act, R.S.B.C. 1996, c. 121 [FRA], family purpose determined the character of an asset regardless of ownership. A family home was quintessentially a family asset, subject to equal division unless fairness pursuant to the factors enumerated in s. 65(1) mandated reapportionment. On separation, as opposed to the death of a spouse, an intention to gift an interest in a family asset was insignificant. Obviously, it was impossible for a spouse to know by doing so he or she was giving away an entitlement, in the event of marriage breakdown. The "FRA reality" has several implications, a small one being an emphasis on the absence of discussion regarding intention at the time of a transfer during the FRA's reign, to determine its effect now, seems misplaced.

[117] More generally, ascribing intention to a spouse at an early stage of a relationship as to whether the spouse intended to gift is somewhat artificial; one would anticipate any spouse would be expecting the relationship to last indefinitely, if not "til death do us part".

[118] As noted in *Namdarpour* at para. 46, depositing funds to a joint account in any given case is not in itself persuasive evidence of intent to gift. Rather, the court must ascertain the intention at the time of transfer using available evidence.

2. Analysis

[119] The respondent submits that, even if funds from excluded investments can be traced into the family home held in joint tenancy, those funds should be deemed to be a gift from husband to wife by virtue of the presumption of advancement.

[120] This claim was troubling to me. It first came to my attention during the final hour of the respondent's closing submissions. Counsel for the claimant advised the Court that she was taken by surprise by this argument, and sought and was granted leave to address it by written submissions. I have reviewed the pleadings, the trial briefs, and the respondent's written opening but was unable to identify any reference to the presumption of advancement.

[121] Further, my notes of the evidence contain no reference to either of the parties being asked about their intention for the transfer of investment funds to the jointly-held TD Paramount account nor the subsequent use of funds from that account to pay for a family home held in joint tenancy. The claimant was asked in cross-examination to confirm that the funds from his investment account were transferred into the joint account in July 1998. He was not asked why.

- [122] The respondent's delayed timing in raising this issue resulted in the lack of a fulsome evidentiary record and prejudice to the claimant. I find it would be unfair to permit the presumption of advancement to be raised as a response to the claimant's excluded assets claim. In any event, the available evidence does not support a finding that the claimant had an intention to gift the excluded assets.
- [123] The respondent suggests that I can infer an intention to gift from the respondent's evidence. The respondent testified that the parties intended to use the money they saved while working in Japan to buy a car and a condominium to start a life together. The respondent did not acknowledge that any inheritance funds remained. She testified that she left banking matters to the claimant. Her evidence provided no basis for a finding of an intention to gift with respect to the inheritance. In any event, it would be the claimant's intent that was relevant and not the respondent's.
- [124] The only evidence that I heard that can be considered explanatory of the claimant's motivation in 1998 in using inheritance funds to partially fund the purchase of the family home was his clear desire to avoid incurring substantial debt. Both the claimant and the respondent gave evidence as to their aversion to debt. The claimant testified that one of the things he initially admired about the respondent was her efforts to quickly eliminate her student debt. He gave evidence that their initial home mortgage in 1998 was structured with six separate tranches in order to facilitate rapid pay-downs. If avoidance of debt was a significant part of the rationale for the use of those investment funds to purchase the family home, then it would indicate a lack of intention to gift. I conclude that this evidence is the sort of circumstantial evidence contemplated in *Namdarpour* at para. 40 as allowing the court to reach a conclusion as to intention.
- [125] I conclude that the only evidence available to me that can be attributed to the intention surrounding the use of the investment funds in 1998 is not consistent with an intention to gift. As a result, I conclude that the presumption of advancement does not apply, and the claimant has established an excluded asset claim in the amount of \$200,000 with respect to the family home. VII. INCOME DETERMINATION AND SUPPORT
- [126] The parties agree that the claimant should be paying both child and spousal support. However, they disagree on a number of the key elements in the calculation of such support. The biggest difference between the parties relates to the claimant's income used in support calculations. A. Income of the Claimant
- [127] The claimant gave evidence that he has signed a six-month consulting agreement with a company known as Blueline Studios Inc. ("Blueline") to act as Head of Operations for the company at a fee of \$10,000 per month. Thus, the claimant argues that support should be calculated on the basis that he would earn an annual salary of \$120,000.

[128] The respondent, on the other hand, argues that the respondent is intentionally under-employed and that income should be attributed to him based on the \$300,000 salary he earned from August 2018 to November 2019.

[129] The determination of this claim requires a review of the claimant's employment history and his efforts to obtain new employment since his termination.

1. Material Facts

[130] I heard extensive evidence on the claimant's employment from 2005 through 2020.

[131] As noted above, the claimant has a Bachelor's degree in computer science. His work over the years has focused on software development and has included various management roles in the technology industry. He was careful to distinguish his work from IT work, which generally focuses on the hardware side of technology and requires a different skillset.

[132] In 2005, the claimant was employed with Electronic Arts in Burnaby. His title at the time was Group Technical Director, Soccer Franchise. Electronic Arts had a robust bonus program. If the Burnaby studio surpassed its revenue targets for their products in any given year, there would be bonuses that would filter down. The claimant had a base salary of \$130,000 in 2005 and \$150,000 in 2006. With bonuses, his income from employment in those two years was \$165,000 and \$177,000, respectively.

[133] Near the end of 2006, the claimant was promoted to CTO of Electronic Arts. His role in this new position was to oversee the technology being developed by a number of teams and try to find studio-wide advantages. From 2007 to 2019, the claimant acted as CTO for various different companies, and while the specific work changed with each company, it remained a senior management role that involved leading software development teams, coordinating technology-related functions, and fostering innovation. In 2007, the claimant's base salary with Electronic Arts was \$200,000, and his employment income including bonus was \$268,356. In 2008, the base salary increased to \$210,000, and with a substantial bonus, the claimant's total income from Electronic Arts was \$304,091.

[134] In 2009, the claimant's T4 indicated a total income of \$450,885. The claimant's evidence was that in this year, his base salary was \$220,000, his bonus was over \$120,000, and there was an attribution of some \$85,000 of income based on a conversion of options to restricted stock units. His evidence was that those options ended up being worth only about \$10,000, and he recovered the excess taxes paid on this attributed income in subsequent years.

[135] In 2010, the claimant's base salary was \$230,000, and his bonus was approximately \$115,000, totalling \$345,000.

- [136] The claimant's evidence was that toward the end of 2010, there were a number of changes at Electronic Arts. A number of senior management positions were moved to the United States. The CTO function was taken over by an individual in Florida. The claimant's evidence was that this was a frustrating reality of the technology industry in Vancouver--once companies become successful and grow to a certain level, they end up moving their head offices elsewhere.
- [137] The claimant's employment with Electronic Arts was terminated at the beginning of 2011. He was given a one-year severance package, which included medical coverage for his family. The claimant's evidence was that he could have tried to stay on with the company as a programmer with a salary in the range of \$100,000; his preference was to look for new work and also devote some time to a project he was interested in that might turn into a commercial venture. He created a company, Digidoo, for this project, and while he did spend time in 2011 working on this project, the evidence indicates that it never generated any income. He also had some business cards printed up with an operating name of "Epiphination", which he anticipated using should he be retained for consulting work. However, the evidence was that no consulting income was generated.
- [138] The claimant's 2011 income tax return indicates that, during the year, he earned employment income of \$221,249, representing his severance package from Electronic Arts, plus holiday pay of \$138,138 for seven months of vacation that the claimant had accrued while at Electronic Arts.
- [139] The claimant was hired by a start-up company, Grantoo, in the spring of 2012 to act as its CTO. His employment contract was dated March 15, 2012, and he began work in April or May of that year. While his initial salary was only \$60,000, he believed that Grantoo would be successful and that it would grow, and he would never have to look for work again. His 2012 income tax return indicates employment income of \$40,000, which was for 8 months' work with Grantoo.
- [140] In 2013, Grantoo was successful in attracting investment, and the claimant's salary was increased to \$80,000.
- [141] In 2014, as Grantoo continued to develop its product and attract investment, the claimant's salary increased mid-year to \$110,000. Although his salary increased in 2014, the claimant did not sign the formal amendment to his original Grantoo employment contract until May 2016. His 2014 T4 indicated employment income of \$91,653. His 2015 income was \$110,000.
- [142] The claimant's evidence was that by 2015, Grantoo's product was not doing well, and the company was beginning to stagnate and struggle. He was involved in various trips to speak with potential investors who might either invest in Grantoo or acquire the business. The fall of 2015 was also the time when the parties' relationship began to fall apart.

- [143] Efforts to find an investor or purchaser continued through 2016. The claimant's annual salary for 2016 remained at \$110,000. Although his T4 for the year recorded income of \$114,230, the claimant's evidence was that he was inadvertently slightly overpaid due to a change in accountants during the year.
- [144] The claimant's evidence was that near the end of 2016, he and the other senior management of Grantoo found a buyer for the company. That buyer was interested in what the claimant described as an "acqui-hire"--that is, the buyer was most interested in the company's software development engineers. The claimant remained with the company for several months, but it was understood that this was not permanent, and he spent most of 2017 looking for a new position. The claimant's 2017 employment income was \$110,000.
- [145] The claimant gave evidence as to his job search in 2017. He described Vancouver as a very "networked City" in its technology sector. His evidence was that all of his leadership positions in the industry have been acquired through networking with his contacts rather than by job applications. Often, available positions at the CTO-level are not publicly known. He began canvassing people that he knew in January 2017 and had a series of interviews with one potential employer in March or April 2017 but did not end up working with that company.
- [146] The claimant described an informal group of chief technology officers that he had helped to establish in about 2015. The group met together regularly for dinners to discuss various key issues in the technology industry. He described having contacted a number of other members of the CTO group about his job search. Ultimately, he learned through another person involved in that group that Vision Critical was looking for a new CTO. The claimant understood that Vision Critical was actually looking to bring in an experienced CTO from the United States, and contemplated having that person based in Toronto. He persuaded them that he was the right person for the job and could do it from Vancouver. He negotiated a salary of \$270,000, signed an employment contract on January 29, 2018, and began work in February 2018. His evidence was that the time period from when he began searching for a new position in January 2017 to when he began negotiating with Vision Critical was approximately 11.5 months.
- [147] The claimant gave evidence as to the many challenges he faced in his work with Vision Critical. His initial role was to head up the technology department for two studios--one in Vancouver and one in Toronto. That was familiar work, although with a much larger workforce than he had previously overseen. He was also assigned an oversight role for the external information technology department that managed servers for the product; working with hardware as opposed to software was new to him. While he initially had five or six direct reports, that was eventually reduced to three. More generally, the CEO of the company was determined to move to a culture of innovation, which was very different from the existing culture, and the claimant was expected to play a lead role in that culture shift. Many in the company resisted these changes. The claimant was required to work long hours, and his responsibilities necessitated significant travel.

- [148] In August 2018, he was asked to oversee the product development side of the business as well. That was a completely new area of work for him and entailed a steep learning curve and even longer hours. In return for these added responsibilities, his salary was increased to \$300,000.
- [149] The claimant's work with Vision Critical was demanding and came with significant stresses. The claimant gave evidence that stresses in his family life significantly exacerbated those stresses. The fall of 2018 included the decision of A.A.P. to move away from the claimant's home to live full time with the respondent, and the escalation of this litigation including a contested application for interim support. As well, the claimant's sister's health deteriorated--she ultimately died of cancer in March 2019.
- [150] The claimant's 2018 tax return indicated \$10,300 in income from Grantoo for January and \$265,112 from Vision Critical for the remainder of the year.
- [151] The claimant gave evidence that his stress continued to mount in 2019. He described himself as the "lightning rod" for the future as efforts continued to bring about a culture change within Vision Critical. The company hired two vice presidents to work under the claimant. Their success continued to be mixed, and the company's board ultimately decided to bring in a new CEO. The claimant was involved in interviewing the new CEO.
- [152] As all of this was going on, stresses in the claimant's personal life continued. The trial of this action was initially set for 2019 but did not proceed. By the fall of 2019, the claimant was speaking with his medical doctor about the need to take a leave of absence from work to deal with stress issues. He advised the respondent that this was probably going to happen; she responded by advising that she would not agree to any changes in the support payments. Ultimately, events overtook the claimant's consideration of whether to take a leave of absence.
- [153] In November 2019, the new CEO took office. Most of the existing executive team was terminated, including the claimant. Vision Critical hired a new CTO to be based out of Toronto. The claimant was offered six months of severance. He initially asked that the severance be spread over 12 months and include medical coverage. He did so because his past experience in both 2011 and 2017 indicated that it would normally take in the range of a year to find an appropriate new position. The respondent advised that she would insist on support being paid based on the full amount of his prior salary. As a result, the claimant renegotiated his severance package so that it would be paid over six months, terminating May 29, 2020, but that medical coverage, including for the children, would continue to November 2020.
- [154] The claimant's employment income for 2019, as reported on his income tax return, included \$303,688 from Vision Critical plus an additional \$13,000 of vacation pay that was paid out on his termination.

- [155] The claimant's annual salary and other employment income from 2005 to 2019 can be summarized as follows: Year Employer Annual Salary Base Income Bonus Vacation Payout Option Conversion 2005 Electronic Arts \$130,000 \$130,000 \$31,094 2006 Electronic Arts \$150,000 \$150,000 \$27,000 2007 Electronic Arts \$200,000 \$200,000 \$68,356 2008 Electronic Arts \$210,000 \$210,000 \$94,091 2009 Electronic Arts \$220,000 \$220,000 \$120,000 \$85,485 2010 Electronic Arts \$230,000 \$230,000 \$115,000 2011 [Electronic Arts severance] \$0 \$221,249 \$138,138 2012 Grantoo (last 8 mos) \$60,000 \$40,000 2013 Grantoo \$80,000 \$81,538 2014 Grantoo \$80,000 - \$110,000 \$91,653 2015 Grantoo \$110,000 \$110,000 2016 Grantoo \$110,000 \$114,230 2017 Grantoo \$110,000 \$110,000 2018 Grantoo (1 mo) Vision Critical (5 mo) Vision Critical (6 mo) \$110,000 \$270,000 \$300,000 \$275,497 2019 Vision Critical \$300,000 \$303,687 \$13,000 As can be seen, the range of annual salaries is large--from \$60,000 to \$300,000. However, the evidence was that the salary paid within this range depended more on the nature of the employer and its size rather than the nature of the work. The lower paying positions came with greater potential for growth while the higher paying positions have not lasted as long.
- [156] After the termination of his position with Vision Critical, the claimant began looking for new work. In December and January, he reached out to the CTO group that he had been involved in to let them know of his availability, spoke with people he had previously worked with, and reached out to recruiters and executive search people. He also identified an interest in developing his skills in executive coaching--which he viewed as potentially leading to additional income-earning opportunities, but more importantly, making him a better and more attractive candidate for senior management opportunities in the technology industry. He identified a coaching training program and began to take courses in January 2020. As well, he took a one week holiday in southern California to help deal with the after-effects of his job loss and the stressful times he had been dealing with.
- [157] His evidence was that in February 2020, he "ramped up" his job search work. He began applying digitally for various positions and posted his information on various technology-related job search websites. The documents in evidence at trial included a significant number of job postings, applications, and related correspondence. The bulk of the job postings that the claimant had collected and applied for showed salary ranges of \$100,000 to \$150,000. The claimant also continued to reach out to contacts. He remained of the view that he was much more likely to find a position through his industry contacts than through applying in response to specific job postings. He had a few interviews beginning in March, but by mid-March, his ability to conduct a job search was impacted due to the COVID-19 pandemic. His evidence was that all of the interviews he had resulted from his network connections rather than from applications made in response to job postings.

- [158] Ultimately, the claimant entered into a contract with Blueline, which was to take effect on August 1, 2020 subject to certain conditions. When the claimant gave evidence, he anticipated that it would start shortly after this trial. Although the contract is only for six months, the claimant believes the company has significant opportunities for growth going forward and it could turn into a long-term position. The claimant's evidence was that the Blueline position resulted from a meeting with a contact in January 2020.
- [159] As noted above, the claimant received severance pay from Vision Critical until the end of May 2020. From June 2020 to the time of trial, he received the CERB.
- [160] The respondent tendered an expert report of Mr. John Lawless of Lawless Vocational Consulting Inc. dated April 17, 2020. The report was entered without objection, and Mr. Lawless was accepted as an expert in the area of vocational rehabilitation. He was not cross-examined.
- [161] Mr. Lawless was provided with an employment history with respect to the claimant, prepared by the respondent. He limited his analysis to line 101 and line 150 entries of the claimant's income tax returns without considering the underlying components of the amounts shown.
- [162] Mr. Lawless referred to the Government of Canada's National Occupational Classification guide. He identified three job categories that might apply to the claimant: Computer Programmers & Interactive Media Developers, Software Engineers & Designers, and Computer & Information Systems Managers. The claimant agreed that his work over the years would likely fall within the latter two of these categories. Mr. Lawless obtained statistics for earnings in each of these categories and provided both the median (50th percentile) as well as the "high" figure (90th percentile) for each category. He suggested that one could multiply the hourly wage statistics by 2,000 to get an annual salary. Thus, the salary ranges for these categories were as follows:
- | | 50th Percentile | 90th Percentile | Hourly | Annual |
|---|-----------------|-----------------|---------|-----------|
| Software Engineers & Designers | \$42.07 | \$84,140 | \$67.31 | \$134,620 |
| Computer & Information Systems Managers | \$45.67 | \$91,340 | \$66.67 | \$133,340 |
- [163] Based on this analysis, Mr. Lawless concluded as follows: To conclude, I think you can consider that [the claimant's] earning capacity is higher than the 90th percentile of people working in the occupation of Computer & Information Systems Managers. That is, at least \$135,000 a year. Probably it is closer to that of his last position, where he earned \$300,000 a year, and it is possible he could earn even more in the future. While I cannot be precise, I think he has an outstanding vocational potential.
- [164] Mr. Lawless prepared his report without having interviewed the claimant. His instructions were to rely on the summary prepared by the respondent. The claimant wrote to Mr. Lawless setting out various errors in the facts that he was asked to assume. Mr. Lawless did not respond, nor did he make any changes to his report.

2. Applicable Law

- [165] The parties did not differ substantially on the legal test to be applied in considering whether to impute income for purposes of either child support or spousal support. In *Marquez v Zapiola*, 2013 BCCA 433 at paras. 36-37, the governing principles were summarized as follows:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. [Citations omitted.]
- [166] *Beissner v Matheusik*, 2015 BCCA 308 at para. 44, set out a series of factors to be considered in determining whether income should be imputed. Factors that are particularly relevant to this case include the following:
- (1) there is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work;
 - (2) a parent cannot avoid support obligations by a self-induced reduction of income;
 - (3) when imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. Factors include the age, education, experience, skills, and health of the parent as well as the availability of work, the freedom to relocate, and other obligations; and
 - (4) a parent cannot be excused from support obligations in furtherance of unrealistic or unproductive career aspirations.

3. Analysis

- [167] The respondent's arguments in favour of imputation of income focus primarily on two assertions:
- (1) First, the claimant was too slow to begin making job applications after his termination in late November 2019. Respondent's counsel focused primarily on the making of applications in response to specific postings and did not accept the claimant's view that the better approach to obtaining an appropriate position was through networking with contacts and developing coaching skills. The respondent was particularly critical of the claimant's decision to take a one week holiday in January 2020.

- (2) Second, the high end of the compensation range suggested by Mr. Lawless (\$300,000 annual salary) should be adopted, and the contract that the claimant has signed with Blueline (\$120,000 equivalent annual salary) should not be considered because it is below an appropriate salary.

[168] In my view, the claimant acted reasonably in his job search. His evidence was clear that the combination of work and family issues was causing him a great deal of stress. The evidence indicated that, prior to his termination, the claimant had spoken with his doctor about potentially taking a leave of absence for medical reasons. The taking of a one week holiday, given the claimant's stress level prior to his termination, does not seem inappropriate. I do not think that the timing of the claimant's various steps to find new employment is unreasonable.

[169] Nor do I see his approach of relying on his network and connections within the technology industry as the primary source of leads as unreasonable. The documents produced indicated that from mid-February onward, he had expanded his approach to include responding to job postings. The fact is that, within 8 months of his termination, the claimant had found a new position that he was happy with, notwithstanding the COVID-19 pandemic that arose in the interim. I am satisfied on the evidence that his job search was reasonable.

[170] Implicit in the respondent's argument is the suggestion that, had the claimant ramped up his job search immediately upon his termination, he would have obtained a more highly paid position and he would have obtained it sooner. The respondent has put forward no evidence to suggest that there were other positions that would provide higher compensation that the claimant should have applied for.

[171] I do not accept the suggestion in Mr. Lawless' report that the claimant should have been able to find a new position paying in the range of \$300,000 per year. The claimant identified several errors in Mr. Lawless' factual assumptions. Many of them are minor points that should not have made a substantial difference to his analysis. However, his reliance on the total income in line 101 from the tax returns, his lack of attention to the different components of the claimant's line 101 income, and his attribution of portions of the income to Digido and Epiphination all suggest a lack of detailed understanding of the claimant's actual income over the years. The inclusion of severance pay, holiday pay payouts after termination, and deemed benefits related to option conversions never actually realized in the table he produced all tend to exaggerate the claimant's past salaries.

[172] The respondent points to the fact that Mr. Lawless was not cross-examined as contributing to the reliability of his opinion. However, the weight to be given to an expert's evidence is always a matter for the trier of fact, regardless of whether the expert is cross-examined. The party tendering the report bears responsibility for ensuring that the factual underpinnings of the report are established in evidence, and the analysis and logic of the expert must stand up to review regardless of whether the expert is cross-examined.

- [173] Mr. Lawless' report was primarily based on a simple process of categorizing the type of work and reviewing statistics to determine a salary range. Mr. Lawless did not purport to have any specific knowledge of the technology industry. He did point to any particular jobs that were available that might have been appropriate for the claimant. I find the claimant's detailed evidence as to the industry in which he has spent his career much more insightful and valuable.
- [174] Most importantly, I find that the statistics generated by Mr. Lawless and his resulting conclusion that the 50th to 90th percentile levels of compensation for the type of work the claimant does give rise to a salary range of \$90,000 to \$135,000 in fact confirmed that the claimant's new position at a salary of \$120,000 is within an appropriate range given his experience and qualifications. While his salary over the years has clearly fluctuated, it has not been at all uncommon for the claimant to earn in the range of \$110,000 to \$120,000 per annum. The claimant earned a \$110,000 salary for nearly two years before and after his separation from the respondent.
- [175] I find no rational basis in Mr. Lawless' report for the assertion that the claimant's earning capacity is "closer to that of his last position, where he earned \$300,000 a year, and it is possible he could earn even more in the future". That assertion is not connected in any way to the balance of Mr. Lawless' analysis and the statistics he reviewed. No basis is given as to why one would expect the claimant to find a new position that pays more than double the top end of the salary range that arose from Mr. Lawless' statistical analysis. It appears to be nothing more than a general, speculative conclusion that since the claimant made that much money once, he could do it again.
- [176] In his evidence, the claimant commented that "I've been remarkably lucky twice", referring to his senior management positions with Electronic Arts and with Vision Critical. Each of those two positions was, within 2-4 years, pulled from Vancouver-- something the claimant identified as being all too common in the technology industry here. Otherwise, his income has been in or around the median to 90th percentile. Mr. Lawless' report appears to confirm the claimant's view of the appropriate ranges.
- [177] For all of these reasons, I place no weight on the speculation in Mr. Lawless' report that the claimant could earn \$300,000 or more. I find that the proper employment income for the claimant to assess both child support and spousal support moving forward is the \$120,000 annual salary that the claimant anticipates earning at Blueline. B. Basis for Entitlement to Spousal Support
- [178] The parties are agreed that both child support and spousal support should be paid by the claimant. However, the respondent argues that it is important to address the basis for the respondent's entitlement to spousal support as that may impact any future review or application to vary. The respondent argues that entitlement arises in this case solely on compensatory principles. The claimant argues that both compensatory and non-compensatory principles are at play.

[179] The law that governs an order of spousal support is section 15.2 of the Divorce Act, which provides that:

- (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
- (4) In making an order the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time. Similar provisions are found in the FLA, ss. 160-162.

[180] The concepts of compensatory and non-compensatory spousal support were explained in *Chutter v Chutter*, 2008 BCCA 507 at paras. 50 and 54:

[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).

- [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.
- [181] In this case, the respondent has not worked since A.A.P.'s birth, other than a handful of projects over the years which have generated only small amounts of income. She has given up the opportunity to build a career either as a teacher or in the fashion industry, while at the same time allowing the claimant to successfully advance his career. I note that even in the early days of their relationship when both parties were working full time, the respondent's income was generally significantly less than that of the claimant. One aspect of an order for spousal support in this case is maintaining the pre-separation standard of living of the respondent, which reflects in part a goal of meeting the reasonable needs of the spouse.
- [182] A unique feature of this case is the decision, as reflected in the Consent Parenting Order, that the respondent will continue to be fully engaged in homeschooling A.Z.P. for the next several years as she completes her schooling. The practical reality of this decision is that the respondent is not in a position to seek full-time employment. The goal of economic self-sufficiency [Divorce Act, s. 15.2(6)(d)] is postponed, at least for the time being.
- [183] Finally, it is noteworthy that the parties accumulated significant assets in the course of their relationship, including various investments accounts, RSPs, and the proceeds of sale of their Point Grey home--all of which have been divided equally between the parties (subject to the excluded asset claim discussed above).
- [184] In my view, the respondent's entitlement to spousal support in this case is rooted in both compensatory and non-compensatory principles. C. Retroactive Support
- [185] The respondent seeks an award of retroactive child and spousal support. While the claimant in the course of his evidence stated that he wanted there to be a full reconciliation of past support payments and entitlement, in closing submissions the claimant argued that retroactive support should not be awarded in the circumstances.

1. Material Facts

- [186] As noted above, from the time of separation in the spring of 2016 until February 2018, the claimant was earning an annual salary of \$110,000. In addition, the parties had significant investments that generated annual returns in the form of interest income, dividends, and capital gains. Those investments and the associated return increased substantially at the end of May 2016 when the home in Point Grey was sold and the proceeds placed in

investment accounts. The joint investment accounts were divided equally in May 2016 and each of the parties has, since then, had control of and access to their respective investments.

- [187] Up to May 2016, the parties maintained joint bank accounts and credit cards. All family expenses were paid from those jointly-held funds.
- [188] At the end of May 2016, in the course of separating their financial affairs, the parties exchanged emails about support payments that should be made. The respondent advised on May 27, 2016, that she expected half of the claimant's net monthly pay to be deposited into her account on the first of each month beginning June 1, 2016. She identified \$3,839 as the amount she expected. The claimant responded on May 30, 2016, advising that the amount of \$2,350 that he proposed to pay was based on a DivorceMate calculation. The DivorceMate calculation itself was not in evidence, and it is not clear what underlying assumptions it was based on.
- [189] Beginning on June 1, 2016, the claimant began depositing funds into the respondent's bank account--mostly on the first or second day of each month with the occasional exception usually due to banking difficulties. The amount paid for each of the first four months was \$2,350. The respondent did not agree to the amounts provided, but she did not obtain a court order mandating a higher number until the end of 2018.
- [190] It became clear over the next two years that the parties did not have a shared understanding of whether the support payments received were child support or spousal support. This remained an area of dispute until December 2018, when a court order for interim support provided clarity. Prior to December 2018, the respondent did not report any of the support payments received as spousal support - meaning that the claimant was unable to deduct the payments from his income.
- [191] There was a dispute between the parties as to whether A.Z.P. should continue to attend public school or be homeschooled by the respondent. It appears that at some point in September 2016, the respondent began to devote her full efforts to schooling A.Z.P., which has continued to the present. Her income since that time, other than returns from the investment accounts, has been very limited.
- [192] In October 2016, the claimant reduced the monthly support amount to \$1,400, which he attributed to discussions that had occurred in an unsuccessful mediation as well as the fact that A.A.P. had begun residing primarily with the claimant (9 days out of 14). The October 2016 payment was actually \$1,667, the November 2016 payment was \$1,400, and the December payment was \$1,343.09. When asked the reason for the reduction of the December payment, the claimant advised that it was because the respondent had received a reimbursement of physiotherapy costs from insurance. The payments in January and February 2017 returned to \$1,400.

- [193] The notice of family claim in this matter, although filed in April 2016, was not served on the respondent until early 2017. On February 21, 2017, the respondent filed a response to family claim and a counterclaim.
- [194] On February 28, 2017, the claimant emailed the respondent advising that: As mentioned before there has been an overpayment in support payments during the initial months after I left the house. Attached is a spreadsheet with the payments in the past and the schedule for the upcoming payments. As we need to rectify this imbalance I am going to reduce the payments going forward but will maintain the child support payments. The imbalance should be rectified by October.
- [195] It appears from that spreadsheet that the claimant had concluded that the support payment from June 1, 2016 onward should have been \$1,400, not \$2,350. By this email, he communicated his unilateral decision that the support payment would be reduced to \$811 for the next several months until such time as the net monthly payment (from June 2016 to date) had been reduced to \$1,400.
- [196] The June 1, 2017 payment, however, was only \$690. The claimant advised that he was decreasing the amount from \$811 to reflect a \$110 Costco membership payment and \$11 in respect of a school trip fee for A.A.P. The respondent replied noting that she had her own Costco card and should not be paying for the claimant's card. There ensued a series of emails about who was getting what Costco rebate. I was not directed to any documents showing any further adjustments of the June 2017 support payment.
- [197] As can be seen, prior to the interim support order made in December 2018, the claimant paid the amount he considered to be appropriate regardless of the respondent's position. Reductions were frequently made based on the claimant's unilateral decision to allocate specific expenses to the respondent.
- [198] Various court applications, including a claim for interim support, were filed in June and July 2017; however, there were emails between the parties and a letter between counsel in late July 2017 confirming that the parties were going to try to work things out without going to court. The parties ended up embarking on a further mediation with a counsellor from the Family Justice Centre, which was ultimately not successful.
- [199] In about late August 2017, the respondent signed a handwritten note--apparently written out in a parking lot during a child exchange--stating: I accept \$1400 per month without adjustment until we meet with a financial counsellor and accountant who will help us put proper support in place. & set up tax arrangements to our best advantage. I expect this to happen [before] Christmas.
- [200] The claimant sent the respondent an email on September 23, 2017, noting that the respondent had subsequently advised him that she would not be declaring the \$1,400 per month as spousal support, which would be taxable in her hands and deductible by the claimant. As a result, he would be deducting \$353 from that amount to reflect his inability

to deduct the support payment from his income. The respondent replied that any reduction to the \$1,400 was not acceptable to her and that the payments should be considered child support. Each of them maintained their respective positions, and beginning on October 2, 2017, the claimant began depositing \$1,047 to the respondent's account each month.

[201] In February 2018, the claimant began a new position with a much higher salary. The respondent emailed him on April 11, 2018, congratulating him on the new position, pointing out that she should have been kept informed, and seeking information on his new income levels. The claimant's evidence was that he had understood that his then-lawyer would advise the respondent of the change in position and the new income information. That does not appear to have happened until late September 2018, by which time the claimant's salary had increased to \$300,000.

[202] In the interim, the claimant reduced the August support payment to \$987.06. He did so because he was deducting \$59.54 from the \$1,047 amount to reflect the respondent's half of a subscription for a 2Houses communications program.

[203] Beginning in October 2018, the claimant began paying \$3,000 per month in support. He explained to the respondent that he was increasing the amount because he had a higher salary. The support payment on December 3, 2018 was further increased to \$4,279.

[204] On December 13, 2018, the respondent's application for an order for interim support was heard and decided. Based on a DivorceMate calculation presented by the respondent's counsel, interim child support was set at \$3,865, and interim spousal support was set at \$6,211. The total of these two amounts was \$10,076. Later that month, the claimant made further deposits to the respondent's account, bringing the support paid for that month to this new level.

[205] The claimant has continued to pay \$10,076 per month from December 2018 to the time of trial--even at times when his only income was the CERB. His applications to lower the amount--brought after his termination by Vision Critical and at times when he was self-represented--were unsuccessful.

2. Applicable Law

[206] The factors to be considered on an application for payment of retroactive child support were established in *D.B.S. v. S.R.G.*, 2006 SCC 37, as follows:

- (1) Whether there is a reasonable excuse for any delay in seeking support;
- (2) The presence or absence of any blameworthy conduct by the payor;
- (3) The circumstances of the support recipient; and
- (4) Any hardship to the payor occasioned by a retroactive award.

[207] Similar considerations apply to applications for retroactive spousal support, although "concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support": *Kerr v. Baranow*, 2011 SCC 10 at para. 208.

3. Analysis

[208] The bulk of the retroactive support that is sought in this case is from 2016 to November 2018--some two to four years in the past. In considering the delay involved, I note that (a) the respondent made clear from May 2016 onward that she considered the support payments she was receiving to be insufficient; (b) the amount of all payments prior to December 2018 were set unilaterally by the claimant; and (c) the respondent did file an application in the summer of 2017, although that application was adjourned as the parties embarked on a second mediation process, and not renewed until the end of 2018. The fact that the parties made efforts to resolve issues, including support, in two mediations also helps to explain the delay in applying for interim support.

[209] In this case, the parties sold the matrimonial home in May 2016 and divided the bulk of the proceeds from that sale, as well as a significant investment portfolio accumulated over the years prior to 2016, into separate investment accounts. The respondent has been in a position to make use of the income from those investments to pay any necessary expenses for herself or for the children to the extent the support payments actually received were insufficient.

[210] The claimant also has access to his share of the investment funds as a source of funds for any order made for retroactive support.

[211] In terms of the claimant's conduct, his failure to provide prompt financial disclosure upon his hiring by Vision Critical certainly contributed to delay from February 2018 onward. While he may have provided information to his lawyer prior to September 2018, as between the parties, he bears responsibility for the delay in communicating that information whatever the cause.

[212] In all of the circumstances, I conclude that an order for retroactive support is appropriate. In my view, it would be unfair for the respondent to have been forced to use greater amounts of the income from her share of the investment funds--after those funds had been divided--while the claimant benefited from not having to make the full amount of support payments. It would undercut the underlying equal division of those assets. I do not see any need to order support prior to June 1, 2016 since all family expenses prior to that time were paid from joint accounts. But I would order that retroactive support be paid from June 1, 2016 to the time of trial. In fairness to the claimant, any overpayments during that time period should be credited against amounts owing prior to December 2018. D. Support Calculations

[213] The parties each submitted DivorceMate calculations in the course of final arguments. Unfortunately, a comparison of those calculations revealed certain factual issues with respect to the assumptions underlying the numbers that were not clearly explored in the evidence. I have done my best with the evidence provided to calculate the amounts that should have been payable at any given time.

1. Prospective Support Calculations

[214] The major difference between the parties' prospective support calculations is the amount of employment income entered for the claimant. For the reasons set out above, I have decided that the amount should be \$120,000.

[215] The claimant's calculation included a sum of \$2,000 as "self-employment income" for the respondent. Although I heard evidence of certain textile and art projects that the respondent has created and sold in recent years, it does not appear that any net income of any significance was generated. I was also advised during the trial that the claimant did not seek to impute any income to the respondent. I would not include self-employment income for the respondent in this calculation.

[216] By my calculation, when the \$120,000 salary is combined with the parties' respective investment returns (the latter numbers being based on 2019 income tax returns), the parties' guideline incomes come to \$148,560 for the claimant and \$36,090 for the respondent.

[217] The claimant presented calculations based on the respondent claiming the child disability benefit. Specifically, a "Disabled Dependent" option on DivorceMate was used to adjust the net disposable income to reflect the fact that the recipient spouse receives the Canada Child benefit topped up with a disability benefit amount. It appears that this disability benefit amount is available for a family who cares for a child under age 18 who has been designated as "disabled". I heard much evidence as to the special needs and challenges of the children of the marriage and would infer in the absence of evidence to the contrary that each of them qualifies for this benefit until the age of 18. I note that the disability tax credit has been claimed in tax returns each year in respect of both children. Given that A.A.P. is now 18, I would calculate support moving forward on the basis that only A.Z.P. qualifies for the disability benefit amount. However, calculations for retroactive support should be made on the basis that both children qualify given that A.A.P. was under the age of 18 at the relevant times.

[218] By my calculation, on the basis of the guideline income set out above, and the special expenses as discussed below, the prospective monthly support payments to be made by the claimant from September 2020 should be spousal support of \$1,433 and child support of \$1,802.

[219] A.A.P. turned 18 years of age shortly after the conclusion of the trial. He has tentative plans to begin a post-secondary training program in the fall of 2020. He also has a pending application for designation as a person with disabilities, which would provide him with income and support as an adult. I heard from both parties that A.A.P. would like to be able to live independently, although there is some apprehension as to whether he is ready. The trial proceeded on the basis that A.A.P. continues to be a child of the marriage, residing primarily with the respondent, and the calculation of child support has been made on that basis. I was not asked to provide any direction as to how any changes in that status might impact the support calculations.

2. Retroactive Support Calculations

[220] Two additional issues arise with respect to retroactive support calculations. The first relates to the division of parenting time with respect to each child. The parties agreed that A.Z.P. has at all times spent approximately equal time with each parent. However, they had different recollections as to the time periods during which A.A.P. resided with each parent. The parties generally worked on a 14-day parenting time cycle; thus, any time A.A.P. spent 9 or more of every 14 days with one parent, being more than 40% of the time, he would be considered as residing primarily with that parent.

[221] The parties agreed that, prior to September 2016, A.A.P. resided approximately equally with each parent. They also agreed that beginning in mid-October 2018, A.A.P. has resided solely with the respondent. I heard evidence from both parties as to their respective parenting time with A.A.P. from September 2016 to October 2018.

[222] In particular, the claimant's evidence was that starting at the beginning of October 2016, A.A.P. was residing 9 of every 14 days with him and the remaining 5 with the respondent. The respondent's evidence was that A.A.P. was residing only 8 days with the claimant and 6 with her. Other evidence relevant to this issue included: (a) it was the fall of 2016 when the claimant reduced support payments to \$1,400 per month, which the claimant attributed in part to A.A.P. now residing primarily with him; (b) the 2Houses calendar printout produced by the claimant that showed A.A.P. residing 9 of every 14 days with the claimant; and (c) the 2Houses email from the respondent to the claimant on September 30, 2016, commenting on the calendar change. The respondent suggests that the claimant could have changed the calendar entries after the fact, and that I should place no weight on the calendar printout. However, having considered all of the evidence, I conclude that beginning on October 1, 2016, A.A.P. began primarily residing with the claimant.

[223] The evidence indicated that in July 2017, A.A.P. moved back to a 50/50 split, and then in early September 2017, A.A.P. began to spend 10 of every 14 days with the claimant. There were sporadic emails over the next several months in which the respondent indicated that A.A.P. had told her that he would like to spend more time with her, while the claimant indicated that A.A.P. had told him that was not the case. It appears that no change was made for some time.

- [224] The parties differ on when arrangements did change. The claimant's evidence was that A.A.P. continued to reside primarily with him until October 2018, with the respondent pressing for A.A.P. to spend more time with her. However, the claimant seemed uncertain at times as to the exact number of days per fortnight that A.A.P. was with him. The respondent gave different evidence at different times. At one point in cross-examination, she agreed with the suggestion that A.A.P. resided primarily with the claimant from September 2017 through October 2018. However, on numerous other occasions, her evidence was that A.A.P. moved back to a 50/50 split in parenting time in July 2018 and continued that way until October 2018--with the claimant pressing for A.A.P. to spend more time with him.
- [225] There is little in the documentation to support one version over the other. The 2Houses parenting schedule does not appear to have been updated after October 2017. There is a letter dated September 26, 2018 from the claimant's lawyer to the respondent's, primarily dealing with the calculation of child support in light of the claimant's increased income. In that letter, the claimant's lawyer stated: Because it is unclear whether or not Ms. Price has shared parenting of [A.A.P.] and keeping in mind that [the claimant's] income is over \$150,000 (and thus the table amounts do not strictly apply), we propose averaging out the child support payable by [the claimant] if [A.A.P.] was shared (\$2,866) and the amount payable by [the claimant] if [A.A.P. primarily resided with him (\$1,263). The average is \$2,065.
- [226] This letter could be read as supporting the evidence of either the claimant or the respondent.
- [227] On balance, I found the claimant's evidence on this point less certain and prefer the respondent's evidence. As a result, the retroactive support will be calculated on the basis that both children had shared parenting time from July through October 2018.
- [228] The other issue was whether special expenses were incurred prior to June 2018. The claimant included in his calculations amounts for special expenses from 2016 onward, showing all such special expenses as having been paid by the claimant. The respondent's calculation included no special expenses other than those paid by the respondent. The respondent takes the position that in the absence of receipts and proof for each expense in the claimant's calculations, no credit should be given.
- [229] The evidence supported the fact that special expenses were being paid and gave some indication as to amounts. The evidence was that counselling fees for A.A.P. were sometimes as high as \$3,500 in a year, that Krav Maga fees and camps for the children cost in the range of \$1,000 per year, and that there were vision, dental and medical costs for each child. The claimant's tax returns included claims for medical expenses, children's arts and fitness tax credits, and childcare costs each year. I accept that, other than the specific expenses that the respondent gave evidence of having paid herself and not reimbursed, the claimant paid the special expenses each year. The children's arts and fitness tax credits

were no longer available after 2016; therefore, having considered the evidence, I include \$1,000 per year for each subsequent year to reflect the children's extracurricular activities.

[230] What I propose to do is include, in calculating the retroactive support payments, the following amounts (sourced unless otherwise noted in the claimant's income tax returns):

- (1) For 2016, medical expenses totalling \$4,786, extracurricular (non-fitness) expenses of \$848, and extracurricular (fitness) expenses of \$1,522, all paid by the claimant;
- (2) For 2017, medical expenses totalling \$1,368, extracurricular (non-fitness) expenses of \$594, and other extracurricular expenses of \$1,000, all paid by the claimant;
- (3) For 2018, medical expenses totalling \$4,499, childcare expenses of \$697, and extracurricular expenses of \$1,000, all paid by the claimant, and educational expenses of \$1,908 paid by the respondent;
- (4) For 2019, childcare expenses of \$2,304 and extracurricular expenses of \$1,000, all paid by the claimant, and a number of expenses paid by the respondent, including \$2,778 in VLC fees, \$225 in counselling fees, and \$292 in school fees; and
- (5) For 2020, it appears that the respondent has paid VLC fees of \$1,900, Krav Maga fees of \$945, and counselling fees of \$675. The claimant suggests that he will incur childcare costs of \$1,000--that is reasonable to me on the assumption that he will resume full-time work after the trial.

[231] Finally, for purposes of these calculations, given that the support payments received prior to December 2018 were all treated as non-tax-deductible, the calculation below assumes those payments to have been made in respect of child support.

[232] I have prepared the following summary of my calculation of the monthly support payments that should have been made from June 2016 to August 2020, with the column "Net Child Support" including contributions to special expenses: Time A.A.P. A.Z.P. Clmt Emp Income Clmt Guideline Income Resp Guideline Income Special Exp Table Child Support Net Child Support Spousal Support 2016 Jun-Sep shared shared 114,231 116,656 12,288 596 1,566 1,410 1,798 2016 Oct-Dec clmt shared 114,231 116,656 12,288 596 932 744 2,372 2017 Jan-Jun clmt shared 110,000 173,895 67,367 215 496 418 1,671 2017 Jul-Aug shared shared 110,000 173,895 67,367 215 1,395 1,321 1,271 2017 Sep-Dec clmt shared 110,000 173,895 67,367 215 496 418 1,671 2018 Jan-Jun clmt shared 275,497 289,269 22,506 516 / 159 2,095 2,057 5,745 2018 Jul-Oct shared shared 275,497 289,269 22,506 516 / 159 3,455 3,426 5,399 2018 Nov-Dec resp shared 275,497 289,269 22,506 516 / 159 3,618 3,594 5,208 2019 resp shared 303,688 345,254 36,117 275 / 275 4,123 4,240 6,090 2020 Jan-May resp shared 300,000 341,560 36,117 83 / 293 3,926 4,118 5,162 2020 Jun-Aug resp shared 24,000 65,560 36,117 83 / 293 478 618 0

[233] These amounts can be compared with the amounts as actually paid: Time Total (Net) Child Support Payable Total Spousal Support Payable Non-Taxable Support Paid Taxable Spousal Support Paid 2016 Jun-Sep 5,640 7,192 9,400 0 2016 Oct-Dec 2,232 7,116 4,410 0 2017 Jan-Jun

2,508 10,026 5,923 0 2017 Jul-Aug 2,642 2,542 1,622 0 2017 Sep-Dec 1,672 6,684 4,008 0 2018 Jan-Jun 12,342 34,470 6,282 0 2018 Jul-Oct 13,704 21,596 6,081 0 2018 Nov-Dec 7,188 10,416 6,865 6,211 2019 50,880 73,080 46,380 74,532 2020 Jan-May 20,590 25,810 19,325 31,055 2020 Jun-Aug 1,854 0 11,595 18,633 TOTAL 121,252 198,932 121,891 130,431

- [234] On the basis of these calculations, it appears that the total amount of support paid on a non-taxable basis exceeded the total amount of child support payable by \$639. The amount of spousal support that should have been paid, however, was some \$68,501 more than the amount of support that was paid and treated as taxable. Having reviewed these numbers, netting them out with consideration to the different tax treatment of child and spousal support, and rounding slightly down (ignoring for the moment the other tax issues discussed in the next paragraph), I would order that the amount of retroactive spousal support that should be paid to the end of August, 2020 is \$67,500. There may be further adjustments as a result of support payments made after the trial but prior to judgment; if the parties cannot work that out they can seek direction from the court.
- [235] Issues with respect to the tax treatment of retroactive support payments arose during closing submissions. Had the indicated amounts of spousal support been paid at the time the obligation arose, it would have been deductible by the claimant and taxable in the hands of the respondent. Counsel for each party had differing views on whether CRA's options for dealing with retroactive payments like this would be available. No evidence was presented on this topic, and it is not clear that either party saw it as an issue prior to closing submissions. I am hopeful that, with the above numbers determined, the parties can calculate the applicable tax consequences and come to some agreement as to the appropriate treatment. If not, they may seek further directions on this issue. VIII. SPECIAL EXPENSES A. Prospective
- [236] The parties differ in respect of who should pay special expenses moving forward. It appears there has been friction between the parties as to the costs of the VLC distributed learning program for A.Z.P. The claimant's evidence was that the respondent determines what portion of each school week should be spent using VLC facilities and what portion should be at home or outdoors. The available funding for the program is often uncertain. The claimant is concerned that there should be some sort of limit, given that the VLC costs are charged on a per hour basis. It appears that from 2018 to date the respondent has paid the VLC fees (to the extent not covered by funding) without reimbursement from the claimant. My approach to resolving this issue is to:
- (1) set a maximum amount that can be spent at the respondent's discretion,
 - (2) provide that the parenting coordinator can resolve any dispute as to the extent of VLC services used, and
 - (3) proceed on the assumption that the VLC fees will be paid by the respondent, while the claimant will pay other special expenses.

- [237] The parties agree that the final order should include a list of items to be included as special expenses going forward. Such expenses would be shared on a proportionate basis, with the claimant's proportionate share being 71% and the respondent's proportionate share being 29%. Having reviewed the proposed lists provided by each party in closing submissions, it would appear to me that an appropriate phrasing moving forward would include the following:
- (1) 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 other persons, physiotherapy, occupational therapy, speech therapy, prescription drugs, hearing aids, glasses, and contact lenses;
 - (2) Premiums paid for extended medical and dental insurance coverage for the children, net of any tax deductions, to the extent that the claimant's employment contract does not provide such coverage;
 - (3) Reasonable post-secondary education expenses, after taking into account RESP funds and tax deductions for these expenses if available;
 - (4) The costs of A.Z.P.'s distributed learning program that exceeds funding available through Hands-On-Home Learning ("HOHL") and At Home Program, net of any tax deductions that may be available. Any costs exceeding \$2,700 in any given year are to be included by agreement of the parties or decision of the parenting coordinator;
 - (5) Extracurricular activities and lessons as agreed upon between the parties in advance or as determined by the parties' parenting coordinator, to the extent not covered by programs such as HOHL or other resources;
 - (6) Childcare expenses incurred by the claimant as a result of his employment; and
 - (7) Any other expenses that the parties agree to in advance in writing.
- [238] The parties presented their respective lists during the final day of closing submissions and very little time was spent on them. The parties have the liberty to apply for clarification of this list in the event I have misapprehended their respective positions. B. Retroactive
- [239] The respondent put in evidence a series of receipts for expenses that she paid in respect of the children to which the claimant did not contribute. The bulk of them has been included as special expenses in the calculation of retroactive support as set out above and should be accounted for in that manner.
- [240] There was also a claim for a deposit paid for a 2020 school trip to Germany. The trip did not happen. At the time of trial, it was uncertain whether and how much of the deposit would be refunded. The respondent seeks to have the claimant reimburse her for 70% of the \$3,600 paid. I have difficulty understanding why a substantial part of this cost would not be refundable. I know there are circumstances in which airlines offer flight credits rather than refunds and that may pose some difficulty. I conclude that the maximum amount that the

claimant is to reimburse the respondent is \$1,000 (70% of \$1,400).

- [241] Finally, the respondent seeks reimbursement of costs for a cell phone for A.A.P. The cell phone does not include a data plan and its cost is minimal. I do not see cell phone costs at this minimal level as falling within the scope of special expenses. IX. INSURANCE
- [242] The respondent seeks an order pursuant to s. 170 of the FLA that the claimant maintain a life insurance policy for \$1 million as security for support, with the respondent named as irrevocable beneficiary, for so long as child and spousal support is payable.
- [243] Section 170 states that: In an order respecting child support or spousal support, the court may provide for one or more of the following:
- (e) that a person who has a contract of life insurance within the meaning of Part 3 of the Insurance Act
 - (i) designate his or her spouse or child as a beneficiary, irrevocably or for the period designated by the court, and (ii) either pay all premiums on the policy, or authorize his or her spouse to pay all premiums on the policy and to compensate the spouse for doing so;
- [244] The claimant gave brief evidence about the existing insurance coverage in the context of reviewing his financial statement. There is a whole life insurance policy for the benefit of the children with a current value of over \$350,000. The premiums for that policy are fully paid except one last payment that the claimant plans to make. The other insurance policy is a term life policy that is about to expire. The claimant understood that it will expire in late 2020; the respondent understood that it will expire in early 2021. The policy itself was not put in evidence. The claimant gave evidence that he did not think it viable to renew the policy as he had been told that the renewal premium will be substantially higher.
- [245] This claim is not referred to in the pleadings, in the trial briefs, or in the respondent's written opening. It first came to my attention during the respondent's closing submissions. In fairness to the respondent, it may not have occurred to her to advance the claim until the claimant gave evidence that he did not intend to renew the existing policy. The respondent, in her written reply submissions the week after trial, provided cases in support of the claim.
- [246] The claimant, in reply submissions, attempted to provide further information about the cost of renewing the policy. The respondent strenuously objected to that information being provided as part of reply submission. Presumably, had the claim been advanced prior to closing submissions, the claimant would have been in a better position to tender more detailed evidence at an earlier point in the trial.
- [247] A recent summary of the applicable principles is found in *R.E.Q. v. G.J.K.*, 2019 BCSC 1116 at paras. 134-50. It appears that "security for support obligations should only be ordered on the basis of evidence showing them to be necessary due to factors such as the recipient's 'extremely necessitous circumstances' or the payor's ill-health": *R.E.Q.* at para. 141. The

relevant factors on an application like this include whether the payor has complied with court orders in the past, whether the payor is presently in arrears, and the payor's health: R.E.Q at para. 143. As well, the recipient spouse's own circumstances are relevant. In R.E.Q., it was argued that the respondent should be ordered to maintain such insurance because he did "not have a lot of equity in his assets"; the court held that was not a sufficient reason: R.E.Q at para. 149.

[248] In the present case, there is a whole life insurance policy providing for the interests of the children. The parties have accumulated substantial assets, of which the respondent now has half. The claimant has fully paid the amounts mandated by the interim support order even when he was unemployed and receiving CERB payments. There was no evidence of any significant health issues on the part of the claimant.

[249] In the circumstances, I would not make an order requiring the claimant to maintain a policy of term life insurance. X. REVIEW

[250] The claimant seeks an order that there be a review of spousal support either:

- (1) on or after July 30, 2026;
- (2) when the claimant is no longer obligated to pay child support; or
- (3) when A.Z.P. ceases to attend full time in the Distributed Learning Program.

[251] The claimant asserts that there is a significant number of contingencies in this case. They include uncertainty as to A.Z.P.'s educational needs moving forward--particularly given that she will be of high school graduation age in 2025. The order being made at this time, which is premised on the respondent earning no income for the foreseeable future, assumes that she will continue to be engaged full time in the education of A.Z.P. That may well change as A.Z.P. becomes an adult.

[252] The respondent, on the other hand, asserts that review orders should be granted sparingly and that any changes in spousal support in the future should be based on the tests for variation--that is, a material change in circumstances.

[253] Review orders are provided for in section 168(1) of the FLA: Review of spousal support 168
(1) An agreement or order respecting spousal support may provide for a review of spousal support, and for this purpose may provide for

- (a) the review to occur on or after a specified date, after a specified period of time or after a specified event has occurred,
- (b) the type of family dispute resolution by which the review will take place,
- (c) the grounds on which a review will be permitted, and
- (d) the matters to be considered for the purposes of a review.

- [254] In *Leskun v. Leskun*, 2006 SCC 25 at paras. 36-38, the Court considered the scope of review orders under section 15.2 of the Divorce Act and commented as follows:
- [36] Review orders under s. 15.2 have a useful but very limited role. As the amicus curiae pointed out, one or both parties at the time of trial may not, as yet, have the economic wherewithal even to commence recovering from the disadvantages arising from the marriage and its breakdown. Common examples are the need to establish a new residence, start a program of education, train or upgrade skills, or obtain employment. In such circumstances, judges may be tempted to attach to s. 15.2 orders a condition pursuant to s. 15.2(3) of the Divorce Act, that entitles one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order. This will properly occur when the judge does not think it appropriate that at the subsequent hearing one or other of the parties need show that a change in the condition, means, needs or other circumstances of either former spouse has occurred, as required by s. 17(4.1) of the Divorce Act.
- [37] Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances: *Choquette v. Choquette* (1998), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the amicus curiae fairly points out, the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there had been no change in circumstances. The test for variation is a strict one: *Willick v. Willick*, [1994] 3 S.C.R. 670, at pp. 688-90.
- [38] Here the review order was justified by serious doubt at the time of trial as to the true financial situation and prospects of the wife and what level of support would actually be needed.
- [255] Review orders have been made in cases of genuine uncertainty as to a spouse's finances in the future: *Joffres v. Joffres*, 2014 BCSC 1778 at para. 173; *Burseth v. Burseth*, 2017 BCSC 2076 at para. 174-77. The requirement of genuine and material uncertainty must be met: *Toth v. Toth*, 2016 BCCA 50 at para. 12.
- [256] I find that there is genuine uncertainty in this case that justifies a review. The underlying premise of the support order that has been made--that the respondent will be fully engaged in the education of A.Z.P.--is exceptional and is highly likely to change within that six-year time frame. XI. DIVORCE
- [257] Both parties seek an order for divorce. The parties have been separated for more than one year, and there is no prospect of reconciliation. With arrangements in place for the care and support of the children as set out above and in the Consent Parenting Order, an order for divorce is granted on the usual terms. XII. DISPOSITION

[258] As noted above, a consent final order was made at the start of the trial with respect to parenting issues. These reasons for judgment deal with the matters that are contested as between the parties. The orders provided for above will go, along with the various orders that were not contested (including an order for equal division of non-excluded assets).

[259] The orders on contested matters can be summarized as follows:

- (1) The date on which the parties commenced to live together in a marriage-like relationship was February 1, 1995;
- (2) The date of separation of the parties was March 1, 2016;
- (3) The claimant has established that the following are excluded assets:
 - i. \$20,000 invested in his RSP account; and ii. \$200,000 invested in the family home.
- (4) The employment income of the claimant for purposes of calculating child and spousal support from September 2020 onward is \$120,000;
- (5) The total income of the parties for purposes of the guidelines calculations is \$148,560 for the claimant and \$36,090 for the respondent;
- (6) The respondent is entitled to spousal support on both compensatory and non-compensatory bases;
- (7) The claimant shall pay to the respondent monthly spousal support from September 2020 onward in the sum of \$1,433, plus monthly child support in the sum of \$1,802;
- (8) The claimant shall pay to the respondent retroactive spousal support in the amount of \$67,500 to the end of August, subject to any tax adjustments as agreed to by the parties or as may be directed by the Court;
- (9) The respondent's application for an order requiring the claimant to maintain a term life insurance policy is dismissed; and
- (10) There shall be a review of spousal support either:
 - i. on or after July 30, 2026; ii. when the claimant is no longer obligated to pay child support, or iii. when A.Z.P. ceases to attend full time in the Distributed Learning Program.

[260] Some of the decisions set out above have involved mathematical calculations on the part of the court. All such calculations are of course subject to correction as they are reviewed by the parties.

[261] Both parties asked to speak to costs after the other issues have been decided. Either party is at liberty to apply for costs.

[262] There are certain matters set out above as to which the parties are given leave to apply. I would direct that:

- (1) any application for further direction or for costs shall be filed and served within 35 days of these reasons for judgment; and
 - (2) the other party shall file and serve its response within 14 days thereof. I would ask that parties indicate in the application and response whether they believe a hearing is required, or whether they are content to have outstanding issues decided on the basis of written submissions. "Veenstra J."
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