

CANADA / JUDGMENT

R.W.W. v. L.M.B.

2024 BCSC 94

COURT

Supreme Court of British Columbia

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2024 BCSC 94 R.W.W. v. L.M.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.W.W. v. L.M.B.,

2024 BCSC 94

Date: 20240122

Docket: E26164

Registry: Cranbrook

Between:

R.W.W.

Claimant

And:

L.M.B.

Respondent

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

In Chambers

Counsel for the Claimant:

M.A. Matthews

Counsel for the Respondent:

R.S. Miles

Place and Dates of Trial:

Cranbrook, B.C.

September 21-24, 2021

January 4, 2022

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June 24, 2022

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Place and Date of Judgment:

Cranbrook, B.C.

January 22, 2024

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INTRODUCTION

- [1] This high conflict family matter primarily addresses various financial issues between former spouses who cohabited and were then married for a total of approximately 19 years. The parties met in their teens and lived together for about three years before they were married in July 1999. The parties separated on July 3, 2015, and were divorced in July 2019. They have two children; a son born September 2007 and a daughter born, November 2011 ("Children").
- [2] Following their separation, the parties shared an equal parenting time schedule with the Children. After the respondent began her relationship with her now husband, further conflict arose between the parties and the mother-son relationship was negatively impacted. As a result, since January 1, 2017, the son has lived with the claimant father. However, the respondent mother hopes to improve her relationship with her son. She testified to a desire to be re-united with him should he choose. The parents have continued to share equal parenting time with their daughter since they first separated.
- [3] The central issues before me are:
1. What are the parties' respective incomes pursuant to the Federal Child Support Guidelines, SOR/97-175 ("Guidelines" or "Guideline")?
 2. What are the parties' respective child support obligations?
 3. Whether the claimant has a valid claim for retroactive child support?
 4. What are the parties' share of extraordinary s. 7 expenses?
 5. Does the father have a valid claim for spousal support?
 6. What is the value of the family assets and debts?
 7. How should the family assets and debts be divided?
- [4] There are other miscellaneous issues that I will address later in these reasons for judgment ("Reasons").
- [5] I will address these issues in their respective order, following an overview of the evidence.
- [6] The parties have agreed to a number of consent orders regarding the management and control of Registered Education Savings Plans ("RESP") and Extended Health Benefits. These orders will also be addressed later in these Reasons.

FACTUAL BACKGROUND

1. Overview
- [7] I begin with a general overview of the facts. Additional facts are reviewed when I address each of the issues in dispute.

- [8] While I have considered the evidence tendered at trial in its entirety, I have not addressed all the evidence tendered by the parties, particularly evidence that is inconclusive or aimed at casting the other party in a bad or embarrassing light, including evidence relating to events that happened years ago that are of marginal or questionable relevance. Nevertheless, I have considered the evidence as a whole, and endeavored to address the evidence that most informs my determination of the issues before me.
- [9] The respondent testified that she first met the claimant in 1996 when she was 16 years old and the claimant was 19 years old. She testified that they started living together in 1997 in her in-law's home. The claimant testified that the couple met in 1995 and that they started living together in the spring or summer of 1996.
- [10] The discrepancy in the evidence regarding the date the parties started cohabiting is understandable given the passage of time and does not compromise the general credibility of either party. The evidence as whole, including the parties' respective recollections of the age of the other when they met, supports the conclusion that the parties met in 1995 and started living together in the spring or summer of 1996.
- [11] When the parties first met, neither had graduated from high school, although each developed their own careers in the years before their Children were born. The respondent eventually obtained a high school equivalency certificate and a mortgage brokers' licence in 2005. She has worked exclusively and continually as a mortgage broker since 2005, save for two relatively short maternity leaves. The claimant also upgraded his skill-set during their marriage. He has worked as a carpenter (uncertified), as well as at other jobs, such as a fisheries technician for Nature Trust of British Columbia ("Nature Trust"), and later as a landscaper. For a number of years, between approximately 2007 until late 2011 or early 2012, the claimant incorporated and ran a construction business, Fishbone Developments Inc., with a business partner.
- [12] During their marriage, the parties also bought and sold homes, and received rental income, although they lost money on their last rental property. For a short period of time towards the end of their marriage when their financial situation was grim, the parties housed foreign students. The respondent testified that they did not "make a lot of money" housing students and that they did so for approximately a six- month period.
- [13] The parties hired nannies to assist with the care of their Children while they worked. The first nanny was hired after their first child, a son, was born in 2007.
- [14] Having heard the evidence of both the claimant and the respondent, including vigorous cross-examination by both their respective counsel, and having also considered the evidence of other witnesses, what becomes clear is that the respondent is a very capable, hard-working professional, who is devoted to her family, and who demonstrated a strong work ethic throughout her working life.

2. The Mortgage Companies

- [15] In October 2005, the respondent started working for L. Belding Mortgage Consulting Inc. ("Belding"). The owner of Belding, Ms. Linda Belding (whose surname is now Yeager) testified at trial. She described the respondent as a woman of integrity who was ambitious, hard-working, and eager to learn. She described how the respondent became a respected member of the team and that she specifically chose the respondent to purchase her business.
- [16] In March 2009, the respondent incorporated her business, which I will refer to as Mortgage Company #1, and purchased Belding for \$580,000, by way of an asset purchase agreement.
- [17] The respondent recalled she was a very anxious buyer. She saw this as an opportunity to purchase a career for herself. The purchase was financed by Belding. The respondent recalled that the financing arrangements were appealing to her because she did not have to pay any money "up front." She did not retain a lawyer or have the business valued.
- [18] The respondent agreed to pay for the purchase price by providing Belding with a percentage of her yearly gross commissions over time. After she paid \$400,000 of the purchase price, Belding agreed she was not required to pay the remaining unpaid portion of the purchase price. The respondent testified that this was as the result of the significant reduction in gross commission sales following the purchase.
- [19] The respondent explained that by the time she actually started running Mortgage Company #1 in August 2009, there was already "a shift downward" in the volume of business. Ms. Yeager, a pioneer in the independent local mortgage broker industry, described the business as "volatile". As it turned out, that was indeed the respondent's experience.
- [20] Shortly after the purchase of Mortgage Company #1, one mortgage broker and one assistant resigned to open up a competing mortgage brokerage. In November of that year, Ms. Yeager retired. This development clearly affected the volume of commission sales. In addition, the respondent explained that the business was previously in a good position because it had "no real competition", but this changed as more brokers entered the mortgage broker business in the years that followed. For example, two of the respondent's clients became brokers and started competing with her without having to "buy-into" the business as she had.

3. Building The Family Home and Subsequent Debts

- [21] In 2011, the parties purchased a vacant lot in their hometown of Cranbrook and began construction on what they hoped would be their dream home. At first, the family's finances were manageable. The couple sold other property they owned to assist with the purchase of the land and the construction costs. However, significant debts began to accumulate during construction. The respondent extended lines of credit and started borrowing from Mortgage Company #1. I accept the respondent's testimony that she repeatedly urged the claimant to work in 2012 and thereafter so that he could share in paying-off the accumulating debt, as their debt load began to exceed the value of their assets.

- [22] In 2012, the family moved into their, as yet, unfinished home. The kitchen was not finished, the deck and railings were not up, the landscaping was not done, and there was additional unfinished work to be paid for. The claimant stopped working at Fishbone Developments.
- [23] I do not accept the claimant's evidence that before their separation, he and the respondent agreed that he would stay home to take care of their Children and that is the reason why their nanny was let go in the spring of 2013.
- [24] Nor do I accept the claimant's minimization of the significant financial difficulties and debt faced by the family prior to their separation. The claimant conceded on cross-examination that the respondent "looked after the finances." It was clear during his testimony that he knew very little about the debts the respondent was left to carry and deal with.
- [25] I accept the respondent's evidence that the family was in significant debt by 2013 and still the claimant did not want to work outside the home. I also accept the respondent's evidence that she did not willingly agree that the claimant should stay home to take care of the Children. Rather, I accept that she eventually let their nanny go because she could not afford to pay the nanny while also keeping-up with the mounting debt payments, when the claimant was no longer bringing in an income. The respondent described how it made little sense to pay for a full-time nanny under such circumstances. The respondent's evidence to this effect was compelling and was internally consistent with the evidence as a whole.
- [26] The evidence suggests that the complainant stopped working at Fishbone Developments sometime around the end of 2011 early 2012, although the couple had a full-time nanny until the spring of 2013. The claimant testified that after he stopped working at Fishbone Developments, he did construction work on their home. The respondent testified that the claimant did not do any construction related work on the house until the nanny was released in the spring of 2013, although she acknowledges that he did some work, such as assisting a kitchen contractor with the installation of the kitchen cabinets. The respondent added that between 2013 and until the separation in July 2015, the claimant only completed the back deck. She testified that this was a "bone of contention for her" given the debt load she was left to carry on her own.
- [27] The claimant denies the respondent's characterizations of the facts, stating that he was working on the house while taking care of the Children. He admitted on cross-examination that the family home was not finished when it was sold in November 2015.
- [28] The respondent testified about the significant cost overruns relating to the construction of their home, including how they risked personal bankruptcy in 2013 when the respondent was not earning an income. I accept her evidence in this regard. In addition to their first construction mortgage, the parties borrowed \$30,000 from Invis Inc. and also from borrowed from Mortgage Company #1. Mortgage Company #1's 2013 year-end Financial Statement showed the parties had a balance owing of \$100,000. The respondent testified that over time, the parties borrowed a total of \$260,000 from Mortgage Company #1 to contribute to the cost of building their home. In May 2013, the parties also took out a second mortgage

on their family home.

- [29] The claimant was critical of the way the respondent ran Mortgage Company #1. He testified that he needed just "two years to run it and get it back on its feet".
- [30] By the time the parties separated, they had two mortgages on their family home totalling approximately \$690,000, as well as very significant credit card debts. Again, the respondent was making all the mortgage and credit card payments and continued to do so after the separation.
- [31] The respondent also explained how she had to borrow \$9,000 from her sister to keep their rental property from foreclosing due to unpaid property taxes. She also borrowed \$5,000 from her grandparents and another \$10,000 from a friend. At the time the parties separated, the mortgage payments exceeded the rent. The respondent covered the \$200 a month shortfall. While the parties bought the rental property at the height of the local real estate market, by the time of their separation in 2015, the amount of the mortgage was higher than the fair market value of the property. I accept the respondent's evidence regarding the parties' family debts, much of which was supported by related documentation.
- [32] By the time the family home was sold in November 2015 for \$760,000, in addition to a \$10,000 lien holdback, the parties paid the following debts with the proceeds of sale: a Toronto Dominion Bank Mortgage loan of \$644,929.44; a Judy Masuch Mortgage loan of \$45,856.41; a \$33,000 debt relating to a Scotiabank Visa account; a \$19,500 ARO Inc. settlement for a Visa DeJardins Account; and \$1,026.25 for conveyancing fees. While these particular debts were satisfied upon the sale of the family home, there were family debts as well. The respondent asserts they used "credit to pay for their credit cards and lines of credit."
- [33] The proceeds of sale of the family home after the payment of these debts were slightly more than \$6,000. The evidence before me was inconclusive regarding what happened to the \$10,000 lien hold back, although the respondent recalled the proceeds of sale were used to pay another credit card debt.
- [34] In addition to not earning an income from early 2012 until the parties separated in July 2015, the claimant did not work for the remainder of 2015 and for all of 2016. It is not clear how long or how much he worked 2017. He lived at his parents' home. Some time later his girlfriend moved-in with him into his parents' basement suite. I will elaborate on the claimant's work history, after the parties separated, later in these Reasons.
- [35] The claimant conceded on cross-examination that he did not assist in paying for any of the family debt, including Mortgage Company #1's debt, after the parties separated in July 2015.

- [36] On November 12, 2015, the claimant filed his Notice of Family Claim, seeking child support, spousal support and the division of family assets. On January 6, 2016, Master Keighley ordered, among other things, that the respondent pay \$1,500 a month to the claimant for child support, and that the parties have equal parenting time with the Children ("2016 Master Keighley Order").
- [37] In June 2016, the respondent incorporated Mortgage Company #2. She testified that she wound down Mortgage Company #1 and incorporated the new mortgage company out of fear. The respondent explained that the claimant had "threatened" to get his mortgage broker's licence and take over Mortgage Company #1 in order to "fix" its business reputation. In any event, after winding down Mortgage Company #1, the respondent continued working as a mortgage broker at Mortgage Company #2. It is agreed between the parties that Mortgage Company #1 and Mortgage Company #2 are each a family asset and effectively one and the same. The evidence before me supports this agreement. To simply matters, I will now refer to each mortgage company collectively as the "Mortgage Company," unless the context otherwise requires."
- [38] The respondent did not pay personal or corporate tax returns after the separation for a few years, nor did she keep or produce income tax returns and financial statements in a timely manner. In 2018, she sought the assistance of a Ms. G, to attend to her book-keeping and corporate finances. Ms. G. made a number of errors in producing the Mortgage Company's financial statements and so the respondent hired Mr. Weisgarber, an accountant and certified tax specialist to address them. Since then, the respondent has proactively addressed her personal and corporate tax liabilities. She continues to pay-off her outstanding personal and corporate taxes.
- [39] The respondent did not pay child support on time, as required by the 2016 Master Keighley Order. At a Judicial Settlement Conference on December 18, 2018, Justice Dley resolved a number of outstanding issues between the parties, including child support arrears ("2018 Dley Order").
- [40] The respondent testified that she was late in paying child support due to her financial struggles and debts. In addition, she explained that she misread the 2018 Dley Order and paid \$863 per month instead of \$900.
- [41] The Family Maintenance Enforcement Program ("FMEP") became involved. However, by October 11, 2019, the respondent had paid her outstanding arrears, including default fees as required by FMEP. She now makes her child support payment to FMEP on time; she testified that she was only late once. I am satisfied that the respondent has been and is now paying child support in a timely manner as required by FMEP.
- [42] The claimant has claimed and received the child tax benefits for both children and also claims them as dependents on his income tax returns.

- [43] In 2018, the respondent arranged for the tenants of the parties' rental property to purchase that property. She paid for the real estate appraisal. When the rental property was sold, a Capital One Mastercard judgment was registered against title. As of June 25, 2018, the owing amount was \$7,076.73. The respondent testified that this credit card debt represented the claimant's post-separation debt. In any event, this debt was settled for a lower amount and was paid largely with what had been left in trust from the sale of the former family home.
- [44] In 2001, the Canada Revenue Agency ("CRA") garnished \$5,000, a month from the respondent's Invis commissions to pay the Mortgage Company's outstanding tax debt, which was then \$39,742.15.
- [45] The respondent also described the impact that the Covid-19 pandemic had on her business. She applied for and received a \$60,000 CEBA loan, \$40,000 of which must be repaid.
- [46] The respondent is the only mortgage broker working at the Mortgage company.

JUDICIAL SETTLEMENT CONFERENCE CONSENT ORDER

- [47] At the Judicial Settlement Conference on December 18, 2018, with the assistance of Justice Dley, the parties reached a number of agreements.
- [48] These agreements included that "it is in the best interests of their two children to ultimately be on a shared parenting regime". By this point in time, there continued to be significant conflict within the family notwithstanding the parties' separation, and the parties' eldest son had been living exclusively with the claimant since January 2017.
- [49] The parties also agreed by consent to the following detailed court orders:
1. The parties are guardians of the Children and shall share equally the parental responsibilities as follows:
 - a) making day-to-day decisions affecting the Children and having day-to-day care, control, and supervision of the Children;
 - b) making decisions respecting where the Children will reside;
 - c) making decisions respecting with whom the Children will reside and associate;
 - d) making decisions respecting the Children's education and participation in extracurricular activities, including the nature, extent, and location;
 - e) making decisions respecting the Children's cultural, linguistic, religious, and spiritual upbringing and heritage;
 - f) subject to section 17 of the Infants Act, giving, refusing, or withdrawing consent to medical, dental, and other health-related treatments for the Children;
 - g) applying for a passport, licence, permit, benefit, privilege, or other thing for the Children;

- h) giving, refusing, or withdrawing consent for the Children, if consent is required;
- i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- j) requesting and receiving from third parties' health, education, or other information respecting the Children;
- k) subject to any applicable provincial legislation:
 - i) starting, defending, compromising, or settling any proceeding relating to the child;
 - ii) identifying, advancing, and protecting the child's legal and financial interests; and
 - iii) exercising any other responsibilities reasonably necessary to nurture the child's development.
- l) for the exercise of any other parental responsibilities, both guardians must consult about any important decisions that must be made and try to reach agreement concerning these important decisions;
- m) During parenting time, a guardian may exercise the parental responsibility of making day-to-day decisions affecting the Children provided that the guardian must advise the other parent of any matters of a significant nature affecting the Children;
- n) If any of the Children require emergency health care, while in the care and control of either parent, that parent must:
 - i) do everything necessary to provide for such health care, and
 - ii) promptly notify the other parent of the emergency.
- 2. The parties agree the Children shall attend extra-ordinary activities regardless of which parent has parent time on the day the activity falls Christmas parenting time shall be as follows:
- 3. Christmas parenting time shall be as follows:
 - a) For 2018, the Mother shall have both Children from 8:30 am on Christmas Eve. [The son] is to return to the Father's care at 8:30 pm that evening and return to the Mother's care from 12:00 noon until 8:00 pm on Christmas Day.
 - b) The Mother will have parenting time with [the daughter] from 8:30 am Christmas Eve for one week.
 - c) Commencing in 2019 and in each odd numbered year thereafter, the Children shall be in the Mother's care for the first half of the school Christmas break and in the Father's care for the second half of the school Christmas break.

- d) Commencing in 2010 and in each even numbered year thereafter, the Children shall be in the Father's care for the first half of the school Christmas break and in the Mother's care for the second half of the school Christmas break.
- 4. The parties will exchange passports, travel consents, and consents to healthcare (medical and dental) for the Children.
- 5. The parties shall:
 - a) put the best interests of the Children before their own interests;
 - b) encourage the Children to have a good relationship with the other parent and speak to the Children about the other parent and that parent's partner in a positive and respectful manner; and
 - c) make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or arguments in front of the Children.
- 6. The parties shall not:
 - a) question the Children about the other parent or time spent with the other parent or time spent with the other parent beyond simple conversational question;
 - b) discuss with the Children any inappropriate adult, court or legal matters; or
 - c) blame, criticize or disparage the other parent to the Children.
- 7. The parties will encourage their respective families to refrain from any negative comments about the other parent and his or her extended family, and from discussions in front of the Children concerning family issues or litigation.

Reunification of [the son] and Mother through Counselling with Dr. Wynette Morley

- 8. The parties shall co-operate with Dr. Morley with respect to reunification counselling for [the son] and the Mother.
- 9. The parties shall abide by Dr. Morley's recommendations, including in the event shared parenting for both Children is reinstated regardless of whether shared parenting should be as per the existing shared parenting arrangement for [the daughter] or on a week by week basis.
- 10. Dr. Morley expresses concern that one party is not cooperating with the reunification process, then a complete s. 211 report shall be prepared by Dr. Elterman, with the initial cost to be shared equally, with responsibility for the costs of Dr. Elterman's report to be at the discretion of the trial judge.
- 11. Each party will bear their own costs separately for fees associated with counselling rendered by Dr. Morley.

12. Any concerns expressed by Dr. Morley that either parent is not co-operating then either party is at liberty to apply to this Court for direction.

Child Support and Child Support Arrears

13. The calculation of child support arrears shall be based on the Mother paying child support to the Father at \$900 per month for the year 2016, \$1,000 per month for the year 2017, and \$900 per month for the year 2018 until the resumption of a shared parenting arrangement. The Mother shall be credited with all child support payments made by her to date.
14. Upon equal shared parenting for both Children being reinstated, based on agreed annual Guideline incomes of \$115,000 for the Mother and \$55,000 for the Father, child support shall be paid in the amount of \$863.00 per month.
15. The Father shall pay for karate and the Mother shall pay for gymnastics. With respect to [the son's] baseball costs, tournament costs shall be considered s. 7 special expenses and shall be paid by whoever takes the child to the tournament.
16. All other s. 7 special expenses shall be shared between the parties proportionate to their incomes, so long as such expenses are agreed between the parties to be treated as special expenses.
17. Execution on child support arrears shall be suspended until June 30, 2019; provided however, the Mother shall use her best efforts to make interim payments and ensure all arrears shall be paid in full no later than June 30, 2019.

Property Division

18. The parties shall initially share in the cost of an appraisal of [Mortgage Company] with responsibility for the cost of the appraisal to be at the discretion of the trial judge.
- [50] Conflict between the parties continued after the settlement conference and the issuance of the 2018 Dley Order. That Order reflects the efforts made to re-unite mother and son; however, such efforts have not been successful to date. The respondent testified that she continues to this day to make overtures to her son, but he has not responded very often. The parties did not seek any further order in this specific regard at the trial before me. Suffice it to say that the son has continued to live with the claimant and the respondent remains hopeful that one day she may be reunited with him.
- [51] The parties have shared an equal parenting arrangement with their daughter since their separation in July 2015.

DISCUSSION OF ISSUES

- [52] Set out below are the outstanding issues. I will add further factual context as these issues are unpacked.

1. The Parties' Respective Incomes pursuant to the Federal Child Support Guidelines

A. The Claimant's Guideline Income

- [53] During his direct examination, the claimant testified that he worked for the Nature Trust and also for seven years as a fisheries biologist for the government, before he left that government job and incorporated Fishbone Developments in about 2007 and ran it with a business partner.
- [54] The respondent testified that the claimant earned \$55,000 to \$60,000 a year both before and after they moved to Cranbrook; however, the claimant says that he earned about "\$45,000 to \$50,000 annually. He testified that he went "into construction to make more money" and he did. Although, later in his testimony, he changed his evidence and stated that he made about the same in construction as he had in his previous jobs.
- [55] The claimant agreed on cross-examination that he stopped working between 2012 and 2017. He testified that after the parties separated, he "stayed home" with their youngest daughter "full-time" for a year-and-a-half. He said that he did not earn any income in either 2015 or 2016. Counsel for the respondent points out that the claimant nevertheless deposed in his 2016 Financial Statement that he continued to make a lease payment of \$867 per month on his truck.
- [56] In 2017, the respondent started working as a landscaper for a friend. When it was put to him that he stopped working for the landscaping company after the owner confronted him for being late one day, the claimant responded that he was not late, but rather that the owner thought he was tardy. The claimant added that he "walked away from that position", and suggested that he left because the owner swore at him. That year, the claimant's employment income was stated on his line 150 income as \$33,656.75. Although, I am unable to determine the hourly wage or number of hours worked that year.
- [57] The claimant's line 150 income for 2018 was \$39,994, although he agreed to an imputed annual income of \$55,000 at the Judicial Settlement Conference before Justice Dley on December 18, 2018. He said that he agreed to that sum to facilitate an agreement between the parties, although that sum did not reflect his earnings.
- [58] In 2019, the claimant's line 15000 income was assessed at \$28,232 and his taxable income was \$28,209.
- [59] In 2020, the claimant's employment income was \$3,001.44 and his line 15000 income was \$22,576. The difference between his employment income and the line 15000 income comprises employment insurance premiums and \$12,000 in "other income."
- [60] In 2021, the claimant's line 15000 income was \$29,102.

- [61] The claimant collected CERB during the Covid-19 pandemic. He agreed that he was paid in cash for some landscaping jobs and did not report that income for tax purposes, which he said was "maybe \$3,000" a year.
- [62] The claimant also stated during cross-examination that he had a "side thing" where he was "making video" and earned \$300 - \$400 a month, but that "ended a long time ago."
- [63] At the time of trial, the claimant testified that he had been working for four months doing "maintenance" for Broadstreet Properties and was earning \$25.40 per hour.

B. Imputing the Claimant's Income

- [64] Determining Guideline income includes a consideration of ss. 16 to 20 of the Guidelines. In *Brown v. Brown*, 2014 BCCA 152, Justice Groberman reasons as follows in this regard, at para. 16:
- [16] The legislative scheme for determining Guideline income is fairly straightforward. A court begins, under s. 16 of the Guidelines, with the "total income" from the payor parent's tax return and then makes specified adjustments. Next, the court is entitled to take further specific considerations into account under ss. 17-20 of the Guidelines to determine Guideline income. This Court outlined the steps in *Vincent v. Vincent*, 2012 BCCA 186:
- [35] All determinations of child support begin with finding the spouse's Line 150 income, a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions applies, and, if so, what effect they should be given on the facts of the case.
- [65] In *Brown*, the court also discussed ss. 17-20 of the Guidelines in the context of their objectives and reasoned:
- [22] Section 1 of the Guidelines explicitly sets out certain objectives:
1. The objectives of these Guidelines are
 - (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
 - (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
 - (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
 - (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

- [23] Sections 17-20 of the Guidelines allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the Guidelines. It is important, however, in interpreting and applying those sections, that courts recognize the need for consistent and predictable results. Courts should interpret ss. 17-20 of the Guidelines with a view to advancing the objectives set out in s. 1.
- [66] After a careful review of the evidence, I have no difficulty concluding that the claimant has been underemployed for many years, and that he was unemployed for considerable periods notwithstanding his child support obligations. I am satisfied that I must impute income to him. Counsel for the claimant asserts his income should be imputed at \$45,000 annually from date of separation. In my view, this amount significantly underestimates his income earning capacity.
- [67] Counsel for the respondent submits that the claimant's income should be imputed at \$55,000 or \$60,000 annually. This submission is more aligned with the evidence before me.
- [68] When imputing income, it is axiomatic that the Court is not limited to what a party actually earns, but must consider the party's capacity to earn income: see *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37; *Van Gool v. Van Gool* (1998), 64 B.C.L.R. (3d) 94 (C.A.); *Barker v. Barker*, 2005 BCCA 177 at para. 19. If a party is unreasonably underemployed (that is, not employed in a position commensurate with their earning capacity) it may be appropriate to impute income for purposes of a support order: *Hsieh v. Lui*, 2017 BCCA 51 at para. 47.
- [69] The reasons of this Court in *Hanson v. Hanson* (1999), 92 A.C.W.S. (3d) 1024 (B.C.S.C.), 1999 CanLII 6307 (BCSC) are also of assistance in discerning whether income should be imputed to the claimant. In that case, the legal principles set out by Madam Justice Martinson may be summarized as follows:
1. Section 19(1) of the Guidelines allows the Court to impute such amount of income to a parent as it considers appropriate in the circumstances.
 2. Imputing income is the way in which the Court gives effect to the legal requirement that a parent must earn what they are capable of earning; the Court must consider not only the amount of income a parent actually earns, but "the amount of income a parent could earn if working to capacity."
 3. Bad faith is not required.
 4. When imputing income on the basis of under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the spouse are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.

[70] In *Marquez* at para. 38, our Court of Appeal reasoned that the test for imputing income for under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of age, education, health, work history and work availability: see also *Zilic v. Zilic*, 2021 BCCA 107 at para. 19. In addition, our Court of Appeal (see *Watts v. Willie*, 2004 BCCA 600 at para. 16 and *Beissner v. Matheusik*, 2015 BCCA 308 at para. 44) has endorsed the factors set down by the Manitoba Court of Appeal in *Donovan v. Donovan*, 2000 MBCA 80 at para. 21, which may ground an imputation of income on the basis of underemployment or unemployment as follows:

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

[71] I have considered these principles of law as well as the claimant's capacity to earn income having regard to his age, education, health, work history and work availability in light of the facts before me. I am of the view that it would be both reasonable and fair to impute income to him at \$60,000 annually from the date of separation.

[72] The claimant is a bright, healthy, and personable man in the prime of his life. He has experience in the construction industry, both as a carpenter and business man, and more recently in the area of landscaping. I accept the evidence of the respondent that he earned \$55,000 to \$60,000 a year, both before and after the parties moved to Cranbrook and before he incorporated Fishbone Developments Inc. At this juncture, his current income earning capacity has likely increased in light of the additional experience he has gained over the years. Nevertheless, I am satisfied that although imputing income at \$60,000 is rather

conservative, it is a fair and reasonable assessment of the claimant's earning capacity.

[73] Of course, if the claimant Guideline income exceeds \$60,000 annually, his child support obligation will increase according to the applicable table amount. He is capable and experienced in a number of fields and this may occur in future years.

C. The Respondent's Guideline Income

[74] By way of summary, in the three years prior to their separation in 2015, the respondent's income tax returns, recorded her income as follows:

Year

Income

2012:

\$75,848.50

2013:

\$42,790.99

2014:

\$75,055.88

[75] Since 2018, the respondent's line 15000 income stated:

Year

Income

2018:

\$58,001.00

2019:

\$48,041.00

2020:

\$84,000.00

[76] The respondent testified that more recently that her income is somewhere in the range of \$65,000 to \$90,000 annually. She also testified that an income of \$84,000, which was declared in her 2021 Financial Statement, fairly represents what she has been able to earn over the past few years.

- [77] Counsel for the respondent submits that her Guideline income should be assessed at \$84,000 a year. Counsel for the claimant submits that her Guideline income should be assessed at \$150,000 a year.
- [78] I accept the respondent's evidence that the mortgage brokerage business in Cranbrook is not as lucrative as it once was due to the increase in the number of mortgage brokers and the competition between them. Ms. Yeager corroborated the respondent's evidence, that competition in the mortgage brokerage business has increased significantly since the claimant first entered the business. I also accept the respondent's evidence regarding the negative impact of increased costs and rising interest rates on the profitability of her business over the years.
- [79] Nevertheless, I am of the view the respondent's income should be imputed, well above \$84,000 annually, to \$125,000 annually. In reaching this conclusion, I have carefully reviewed the Mortgage Company's Financial Statements over the years, its gross revenues and its claimed expenses, the information in Mr. Sanders valuation report regarding gross commission sales, as well as counsel for the claimant's able submissions regarding the overstatement of business expenses. While I do not agree with all of the claimant's submissions in this regard, I have concluded that some business expenses, e.g., meals/entertainment costs and advertising/marketing costs, have been overstated and that this, in turn, should effectively increase the respondent's Guideline income.
- [80] Mr. Weisgarber testified that he was first retained in 2018 by the respondent to amend the corporate financial statements previously prepared by Ms. G. He testified that there were significant errors in the Mortgage Company's Financial Statements which he corrected. These errors included, for example, the attribution of dividends when there were no retained earnings and outstanding taxes due to CRA. Mr. Weisgarber testified that he also reviewed some of the Mortgage Company's business expenses and did not allow some that were obviously personal, such as "Toys R Us" receipts. However, he also acknowledged that the statements he prepared were not forensic in nature or audited. He did not do a detailed review of business receipts over the years and, for example, allowed a \$10,000 business expense relating to a "recreation vehicle".
- [81] I have also considered Mr. Weisgarber's evidence that he discussed the option of bankruptcy in 2018 with the respondent because of her corporate and personal tax debts, as well as her determination to pay-off the tax debt by "working hard" and his evidence that the respondent had already payed "a fair chunk" of that tax debt. Mr. Weisgarber testified that he was able to rely on corporate losses from 2014, 2015 and 2016 to reduce the Mortgage Company's tax burden in 2017 onward. Again, I have also considered Mr. Sanders expert report and his opinion, including his analysis of the respondent's discretionary earnings over time, as well as her evidence of her decreased commissions and increased costs over time.

- [82] In summary, I have considered the submissions of the parties and the evidence as a whole including: the testimony of the parties and witnesses; the ebb and flow of the claimant's taxable income over the years and related documentation; the Mortgage Company's gross profits, expenses and taxes over the years as well as insurance commissions; the Mortgage Company's tax liabilities; the significant fluctuations in business expenses over the years, even though commissions/gross revenues remained the same.
- [83] I am also mindful that the respondent derives her income from the Mortgage Company and that for some time now she has been the only mortgage broker at the company earning commissions. I have applied the Guidelines and authorities that permit me to go behind the "corporate veil" and consider business deductions that have been accepted for income tax purposes but that do not reflect the actual Guideline income of the parent for child support purposes: see ss. 17, 18, 19(1)(g) and 19(2) of the Guidelines; *Dancak v. Dancak*, 1998 CanLII 2568; *R.A. v. W.A.*, 2021 BCSC 637; *de la Fuente v. Breen*, 2022 BCCA 424.
- [84] This has been admittedly a difficult assessment. This Court has had both the benefit and challenge that arises from a considerable amount of evidence that informs income earning capacity, as well as past patterns of business income earned and expenses incurred. In the final analysis, I am satisfied that a Guideline income of \$125,000 annually is a fair and reasonable assessment of the respondent's income earning capacity.

2. The Parties' Respective Child Support Obligations

- [85] I am satisfied that the parties' child support obligations should be set based on their respective Guideline incomes, as discussed above, according to the applicable table amounts. That, is the claimant must pay child support based on a Guideline income of \$60,000 and the respondent must pay child support base on a Guideline income of \$125,000. I address the parties proportionate share of section 7 expenses more specifically later in these Reasons.
- [86] Should the living arrangements of the Children change in the future, the parties are to immediately address the requisite changes in child support payments, as required and set out in the Guidelines.

3. Whether the Claimant has a Valid Claim for Retroactive Child Support

- [87] The claimant seeks retroactive child support for two distinct periods: \$8,700 for the six-month period between July 2015 to January 2016; and also \$22,260 for the period between January 2019 and January 2022.
- [88] The claimant argues that he has sought child support since he first filed his Notice of Family Claim on November 12, 2015, and there has been no undue delay in filing his notice for child support and spousal support. Furthermore, he submits that the respondent has shown bad faith by: her refusal to pay appropriate child support (and spousal support); under-reporting her true income at the Judicial Settlement Conference with Justice Dley; her nasty emails and texts to him, calling him obscene names and minimizing his financial need; her delay in

the disclosure of her financial materials; by continuing to "prevaricate in her evidence as to her income, giving inconsistent and contradictory statements under oath as to her earnings"; and, continuing to hide her income by declaring unreasonable and personal expenses as business expenses.

[89] I will address these arguments for retroactive child support in relation to each of the two time periods in question.

A. July 2015 to January 2016

[90] I am not prepared to make any child support orders relating to the period from July 2015 to January 2016.

[91] At the Judicial Settlement Conference before Justice Dley, the parties clearly focused on the issue of outstanding child support payment to be made by the respondent. She was in arrears at that time. The parties and the Court addressed and reached agreement on the payment of outstanding child support then owed in December 2018. Justice Dley considered the agreement made between the parties and issued his order. The respondent has now paid her outstanding child support arrears and has continued paying her child support as required by FMEP.

[92] While I appreciate the 2018 Dley Order does not specifically address the child support payable between July 2015 and January 2016 which the claimant now seeks, the parties did address, as that Order stipulates, the child support payable by the respondent in 2016, 2017, 2018 and onward. Reaching back into time, seeking child support payments relating to a time frame before the 2018 Dley Order, in the context of his settlement conference, in my view, flies in the face of the resolution reached between the parties some years ago.

[93] My conclusion in this regard is buttressed by the reasons and four factors set out by the Court in *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 100-116, as follows:

- (1) Is there a reasonable excuse for why support was not sought earlier?
- (2) Was there any blameworthy conduct on the part of the payor parent?
- (3) Is a retroactive award appropriate in light of the child's past and present circumstances?
- (4) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[94] On the facts of this case, adopting the holistic approach in *D.B.S.*, and recognizing that none of these four factors alone is determinative, I am once again not able to justify a retroactive order for the six-month period in question.

[95] I do not see a reasonable excuse for why support for this particular six-month period was not sought at the hearing before Master Keighley or that before Justice Dley. As to the second factor, I agree that there is some blameworthy conduct on the respondent's part during the six-month period in question. The respondent should have attended to the issue of child support sooner; however, I do not agree that she has shown bad faith, as the claimant

asserts. She was in emotional and financial distress, the relationship between the parties was volatile and incendiary, and for some months after the parties legally separated, the children had the benefit of living in the former family home, while the respondent paid for some of the monthly mortgage debts prior to its sale. I also accept the respondent's evidence that the claimant also relied (understandably) on a credit card and this debt was paid from the proceeds of the sale of the family home in November 2015. In this light, I find that the respondent's blameworthiness has been attenuated and falls at the lower end of the blameworthy scale.

- [96] As regards to the claimant's submissions about the respondent's nasty comments towards him, both parties gave evidence accusing the other of abusive, hostile and inappropriate conduct. Although the claimant adamantly denies it, the respondent testified that the relationship ended as a result of an incident of physical abuse in June 2015 and there were also a few prior instances in the relationship where the claimant was physically violent towards her. I do not dismiss or minimize either of the parties' evidence in this regard. I accept that there is truth in both their testimonies. It is clear that both parties had and, to some extent, continue to have a toxic relationship, although evidence of concerning or dangerous conduct has waned in more recent years. Having considered the evidence in its entirety and in context, I am unable to conclude that the respondent's conduct was as, or more, blameworthy than that of the claimant's in this regard.
- [97] I have also considered the third D.B.S. factor regarding the Children's' past and current circumstances. I am not of the view that this factor weighs in favour of a retroactive award of child support for this period. The evidence does not support the conclusion that the Children need the retroactive support sought now for that period, or that their standard of living was markedly different during the six-month period following the separation when they lived in the former family home for a while and then half-time with the respondent.
- [98] As regards to the fourth factor, I am not satisfied that the issue of hardship is particularly determinative given the short time frame involved.
- [99] In the final analysis, I simply cannot conclude that it would be fair or in the interests of justice to reach back in time, well before the Judicial Settlement Conference and the 2018 Dley Order, to order child support for the six-month period immediately following the separation. Nor am I satisfied, taking a holistic approach, that the D.B.S. factors warrant retroactive child support for this period. The respondent will not be required to pay child support for the six-month period following their separation in July 2015.

B. January 2019 to January 2022

- [100] The 2018 Dley Order states that the respondent is to pay child support in the amount of \$900 a month until the resumption of shared parenting.

- [101] By seeking retroactive child support, the claimant is effectively seeking a variation of this Order based on the submission that the respondent's income should be imputed at then Guideline income of \$150,000 a year.
- [102] Counsel for the respondent argues there is no valid basis upon which retroactive child support can be ordered. He acknowledges the principle in *Morgan v. Morgan*, 2006 BCSC 1197 at para. 48, that a parent is obligated to make a higher child support payment when their income increases. However, he submits that the respondent did not earn a higher Guideline income than that stated in the 2018 Dley Order. The respondent testified that in 2018, she hired Ms. G to file her personal and corporate taxes, but then discovered that Ms. G did not know what she was doing. Counsel underscores the respondent's evidence that, not long before the Judicial Settlement Conference, she realized that the income tax returns filed by Ms. G. were not reliable and, accordingly, provided all her financial records to Mr. Weisgarber to review and correct. As such, her agreement to a Guideline income of \$115,000 at the Judicial Settlement Conference was "nothing more than a guess."
- [103] Counsel for the respondent also submits that the D.B.S. factors do not justify a retroactive child support award. He underscores delay in seeking the variation, no blameworthy conduct, and hardship.
- [104] In order to succeed in varying the 2018 Dley Order, the claimant must first demonstrate that there has been a material change of circumstances since that Order was made. Subsections 17(1) and 17 (4) of the Divorce Act, R.S.C 1985, c. 3 [Divorce Act] state:
- 17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,
- (a) a support order or any provision of one, on application by either or both former spouses;
 - (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
- [105] The Supreme Court of Canada in *Willick v. Willick*, [1994] 3 S.C.R. 670, Provides the following guidance with regard to the application of subsection 17(4) of the Divorce Act:
21. This subsection authorizes the court to vary a previous support order if a change of circumstances occurs. The approach which a court should take is to determine first, whether the conditions for variation exist, and if they do exist, what variation of the existing order ought to be made in light of the change of circumstance.

22. In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied upon as constituting a change was known at the relevant time, it cannot be relied on as the basis for variation

[Emphasis added]

- [106] I have reviewed and analyzed the evidence with considerable effort and I am satisfied that there has been a material change in circumstances since the 2018 Dley Order. I have, of course, had the benefit of additional years of evidence relating to Guideline incomes garnered over many days of trial, which the parties and the Court did not have in 2018. Indeed, the Court did not "assess" the parties' respective incomes in the context of the Judicial Settlement Conference." Further, I have received evidence both through examination and cross-examination, as well as Amended Financial Statements and income tax returns. Further, we know now that efforts to reunite the respondent and her son have not been successful to date.
- [107] I am satisfied that the Guideline incomes of \$125,000 for the respondent and \$60,000 for the claimant are reasonable assessments from January 1, 2019 onward.
- [108] As such, I must now consider the D.B.S factors as they relate to the respondent's retroactive child support obligations.
- [109] On the issue of delay, I agree with counsel for the claimant that the delay in seeking retroactive child support has not been inordinate or unreasonable.
- [110] While I am not persuaded that the respondent knowingly under-reported her income at the Judicial Settlement Conference, she is blameworthy for the delay in not providing timely disclosure of her financial circumstances earlier than she did. However, the degree of blameworthiness is attenuated somewhat by the erroneous financial statements and the erroneous booking keeping for which the respondent was not entirely responsible. To be clear, I find the respondent is, ultimately, accountable for her late disclosure. I have simply recognized that her level of blameworthiness is reduced somewhat by her extenuating circumstances.
- [111] As regard to the third factor in D.B.S., I am satisfied that while the Children have always been well cared for by both parents, their standard of living would have benefited significantly by the additional child support commensurate with the respondent's Guideline income of \$125,000.
- [112] As to the fourth D.B.S. factor, I am not satisfied that the respondent will suffer hardship if a retroactive award is ordered. The respondent earns a good income and child support must take priority over her remaining debts.

[113] Applying the holistic approach established in D.B.S., while a difficult decision, I am of the view that a retroactive award for the period from January 2019 to January 2022 should be granted on the Guideline income of \$125,000 for the respondent. I understand that the January 2022 end point was based on the trial date. Accordingly, the respondent's child support obligations will continue beyond January 2019, based on her imputed Guideline income assessment of \$125,000 annually.

4. The Parties' Share of Extraordinary s. 7 Expenses

[114] The parties shall share extraordinary expenses pursuant to s. 7 of the Guidelines, proportionate to their incomes, provided the parties agree in advance to treat such expenditures as special expenses.

[115] The party seeking contribution for extraordinary expenses must first secure the written consent of the other party in advance of the expenditure and must also provide a receipt for the expense. The other party shall be obligated to reimburse their proportionate share of the extraordinary expense within thirty (30) days, or such other time as agreed by the parties in writing.

5. Whether the Claimant has a Valid Claim for Spousal Support

[116] The claimant asserts that he became the primary caregiver of the Children in Spring of 2013, when their nanny was let go and until the parties separated in July 2015. He acknowledges that the respondent shared childcare duties while they were together and that prior to 2013, the parties hired nannies to care for the Children while the parties worked.

[117] For eleven years of their marriage, the parties did not have children. After their first child was born in 2007, they relied on nannies until 2013. The respondent testified there was no agreement that the claimant would stay home with the Children. She testified that the claimant's unemployment and the reduced family income was a point of contention between the parties because they were facing significant debt and financial stress. The claimant testified that he gave up his business to take care of the Children and denies there was no agreement or understanding that he would stay home.

[118] When determining whether a claimant is entitled to spousal support, the Court must consider its objectives, as enumerated in s. 15.2(6) of the Divorce Act. A spousal support order 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.

[119] The claimant also relies on ss. 160-162 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. As noted by Griffin J.A. in *Zilic v. Zilic*, 2021 BCCA 107 at para. 21, these sections largely overlap with those in the Divorce Act; however, the conceptual bases underlying both statutes are the same. The case law clarifies the bases upon which entitlement may be established. These were summarized in *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 25-27:

[25] Canadian courts have recognized three distinct bases upon which a spouse may be entitled to an award of spousal support: compensatory, non-compensatory, and contractual.

[26] Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. Most often, such entitlement will arise where one spouse has sacrificed career opportunities in order to take on more of the family's household or child-rearing responsibilities. Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity, or to share in the augmented earning capacity of the other spouse. The main goal of compensatory spousal support is to provide for an equitable sharing of the economic consequences of the marriage (see *Moge v. Moge*, [1992] 3 S.C.R. 813 at 858-66).

[27] Non-compensatory support entitlement focuses on the needs of the spouses and on their respective means. It is based on the idea that spouses, by virtue of marriage, have some ongoing responsibility to care for one another. The degree to which non-compensatory principles will apply will depend on a close examination of not only the means and needs of the spouses, but also of the nature of the marital relationship and its duration (see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, particularly at para. 53).

[120] In this instance, there is no contractual entitlement to spousal support.

[121] I am mindful that self-sufficiency is only one factor to be considered in assessing entitlement to child support and that no single objective is paramount (*Moge v Moge* [1992] 3 S.C.R. 813 at 852). In reaching my conclusions on eligibility for spousal support, I have considered all the circumstances before me such as the claimant's age, gender, skills, education and opportunity for retraining, and realistic job opportunities (*Tedham v. Tedham*, 2005 BCCA 502 at para. 33).

A. Entitlement to Compensatory Spousal Support

- [122] The claimant asserts that he was economically disadvantaged and suffered financial consequences as a result of the marriage and its breakdown, including his role in caring for the Children.
- [123] In light of the entirety of the evidence before me, I am unable to accept that the claimant has a compensatory claim to spousal support. The evidence before me does not establish an agreement between the parties that he give up his business or career to stay home to take care of the Children. I accept the respondent's evidence that, in the face of mounting family debt and the claimant not working, she eventually let their nanny go as she could no longer pay this expense, along with the other family debts. At the time the nanny was let go in 2013, the claimant had not been earning an income for about one year. The respondent testified that she hoped that, if the claimant started working again, they could hire a nanny again as they had done before.
- [124] Having carefully reviewed the evidence, I am simply unable to conclude that the claimant's career aspirations or income earning potential were compromised by his roles and responsibilities in the family as a father and husband. As noted earlier, in the course of nineteen-year relationship, he stayed home for a two-year period just before the parties separated.
- [125] The claimant is not entitled to spousal support on a compensatory basis.

B. Entitlement to Non-compensatory Spousal Support

- [126] The claimant also asserts an entitlement to non-compensatory spousal support. He submits that when assessing "need" it is unduly restrictive to define "need" as the spouse's ability to meet their expenses; that is, need must be considered with reference to the marital standard of living and the payor spouse's post-separation standard of living: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 57-61; *Ouellette v. Ouellette*, 2012 BCCA 145; *Marquez v. Zapiola*, 2013 BCCA 433; *Lee v. Lee*, 2014 BCCA 383 at para. 59.
- [127] A difficulty with the claimant's argument is that the economic impact and the financial consequences of the marriage have had an adverse effect on both parties, both before and after the parties separated. Moreover, the respondent persevered through financial difficulties before and after their marriage breakdown in 2015, and she has paid a significant part of the family debt through her own work. She kept working and paying family debts in the face of the negative effects of increased competition and rising business costs.
- [128] The dissolution of the marriage has been difficult on both parties. However, the respondent suffered greater financial pressure in many respects as she dealt with maintaining the Mortgage Company, her career and paying-off the family debt.

- [129] The decision in *Levine v. Levine*, 2017 BCSC 801, is of particular assistance in this case. The Court considered the objectives relating to determining entitlement to spousal support set out in s. 161 of the FLA and s. 15.2(6) of the Divorce Act. Justice Murray reasons, at paragraph 34, that the last two objectives, which I enumerated earlier in these Reasons relating to non-compensatory spousal support, aim to narrow the gap between the needs and means of the spouses on marital breakdown: see also *Namdarpour v. Vahman* 2019 BCCA 153. In *Levine*, at para. 34, Justice Murray relies on the reasons of Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10 where the Court reasons that "needs" is a flexible concept, and that the needs of the spouse "is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted".
- [130] Significantly, Justice Murray also reasons that income disparity alone will not entitle a spouse to non-compensatory support:
- [35] Our Court of Appeal has stated that income disparity alone will not entitle a spouse to non-compensatory support: *Lee v. Lee*, 2014 BCCA 383.
- [36] In summary, in determining spousal support:
1. The starting point is the objectives of spousal support in s. 15.2(6) of the Divorce Act;
 2. All the objective must be considered and no single objective is paramount: *Moge v. Moge*;
 3. Self-sufficiency is one objective, and is only a goal "in so far as is practicable";
 4. Income disparity in is not determinative; and
 5. In determining what is practicable, the court should consider all circumstances, including the recipient spouse's age, gender, skills, education, opportunity for retraining, and the realistic prospect of the spouse finding a job that enables him to become self-sufficient: *Tedham v. Tedham*, 2005 BCCA 502.
- [131] Therefore, as regards to the fourth factor of income disparity between the parties, the law is clear that this factor is not determinative, particularly in light of the factual matrix surrounding the dissolution of the marriage in this case. As I have discussed earlier in these Reasons, the parties were suffering significant financial difficulties even before they separated. The respondent was struggling with the debt load of the family in 2013; she considered bankruptcy at that time, but chose to press on. That financial struggle was continuing in 2018, when she retained Mr. Weisgarber who discussed the possibility of bankruptcy with her. Again, she refused to accept that option and pressed on by facing and paying outstanding debts, which included the Mortgage Company's tax debt and her personal tax debt.

- [132] I also note that both parties had equal parenting time with the Children from the date of separation on July 3, 2015 until January 2017. During this period, the respondent worked full-time at the Mortgage Company while the claimant did not work at all for a time. Clearly, the claimant's employment choices, have placed a significant financial burden on the respondent over the years and caused her and the financial hardship.
- [133] Framed in a different light, while it is not clear when the claimant began working in 2017, he took no apparent steps from the time the parties separated until 2017 towards his economic self-sufficiency or to address his economic disparity during that time. Further, I have found that he has been significantly underemployed for years.
- [134] As I found previously in these Reasons, the parties hired nannies for most of the time they were raising their Children and there was no agreement between them that the claimant would not work during any portion of their relationship. I accept the respondent's evidence that the claimant's refusal to work contributed to the parties' increasing debt and precarious financial situation in 2013, which continued well after their separation. The claimant did not dispute that he was unemployed and underemployed after the parties separated, and he also testified that the owner of a large and successful construction company in the Cranbrook area "would have taken [him] on any day." The claimant contributed to the income disparity by the choices he made.
- [135] Significantly, the parties were facing financial difficulties before the marriage ended and the claimant's decision not to work certainly did not help. The respondent continued to earn an income and pay-off the family debt before and after the marriage ended; the claimant did not. As late as 2021, when the Mortgage Company was valued for purposes of this litigation, its corporate debt had been reduced through the respondent's efforts and hard work, but it was still at \$40,000 at that time.
- [136] As I have noted earlier, the claimant is a healthy man in the prime of his life, who developed various skills which included building homes and running a construction business. He also testified that he was capable of retraining as a mortgage broker and running the Mortgage Company himself, stating he could "turn the business around" and do better with it than the respondent had.
- [137] In regard to his income earning capacity, there was also evidence before me from witnesses, such as Mr. Bell and Ms. Madsen, that when the claimant was working, he was a hard and diligent worker. Considering the evidence before me as a whole and with the benefit of having observed the claimant on the witness stand, I am of the view that if he put his mind to it and if he worked hard and as consistently as the respondent has, that over time he could eventually earn an income that matched or exceeded that of the respondent. However, at this juncture in time, these contingencies or "ifs" are such that I must maintain my assessment that his income earning capacity is not at the same level as that of the respondent. Nevertheless, in the unique circumstances of this case, I find that the income disparity between the parties is not determinative of whether he is entitled to spousal

support.

[138] Considering the facts as a whole and the guiding authorities on spousal support, including the applicable provisions of the Divorce Act and the FLA, I find that the claimant has not met the threshold test for spousal support either on a compensatory or non-compensatory basis. His claim for spousal support is dismissed.

6. Valuation of the Family Assets and Debts

A. Valuation of the Mortgage Company

[139] Mr. Derek Sanders was retained jointly by the parties to assess the fair market value of the Mortgage Company. He is a chartered business valuator. He produced a valuation report dated May 17, 2021, which provided the 'en bloc' fair market value of the Mortgage Company as of January 31, 2021. He valued the shares of the Mortgage Company at "a low of \$115,000 and a high of \$155,000" (before taxes).

[140] Mr. Sanders defined fair market value as "the highest price available in the open and unrestricted market between informed and prudent parties, under no compulsion to act and acting at arm's length, expressed in money or money's worth."

[141] The claimant does not accept the expert's valuation of between \$115,000 and \$155,000. He underscores a footnote in Mr. Sanders expert report which states:

As set out in our draft report dated March 18, 2021, we estimated the 'en bloc' fair market value of the Shares fell in the range of \$145,000 to \$185,000. This estimate was determined before we were advised that certain commissions earned from a life insurance book of business owned personally by [the respondent] were recorded in the Company's Financial Statement. Our update estimate of value of the issued and outstanding shares of the Company (i.e., \$30,000 lower) reflects our adjustment to remove the life insurance commissions from the Company's revenues and cash flow.

[142] The claimant underscores that this footnote is very important as the valuation excluded the income from commissions which the respondent derived from insurance sales. He asserts that the respondent's business should be valued at \$185,000 and that he is entitled to a half-share of that amount.

[143] Mr. Sanders testified that his final expert report was revised to extract life insurance commission because they were personal to the respondent and not the property of the Mortgage Company.

[144] Importantly, the respondent testified that since 2017, when the new licencing regulations for insurance sales were put into effect, she was no longer able to sell life insurance when she placed mortgages, like she did previously, as she was not qualified to do so. Accordingly, she has not been selling insurance since 2017. However, she also testified that approximately a month before trial, she obtained a licence so she could now sell insurance

when she places a mortgage. She explained that she receives about \$7.00 per mortgage, and that these sales do not yield much income anymore.

[145] Mr. Sanders reported that the housing market in the Kootenay region of British Columbia (the region within which the respondent operates), was forecasted to decrease 21% in unit sales in the year following his valuation; that is, in 2022. I would note that this evidence corroborates the respondent's additional evidence at trial that the recent down turn in the economy and the increased interest rates have had a further negative impact on her business. In light of Mr. Sanders expert report, it is clear that this recent downturn would negatively impact the value of the Mortgage Company, as well as the respondent's income; this in turn, underscores the volatile nature or industry described by Ms. Yaeger.

[146] In addition, of particular significance in this case, Mr. Sanders assumed in his report that the respondent would:

assist in a diligent manner with a transition to a new ownership and would not compete with the [Mortgage Company] subsequent to a notional disposition of Shares as is the normal course of a sale of this type of business.

[147] Mr. Sanders adds, in a footnote in his report, that if this assumption was not borne out and if the respondent did not provide a covenant to not to compete with the Mortgage Company's business, the market value of the Mortgage Company would be between \$50,000 and \$70,000 plus a minimal value for its client list:

In this regard, absent [the respondent's] willingness to assist in a diligent manner with the transition to new ownership and to provide a covenant not to compete with the Company following a notional sales of the Shares, in our view, the market value of the Company's business and net operating assets would be limited to the Company's tangible asset backing as set out in Schedule 4 (i.e., 50,000-\$70,000) plus a minimal value for the Company's client list.

[148] The respondent testified that the mortgage brokerage business is her livelihood. It is the career she has built and worked hard at for years. People seek her service because of her good reputation and the relationships she has built since 2005. In this light, it is not surprising that she was very clear during her testimony that she will continue to work as a mortgage broker in the Cranbrook area and that she would not sign a non-competition clause. Accordingly, Mr. Sanders assumption, underpinning his opinion that the en bloc value of the Mortgage Company being at a low of \$115,000 and a high of \$155,000 is not sustainable on the evidence before him.

[149] Counsel for the respondent's first position on the value of the Mortgage Company is that it has no marketable value because it is a mere alter ego of the respondent herself. Counsel cites a number of cases for "background" where the Court found that there is no separate value to a one-person company: for example, *Singh v. Singh*, 1998 Can LII 6038; *A.J.C. v. R.C.*, 2000 797; *Petersen v. Petersen*, 1994 Can LII 1057; *Lee v. Ly*, 2006 BCSC 816.

- [150] These cases do not persuade me that there is no value in the Mortgage Company. For example, in *Petersen*, the Court found that there was good will and some asset value, and fixed the value of the business at \$50,000 yet found it was not a family asset. The parties in this case rightly agree the Mortgage Company is a family asset.
- [151] *Lee v. Ly*, is also distinguishable. In that case, the Court found there were insignificant underlying assets and no qualified business valuer; in this case Mr. Sanders valued the business assets, as I have described earlier in these reasons, including the underlying assets.
- [152] Counsel for the respondent submits that the "book of business" cases, such as *R.A.C. v. V.L.C.*, 2009 BCSC 825, do not apply since the mortgage brokerage business, unlike the book of business cases (e.g., investment managers), does not have a residual or repeat value. Counsel points out that once a client signs a mortgage, the respondent receives a one-time commission based on the value of the mortgage. There is no ongoing management of the client's monies and no comparable ongoing relationship or residual benefit in this case.
- [153] Counsel adds that the claimant's submissions regarding the respondent's insurance commissions are misplaced since the respondent has received no insurance commission since 2017. The evidence before me regarding such commission does not establish that either the Mortgage Company or the respondent have personally received significant insurance commissions since 2017.
- [154] Counsel for the respondent point out there is no real "book" for an independent mortgage broker other than the client list. The respondent testified that the business she generates is based on her personal reputation and relationship with clients. In a similar vein, Mr. Sanders' opines that there is a "minimal value" for the Mortgage Company's client list.
- [155] I have considered counsel's respective submissions regarding the value of the mortgage company and carefully reviewed the evidence.
- [156] I accept Mr. Sanders' opinion where he concludes that, in the absence of the respondent's willingness to assist in a diligent manner with the transition to new ownership and to provide a covenant not to compete with the Mortgage Company, the market value of the Mortgage Company's business and net operating assets would be limited to its tangible asset backing of \$50,000-\$70,000 plus a minimal value for the Mortgage Company's client list. Since it is very clear the respondent will not assist a competitor during the transition of ownership and also very clear that she would not agree to a non-competition clause, I am of the view that a \$50,000 value for tangible assets, plus a "minimal value" for its client list of \$20,000, for a total of \$70,000, is a fair and a reasonable assessment of the en bloc fair market value of the Mortgage Company.
- [157] In reaching this assessment, I have considered not only the expert report of Mr. Sanders but all the evidence before me relating to the tangible assets of the Mortgage Company, particularly that addressed in some detail during the respondent's cross-examination. As

regards to assessing the value of the client list, I have done so by working within the parameters of Mr. Sanders' report and considering the respondent's long standing as a mortgage broker in the community of Cranbrook, coupled with her evidence that clients come to her personally because of her particular reputation in the community or their prior business relationships with her. While an assessment of \$20,000 may be generous, I am of the view that it nonetheless reasonable.

[158] Accordingly, I conclude that a fair and reasonable assessment of the Mortgage Company is \$70,000.

[159] I must note that I do not see the claimant running the Mortgage Company instead of the respondent as an acceptable or reasonable alternative, as was suggested by the claimant during his testimony. This would deprive the respondent of a business she has taken years to build and would undermine her livelihood. This would also not be in the Children's best interest. They have relied on the respondent as a significant and reliable source of income and support. The loss of her livelihood in this way would be destabilizing and would jeopardize their wellbeing.

[160] The respondent is, of course, free to start or restart any business he chooses. However, handing the Mortgage Company over to him to run is not reasonable or fair in light of the circumstances before me.

B. Other Assets

[161] The claimant is seeking further compensation for his half-share of various household contents and miscellaneous items which he testified were removed by the respondent from the former family home without his agreement or knowledge. The respondent testified adamantly that their household contents have been divided fairly, and her evidence was not shaken on cross-examination. I am unable to determine based on the evidence before me, on a balance of probabilities, either the value of the assets in question or whether they were unfairly divided or taken. Accordingly, I am unable to issue an order in this regard.

C. Valuation of Family Debts

[162] The claimant provided little information regarding the family debts, did not attend to the family's financial debts, and did not pay any family debts following the separation. The respondent's evidence, however, was very clearly on the debt she carried and paid before and after the parties separated.

[163] I begin my assessment with a consideration of all family debts, with the exception of the Mortgage Company debt. I address the Mortgage Company debt in the next section of my Reason for purposes of analytical clarity, although I have considered the family debt evidence as a whole.

(a) Family Debts (excluding the Mortgage Company Debts)

[164] Section 86 of the FLA states that family debt includes any financial obligation incurred during the relationship in either spouse's name. This includes credit card debt, car loans and CRA debt, as well as a parties' personal income tax liability: see *Neely v. Neely*, 2019 BCSC 610; *Young v. Barnicott*, 2020 BCSC 1869.

[165] I have considered the respective submissions and related Scott Schedules of the parties as they relate to their family debts. I accept the submissions of counsel for the respondent, as they are aligned with my evidentiary findings. I also accept the submission of the counsel for the respondent that, after factoring in the net value of family assets and the respondent's payments of family debts, as set out in her Scott Schedule, assuming an equal entitlement to family assets and debts, the claimant owes the respondent \$23,639.50.

[166] The claimant asserts that the respondent owes a historical Telus telephone bill of \$9,282.02. The respondent denied she owed this debt. I am unable to conclude, on a balance of probabilities, that the respondent owes this debt to the claimant. I also note that he has not paid this debt and the limitation period has since expired.

(b) Mortgage Company Debt

[167] I agree with counsel for the respondent's submissions that I must consider the Mortgage Company's debt in addition to its valuation. Mr. Sanders did not consider the Mortgage Company's debt in determining its value. He testified that the seller must account for that debt separately. Accordingly, as the Mortgage Company is a family asset, its family debt must be shared between the parties.

[168] The respondent attests to the following family debt incurred by the Mortgage Company, totalling \$132,425.89:

- (1) employee loans for house construction of \$76,609.00;
- (2) Invis loans of \$43,046.16;
- (3) corporate income taxes debt of \$12,770.73.

[169] Mr. Weisgarber testified that a portion of the house construction debt has subsequently been written off by the Mortgage Company as a bad debt, such that the house debt is now recorded as \$51,360, rather than the \$76,609 owed at the date of the separation. Counsel for the respondent says that while the house construction debt is now recorded as \$51,360, the amount owing as of the date of separation should be included as corporate debt. I disagree. I find that this historic debt is unlikely to be paid by the parties and the assessment should be made as to the date of trial. Moreover, it is very unlikely that any remaining construction debt is anything other than a bad debt. I am of the view that it is a bad family debt that ought not be attributed to either party.

[170] The Invis loan of \$43,046.16 is an entirely different matter. The amortization of the initial Invis loan attached to the promissory note of April 2, 2015, shows \$13,046.16 as outstanding and an additional loan of \$30,000 was advanced on April 2, 2015. I accept the respondent's

evidence that these loans were taken out for purposes of paying family debt. Moreover, the \$43,046.16 was paid in full by the respondent as these loan payments were taken directly from her commissions by Invis. This debt must be divided between the parties. The respondent suggests an equal division of this debt.

[171] As regards the Mortgage Company's income tax debt, the July 31, 2015 Amended Financial Statement prepared by Ms. G showed a corporate tax owing of \$30,987.58. After Mr. Weisgarber corrected its Financial Statements, the Mortgage Company's tax debt owed at the time of separation was reduced to \$12,770.73.

[172] The Invis debt of \$43,045.16, plus the Mortgage Company tax debt of \$12,770.73, totals \$55,816.89. As I discuss later in these Reasons, I am of the view that this family debt should be equally divided.

7. Division of Family Assets and Debts

[173] Section 81 of the FLA provides that parties are presumptively entitled to an equal division of family property and are equally responsible for family debt, regardless of their respective use or contribution. However, s. 95 of the FLA also contemplates unequal division where equal division of assets and/or debts would be "significantly unfair."

[174] Section 95 guides the exercise of the Court's discretion in assessing whether it would be significantly unfair to divide family property equally by setting out a number of factors which inform this assessment. The salient part of s. 95 in the context of this case provides as follows:

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

(a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6 [Pension Division].

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

(a) the duration of the relationship between the spouses;

[...]

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

[...]

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

[...]

- (i) any other factor, other than the consideration referred to in subsection (3) that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouse if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[175] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, our Court of Appeal discussed the meaning of "significant unfairness" as follows:

[41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.

[176] In *Singh v. Singh*, 2020 BCCA 21, Justice Garson underscores the high threshold that must be met in reapportioning family property and specifically considered s. 95(2)(i) of the FLA. She reasoned that this subsection is subject to the ejusdem generis ("of the same kind") principle of statutory construction; that is, the provision's apparent generality is circumscribed by the more constrained factors that precede it. She held that the significant unfairness under this general provision must relate to a limited class of considerations, namely "the economic characteristics of a spousal relationship": para. 138.

[177] In light of s. 95(1), and the factors set out in s. 95(2), I am of the view that an equal division of assets and debts between the parties is fair and reasonable in this case. No unfairness would result from an equal division. The parties did not argue otherwise.

8. Miscellaneous issues

A. No Contact Order

[178] The respondent seeks a no contact order. I am not of the view that such an order is necessary. In an October 21, 2020 order of Justice Dley, he made a specific order in regard to the appropriate level of contact between the parties. He did so pursuant to s. 225 of the FLA, and ordered the parties to have no communications, directly or indirectly, with each other and/or with the other party's significant other, except for emergency purposes in relation to

parenting of their Children, and that such communications should be restricted to text messages.

- [179] The parents must continue to co-parent and Justice Dley's order of October 2020 accommodates that necessity. Further, I am not aware of any material change in circumstances that would warrant a variation of Justice Dley's order.
- [180] Nevertheless, if the conflict between the parties abates in the future, and they are both agreed in this regard, this would likely constitute a change in circumstances that would warrant loosening the restrictions imposed within the October 2020 Order and a variation of it. In such circumstances, the parties may seek to vary this order by consent.

B. Life Insurance

- [181] The claimant seeks an order that the respondent obtain life insurance for the purpose of securing her child support payments. Counsel for the claimant is correct that the Court has the discretionary authority to order a payor to obtain life insurance for purposes of child support purposes: for example, see *Quinton v. Kehler*, 2020 BCCA 254. In *Quinton*, our Court of Appeal concluded that the appellant identified no error in the chamber's judge's consideration and dismissal of this type of relief, although it affirmed the discretionary authority of the Court to order a payor to take out life insurance.
- [182] In dismissing the application for an order directing the respondent to obtain and maintain a life insurance policy, the trial judge in *Quinton* was satisfied that he had jurisdiction to make the order pursuant to s. 15.1(4) of the Divorce Act as an appropriate term, condition or restriction of an order for child support. However, he concluded and the Court of Appeal agreed that such an order is discretionary and the evidence must provide a basis for it. The trial judge's judgment in *R.E.Q. v. G.J.K.*, 2019 BCSC 1116, endorsed by our appellate court, reasoned in part:
- [143] Relevant factors include whether the payor has complied with court orders in the past, whether the payor is presently in arrears, and the payor's health: *D.P.R. v. L.L.R.*, 2015 BCSC 2317 at paras. 68-69, 159; *E.D.A. v. M.A.A.*, 2014 BCSC 1084 at paras. 90, 125, 135; *Buck v. Buck*, 2013 BCSC 449 at paras. 6, 8, 42; *McIntosh v. McIntosh*, 2007 BCSC 1331 at paras. 100-102; *Milligan v. Milligan*, 2001 BCSC 1059 at paras. 74, 189; *Greenwood v. Greenwood* (1998), 37 R.F.L. (4th) 422 (B.C.S.C.) at para. 45; *Kemp v. Kemp*, 2018 BCSC 381 at para. 62; *Sarro* at para. 50; *R.A.C. v. V.L.C.*, 2009 BCSC 1417 at para. 42.
- [144] The court has ordered the payor to maintain a life insurance policy and name the child or spouse as the sole beneficiary in cases where the payor had not complied with support obligations in the past or was in arrears: *D.P.R.* at paras. 68-69, 159; *E.D.A.* at paras. 90, 125, 135; *Buck* at paras. 6, 8; *McIntosh* at paras. 100-102; *Milligan* at paras. 74, 189; *Kooner* at paras. 46-47; *K.A.P. v. K.A.M.P.*, 2012 BCSC 811. However, security is not necessarily required in those circumstances. In *Pearce*, the payor had failed to comply with the interim spousal and child support order and was in arrears. The court stated that these were

relevant considerations but was nonetheless satisfied that the child support obligations were a priority to the payor and that the actions of the Family Maintenance Enforcement Program were adequate to ensure that payments were made (paras. 47-49).

[145] The court has declined to order security through a life insurance policy when the payor has a record of complying with his or her support obligations: *K.R. v. J.D.*, 2017 BCSC 182 at paras. 60-61, *aff'd* 2018 BCCA 232; *M.S. v. M.M.* at para. 396; *H.P. v. C.T.P.*, 2014 BCSC 2024 at para. 190; *Greenwood* at para. 45.

[146] The age of the children and the importance of the payor's contribution to their financial well-being may also be relevant considerations: *K.A.P.* at para. 54.

[147] Finally, the recipient spouse's own circumstances may be relevant. In *Kemp*, the court declined to order that support be secured by a life insurance policy on the basis that the payor was in good health and the recipient spouse was capable of supporting herself without the support payments. The court held at para. 62, "[i]f the [claimant] seeks the peace of mind that would come with coverage being in place, she can purchase a policy on his life at her own expense. That is not a cost that should be borne by the respondent."

[183] Having considered the circumstances before me, and the authorities cited above, I am satisfied that I should not exercise my discretion by ordering the respondent to obtain life insurance that would name the claimant as her beneficiary in order to ensure child support payments. The respondent has paid her child support as required by FMEP for some years now, and she asserts that she intends to meet her child support obligations now and in the future. I accept her testimony, and expect this will not be an issue any longer. Furthermore, both parents are in good health and capable of earning a good living for themselves and their Children. If either party is concerned about the future, either is free to obtain their own life insurance.

C. Registered Education Saving Plan

[184] While the parties have resolved outstanding issues relating to the Children's Registered Education Saving Plan ("RESP"), a dispute remains regarding how the existing fund is to be divided if the Children do not use the RESP. I have considered the matter and am of the view that the following order is both fair and reasonable under the circumstances:

Unless the parties otherwise agree in writing: if the claimant cannot be added to the existing RRSP and the Children do not use the RESP as contemplated by its terms and not later than when the youngest child turns 25, the remaining funds are to be returned to the donors and divided equally between the parties to the date of their separation on July 3, 2015; thereafter, the funds are to be divided between the parties according to their proportional contribution.

[185] The parties may agree to different terms in writing.

D. Outstanding Costs Award

[186] The claimant is seeking an order for an immediate cost assessment and payment for the costs ordered by Mr. Justice Dley at the application before him in October 2020. At that time, the claimant brought a successful application relating to parenting safeguards during the Covid-19 pandemic. Mr. Justice Dley ordered that the claimant was entitled to his costs at Scale B. Counsel for the respondent notes that no draft Bill of Costs was provided by the claimant and no prior demand was made. I direct that a Bill of Costs be drafted and provided to counsel for the respondent as soon as possible, and that the matter be resolved promptly thereafter. If there is no resolution of this matter within 21 days of receipt of the draft Bill of Costs, unless otherwise agreed in writing between the parties, this costs issue shall be referred to the Register for costs assessment and certification. The claimant is entitled to interest pursuant to the Court Order Enforcement Act, R.S.B.C. 1996, C. 78.

CONSENT ORDERS

- [187] By consent, so long as a child or both children remain eligible for RESP matching government grants, the parties shall contribute \$100 per month to a RESP account for the benefit of both Children. Payments shall commence on the first day of the month following this order, and shall be payable on the first day of each month thereafter.
- [188] If possible, the claimant is to be added to the existing RESP for the Children, held in the respondent's name; that is, Sun Life CI Investments account #...9487 (digits removed to maintain confidentiality); as of February 3, 2023, the balance of this account is \$10,516.15.
- [189] The aforementioned RESP contributions shall be deposited to credit the aforementioned RESP and the parties shall jointly administer the RESP. The claimant will be obliged to forthwith make a one-time contribution of \$2,174.09 to match the respondent's post-separation contributions to the RESP.
- [190] If a new RESP account is required, the new RESP shall be jointly administered by the parties. If the Children do not utilize the funds as contemplated by the terms of the RESP and no later than the time the youngest child turns 25, the remaining balance in the account shall be equally divided between the parties.
- [191] The claimant and respondent shall retain the Children on their extended medical and dental health plans available to them through their employment. If there are no such benefits available to each party through their employment, each party shall be obliged to make best effort to maintain both Children, while children of the marriage, as their beneficiaries on their own respective medical and dental benefit insurance policies.
- [192] The parties shall treat each child of the marriage equally with respect to their eligibility for such insurance.

[193] The parties shall cooperate with the other to maximize any advantage achieved if the Children are eligible for coverage under multiple insurance policies.

[194] Each party shall fully cooperate with the other to ensure the other party is reimbursed for any expenses that are eligible for reimbursement under their respective extended health benefit plan.

DISPOSITION

[195] The claimant's Guideline income is \$60,000.

[196] The respondent's Guideline income is \$125,000.

[197] The respondent shall pay retroactive child support from January 2019 to January 2022 based on her Guideline income of \$125,000. The respondent's child support obligations shall continue beyond January 2019, based on her imputed Guideline income assessment of \$125,000 annually.

[198] Recognizing that the parties' son, born in September 2007, resides primarily with the respondent, and the parties share equal parenting time with their daughter, born November 12, 2011, the respondent shall pay the claimant child support on this basis, according to her imputed guideline of \$125,000 from January 2019 onward.

[199] The parties shall share s. 7 expenses proportional to their imputed Guideline income, provided the parties agree in advance to treat such expenditures as special expenses.

[200] The party seeking contribution for extraordinary expenses must first secure the written consent of the other party in advance of the expenditure and must also provide a receipt for the expense. The other party shall be obligated to reimburse their proportionate share of the extraordinary expense within thirty (30) days, or such other time as agreed by the parties in writing.

[201] All family assets and debts shall be divided equally.

[202] The Mortgage Company is valued at \$70,000 and shall be divided equally. Accordingly, the respondent must pay the claimant \$35,000 in relation thereto.

[203] The claimant's equal share of the family debts, not including the Mortgage Company debt is assessed at \$23,639.50. The claimant must pay the respondent \$23,639.50.

[204] The Mortgage Company's debt is assessed at \$55,816.89. Accordingly, the claimant must pay the respondent half of that debt, namely, \$27,908.

[205] The parties shall retain possession of those family assets and responsibility for any family debts currently in their name that is not otherwise addressed in these Reasons.

[206] The parties are at liberty to reach an agreement, in writing, to otherwise settle the division of assets and debts between them.

[207] I will not repeat the consent orders or the RRSP orders as they are lengthy and ought to be read together.

[208] I will not repeat my order regarding the respondent's obligation to address Justice Dley's October 2020 costs order promptly, or other findings where I dismiss a party's claim. All findings and orders set out earlier in these Reasons speak for themselves.

[209] All remaining claims of the parties are dismissed, except as addressed herein.

[210] As success is divided between the parties, they shall bear their own costs.

"MORELLATO J."

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