

CANADA / JUDGMENT

Riznek v. Riznek

2022 BCSC 2068

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2068 Riznek v. Riznek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Riznek v. Riznek,

2022 BCSC 2068

Date: 20221128

Docket: E32608

Registry: Penticton

Between:

Lucia Erminia Riznek

Claimant

And

Bradley Douglas Riznek, Show In Motion Services Inc.,

Wine Country Party Rentals Inc. and 458628 BC Ltd.

Respondents

Before: The Honourable Justice Skolrood

Reasons for Judgment

Counsel for the Claimant:

D.M. King

Counsel for the Respondents:

M. Koochin

Place and Date of Trial:

Kelowna, B.C.

July 18-20 and 22, 2022

Place and Date of Judgment:

Penticton, B.C.

November 28, 2022

Table of Contents

Background.. 4

The Consent Order 4

Date of Separation.. 5

The Respondent's Evidence. 5

The Claimant's Evidence. 8

Findings of Fact and Analysis. 10

Child and Spousal Support.. 14

The Respondent's Obligation to Disclose His Income. 14

Child Support Disclosure Obligations. 15

Spousal Support Disclosure Obligations. 20

Parties' Incomes in the Years 2014-2019. 21

Retroactive Child Support 23

Retroactive Variation of Spousal Support 26

Prospective Spousal Support 31

Insurance Policies.. 36

Conclusion.. 36

- [1] The parties to this family law dispute were married in May 1984 and divorced by court order dated June 21, 2012. On December 6, 2011, they entered into a comprehensive consent order (the "Consent Order") that resolved the majority of issues between them, including asset division, parenting and child and spousal support.

- [2] On June 12, 2020, the respondent husband filed a notice of application seeking to terminate spousal support and to vary child support. On October 9, 2020, the claimant wife filed a cross-application seeking to vary spousal and child support retroactively and prospectively.
- [3] By agreement of the parties, the two applications were referred to the trial list and scheduled to be heard together.
- [4] At the time of trial in July 2022, none of the parties' three children remained children of the marriage for child support purposes so there is no longer a claim for prospective child support.
- [5] The support claims turn in part on determining the respective incomes of the parties. The respondent has historically earned income through his solely owned business, which he says has been decimated in the last two years by Covid-19. The claimant implicitly acknowledged the significant impact on the respondent's income by voluntarily agreeing to waive spousal support for two years, from April 2020 to April 2022.
- [6] The claimant is employed as a realtor, but the respondent alleges that she is not earning to her full capacity.
- [7] The other issue of note between the parties is the date of separation. The respondent says they separated on October 20, 2000 whereas the claimant says separation occurred on August 1, 2007. Determination of the date of separation and the corresponding length of the relationship may impact on the duration of spousal support payable by the respondent.

Background

- [8] The general background is described above; however, I will provide a further summary overview and then will delve into the evidence in greater detail when addressing the issues that arise.
- [9] As noted, the parties were married in May 1984. The respondent was 21 years old at the time and the claimant was 20.
- [10] They initially lived in the Lower Mainland of BC in a suite in the claimant's parents' home. In 1991, they bought a house in Surrey, with the assistance of the claimant's parents. In 1992, they purchased a condo for recreational purposes in Osoyoos. After holidaying in Osoyoos for a few years, they decided to move there in 1996. They bought a lot and built a house, where the claimant still lives.
- [11] The parties have three children: a son who is currently 30, and two daughters, currently age 26 and 22.

- [12] Since the mid 1980's, the respondent has been involved in the business of providing organization and staging services for conferences, trade shows and other special events. He initially worked for a company in Vancouver, but since 1988 he has operated his own business, currently known as Show In Motion Services Inc.
- [13] The claimant is a licenced realtor. She began selling real estate when the parties lived in Vancouver but stepped away when the children were born. She became licenced again in 2006 and began selling real estate in the Osoyoos area.

The Consent Order

- [14] The family law proceeding was commenced by the claimant in 2009. As noted, most issues were resolved by way of the Consent Order, which contains a number of provisions that are material to the matters in dispute:
- a) The respondent's Guideline income was set at \$250,000 per year and the claimant's at \$50,000 per year (para. 3);
 - b) Child support was set at \$3,280 per month for the parties' two daughters, who were then both still children of the marriage (para. 4);
 - c) Spousal support was set at \$4,300 per month (para. 7); and
 - d) Either party was entitled to apply for a review of spousal support without showing a material change in circumstances on or about the third anniversary of the order, i.e. as of December 6, 2014 (para. 8).
- [15] With respect to the review provided for in the Consent Order, neither party took steps to initiate a review until the respondent filed his present notice of application on June 12, 2020. The claimant then followed with her notice of application filed October 9, 2020.
- [16] In terms of the division of assets, amongst other things, the claimant kept the family home in Osoyoos, certain investment properties and received an equalization payment from the respondent of \$739,000. The respondent retained sole ownership in his company and certain other properties.

Date of Separation

The Respondent's Evidence

- [17] The respondent again alleges that the parties separated on October 20, 2000. He says that is the day the claimant told him to leave the family home. According to the respondent, it was the date of their youngest daughter's first birthday. He says that the claimant had planned a family celebration for the day, whereas he had made arrangements to golf with friends and then attend a local hockey game. This led to an argument and then to the claimant telling him to leave.

- [18] According to the respondent, he thought it was a relatively minor disagreement, but it was the culmination of a number of issues that had been building up. He described the argument on that day as the "straw that broke the camel's back".
- [19] The respondent says that he left the family home and moved into a trailer parked on the property where one of his company's warehouses was located. He lived there until 2007 when he bought a townhome. Some funds from the family home, in the form of a refinancing, were used to purchase the townhome.
- [20] The respondent says that he never returned to the family home to live, although he attended from time to time to see the children and for family events, such as birthdays.
- [21] Beginning in 2001, the respondent entered into a new relationship. He alleges that by at least late 2001, the claimant was aware of the relationship as were the children. That relationship continued until 2013. Thereafter, the respondent married his present wife in 2016.
- [22] The respondent acknowledged that in the years 2000-2007, the parties and the children continued to do some things as a family. For example, they took two trips to the Oregon Coast as well as a trip to Disneyland. In 2007, he travelled with the family to Ontario to take their son to boarding school. He said he wanted to give the children as normal a life as possible.
- [23] Throughout the period of 2000-2007, the respondent said that financially, the parties carried on as they had in the past in that they used money earned in the business to pay their expenses.
- [24] The respondent also acknowledged that the parties purchased property together after 2000. Specifically, in August 2001, they bought a condo at Apex Mountain Resort ("Apex") in Penticton, although it was done through his company. The respondent said that the claimant found the property and thought it was a good deal. He said that the claimant and the kids mostly used it and that he rarely went there.
- [25] In 2006, the parties bought a new motorhome. The respondent said he needed to replace the trailer he was living in so he traded it in and bought a new one. Both parties were listed on title and on the financing documents. He agreed that the parties used the new motor home to travel to the Oregon Coast once or twice.
- [26] The parties dispute whether they continued a sexual relationship after October 2000. The respondent adamantly denies this whereas the claimant alleges that they continued to be intimate when he would come to the family home and when they would travel together.
- [27] According to the respondent, the parties discussed the state of their relationship. He testified to one time in 2003 or 2004 when he said the claimant challenged him to tell the children they were getting a divorce. He told her to go and get the children but she refused. He said they never discussed the issue again.

[28] The respondent entered into evidence an email sent by the claimant to him dated May 3, 2004. In it, she expressed her anger and dissatisfaction with how she perceived he has treated her and his lack of effort and attention towards the family. In that email, she made a number of statements, including:

- I want a divorce. I have tried to talk to you about it for months and months;
- We have a beautiful home, 3 wonderful children, money apparently yet you stay away. You want us but you don't;
- I know I mean nothing to you, your actions have demonstrated this for the last seven years;
- If you think that we deserve to wind up with anything in the end - family or \$\$ then you will try to help give this relationship a decent burial;
- Please stay away I will need statements of our current financial situations and statements of the last couple of year end at Show In Motion, Kelowna Display and the numbered company I also need a list of assets You have clothes in the closet and I would like them gone We need to list the house; and
- We need to have an official separation agreement and I would like this as soon as possible. I do not intend to spend Christmas with you, so think about how we can handle this. I could rattle on and on, I've got years worth of stuff to talk to you about, but you have no time or interest so I would appreciate the minimum effort you have to give to LET ME GO.

[29] Despite this email, the parties largely continued on as before, getting together for family events and taking occasional family holidays together. Their lives continued to be financed by money earned through the business.

[30] That continued until 2009 when the claimant told the respondent that she was going on a trip to Hawaii with a friend. The respondent said he knew she was going to pay for the trip using her company credit card which he did not agree with so he cancelled her card. The claimant commenced the family law claim shortly thereafter.

The Claimant's Evidence

[31] The claimant does not dispute that the respondent left the family home on October 20, 2000 and moved into the trailer on the warehouse property. However, she denies telling him that he had to leave, rather she wanted him to put the family first. At one of her examinations for discovery, she acknowledged that it was "possible" that she told him to leave.

[32] The claimant alleges that going forward from that date, the respondent came and went from the family home much more frequently than what he testified to and that their marriage continued to subsist, albeit in an unconventional form, until 2007.

- [33] The claimant says that after October 2000 through much of 2001, when the respondent was not away working, he spent about 50 percent of the time staying at the family home and the other 50 percent at the trailer. Beginning later in 2001, he began to spend less than 50 percent of the time at home and more at the trailer. Throughout that time, the claimant says that the parties continued their intimate relationship when the respondent was home. She says that after 2004, he came home less often but they continued to be intimate until at least 2007.
- [34] In the summer of 2001, they bought the condo at Apex which the claimant says was used for family holidays. They set up an office for the respondent in the condo and he often joined the family there when he was not away for work. The claimant testified that whenever the respondent was there, they shared a bed and engaged in intimacy. The claimant says the family had at least three or four Christmases together at Apex.
- [35] The claimant went through a series of photographs that she says shows their ongoing life together. The photos include:
- a) Family birthday celebrations with the respondent in June of 2006 and 2008;
 - b) A family trip to Niagara Falls in 2007, which is when they travelled to Ontario to drop their son off at boarding school;
 - c) A family trip to Disneyland in 2005;
 - d) Family Christmas gatherings at Apex in 2003 and 2005;
 - e) A family trip to Oregon in 2003; and
 - f) A motorcycle trip that the two of them went on through Washington State in 2003.
- [36] In addition, there are three photographs taken at what the claimant says was her surprise 40th birthday party in May 2004. She says that the party was organized by the respondent, who arranged the catering and invited all the guests. The timing of the party is noteworthy in that it occurred a couple of weeks after the May 3, 2004 email referred to by the respondent. The respondent testified that he does not recall attending the 40th birthday party and he denies organizing it.
- [37] With respect to the May 3, 2004 email, the claimant acknowledges sending it but denies that she intended to end the marriage. She says she was trying to get his attention and to make him change. She says the email was indicative of how they often communicated. They would both say things they shouldn't but then made up.
- [38] The claimant also testified about a trip she and the respondent took together to attend a show in Langley, BC. She says they stayed together in a hotel and were intimate.

- [39] The claimant says that she was not aware that the respondent had commenced a relationship with another woman, although she acknowledged having suspicions. She says she asked him but he denied it. She says she did not discover the relationship until 2009, after she commenced this proceeding. She learned of it when their daughter found a photo of the respondent and his girlfriend and called the claimant.
- [40] The claimant maintained throughout her testimony that she did not believe the marriage was over and she continued to want to make things work. She says that hope died when the respondent cancelled her credit cards and terminated her access to money from the business in 2009. She says that as part of commencing the claim, she had to identify a date of separation. She chose August 1, 2007, when the respondent moved into the townhome, because in her mind that signalled the "point of no return".

Findings of Fact and Analysis

- [41] Given the significantly divergent evidence of the two parties about their relationship and, in particular, about the circumstances and timing of their separation, it is necessary to assess the credibility and reliability of the parties.
- [42] The principles governing such an assessment are well known and discussed at some length in a number of cases. See for example *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.) and *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd* 35006 (1 October 2012). It is not necessary to review those principles in detail, but I am particularly mindful of Justice Dillon's observation in *Bradshaw* (B.C.S.C.), at para. 187 that when considering competing versions of events, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)).
- [43] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).
- [44] That observation is particularly apt in this case given that there were aspects of both parties' testimony that rang true and other aspects that were more difficult to accept. Accordingly, rather than make a sweeping or general determination of the parties' credibility and/or reliability, I will assess the evidence in respect to each of the issues and will make findings of fact based upon the evidence I accept or reject. I would add that the assessment of the parties' competing versions of events is made particularly challenging by the absence of any evidence from corollary witnesses, for example people who may have been able to testify whether the parties did, or did not, continue to present outwardly as a married couple in the years 2000-2007.

- [45] In *M.B.L.1 v. B.S.L.*, 2003 BCSC 229, Justice C. Ross said the following about the test for determining whether a separation had occurred:
- [65] The key factor in determining whether there has been a separation is an intention to end the matrimonial relationship. Physical separation is a factor to be considered but it is not determinative, see *Dorchester v. Dorchester* (1971), 3 R.F.L. 396 (B.C.S.C.) at 398; *Dediluke v. Dediluke* (Public Trustee of), 2000 B.C.S.C. 487. Neither is the fact that there has been a physical separation made in the context of significant difficulties in the marriage determinative of the question, see *Siller v. Siller*, [1987] B.C.J. No. 80.
- [46] An issue in that case was whether the parties separated in 1997 or later in 1999. Justice Ross discussed a number of factors that informed her analysis of when separation occurred, many of which resonate with the facts of this case:
- [67] I find that the marriage was undoubtedly troubled in 1997 and that Mr. B.S.L.'s move to the apartment in Richmond was, at least in part, as a consequence of these difficulties. However, I have concluded that the parties did not separate at that time but rather made the decision to end the matrimonial relationship in late January 1999. Their conduct was not consistent with a decision having been taken by either that the marriage was ended in 1997. In particular:
- (a) the parties attended for marriage counselling with David Freeman some 33 times between July 1997 and July 1998;
 - (b) Ms. M.B.L.2 felt at times that progress was being made; they were working on the relationship;
 - (c) the parties did things together, took walks, and went out for meals;
 - (d) the cards exchanged by the parties during the period were, in my view, inconsistent with a separation having occurred;
 - (e) the parties travelled together during this period;
 - (f) they continued to share the same accountant;
 - (g) Mr. B.S.L. had unrestricted access to the matrimonial home throughout the period;
 - (h) On February 21, 1999, Ms. M.B.L.2 sent a note to Mr. B.S.L. which stated in part: "I am completely stymied as to who you are. You are a stranger in my bed + it's very painful for me to witness this. I'm sad to say that I don't see any solution, + since we agreed to separate last month, I'm expecting you to be settled in a hotel or apartment by the end of this month." The language of this note is, in my view, inconsistent with the separation having occurred in 1997. Rather, it speaks to a decision to end the marriage having been made in January 1999 and I find that that is when the separation occurred.

- [47] Considering all of the evidence in light of the principles discussed in paras. 43-45 above and applying the factors identified in the case law, I am unable to accept the respondent's position that the parties separated on October 20, 2000. It is apparent on the evidence that after that date, and despite moving into the trailer at the company warehouse, the respondent continued to participate in family activities and to maintain his marital relationship with the claimant, albeit in a somewhat unconventional form, to a much larger degree than he testified to. In particular, the following facts support this finding:
- a) The respondent continued to have unfettered access to the family home and kept most of his belongings there;
 - b) He regularly participated in family dinners and events;
 - c) The parties continued to travel together, both as a family and as a couple;
 - d) The parties bought various assets together, including the condo at Apex in 2001, a fractional interest in the Spirit Ridge resort in 2005 and a new motorhome in 2006;
 - e) Their financial interests continued to be intertwined until 2009;
 - f) The parties filed income tax returns listing their status as "married" through until at least 2007; and
 - g) They continued to have sexual relations. On this point, I have no difficulty accepting the evidence of the claimant over that of the respondent.
- [48] In addition to these factors, I put considerable weight on the fact that the respondent swore an affidavit on June 14, 2012 in support of an application for a desk order divorce in which he stated that he had lived separate and apart from the claimant since August 1, 2007.
- [49] The respondent testified that this is an error and that he simply signed what his lawyer put in front of him. I have difficulty accepting that the respondent did not appreciate fully the significance of what he was signing, particularly given that this affidavit was the fourth one sworn by the respondent in the proceeding. Further, the proper and effective administration of justice is undermined if parties can simply resile from sworn statements on the basis of an alleged error or misunderstanding. The respondent swore this affidavit for a particular purpose, i.e. to obtain a desk order divorce, and he cannot now walk back from that affidavit because it no longer suits his purposes.
- [50] For these reasons I reject the respondent's position that the date of separation was October 20, 2000. I will say that the claimant's date of August 1, 2007 is somewhat arbitrary. Again, she chose that date because that was when the respondent moved into his new townhome because in her mind, that reflected a degree of finality in their relationship. While it is not entirely clear how that was any more "final" than other actions taken by the respondent, particularly given that the parties' relationship largely carried on in the same manner, absent evidence to support a different date, I am prepared to accept August 1, 2007 as the date of separation.

[51] In doing so, I am alive to the sentiments expressed by the claimant in her May 3, 2004 email to the respondent, including her stated desire for a divorce and to list the family home for sale. However, I accept her evidence that the email was her venting in an attempt to get the respondent's attention. I note as well that despite what the claimant said in the email, the parties again continued on in the same vein, including the respondent organizing a surprise birthday party for the claimant shortly after the May 3 email.

[52] I therefore find that the date of separation was August 1, 2007.

Child and Spousal Support

The Respondent's Obligation to Disclose His Income

[53] As I will discuss in more detail below, in the years 2014-2019, the respondent's income increased significantly over what was used to set child and spousal support in the Consent Order.

[54] Unlike many similar orders made in family law proceedings, particularly where there is an ongoing child support obligation, the Consent Order did not include a term requiring the parties to exchange income information on an annual basis. As a result, there was minimal financial disclosure between the parties over that period of time until the respondent applied in June 2020 to terminate spousal support. That led to the retention of a valuator to determine the respondent's income for the years 2014-2019. I will address the income valuation below.

[55] As noted, the claimant is seeking a retroactive variation of both child and spousal support. The absence of financial disclosure by the respondent after the date of the Consent Order factors into the claimant's application, thus it is useful to make some general observations about disclosure obligations in family law matters.

[56] The importance of financial disclosure in family law litigation has been consistently underscored in judicial decisions for many years. The failure to disclose material information, particularly income and financial information, has been described as "the cancer of family law litigation": *Michel v. Graydon*, 2020 SCC 24 at para. 33; *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.) at para. 9.

[57] Much of the discussion about disclosure has been in relation to child support issues. While it is not possible to canvass all of the innumerable cases dealing with this subject, it is useful to highlight some key principles emanating from the leading authorities.

Child Support Disclosure Obligations

[58] In the child support context, it is necessary to start with the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. While the Guidelines deal with many different aspects of child support, there are two key principles relevant to the issue of financial disclosure:

- a) The amount of child support payable is largely a function of the payor spouse's income and the number of beneficiary children. This flows from s. 3 of the Guidelines and has been confirmed in the case law. For example, in *D.B.S. v. S.R.G.*, 2006 SCC 37, Justice Bastarache stated at para. 54: "parents have an obligation to support their children in a way that is commensurate with their income"; and
- b) Pursuant to s. 25 of the Guidelines, a payor spouse must disclose income information not more than once per year on the written request of the other spouse. Thus, the Guidelines do not impose a positive obligation on the paying spouse to unilaterally disclose updated income information whenever their income changes (*D.B.S.* at para. 58).

[59] In *D.B.S.*, the Court implicitly acknowledged the disconnect between an income-based support calculation and the absence of mandatory income reporting. Bastarache J. said at para. 59:

While the payor parent does not shoulder the burden of automatically adjusting payments, or automatically disclosing income increases, this does not mean that (s)he will satisfy his/her child support obligation by doing nothing. If his/her income rises and the amount of child support paid does not, there will remain an unfulfilled obligation that could later merit enforcement by a court.

[60] The test for whether there should be a retroactive award or variation of child support is discussed below beginning at para. 86. In *D.B.S.*, Bastarache J. in discussing this test, considered whether a failure of the payor parent to disclose financial or income information amounts to blameworthy conduct, which is one element of the test. Justice Bastarache said:

106 I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments. A payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

107 Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct.

[61] Justice Bastarache went on to say that where a payor parent acts in conformity with an existing order, the parent should be presumed to be acting reasonably (i.e. not in a blameworthy manner). However, that presumption may be rebutted if there is a material change in circumstances resulting in a revised ability to pay that is not disclosed: *D.B.S.* at para. 108.

[62] *D.B.S.* has been considered in two more recent Supreme Court of Canada decisions: *Michel and Colucci v. Colucci*, 2021 SCC 24.

- [63] Michel addressed the issue of whether a payee spouse could apply to retroactively vary child support if the beneficiary child was no longer a "child of the marriage" at the time of the variation application. There, the husband payor had paid child support in accordance with a consent order made in 2001, but it was subsequently determined that he had understated his income and, with the exception of one year, had earned more in every year until his child support obligation was terminated by court order in 2012. The payee wife applied in early 2015 to retroactively vary child support back to 2001.
- [64] The applicant wife was originally successful on her retroactive variation application in the Provincial Court of British Columbia, however, the husband successfully appealed to this Court. A further appeal by the wife to the Court of Appeal was dismissed. There, the Court applied its decision in *Dring v. Gheyle*, 2018 BCCA 435, where it was held that the Court has no jurisdiction to vary a child support order under s. 152 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], if the beneficiary is not a "child" at the time of the application. The Supreme Court of Canada disagreed and reinstated the variation order of the Provincial Court.
- [65] While the decision focusses largely on the interpretation of s. 152 of the FLA, the Court addressed the issue of the payor parent's disclosure obligations. It did so as part of considering whether the payor spouse had engaged in blameworthy conduct, again part of the D.B.S. test for a retroactive variation.
- [66] As referred to above at para. 55, Justice Brown for the majority described the failure to disclose material information as the "cancer of family law litigation" (para. 33). Elsewhere, he underscored that the failure of a payor parent to pay the appropriate amount of child support will often result in hardship to both the recipient parent and the beneficiary child. Thus, an award for retroactive child support is not an exceptional form of relief, but rather a means of enforcing an existing obligation (para. 31).
- [67] At para. 32 of Michel, Brown J. went on to say that "retroactive child support awards will commonly be appropriate where payor parents fail to disclose increases in their income" (citing D.B.S. at para. 107). Justice Brown also addressed the disconnect between an income-based calculation of child support and the absence of mandatory income disclosure. As he noted, there is "informational asymmetry" resulting from the fact that the payor parent has the information required to determine the proper amount of child support while the recipient parent does not. Thus, without adequate disclosure, a recipient parent applying to vary child support is at a disadvantage (para. 32).
- [68] With these considerations in mind, Brown J. held that the husband's failure to accurately disclose his income at the time of the original consent order, and failure to disclose material changes in his income for the 11 years that followed, constituted blameworthy conduct supporting an order for retroactive child support (para. 34).
- [69] Colucci involved a somewhat different set of facts in that the original decision under appeal was a decision granting the payor father's application to reduce child support arrears. The parties divorced in 1996 with the mother being granted sole custody of the parties' two

children. The father was required to pay child support of \$115 per week per child. In 1998, he requested a reduction in child support but that request was denied. His child support obligation continued until 2012, but between 1998 and 2016, he made no voluntary payments and only limited amounts were collected through enforcement mechanisms. In 2016, the father applied to retroactively reduce child support and cancel the arrears owing, which by then were approximately \$170,000. His application was largely successful at first instance, however, the variation decision was overturned on appeal and a further appeal to the Supreme Court of Canada was dismissed.

- [70] Justice Martin for the Court set out a framework for determining applications to retroactively decrease child support and/or cancel arrears. In doing so, Martin J. referred to and built upon the discussion emanating from D.B.S. and Michel about whether the failure to disclose material financial and income information amounted to blameworthy conduct for the purposes of a retroactive variation application.
- [71] Justice Martin underscored that "disclosure is the linchpin on which fair child support depends" (para. 48) and that "frank disclosure of income information by the payor lies at the foundation of the child support regime" (para. 50). She noted that some jurisdictions have legislated a mandatory annual disclosure of income information without the need for a written request from the other parent (at para. 53, citing the Ontario Child Support Guidelines, O. Reg. 391/97, s. 24.1(1)). Justice Martin also referred to the general disclosure obligation set out in the BC FLA, which provides in s. 5(1) that a party to a family law dispute "must provide to the other party full and true information for the purposes of resolving a family law dispute".
- [72] From these decisions, certain key principles emerge:
- a) Because the child support system set out in the Guidelines is premised on the idea that support will fluctuate with the payor parent's income, "adequate, accurate and timely" financial disclosure is critical (Colucci at para. 48);
 - b) However, neither the Guidelines nor the FLA contain mandatory income disclosure requirements. This can result in an informational asymmetry between the payor and payee spouses (Michel at para. 32);
 - c) A payor who makes regular child support payments in accordance with an existing court order may be presumed to act reasonably, however, that presumption may be rebutted if there is an undisclosed change in circumstances impacting the payor's ability to pay (D.B.S. at para. 108); and
 - d) Mere compliance with an existing order while failing to disclose material increases in income may constitute blameworthy conduct for the purposes of the retroactive variation analysis (Michel at para. 34).

[73] On this last point, the Court of Appeal has held that the failure to disclose financial information in the context of a material change in circumstances will not automatically result in a finding of blameworthy conduct; other factors may inform the analysis including, in certain circumstances, the payor's subjective intentions: *Gauthier v. Gauthier*, 2022 BCCA 193 at para. 47. See also *Evanow v. Lannon*, 2018 BCCA 208, where Justice Savage for the Court said at para. 42:

I am not persuaded that in the absence of an order requiring further disclosure, and little or no contact between the parties, Mr. Evanow's failure to update his financial status was, without further inquiry, blameworthy conduct requiring the retroactivity claimed.

[Emphasis in original.]

Spousal Support Disclosure Obligations

- [74] As I noted earlier, much of the discussion in the case law about financial and income disclosure has been in relation to child support issues. There appears to be less consideration of this issue in cases dealing with spousal support, however, case law in other provinces provides some guidance.
- [75] Before turning to that case law, it should be noted that, as is the case with child support, there are no mandatory disclosure provisions in either the Spousal Support Advisory Guidelines [SSAG] (which in any event are advisory only and lack the mandatory application of the Child Support Guidelines) or in the FLA, apart from the general disclosure obligation set out in s. 5(1) (see para. 70 above).
- [76] Turning to the case law, in *Bendall v. Bendall*, 2019 ONSC 3588, the applicant husband sought to terminate spousal support as of a date coinciding with his retirement. In response, the respondent wife sought a retroactive increase in spousal support or, alternatively, continuation of the support amount set by a previous order.
- [77] In support of her position, the wife sought to rely on the husband's failure to inform her of the increases in his income in the many years post-separation. The Court rejected this as a relevant factor, noting that the husband was not obliged to do so pursuant to any agreement between the parties, an existing order or the common law (at paras. 69.17 and 91).
- [78] *Arsenault v. Blanchard*, 2018 NBQB 14, similarly involved an application by the payor husband to vary spousal support and a cross-application by the payee wife for an order to retroactively increase support based on the husband's increased income since the date of the original order. Of note, that order did not require an annual exchange of income information. The Court held that absent such a requirement, the failure to disclose income increases was not blameworthy conduct for the purposes of the retroactive variation analysis.

[79] As part of that analysis, the Court also considered the following facts to be relevant (at para. 42):

- 1) there is no suggestion that the applicant hid his income increases - the evidence confirmed that the applicant was never asked about his income prior to June 2017;
- 2) there is no evidence that the applicant has ever intimidated the respondent from pursuing her claims for spousal support; and
- 3) there is no evidence that the applicant ever misled the respondent in regards to the spousal support she was receiving.

[80] In considering parties' disclosure obligations in respect to spousal support, it is also important to keep in mind the different objectives and legal foundations for spousal support versus child support. This was noted by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, where Justice Cromwell noted that, unlike child support, there is no presumptive right to spousal support and a spouse is under no obligation to look out for the legal interests of their former spouse. (at para. 208).

[81] This supports the view that there is no free-standing obligation for ongoing and continuous financial and income disclosure in respect to spousal support issues and that failure to disclose will be one of a number of factors that will inform the analysis of ongoing and/or retroactive spousal support (see again, *Kerr* at para. 208).

Parties' Incomes in the Years 2014-2019

[82] The claimant seeks an order for retroactive child and spousal support for the years 2014-2019.

[83] As set out above at para. 14, the Consent Order set the respondent's income at \$250,000 per year and the claimant's income at \$50,000 per year for the purpose of the Guidelines.

[84] In late 2020, the parties agreed to retain a valuator, Donald Spence, to determine the respondent's Guideline income for the years 2014-2019. Mr. Spence's findings are set out in a report dated December 2, 2020 that was entered into evidence at trial. As set out in the report, Mr. Spence reviewed income and tax records for both the respondent in his personal capacity and his various corporate entities for the subject years. Given that neither party disputes Mr. Spence's analysis or findings, it is not necessary to delve into the report in any detail other than to note the incomes he determined for the subject years:

2014

\$600,000

2015

\$504,000

2016

\$292,000

2017

\$387,000

2018

\$739,000

2019

\$306,000

[85] For those same years, the claimant's Guidelines income, based on her tax returns, was:

2014

\$26,502

2015

\$36,975

2016

\$119,276

2017

\$64,237

2018

\$29,551

2019

\$69,900

[86] Using those figures, Ms. Lyn Perry, an accountant, prepared a table calculating the total child and spousal support that would have been payable by the respondent during the years 2014-2019. For the purposes of spousal support, Ms. Perry assumed the mid range figure under the Spousal Support Guidelines. She then subtracted the support actually paid by the respondent to arrive at a figure representing the alleged underpayment by the respondent in each year. Ms. Perry's analysis resulted in the following alleged underpayments:

Year

Child Support

Spousal Support

Total

2014

\$53,928

\$112,572

\$166,500

2015

\$39,408

\$79,776

\$119,184

2016

\$7,356

(\$17,232)

(\$9,876)

2017

\$20,112

\$37,572

\$57,684

2018

\$69,948

\$151,932

\$221,880

2019

\$8,640

\$10,236

\$18,876

Total:

\$574,248

Retroactive Child Support

- [87] D.B.S. remains a leading authority on claims for retroactive child support. In addition to discussing disclosure, as referred to above, Bastarache J. identified four factors that the court should consider when determining whether to make a retroactive award of child support, at para. 133:
- a) whether the recipient parent has supplied a reasonable excuse for the delay in seeking retroactive support;
 - b) the conduct of the payor parent;
 - c) the circumstances of the child; and
 - d) the hardship that a retroactive award might entail.
- [88] Justice Bastarache also established a presumptive three year period for retroactive variation. He considered a number of different dates to which an award should be retroactive to and concluded that it should be the date on which the payee parent gave effective notice to the payor that an adjustment to child support was necessary. Effective notice does not require the payee parent to take any specific legal or formal steps, rather what is required is that the topic be broached with the payor (para. 121). Justice Bastarache then qualified this principle by holding that even where effective notice is given, it will usually be inappropriate to delve too far into the past as to do so would undermine the finality and certainty often sought to be achieved by way of family law court orders. Thus, Bastarache J. held that it will "usually be inappropriate" to make a support award retroactive to a date more than three years before formal notice was given to the payor parent (para. 123).
- [89] The presumptive three years may however be set aside where it is established that the payor engaged in blameworthy conduct. In such cases, it may be appropriate to extend the date of retroactivity back to the date when circumstances changed materially so as to alter the payor's child support obligation (D.B.S. at para. 124).
- [90] The claimant submits that the respondent's failure to disclose his increase in income is blameworthy conduct which justifies retroactive variation of child support back to 2014. Using Mr. Spence's income figures and Ms. Perry's Guidelines calculations, this would result in a retroactive award totalling \$199,392.
- [91] The respondent concedes that he is liable for three years of retroactive child support for the years 2017-2019 based on the three year presumptive period established in D.B.S. This totals \$98,700 again using Mr. Spence and Ms. Perry's figures. He submits that there is no basis to extend a retroactive award beyond three years.

- [92] Applying the D.B.S. factors, the first question is whether the claimant has a reasonable excuse for not bringing her application sooner. On this point, it seems apparent that both parties were satisfied with the status quo, until the respondent brought his application to terminate spousal support in 2020.
- [93] The claimant gave minimal evidence addressing her delay in bringing the application, apart from saying that she did not know about the respondent's increased income. In *Michel, Martin J.* in concurring reasons noted that the failure of a payor parent to disclose actual income is often the root cause of a delayed application (para. 116). Similarly, in *Burchill v. Roberts*, 2013 BCCA 39, the Court of Appeal upheld the chambers judge's finding that it was not unreasonable for the payee spouse to have delayed in bringing an application to retroactively vary child support given that the payee spouse had no idea of the magnitude of the increase in the payor spouse's income (paras. 36 and 42). Here, I accept that the failure of the respondent to disclose his increased income was a significant factor contributing to the claimant's delay in bringing her application.
- [94] In terms of the payor's conduct, the respondent's failure to adjust child support based on his increased income during the years 2014-2019 was a breach of the obligation he owed to the children. This failure, and the corresponding failure to disclose the material change in his income, may be characterized as blameworthy conduct.
- [95] The respondent testified that he believed he was meeting his child support obligations in that he was complying with the terms of the Consent Order. However, as noted in *Michel*, mere compliance with an order may not be sufficient if there is an undisclosed change in circumstances that affects the payor's ability to pay support (para. 117). Here, in a number of years after the Consent Order, the respondent earned income that was at least double (and in 2018 almost triple) the income imputed to him in the Consent Order and upon which child support was based. In the circumstances, it is difficult to accept that the respondent honestly believed that he was fully meeting his child support obligation.
- [96] That said, the facts of this case differ from some others where the conduct of the payor parent was more egregious (for example *Michel, Colucci and Jennens v. Jennens*, 2020 BCCA 59). Here, as noted, the Consent Order did not require annual disclosure, the respondent did not refuse to comply with any requests for disclosure and there is no evidence that he actively concealed his income from the respondent.
- [97] In the circumstances, I would assess the blameworthiness of the respondent as falling in the medium range.
- [98] The third factor concerns the circumstances of the children. There was minimal evidence about the circumstances of the children and no evidence to indicate that they suffered in any meaningful way as a result of the respondent's failure to pay increased child support.

- [199] However, in Burchill, the Court noted that "A presumption of unmet needs, or of relative hardship, is one which can, and should be made where there is a substantial failure to provide Guidelines support over a prolonged period of time" (para. 49). Further, it cannot be sufficient for a payor parent to simply say that the child's needs were adequately met as an excuse for not meeting their support obligation as this would fundamentally undermine the objectives of the Guidelines (Swiderski v. Dussault, 2009 BCCA 461 at para. 42).
- [100] The last factor is hardship to the payor. Again the evidence is relatively scant on this point. On the one hand, there is persuasive evidence that the respondent's business has suffered significantly as a result of the COVID-19 pandemic and the cancellation of the types of large events that the business services. On the other hand, the evidence also establishes that the respondent has considerable assets and that his lifestyle does not appear to have been materially impacted over the past couple of years despite the slowdown in his business.
- [101] In the circumstances, I am not prepared to find that any hardship that the respondent might experience from an order for retroactive child support is sufficient to override his obligation to pay proper support.
- [102] Applying the D.B.S. factors and considering the evidence as a whole, particularly the magnitude of the respondent's undisclosed increase in income in the years 2014-2019, I find that it is appropriate in this case to make an order for retroactive child support covering all six of those years.
- [103] Using Ms. Perry's schedule, I therefore order that the respondent pay retroactive child support in the amount of \$199,392.

Retroactive Variation of Spousal Support

- [104] In Kerr at para. 207, Cromwell J. generally endorsed applying the principles from D.B.S. dealing with retroactive child support to claims for retroactive spousal support, although again keeping in mind the different legal foundation for the two types of support.
- [105] It is important to note that while the Consent Order provided for a review of spousal support after three years, a review contemplates possible changes to support prospectively. A review clause does not assist a party who wishes to retroactively vary support. In order to do that, the applicant must satisfy the test set out in D.B.S. and Kerr. I will return to the principles governing reviews when dealing with the issue of prospective spousal support.
- [106] As discussed, the claimant seeks a retroactive variation for the years 2014-2019. She submits that the respondent had a duty to disclose material increases in income in those years, which he breached. In support of her position, the claimant relies on Colucci, however, Colucci is a case dealing with child support. For the reasons I have discussed above, the law does not support the existence of such a duty, absent a clear term to that effect in a valid order.

- [107] Thus, the claimant's application turns on a consideration of the D.B.S. factors. As noted above, neither party addressed these factors in any detail. Again, the claimant rests her position largely on the respondent's failure to disclose his increased income. For his part, the respondent submits that there is no term in the Consent Order providing that spousal support will vary over time depending upon the parties' respective incomes, nor is there an inherent right for a spouse to share in the former spouse's income as that income may increase after a final order is entered. Such a right would significantly undermine the certainty and finality intended to be achieved by the final order.
- [108] The respondent cited no authority for this position and the claimant relied primarily on cases dealing with child support. The claimant did cite one case, *Jennens*, where the Court of Appeal upheld the decision of the chambers judge (2019 BCSC 180) ordering a retroactive and prospective variation of spousal support based upon the payor's increased income.
- [109] The chambers judge there found that the payor's increased income amounted to a material change of circumstances and, applying the D.B.S. factors, held that a retroactive variation of spousal support was warranted. Of particular significance to the chambers judge was the payor's failure to disclose financial and income information in "flagrant" breach of the parties' final order (para. 34).
- [110] The Court of Appeal found no error in the chambers judge's analysis (*Jennens* (C.A.) at para. 34).
- [111] I agree with the respondent that there is no automatic or inherent right to increased spousal support based on a post-final order increase in a former spouse's income. However, it goes too far to suggest that spousal support should never be increased in those circumstances.
- [112] Rather, as I have indicated, the issue turns on the application of the D.B.S. analysis. The first step in that analysis is to determine whether the increase in the payor's income constitutes a material change in circumstances. This requirement flows from both s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and s. 167 of the FLA. I note that the parties cite both statutes in their respective applications. I also note that both s. 17(4.1) of the Divorce Act and s. 167(2)(a) of the FLA refer to a "change in the condition, means, needs or other circumstances of either spouse".
- [113] The leading decision on variation of spousal support and what constitutes a material change is *L.M.P. v. L.S.*, 2011 SCC 64, where the Court said at paras. 29, 35-36:
- [29] In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1). A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse since the making of the spousal support order.
- [35] In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 2003 CanLII 27673 (ON CA), 66 O.R. (3d) 40 [C.A.], at para. 49). Certain other factors can assist a court in

determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see MacPherson J.A., dissenting in part, in *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385 [C.A.], at paras. 54 and 63).

- [36] The threshold variation question is the same whether or not a spousal support order incorporates an agreement: Has a material change of circumstances occurred since the making of the order? (See Willick; G. (L.); *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920.)
- [114] Here, the claimant submits that the substantial increases in income realized by the respondent in the years following the Consent Order constitute a material change in circumstances. The respondent submits that there is no material change because the parties always knew and contemplated that his income would fluctuate from year to year and the respondent nonetheless agreed to a final order that did not require annual exchange of income information.
- [115] While there is minimal evidence about the respondent's income in the years preceding the Consent Order, I accept that some degree of income fluctuation was contemplated by the parties. This is evident from the nature of the respondent's business which is highly dependent upon outside factors, such as the number of trade shows or conferences scheduled in any given year. However, even allowing for some variation from year to year, I find that the magnitude of the increases in many of the years in the 2014-2019 period, above the \$250,00 figure used for the Consent Order, does constitute a material change of circumstances. Certainly it meets the test of a change in the "means" of the respondent within the meaning of s. 17(4.1) of the Divorce Act and s. 167(2) of the FLA.
- [116] Turning then to the D.B.S. factors, I will not repeat the discussion set out above with respect to child support but will simply note that the analysis is similar here.
- [117] Again, while the claimant provided minimal evidence to explain her delay in bringing her application, I have found that a significant factor contributing to the delay was the fact that the claimant was unaware of the respondent's income. With respect to the second factor, the payor's conduct, the respondent has not established any blameworthy conduct on the part of the respondent as it relates to the spousal support claim. I have discussed above the respondent's non-disclosure of his increased income as that relates to the issue of retroactive child support. To the extent that there is an element of blameworthy conduct in failing to disclose an increase in income for child support purposes, that failure, in my view, cannot be characterized as blameworthy in the spousal support analysis given the different legal foundation for the two types of support and the absence of a mandatory disclosure obligation in the spousal support context.

- [118] The impact on the children is not a factor impacting spousal support so the next consideration is any hardship to the payor. Again the evidence is relatively scant on this point. For the reasons discussed above, I find this factor to be neutral.
- [119] One additional factor that may be considered on an application to retroactively vary spousal support based on post-separation income increases, is the connection between the payee spouse's contribution during the marriage to the payor's subsequent increases in income: *Judd v. Judd*, 2010 BCSC 153 at para. 23.
- [120] As discussed below, it is clear that the claimant contributed to the respondent's career and business during the marriage, which gives rise to a strong compensatory claim for ongoing spousal support. However, the evidence is less clear about her contribution to the increase in the respondent's income beginning in 2014, seven years after the date of separation. There was in fact no evidence to explain how or why the respondent's income increased so dramatically, for example, whether it reflected a progressive expansion of the business or was the result of new contracts and clients generated through the respondent's efforts. In the circumstances, I am unable to find that this factor favours a retroactive variation of spousal support.
- [121] In summary, I find that the claimant has not met the test for an award of retroactive spousal support. Specifically, she has not established blameworthy conduct on the part of the respondent. The absence of an annual income disclosure requirement in the Consent Order supports the view that the order intended to give the parties finality and certainty with respect to spousal support. The fact that the Consent Order did contain a review provision that neither party availed themselves of until 2020, indicates that both parties were content with the status quo in the years leading up to that date.
- [122] The claimant's claim for a retroactive variation of spousal support is therefore dismissed.

Prospective Spousal Support

- [123] The Consent Order again provided for a review effective in or about December 2014. While neither party sought to invoke the review clause until 2020, I am satisfied that the three year time frame set out in the Consent Order was intended to establish the earliest date on which a review could be sought and that the present applications fall within the scope and intent of that clause. Thus, in keeping with the law governing reviews, the issue of spousal support may be considered de novo without the need for either party to establish a material change in circumstances. The Consent Order itself in fact specifically stipulates that no material change is required.
- [124] As the Court of Appeal explained in *Morck v. Morck*, 2013 BCCA 186:

[17] the review is a hearing de novo, and treated as an initial application for support under s. 15.2 of the Divorce Act. This permits the court to adjust support in a manner that takes into account changes that may have been contemplated by the parties at the time the order was made, but were nevertheless uncertain. Because the issues on review are similar to those on an initial application, the Spousal Support Advisory Guidelines may be used for guidance

[125] It is therefore necessary to consider the foundational principles governing spousal support, which are well established. In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at 431, Madam Justice McLachlin (as she then was) discussed the three conceptual grounds for spousal support:

the law recognizes three conceptual grounds for entitlement to spousal support: (1) compensatory; (2) contractual; and (3) non-compensatory. These three bases of support flow from the controlling statutory provisions and the relevant case law, and are more broadly animated by differing philosophies and theories of marriage and marital breakdown.

[Emphasis in original.]

[126] The operation of these conceptual grounds was further explained by our Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success

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

[Emphasis in original.]

- [127] There is no doubt that the claimant had a strong compensatory claim to spousal support at the time the Consent Order was finalized. The evidence establishes that she assumed primary care of the children and management of the household during the marriage, while the respondent worked to develop his business. While the claimant's evidence was somewhat vague on this point, I accept that she also contributed to the business by doing a variety of jobs on an as-needed basis.
- [128] The claim for non-compensatory or needs based support is less compelling given the property and asset division established by the Consent Order under which the claimant received sole title to the former family home, certain other investment properties and an equalization payment of \$739,000.
- [129] In the claimant's most recent F8 financial statement sworn June 22, 2022, she lists assets totalling approximately \$3.8 million as against debts of approximately \$467,000. In his financial statement sworn May 30, 2022, the respondent lists assets totalling approximately \$2.2 million as against debts of approximately \$735,000. I agree with the claimant that the respondent's financial statement likely undervalues his financial position, both because the listed value of a property in Arizona is low and because no value is given to his business interests. Nonetheless, it is apparent from an asset perspective that both parties are relatively well off.
- [130] The question then becomes whether the claimant is entitled to prospective spousal support on compensatory grounds. I find that she is, for three principal reasons:
- a) As I discussed, the evidence establishes that the claimant assumed primary responsibility during the marriage for caring for the children and managing the household. She qualified as a realtor when the parties first lived in Vancouver but gave up her licence to care for the children. She got relicensed in 2006 but it has only been recently that she has begun to pursue a full-time career as a realtor. I am satisfied that her career prospects have been impaired by her commitment to the family, a commitment supported throughout the marriage by the respondent;
 - b) Having found that the date of separation was August 1, 2007, the claimant falls within the "Rule of 65" set out in the SSAG at s. 7.5, in that the years of marriage (23) combined with the claimant's age at the date of separation (43) exceeds 65, thus presumptively entitling her to indefinite spousal support (keeping in mind that the SSAG are advisory only); and
 - c) The claimant voluntarily waived spousal support for two years from April 2020 to April 2022 that she otherwise would have been entitled to.
- [131] The challenge here is less about entitlement and more about quantum given that both parties' incomes are in a state of flux. The respondent's income is particularly difficult to determine and the parties made minimal submissions on the appropriate figure.

- [132] In his financial statement filed June 23, 2022, the only income claimed by the respondent is \$5,035 in workers compensation benefits; this despite claiming annual expenses of over \$191,000. In his 2020 and 2021 income tax returns, he reported annual income of \$83,990 and \$38,946 respectively. The 2021 financial statements for his business indicate a net operating loss.
- [133] The claimant's income is somewhat more straightforward in that in 2021, she reported income for tax purposes of \$50,254. In 2020, her income was substantially higher in that she reported \$112,088. I note that in her financial statement, the claimant used the figure of \$79,950 for spousal support purposes. This is in the range of what her average annual income has been over a number of recent years working as a realtor. In her testimony at trial, the claimant said she was hopeful that she would achieve \$150,000 gross commissions for 2022, which would amount to about \$100,000 in net income.
- [134] If a two year average is used for each party, the claimant's average income for 2020-2021 was \$81,171 and the respondent's was \$61,468. Using that two year period makes some sense in that those years given that circumstances differed dramatically from the pre-COVID years. That said, the 2020-2021 years are not likely an accurate predictor of what the parties' incomes are likely to be going forward, given that the respondent's business is only recently starting to become active again and the claimant is still in the process of establishing herself as a realtor in the Okanagan.
- [135] Given this uncertainty, it is not possible to give the parties the certainty and finality that the respondent was seeking by way of his application. Rather, the parties, and the Court, require updated financial and income information that will enable a proper and reasonable assessment of the respective incomes.
- [136] With this objective in mind, I order that the quantum of spousal support may be reviewed no earlier than September 1, 2023. By that date, the claimant will have her income information for 2022 and the first half of 2023 which will permit a more accurate assessment of her income. Similarly, the respondent will have the complete financial results for his business, for the fiscal year ending July 31, 2022 as well as at least preliminary results for the fiscal year ending July 31, 2023.
- [137] It follows from this that the parties must exchange the requisite financial and income information in advance of any scheduled review. If the respondent has not yet produced copies of the July 31, 2022 financial statements for the business, he shall do so forthwith. Both parties will exchange their 2022 personal income tax returns and notice of assessment by June 30, 2023. The respondent will produce financial results for the business for the year ending July 31, 2023 in advance of any review, even if the information is in preliminary form.

- [138] In the intervening period, recognizing that the claimant has an ongoing entitlement to spousal support and that she voluntarily waived that entitlement for a two year period, I order that the respondent recommence paying support effective November 1, 2022.
- [139] While, for the reasons I have given, it is difficult, if not impossible, to accurately ascertain a current income for the respondent on which to base the ongoing support. However, perhaps the best indicator of the respondent's ability to pay spousal support is the fact that he claims approximately \$191,000 in annual expenses yet does not disclose the means by which he pays for those expenses. In particular, his F8 financial statement does not indicate that he has incurred debt or depleted assets to cover these expenses, which leads to a reasonable inference that he has sufficient income to do so. Some support for imputing income on the basis of a payor's expenses can be found in *Motyka v. Motyka*, 2001 BCCA 18 at paras. 16 and 19. In the circumstances, and for the interim period leading to the further review, I impute income to the respondent of \$191,000.
- [140] For the claimant, I impute income of \$100,000, which is what she anticipates, or at least hopes, to achieve in 2022. Again, these are somewhat "rough and ready" figures that will provide a framework for spousal support pending receipt of more accurate and updated income information.
- [141] Using these figures, results in a range under the SSAG of \$2,616 at the low-end, \$3,052 at the mid-range and \$3,488 at the high-end. Given the interim nature of this order and the uncertainty surrounding the parties' incomes, it is appropriate to use the low-end figure. Accordingly, I order that effective November 1, 2022, the respondent pay spousal support in the amount of \$2,616 per month.

Insurance Policies

- [142] There is one additional issue between the parties relating to two insurance policies. These were purchased prior to the Consent Order as investment vehicles to accumulate money for the benefit of each of the parties' son and eldest daughter. The parties say that these policies were inadvertently omitted from the division of property under the Consent Order. At the time of the trial, the combined cash value of the two policies was approximately \$61,000.
- [143] The claimant submits that the value of the two policies should be held in trust for the three children, to be paid out to them either immediately or at a future date certain. The respondent submits that the policies should be cashed out and the proceeds distributed between the two parties, subject to him being reimbursed the \$14,000 in premiums he has paid since the date of the Consent Order.
- [144] In order to remove this issue as a future point of contention, it makes sense to cash out the policies now. I accept the respondent's position that he should be credited for the premiums he has paid to maintain the policies. While there seems to have been a general intention to grow the policy values for the benefit of the children, there is no formal

agreement in place to this effect. I therefore order that the policy values, net of the \$14,000, be divided equally between the parties. It is of course open to them to agree to use the money for the benefit of the children.

Conclusion

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

- a) The parties' date of separation was August 1, 2007;
- b) The respondent will pay retroactive child support in the amount of \$199,392;
- c) The claimant's claim for retroactive spousal support is dismissed;
- d) Effective November 1, 2022, the respondent will pay spousal support in the amount of \$2,616 per month based on an imputed income to the respondent of \$191,000 and the claimant of \$100,000;
- e) The quantum of spousal support may be reviewed no earlier than September 1, 2023;
- f) The respondent will produce the financial statements for his companies for the year ending July 31, 2022 forthwith and for the year ending July 31, 2023, even if only preliminary, in advance of a scheduled review;
- g) The parties will exchange their 2022 personal income tax returns and notices of assessment by June 30, 2023, and
- h) The parties will cash out the two Manulife Insurance Policies, Numbers 5553692 and 5753607, and will divide the proceeds equally subject to the respondent being reimbursed the \$14,000 in premiums paid since the date of the Consent Order.

[146] Success on the two applications has largely been divided. As such, I am inclined to order that the parties bear their own costs. However, if the parties cannot agree, they may make arrangements to speak to the issue.

"Skolrood J."

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