
CANADA / JUDGMENT

Ross v. Ross

2017 BCSC 371

COURT

Supreme Court of British Columbia

DECIDED

7 March 2017

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2017 BCSC 371 Ross v. Ross

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ross v. Ross,

2017 BCSC 371

Date: 20170307

Docket: E32127

Registry: Nanaimo

Between:

Wendy Lynn Ross

Claimant

And

Scotty Alexander Ross

Respondent

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Claimant:

P. McMurphy

G. Clark

Counsel for Respondent:

W. Murphy-Dyson

Place and Date of Hearing:

Nanaimo, B.C.

January 23-26, 2017

Place and Date of Judgment:

Nanaimo, B.C.

March 7, 2017

Introduction

- [1] The applicant, Wendy Ross, seeks various orders relating to child support obligations owed by her former husband, the respondent, Scotty Ross. She seeks retroactive child support from 2011 to January 2017, and ongoing child support, both based on an income level (\$200,000) that far exceeds Mr. Ross' declared income.
- [2] Ms. Ross also seeks an order for payment of half of any future special and extraordinary expenses. Finally, Ms. Ross also seeks an order that Mr. Ross produce certain documentation and information, said to be still outstanding from a previous court order.

Factual Background

- [3] Mr. Ross, age 54, is a grapple yarder operator working in the logging industry in British Columbia. Ms. Ross, age 53, is a teacher now living in Alberta. They were married in 1994 and separated in December 2000. They have a daughter, born June 24, 1998, who is now 18 years (the "Child").
- [4] The parties were divorced in 2003.
- [5] On March 17, 2003, the parties obtained a divorce and at that time, consented to various corollary relief relating to the Child and the division of their assets (the "Consent Order"). The parties agreed to joint guardianship of the Child, with permanent custody in favour of Ms. Ross. The parties also agreed as to their respective Guideline income: Ms. Ross as to Guideline income of \$60,500; and Mr. Ross as to Guideline income of \$50,000. This resulted in Mr. Ross being obligated to pay child support of \$400 per month plus \$200 for daycare expenses.
- [6] Pursuant to paragraph 4 of the Consent Order, the parties were to exchange income tax returns by no later than May 1 of each year, commencing May 1, 2003, for so long as the Child was a child of the marriage.

- [7] At the time of the divorce, the parties were shareholders of Ross Grapple Yarding Ltd. ("RGY"), a company incorporated in 1994. RGY provided grapple yarding operations in the logging industry, principally through equipment owned by RGY and the services of its employees, including Mr. Ross and his crew.
- [8] Under the terms of the Consent Order, Mr. Ross obtained sole ownership of RGY. Paragraph 5 of the Consent Order provided that Mr. Ross was to provide, by August 1 of each year, commencing August 1, 2003, a complete copy of the corporate income tax return and financial statements of RGY and any other corporation in which he has a controlling interest, for so long as the Child remained a child of the marriage.
- [9] Despite the above provisions in the Consent Order relating to the exchange of financial information, neither party in fact did so until issues arose with respect to child support, at least from Ms. Ross' point of view, in late 2011.
- [10] From the time of the divorce to February 2010, Mr. Ross consistently paid Ms. Ross the sum of \$600 per month, presumably in accordance with the Consent Order. He did so even knowing that at times, Ms. Ross' daycare expenses were less than \$200 per month. It is clear that the Child would not have needed any daycare expenses at some point in that timeframe; however, Mr. Ross felt that he had committed to continue paying \$600 per month to Ms. Ross and he did so.
- [11] In February 2010, the Child began living full time with Mr. Ross. In light of these new arrangements, another consent order was granted on September 17, 2010 (the "2010 Order"). By this time, both parties were self-represented.
- [12] By the terms of the 2010 Order, the parties were granted joint permanent custody of the Child. Her primary residence was to be with Mr. Ross, with generous access to Ms. Ross. Ms. Ross' Guideline income was set at \$65,000 and required her to pay \$600 per month to Mr. Ross commencing May 2010. The parties also agreed that they would equally share "extra expenses" of the Child related to any post-secondary education until the earlier of when such education was completed or she turned age 21. In all other respects, the Consent Order was confirmed.
- [13] These arrangements were agreed to without any exchange of financial information having occurred in accordance with the Consent Order.
- [14] The Child lived with Mr. Ross in British Columbia from February 2010 to August 2011, when she moved back to Ms. Ross' residence in Alberta. In October 2011, Mr. Ross began again to pay Ms. Ross monthly child support of \$600 per month.
- [15] In the fall of 2011, Mr. Ross separated from his common law wife, Deborah Mahoney. Ms. Mahoney continued to live in the family home in Lake Cowichan with their son, born in 2006 and then age five.

- [16] In late 2011, Ms. Ross retained her current counsel and he began to request that Mr. Ross provide financial information which could be used to support another court order to reflect that the Child had returned to Ms. Ross' residence. Counsel requested such information as evidence to be put before the Court "to show the proper level of child support is being paid".
- [17] Commencing January 2012, Mr. Ross unilaterally reduced his child support payments to \$178 per month. In part, Mr. Ross attributes this action to his "emotional" response to being asked for the financial information.
- [18] On May 30, 2012, Ms. Ross indicated by email to Mr. Ross (through Ms. Mahoney) that "[i]t is not that I am not happy with the \$600 per month, but I would be very grateful if I could get a couple of hundred dollars extra a month to cover extra-curricular expenses".
- [19] Later, Ms. Ross did seek a court order to confirm that the Child's had returned to live with her. On November 12, 2013, Justice Baird ordered that the Child's primary residence was to be with Ms. Ross, with generous access to Mr. Ross (the "Baird Order"). Mr. Ross did not attend this hearing. The Baird Order was silent as to the matter of child support, beyond ordering Mr. Ross to produce certain documents and information, which I will discuss in more detail below. All other terms of the Consent Order and the 2010 Order were confirmed to be in effect.
- [20] By the time of the granting of the Baird Order, Ms. Ross had disclosed her 2012 tax return indicating line 150 income of \$92,117. Mr. Ross had also provided some tax information for 2009 and 2010 indicating line 150 income of \$17,607 and \$19,809 respectively.
- [21] Commencing January 2014, Mr. Ross unilaterally increased his child support payments from \$178 per month to \$269.50 per month. As with the previous unilateral decrease in child support payments to Ms. Ross, this change was also made by Mr. Ross without having obtained legal advice such that he misunderstood his obligations.
- [22] Ms. Ross continued to seek disclosure from Mr. Ross following the granting of the Baird Order. Mr. Ross did fax income tax information to her counsel in December 2013. He also forwarded an unsworn Form F8 Financial Statement in October 2014.
- [23] On March 5, 2015, on Ms. Ross' application, Master Caldwell ordered Mr. Ross to deliver a filed copy of his completed Form F8 Financial Statement within seven days after delivery of the entered order. Mr. Ross did swear his Form F8 Financial Statement on March 21, 2015.
- [24] In April 2015, Mr. Ross was examined for discovery by Ms. Ross' counsel. Mr. Ross attended with his former counsel. By agreement of the parties, the entire transcript of that discovery was put into evidence on this application.
- [25] At present, Mr. Ross has an interest in two corporations that are very much a focus on this application:

- a) RGY: Mr. Ross is president and Ms. Mahoney is the secretary. Both are directors. Mr. Ross currently has a 50% ownership interest in RGY, having transferred one-half of his shares to Ms. Mahoney at the end of their common-law relationship in the fall of 2011; and
 - b) Nantree Holdings Ltd. ("Nantree"): Nantree was incorporated in 2006 and operates a liquor store and pub on Vancouver Island. As of September 2014, there were five directors, including Mr. Ross and Ms. Mahoney. Mr. Ross was president and Ms. Mahoney was the secretary. Mr. Ross has a 25% interest in Nantree.
- [26] This application was filed in February 2016 by which Ms. Ross sought various relief, including what remains to be addressed on this application.
- [27] In May 2016, Mr. Ross began again paying \$600 per month to Ms. Ross for child support. In addition, he paid a further \$1,400 to her in June 2016 for retroactive child support.
- [28] In the fall of 2016, the Child began attending the University of Alberta in Edmonton where she currently lives in residence. It is her intention to return to Ms. Ross' home in the summer months.
- [29] The parties agree that \$20,470.58 in child support has been paid by Mr. Ross for the period September 2011 to January 2017. He continues to pay \$600 per month at this time.

Document Production

- [30] In her notice of application, Ms. Ross alleged that Mr. Ross had failed to provide a properly completed Form F8 in accordance with Master Caldwell's order and also, that he failed to disclose documents as ordered by Baird J. in November 2013. She initially sought further orders on this application that Mr. Ross comply with these orders.
- [31] Ms. Ross contended that Mr. Ross' Form F8 was inadequate in various respects. These deficiencies are said to include: failure to advise receipt of the 2015 dividend from RGY; failure to include expenses; failure to provide his 2014 income tax return; failure to provide salaries; and, failure to disclose wages paid by RGY to non-arm length persons, which was said to include Ms. Mahoney. However, during the course of this hearing, allegations concerning Mr. Ross' Form F8 were withdrawn.
- [32] With respect to the Baird Order, Mr. Ross responded to the document disclosure issues in his affidavit #2 sworn May 13, 2016, as follows:
- a) documents regarding his sources of income from 2003 to date, including any income from New Zealand: Mr. Ross states that he has provided his personal income tax returns, notices of assessment and financial documentation regarding RGY and Nantree, as requested. The evidence supports that he began responding to the requests shortly after they began in 2011. Indeed, the documents have all been provided for some time now but for his 2014 personal income tax return which was provided to his current lawyer but inadvertently not forwarded to Ms. Ross' counsel until very recently. In any event, Mr. Ross' affidavit set out his line 150

income for that 2014 return;

- b) documents regarding property legally owned by him: Mr. Ross states that his Form F8 Financial Statement disclosed his assets and certain documents attached confirm his interests in RGY, Nantree, his 50% interest in his Lake Cowichan home and a life insurance policy;
- c) documents relating to property in which he has a beneficial interest: Mr. Ross advises that no such interests exist; and
- d) documents relating to RRSPs: Mr. Ross advises that he has none, since his RRSP's of \$93,000 were cashed in earlier in 2008, when his line 150 income had been reduced to \$1,100 in 2007 and \$14,791 in 2008. His March 2015 Form F8 again confirmed that he had no RRSPs at that time.

[33] In my view, there is no basis upon which I can find that Mr. Ross has failed to comply with the Baird Order. As Mr. Ross indicates, he normally works at various remote logging camps around the province and he has clearly struggled, often without counsel, to respond to these various information and documentation requests. In addition, I consider that Mr. Ross is not a very sophisticated person and it is clear to me that he has not fully understood some of the more technical disclosure issues that arose, particularly regarding RGY. This included an initial disclosure of RGY's financial statements which were, to some degree, redacted by RGY's counsel. This matter was, however, remedied when Mr. Ross' current counsel was retained in June 2015; later in May 2016, fully unredacted copies of RGY's financial statements were provided for the fiscal years 2011-2015.

[34] When Mr. Ross did retain counsel in 2015, he did comply, again as best he could. In addition, disclosure has continued as Mr. Ross has received documentation, such as the financial statements of the corporations as and when they were prepared by the accountants. His affidavit #2 sworn in May 2016 after this application was filed also answers many of the questions raised by Ms. Ross.

[35] I accept that, although there has been somewhat imperfect disclosure and some delay, Mr. Ross has provided such documents as were available to him and that he has made best efforts to provide the requested information and documentation. This has substantially been the case since over a year ago when Ms. Ross filed her application. In my view, it is entirely inexplicable to me why she alleged that Mr. Ross had not complied with the Baird Order as of February 2016; it is equally surprising that she continues to advance many of these allegations at this time.

[36] I also reject Ms. Ross' contention that Mr. Ross has been untruthful in respect of his income, by "hiding" the substantial increase in his line 150 income for 2015 when a dividend was received from RGY. In my view, Mr. Ross pays little attention to such financial matters. I accept that when he was examined in April 2015, he did not know of this substantial increase and that it was only when he received his 2015 personal income tax return that it

came to his attention. After receipt of that document and other financial documentation relating to RGY and Nantree in the spring of 2016, his counsel forwarded that to Ms. Ross' counsel as soon as possible.

- [37] On a final note, I find it hypocritical in the extreme that Ms. Ross would make these allegations in her notice of application, including seeking a penalty and a finding of contempt against Mr. Ross, when she herself has either delayed or failed in her own disclosure obligations under the Consent Order, the Supreme Court Family Rules and the Guidelines. In May 2015, Mr. Ross' former counsel asked that she provide her income tax returns from 2009-2011 and 2013-2014 (she provided her 2012 tax return in her evidence in support of the Baird Order). When this application was filed in February 2016, Ms. Ross had failed to provide any of these tax returns. It was only on the eve of this application being heard that Ms. Ross swore her own Form F8 on January 12, 2017, although that document attached her income tax returns for 2013-2015 only. She remains in default of providing any income tax information from 2009 to 2011, despite the Consent Order which requires her to do so and ongoing requests by Mr. Ross and his counsel.
- [38] In the above circumstances, I decline to grant any further order against Mr. Ross in respect of document production.

Retroactive Child Support

- [39] Ms. Ross is seeking a variation of child support under the Consent Order, as amended by the 2010 Order, pursuant to the Divorce Act, s. 17. She asserts that there has been a material change in circumstances, as of September 2011, arising from the Child's move back to Ms. Ross' home in Alberta and the assertion that Mr. Ross' income is substantially higher than what he had disclosed to Ms. Ross.
- [40] She seeks an order imputing income of \$200,000 per year to Mr. Ross from 2011 to January 2017, principally arising from his interests in RGY and Nantree. She seeks an order for payment by Mr. Ross of retroactive child support in the amount of \$89,574.42 over that period of time.
- (1) Mr. Ross' Income
- [41] As stated above, RGY provides grapple yarder services to the logging industry. Its main assets (and value) include various contracting equipment (ie. grapple yarder machines) and motor vehicles. Mr. Ross provides his services as a grapple yarder operator through RGY. He is often away from his home in Lake Cowichan while working with his crew on various jobs around the province.
- [42] Mr. Ross' contribution to RGY is largely his services in being a grapple yarder operator and supervising his crew on the various jobs. In turn, Ms. Mahoney, the other equal shareholder of RGY, handles all the office, financial and accounting matters, including working with the accountants to prepare the financial statements.

- [43] Mr. Ross states that from 1994, and certainly from 2011, his only source of income has been arising from his work through RGY. For the most part, all of the "management salaries" indicated on the financial statements are allocated to Mr. Ross.
- [44] Mr. Ross' evidence is that he draws money from time to time from RGY to pay his various expenses, both related to his work and for himself personally. He uses his own personal VISA card to pay for various expenses. Consistent with my conclusions as to Mr. Ross' level of sophistication, this happens on a very informal basis. His VISA statement is paid by RGY and the accountant later sorts out the expenses, in part by allocating corporate expenses to RGY, and accounting for Mr. Ross' personal expenses.
- [45] Accordingly, Mr. Ross' uncontradicted evidence, which I accept, is that the financial statements of RGY, together with his personal income taxes, fully disclose his income from RGY. These financial statements also disclose other "management salaries" which were paid to Ms. Mahoney from time to time.
- [46] Mr. Ross has provided his income tax returns from 2002. His income tax returns from 2003 to 2010 indicate some extremes in his income levels; 2002-\$35,000; 2003-\$64,002; 2004-\$41,877; 2005-\$60,944; 2006-\$35,016; 2007-\$1,100; 2008-\$107,791 (including \$93,000 from RRSPs); 2009-\$17,607; 2010-\$19,809.
- [47] There are two matters of note regarding this disclosure. Firstly, it is not in evidence as to when the Child was no longer in daycare, such that Mr. Ross' \$600 monthly payment was truly just for regular child support. Even taking a conservative estimate that the Child no longer needed daycare after age six (in 2004), this would have resulted in Mr. Ross overpaying the Guideline amount based on his line 150 incomes over these years. More on this overpayment later. Secondly, Mr. Ross' evidence confirms what has been well-known in British Columbia for years; namely that the logging industry has been on its heels from time to time over the last few years, if not the last decade. He confirms that his income is determined by RGY's accountants based on what is left over after payment of corporate expenses. Mr. Ross states that RGY has just barely survived over these years as the fortunes of the logging industry have gone up and down.
- [48] From 2011-2015, Mr. Ross' line 150 incomes have been more consistent. Those income levels are as follows:

Year

Line 150 Income

Notes

2011

\$34,500

2012

\$35,000

2013

\$35,000

2014

\$36,800

2015

\$95,385

Includes T4 income of \$3,744. Reported dividend amount of \$91,641 arose from actual receipt before CRA gross up

2016

Unknown - income tax not yet filed

[49] After the Child returned to live with Ms. Ross in late 2011, beginning in October 2011, Mr. Ross continued to make support payments of \$600 per month to the end of 2011. He then paid the monthly sum of \$178.17 from January 2012 to December 2013 and the sum of \$269.50 from January 2014 to April 2016. He now agrees that he should have paid the \$600 monthly figure. Mr. Ross began paying this amount in May 2016 and has continued to do so to this time, in addition to paying a further \$1,400 in June 2016.

[50] Again, the parties agree that \$20,422.08 has been paid by Mr. Ross for the period October 2011 to January 2017.

[51] Based on a \$600 per month calculation over the entire period, this would result in arrears of \$18,530 owing by Mr. Ross from September 2011 to January 2017.

(2) The Agreement Issue

[52] The next issue to be addressed is Mr. Ross' contention that no review need to be made of any past and future child support issues (including reviewing financial disclosure) in light of what he describes as the agreement of the parties that he pay \$600 per month for regular child support regardless of any fluctuations in the parties incomes.

[53] Mr. Ross contends that, in fact, Ms. Ross' failure to provide her own income tax information (or demand his at least before 2011) is consistent with his position that the parties agreed that the monthly amount would be \$600 per month payable by Mr. Ross without any regard to what the income tax returns might disclose.

- [54] Mr. Ross argues that the evidence supports that such an agreement was in place since he began, in 2003, paying Ms. Ross the monthly sum of \$600 without regard to any daycare costs, as per the Consent Order. I accept that the Child has not needed daycare for some years now; nevertheless, Mr. Ross continued to pay \$600 to Ms. Ross to January 2010 (when the Child moved in with him).
- [55] Mr. Ross' evidence is that this is also exactly what happened between the parties when the 2010 Order was granted, as I discussed above. By his affidavit sworn July 14, 2010, Mr. Ross gave his rationale for agreeing to these arrangements which led to the 2010 Order:
5. I am aware that the Plaintiff is employed in Alberta as a teacher in the Public School system, and earns approximately \$65,000. I am satisfied with that figure, for guideline purposes, as that will result in a maintenance payment by the Plaintiff, to me, of \$600 per month. The Plaintiff has agreed to make that payment, commencing May 1st, 2010.
 6. I am a businessman, with fluctuating income, and for the purposes of this Affidavit I agree that my income can be imputed to be the same as the income of the Plaintiff, or \$65,000 per annum.
- [56] I agree that the equal sharing of certain post-secondary expenses of the Child under the 2010 Order does support that the parties generally considered their incomes to be equal.
- [57] As stated above, there was no exchange of financial information by either party in accordance with the Consent Order until 2011 when Ms. Ross' counsel requested that Mr. Ross provide documentation. His immediate response was to assert this agreement; in the alternative, he stated that if Ms. Ross wished to depart from the agreement, she should equally disclose her financial information from 2003. She refused to do so and has only partly complied by disclosure of her 2012 income tax return in November 2013 and the filing of her very recent Form F8 sworn January 12, 2017 which discloses financial information from 2013-2015. Mr. Ross asks that I draw an adverse inference against Ms. Ross that in fact such an agreement exists arising from her failure to provide this requested or ordered documentation.
- [58] Mr. Ross refers to s. 15(2) of the Guidelines, which reads:

Agreement

15(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

- [59] I am unable to find that there is any written agreement between the parties as to the annual income of Mr. Ross for child support purposes.

- [60] There is no document that would support such an agreement, save for the Consent Order from 2003 which is clearly out of date now. In addition, the requirement that financial documentation be exchanged each year would suggest that the parties at least initially anticipated an annual review and adjustment, if necessary, of child support. The 2010 Order only addressed the Guideline income of Ms. Ross and then only for so long as the Child lived with Mr. Ross. In addition, Mr. Ross' own unilateral reduction of the child support being paid from January 2012 to April 2016, based on his financial circumstances then and his "emotional" reaction, suggests that the agreement was not as solid as he now suggests.
- [61] I consider that the parties did generally conduct themselves to maintain the status quo in terms of the payment of child support in the amount of \$600, whether by Mr. or Ms. Ross. This conduct, however, does not support that there was any agreement, even orally, in place between the parties. I note that even if there had been an agreement which did accord with s. 15(2), the court is not foreclosed from considering what is reasonable in the circumstances.
- (3) Imputing Income
- [62] Ms. Ross seeks to impute income to Mr. Ross in the amount of \$200,000 per annum, which would result in both retroactive support and ongoing support payments of \$1,693 per month.
- [63] Ms. Ross contends on this application that there are circumstances that support imputing income to Mr. Ross under s. 19 and 23 of the Guidelines. Specifically, she alleges that: under s. 19(d), income had been diverted by Mr. Ross; under s. 19(e), Mr. Ross' property was not reasonably being utilized to generate income; and under s. 23, Mr. Ross had failed to provide income information as he was required to do so.
- [64] The difficulty is that Ms. Ross utterly failed to produce any evidence that would support any of these arguments. In addition, I have found that Mr. Ross did substantially comply with his disclosure obligations under the Guidelines.
- [65] The other major plank of Ms. Ross' argument rests on the proposition that the reported pre-tax income and other expenses of RGY and Nantree should be added to Mr. Ross' income from 2011 to this time for the purpose of calculating child support. The Guidelines provide:

Shareholder, director or officer

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[Emphasis added].

- [66] As previous court decisions indicate, the purpose behind s. 18 of the Guidelines is to "lift the corporate veil" to ensure that the money received by the paying parent fairly reflects the money available for the payment of child support: *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.) at para. 28; *Kowalewich v. Kowalewich*, 2001 BCCA 450 at paras. 43.
- [67] In order to assess the applicability and appropriate analysis under s. 18, the onus is on the shareholder spouse to provide the necessary evidence regarding the finances of the corporation: *Hausmann v. Klukas*, 2009 BCCA 32; *Chapman v. Summer*, 2010 BCCA 237 at para. 16.
- [68] The first issue is whether Mr. Ross' annual income as determined under s. 16 (ie. his line 150 income) fairly reflects all the money available to him for the payment of child support: for example, see: *Kowalewich* at para. 46. In my view, this has not been shown here.
- [69] As I discussed above, the uncontradicted evidence is that RGY operates such that after payment of corporate expenses and maintenance of modest cash reserves for working capital, any further amounts left over are paid to Mr. Ross and Ms. Mahoney for their services to RGY.
- [70] The financial statements of RGY are in evidence for the fiscal year ends of January 2010 to January 2015. No financial statements have yet been prepared for the fiscal year ending January 2016. The financial statements disclose the following information:

Year Ended

Gross Revenues

Net Income (Loss)

Management Salaries

Amortization

Notes

2010

\$354,680

(\$235,450)

\$161,382

2011

\$1,306,196

\$80,434

\$195,393

(1) Income excludes gain on disposal of asset of \$80,000 (2) Gain used to offset deficit/loss from 2010

2012

\$2,008,733

\$464,426

\$34,500

\$49,069

Gain used to offset remaining deficit/loss from 2010

2013

\$2,196,029

(\$144,249)

\$70,000

\$684,714

2014

\$2,377,661

(\$148,346)

\$36,800

\$507,345

2015

\$1,634,436

\$138,760

\$7,000

\$299,809

Income excludes gain on disposal of asset of \$733,515

- [71] As argued by Mr. Ross, taking a five year average of RGY's income from 2010-2014 results in net pre-tax income of \$16,815, or \$3,363 per year of net income (excluding a gain in 2011 on a certain asset). These modest recoveries over the years are substantially consistent with the modest employment income amounts reporting by Mr. Ross over that period on his personal income tax returns. In my view, they are indicative of the fact that at least half of RGY's available income is fairly reflected in Mr. Ross' income tax returns such that there is no requirement to even look at the pre-tax income of RGY, in accordance with s. 18 of the Guidelines.
- [72] This is also borne out by what happened when more cash became available in 2011 and 2015 arising from the sale of equipment. In 2011, the extra cash of \$80,000 was applied to cover operating losses from the previous year. In 2011, Mr. Ross only drew the modest amount of \$34,500 from RGY, as reported on his income tax return. Similarly, in 2015, there was a large gain (net \$722,684) on disposal of some equipment. This gain was used to cover a loss from operations of \$583,924. The remainder of the money was used to fund a dividend of \$155,325 to the shareholders. This resulted in Mr. Ross receiving a dividend of approximately \$77,600 which, after the CRA 18% gross up, resulted in taxable dividends of \$91,641, in addition to employment income from RGY of \$3,744, for a total line 150 of \$95,385 for Mr. Ross in 2015. Accordingly, his actual Guideline income for 2015 before any dividend gross up was \$81,344: *Lightle v. Kotar*, 2014 BCCA 69 at para. 60, leave to appeal to the SCC refused (35841, September 25, 2014).
- [73] Simply put, I do not consider this a situation where Mr. Ross is hoarding income or hiding personal benefits in RGY in an effort to deny available income for child support purposes. I accept that there is no requirement to find that Mr. Ross is intentionally avoiding his child support obligations in order to reach the opinion that his income is not fairly reflected in his personal income tax returns: *Kowalewich* at para. 40. Nevertheless, on a plain consideration of RGY's income and Mr. Ross' personal income over the last five years, there is every indication that Mr. Ross is personally benefiting from RGY's income to the extent possible, while still maintaining the financial health of RGY, and that he is fairly reporting that income on his personal income taxes.

- [74] Even if I had formed a contrary opinion, namely that a closer review of RGY's pre-tax income over the last five years was necessary, that would not have led me to any different conclusion. In *Kowalewich*, the court discussed different approaches in terms of considering the alternatives posed by s. 18:
- [48] In some cases, the nature of the spouse's relationship with the corporation will be decisive. Section 18 applies to a spouse who wholly controls a corporation, but it also applies to one who shares ownership and control with others. In the former case, the corporate income method is likely to be the fairer method of determining income. This is because it allows a court to include not only reasonable payment for personal services but also a reasonable return on the owner's entrepreneurial capacity and investment. These are sources of income available for child support an intact family would utilize. Moreover, it not only permits but requires the inclusion of the income of companies related within the meaning of the Income Tax Act, and of non-arms length payments made without value for the company.
- [75] Contrary to Ms. Ross' assertions, I am not convinced that Mr. Ross "controls" RGY to the extent suggested by Ms. Ross and in particular, in terms of controlling RGY's income. He is a 50% shareholder, as is Ms. Mahoney. Ms. Mahoney is the person who controls the financial matters of RGY. In that circumstance, both must agree before Mr. Ross could take any corporate steps, obtain information and documentation or even declare dividends or take draws from RGY's account.
- [76] I accept and find that Ms. Mahoney is at arm's length to Mr. Ross since the uncontradicted evidence is that they separated in 2011 and remain simply as business partners. In that event, a natural choice would not necessarily be to look simply at pre-tax income of RGY, but look at what amount is commensurate with the services provided by Mr. Ross to RGY. In my view, the amounts reflected on Mr. Ross' personal income tax returns are indicative of his services to RGY, which have been substantially consistent since 2011 after the lean years of 2007-2010.
- [77] Further, as Mr. Ross' counsel's analysis shows, when one approaches RGY's pre-tax income by averaging it over the years 2010-2014, that average income of \$3,363 is very modest, particularly given that Mr. Ross would notionally only be entitled to 50% of that amount. In my view, such an averaging is entirely appropriate in this case given the fluctuating fortunes of RGY in tandem with the logging industry as a whole: *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 66-67.
- [78] In addition, one approach suggested by Ms. Ross (per Chapman) was that RGY's income should only be considered in the "profit" years, while ignoring losses in other years. In my view, such an approach defies the underlying concept of fairness that informs the approach of the Court under the Guidelines.

- [79] Another issue raised by Ms. Ross relating to RGY is her contention that rental amounts paid by RGY to house the crew (which includes Mr. Ross) should be added back into his income. The only reported rental line item in the financial statements was a \$12,483 expense in 2012, although there were also "travel" and "utilities" line items in those statements over the years.
- [80] Mr. Ross' evidence is that after he separated from Ms. Mahoney in late 2011, he lived in various residences in Squamish, Lillooet and Port Alberni, in addition to working in various logging camps. He describes all of these residences as crew quarters for him and the other men working on RGY's various logging operations. There is some evidence that the Port Alberni rental property was obtained in 2013 for \$1,200 per month. For all these locations, RGY paid the rental and utilities for these accommodations.
- [81] Since 2006, Mr. Ross and Ms. Mahoney have owned their residence on Nantree Road in Lake Cowichan, B.C. where they both lived with their son. It appears that Mr. Ross left Ms. Mahoney and their son in that home after their separation. Nevertheless, he still described this residence as his "home base" and he continued to support Ms. Mahoney and their son in that home. I would note that there is a mortgage registered against that home, which would have required servicing and therefore expense even after the separation.
- [82] From the fall of 2011 until approximately May 2015, Mr. Ross was living in the crew quarters. In May 2015, Ms. Mahoney and their son moved from their Lake Cowichan home and Mr. Ross returned to live in the family home.
- [83] From this set of facts, Ms. Ross asserts that Mr. Ross has benefitted from January 2012 to May 2015 to the extent of the rental amounts paid by RGY, which is assumed to be \$1,200 per month over that time frame. She claims that therefore, this amount should be added back to Mr. Ross' income figures for child support purposes, citing *Nielsen v. Nielson*, 2007 BCCA 604 at para. 40. In *Nielsen*, the court discussed various circumstances where such imputation may be appropriate under the Guidelines. Ms. Ross relied on the example where the free housing was part of the employee's remuneration.
- [84] I fail to see how this example in *Nielsen* supports any allocation of such rental expenses to Mr. Ross. The payment of these rental expenses by RGY is no different than an employer paying for out-of-town expenses when its employees travel away from their home to work. No doubt this explains the "travel" expenses over the years, in addition to the specific "rental" expense in 2012. In that event, such rental cost can hardly be described as part of Mr. Ross' remuneration from RGY. As already stated, Mr. Ross would no doubt have continued to have expenses relating to his Lake Cowichan home even when he was living in these temporary accommodations.
- [85] In addition, it defies fairness that Mr. Ross would be assigned the entire cost of such rental accommodation when he was only one of many in his crew who were living at these various locations while attending to RGY's logging contract work.
- [86] I decline to ascribe any part of this rental expense for accommodation to Mr. Ross' income.

- [87] Ms. Ross also contends that Nantree's pre-tax income should be added to Mr. Ross' income. The financial statements indicate the following amounts for pre-tax income (loss) from 2011: 2011 - (\$4,944); 2012 - \$29,389; 2013 - \$44,315; 2014 - \$72,214. No financial statements have yet been produced for Nantree for the fiscal years ending September 2015 and September 2016. As a minority shareholder in Nantree, I find that Mr. Ross has little control, if any, as to when such statements are prepared.
- [88] The latest statement of Nantree for 2014, along with the latest financial statement of RGY (for 2015) and his personal tax return for 2015 were forwarded by Mr. Ross as soon as he received them in May 2016. Again, this is consistent with Mr. Ross complying with his disclosure obligations to Ms. Ross in terms of forwarding documentation as soon as he is in receipt of it.
- [89] Returning to Nantree's pre-tax income, the uncontroverted evidence of Mr. Ross at his examination for discovery in April 2015 is that the payments to the shareholders are restricted by Nantree's lender, Royal Bank of Canada. The terms of the financing are such that no dividends are allowed to be paid to the shareholders (which of course include Mr. Ross) and he is not allowed to draw any salary as president.
- [90] Accordingly, in my view, Mr. Ross' personal income tax returns fairly reflect that he receives no monies from Nantree such that there is no basis upon which to apply s. 18 of the Guidelines.
- [91] The final corporate issue raised by Ms. Ross is her contention that the amortization expenses set out in RGY and Nantree's financial statements should be allocated as part of Mr. Ross' income, in the proportion to his shareholdings in those companies. The gross amortization figures are as follows:

Year

RGY

Nantree

2011

\$195,393

\$57,101

2012

\$49,069

\$51,396

2013

\$684,714

\$46,457

2014

\$507,345

\$40,339

2015

\$299,809

- [92] Amortization can be a complex issue to consider in the context of child support payable by a shareholder spouse. Justice Armstrong described the issue in *S.C. v. D.A.*, 2012 BCSC 1061, as follows:
- [77] Amortization expenses are those amounts properly deducted from taxable income to reflect the diminution in value of the capital asset during the course of the taxpayer's business in any given year. Amortization expenses relating to real estate are added into income for Guideline purposes due to the expectation that real estate is not regularly replaced and may not depreciate over many tax years. The expenses on less permanent capital assets are not added back into income when there is evidence that they more realistically reflect a business's needs to replace those assets on an ongoing basis.
- [78] In this case, D.A. is the sole shareholder and employee of FHCS. The full amount of amortization expenses may not be appropriate deductions from his income for Guideline purposes. Like the recording of retained earnings necessary for future company needs, it can give a distorted view of the actual income available, and some expenses may be charged against the company income when the benefit from those expenses accrues to D.A. personally.
- [93] Accordingly, the issue often needs to be addressed by the evidence of stakeholders in the corporation (such as Ms. Mahoney or Mr. Ross in *RGY* and Mr. Ross and the other shareholders in *Nantree*) and possibly accountants who act for these corporations, all toward the issue as to what amount of amortization is reasonably required to meet the businesses' need to replace capital assets.
- [94] The facts in *J.T. v. K.C.*, 2011 BCSC 1723 were similar to those relating to *RGY* here in that a company contracted out heavy equipment and the shareholder spouse owned only 50% of the shares. The Court discusses the issue at paras. 15-18 and commented that expert evidence would be required to prove that the rates allowed by CRA were unrealistic in reflecting the decreased value of the equipment over time. The Court rejected the wife's argument that this expense artificially understated the company's annual income. The approach in *J.T.* accords with the Court of Appeal's caution that the court is not required to second-guess valid business decisions made by a company in its operations and financial affairs: *Kowalewich* at paras. 44.

- [95] I have already described that RGY's principal assets and value over the years has been heavy contracting equipment used in its grapple yarding operations. There are also motor vehicles. Nantree's amortization cost relates to its buildings, equipment, computers, furniture and fixtures.
- [96] The difficulty in addressing this issue is that beyond the amounts indicated by RGY and Nantree in their respective financial statements as to amortization costs, Mr. Ross has not adduced any evidence on the issue, including the amortization rates used, nor any other matter, such as what amount of amortization is reasonably required to meet the respective businesses' need to replace their capital assets.
- [97] The reason why that is so lies at the feet of Ms. Ross herself.
- [98] No questions were put by Ms. Ross' counsel to Mr. Ross on the amortization issue at his examination for discovery in April 2015. Further and most importantly, in Ms. Ross' notice of application filed in February 2016, when she had most of the corporate financial statements in hand, there is absolutely no mention that she was seeking to add back the amortization expense to Mr. Ross' income, beyond a general reference in the "Legal Basis" that she was relying on s. 18 of the Guidelines.
- [99] The first indication to Mr. Ross that this relief was sought was while reading the written argument handed out by Ms. Ross' counsel on the first day of this hearing. At that time, it also became apparent that Ms. Ross was relying on *Boykiw v. Boykiw*, 2013 BCSC 1107 at paras. 36 and 44 in support of this argument, a case that was not included in the extensive case list found in the notice of application. Even so, the Court in *Boykiw*, following *D.P.G. v. M.A.G.*, 2011 BCSC 290, seems to have simply accepted the adding back of amortization without any extensive analysis of the evidence (if any) on the issue. Other case authorities were not considered in *Boykiw*, including *S.C., J.T.* and even earlier cases, such as *Barker v. Barker*, 2002 BCCA 345 at para. 71, *L.M.W. v. M.J.L.Y.*, 2004 BCSC 113 at para. 16, *Boulton v. Beirne*, 2008 BCSC 577 at para. 24 and *B.M.D. v. C.N.D.*, 2010 BCSC 1785 at paras. 151 and 167-172.
- [100] When coupled with the assertion that the onus was on Mr. Ross to satisfy the court on these corporate expenses (per Hausmann), I find Ms. Ross' submissions on this issue to be unfair in the extreme. In my view, Mr. Ross has clearly been ambushed on this issue. He has had no forewarning that this issue was to be addressed at this hearing, which would have allowed him the opportunity to marshal the necessary evidence.
- [101] In all of the above circumstances, I decline to ascribe any part of either RGY or Nantree's amortization expense to Mr. Ross' income.
- [102] Ms. Ross also argues that there is other circumstantial evidence to support that Mr. Ross is building substantial equity in RGY and Nantree through the retention of income amounts that should be allocated to his personal income for child support. She points to his Form F8 Financial Statement which references the value of his corporate interests at \$1 million for

RGY and \$200,000 for Nantree. It is not clear where Mr. Ross obtained these values. I suspect that it was simply his best attempt to roughly estimate the values, albeit with limited success.

- [103] With respect to RGY, Ms. Ross argues that the company increased its asset values by \$1.2 million between 2010 and 2015. However, that increase largely arose from an asset re-evaluation in 2012 of approximately \$1.1 million which increased the adjusted cost bases to current fair market value. By January 2015, RGY reported retained earnings of approximately \$1.13 million. In addition, in April 2015, RGY purchased a property in the East Kootenay assessed at \$857,000, where Ms. Mahoney and their son now live. Ms. Ross suggests that this shows that RGY has substantial resources in the company. However, although no charges or encumbrances are indicated on title, Mr. Ross says, and other evidence supports, that the entire purchase price was obtained through funding from Canadian Western Bank and is secured by a general security agreement against certain assets of RGY.
- [104] Similarly, Nantree's retained earnings have only grown modestly over the years, rising from \$12,057 in 2010 to \$144,451 in 2014.
- [105] Neither RGY or Nantree report substantial amounts of cash on hand from year to year and, from what I can glean, the cash is modest given the level of operations in each company and need for some liquid working capital, let alone the "rainy day fund" mentioned in Boykiw at para. 51 which even Ms. Ross suggested might be appropriate.
- [106] In conclusion, there is no circumstantial evidence that would support that income is being retained in either company to the detriment of Ms. Ross and the Child by lessening Mr. Ross' reported income for child support purposes.
- (4) Conclusions re Retroactive Child Support
- [107] What I propose to do is revisit the matter of child support back to 2010.
- [108] I am not in a position to recalculate child support from 2003-January 2010 because the evidence is not available in order to do so. I would note that Mr. Ross does not even seriously suggest that such an exercise be undertaken, consistent with his assertion that he is content with having paid \$600 per month over that period despite the general suggestion from the evidence that he has overpaid child support. Based on a purely Guideline calculation, Mr. Ross calculates that he has overpaid child support over that time by approximately \$23,000, subject to deduction based on what actual daycare expenses were incurred for the Child.

- [109] This approach accords with the "new" position advanced by Ms. Ross in 2011 to require strict compliance with financial reporting and payment in accordance with the Guidelines. It also recognizes the change in circumstances relating to the Child by reason of her moving back to Alberta to live with her mother in September 2011: see the Divorce Act, s. 17(4) and the Guidelines, s. 14(b).
- [110] In addition, as a matter of fairness, any consideration of child support obligations owed by Mr. Ross must also consider the clear evidence that Ms. Ross herself has not complied with the 2010 Order in terms of paying support for the Child from May-August 2010. I accept Mr. Ross' argument that it would be unfair for Ms. Ross to unilaterally choose when to "reset the clock" when the evidence on this application amply demonstrates that such amounts are owed by her and she has offered no evidence to suggest any reason why she did not do so.
- [111] The circumstances in which retroactive child support may be awarded were addressed in *D.B.S. v. S.R.G.*, 2006 SCC 37. The Supreme Court of Canada directed trial judges to adopt a broad and holistic approach in the application of four factors, summarized at para. 133, none of which are determinative on their own:
- a) Is there a reasonable excuse for why support was not sought earlier?
 - b) Was there any blameworthy conduct on the part of the payor parent?
 - c) Is a retroactive award appropriate in light of the child's past and present circumstances?
 - d) Will a retroactive award cause hardship to the payor parent or to his or her other children?
- [112] In my view, all of these factors support that retroactive child support should be paid by Mr. Ross. Based on a purely Guideline calculation, Mr. Ross calculates that he has overpaid child support by \$23,334 from 2003-January 2010 (subject to deduction for the period when daycare was needed) and underpaid for the period September 2011-January 2017 by approximately \$11,700, leaving a net overpayment of \$11,642.
- [113] Nevertheless, even though his Guideline incomes from September 2011-January 2017 are in lesser amounts, as set out above, Mr. Ross says that he agreed to pay \$600 per month over all these years, which generally accords with a Guideline income of \$65,000. This accounts for the fluctuations in his income over the years, including smoothing out the increase in his 2015 income, which arose from a non-recurring event (ie. sale of equipment).
- [114] Accordingly, Mr. Ross' Guideline income is set at \$65,000 for the years 2011-2016 which gives rise to a \$600 per month child support obligation. This results in \$18,530 being owed for child support arrears to January 2017. In addition, the evidence supports that Ms. Ross did not pay him child support of \$600 per month in accordance with the 2010 Order for the months of May-August 2010 when the Child was in Mr. Ross' care, resulting in \$2,400 being owed by her. It is appropriate that such a deduction be made, notwithstanding Ms. Ross' argument that it would not benefit the Child, but where other D.B.S. factors support such an adjustment: *Swiderski v. Dussault*, 2008 BCSC 1629 at para. 93.

[115] The net result is that Mr. Ross will pay Ms. Ross retroactive child support of \$16,130. This amount will be paid to Ms. Ross within 30 days of this judgment, which Mr. Ross says that he is able to do.

Ongoing Child Support

[116] For the purposes of 2016, Mr. Ross' Guideline income is set at \$65,000, which results in a \$600 per month child support obligation.

[117] In June 2017, the Child will be 19 years old. True to his commitment to continue to support the Child as before, Mr. Ross has indicated his agreement to continue making the \$600 per month payments until the Child completes her post-secondary education or the Child reaches the age of 21.

[118] I expect that the parties will now commence regularly exchanging their respective financial information and documentation in accordance with the Consent Order, including the 2016 documentation by May 1, 2017. Accordingly, I make no order concerning Mr. Ross' or Ms. Ross' Guideline income for 2017, which will be based on their disclosed income from 2016. Pending any such review of the documentation and any future adjustments in court orders, Mr. Ross will continue to be obligated to pay Ms. Ross the monthly regular child support of \$600 in accordance with the Consent Order and the other orders granted in this proceeding.

Special and Extraordinary Expenses

[119] Section 7 of the Guidelines set out the categories of expenses that are to be considered special or extraordinary expenses, which are intended to be paid beyond regular child support:

Special or extraordinary expenses

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

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

Definition of "extraordinary expenses"

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

[120] In deciding whether an expense, or the totality of expenses claimed on behalf of a child under s. 7 are extraordinary, the court should take into consideration the combined income of the parties, as well as the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the children and the overall cost of the activities: *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39 at para. 81 (B.C.C.A.).

[121] As I indicated above, Mr. Ross initially paid \$200 per month in accordance with the Consent Order for daycare expenses. Nevertheless, he was aware that at times, Ms. Ross' actual daycare expenses were actually below \$200. In addition, it can be reasonably assumed that at some point, the Child no longer was attending daycare, although when that happened is not in evidence. In any event, Mr. Ross states that it was his intention to continue to pay \$600 per month, in accordance to his understanding of what the parties had originally agreed, as discussed above.

- [122] It appears that Ms. Ross also incurred various other expenses relating to the Child from 2011 to the present. In her notice of application, she claimed expenses of \$31,769.19 and sought an order that Mr. Ross pay half of that amount. These expenses included the cost of various activities and also certain orthodontic work. However, during the course of this hearing, Ms. Ross withdrew her application to have Mr. Ross pay one-half of the claimed amounts already incurred to this date. I would note in any event that none of these expenses were discussed with Mr. Ross beforehand and they were also not supported by proper documentation to evidence payment by Ms. Ross.
- [123] Ms. Ross also refers to having paid for the tuition, books and accommodation expenses for the Child for her attendance at University for the 2016/2017 year. These expenses were not referenced by Ms. Ross until her affidavit was filed in November 2016 and represents the first time that Mr. Ross was advised of such expenses. In that affidavit, there is no evidence of any payment for tuition or books. She refers to the Child having received scholarships, although there is no accounting for those monies in terms of the overall education costs. Ms. Ross refers to having paid \$9,873 for accommodation and meal costs, which in her Form F8, she indicates was paid from the Child's RESP.
- [124] Mr. Ross contends that when they separated, he transferred to Ms. Ross a fund that been established by him and his father for the Child's post-secondary education. He believed that Ms. Ross converted this into an RRSP of \$9,441. Indeed, the Consent Order did refer to Ms. Ross having an RRSP in that amount with Assante Capital. By paragraph 13 of the Consent Order, Ms. Ross was to retain sole ownership of, title and possession of that asset. Mr. Ross' contention that this fund was still to have been available for these expenses is supported somewhat by the ambiguous wording in the 2010 Order that provided that the parties would share "extra expenses" of the Child's education costs.
- [125] Mr. Ross stated in his affidavit #2 sworn in May 2016, that he was happy to pay half of the post-secondary expenses, after Ms. Ross had accounted for the education fund that had been transferred to her at the time of the divorce.
- [126] Ms. Ross' evidence in response to Mr. Ross' position has been entirely unsatisfactory. In her November 2016 affidavit, Ms. Ross referred to having RESPs and says that she put the "majority" of money into the Child's RESP. There is no mention as to who put the other money in. In her Form F8 sworn on January 12, 2017, Ms. Ross states that she used \$10,000 from the RESP to pay for the residence fees for the Child's 2016/2017 school year and that she has more money in the RESP to pay for another year. However, she does not list any RESPs on that form. Otherwise, her position on this application was that she obtained ownership of any education fund under the terms of the Consent Order for her own purposes without any obligation to use those funds for the Child's education.

- [127] I agree with Mr. Ross that the evidence is not sufficient to resolve this issue, largely arising from Ms. Ross' failure to respond to Mr. Ross' evidence and argument. Given that the onus lies on Ms. Ross to satisfy me as to these expenses and that there is some basis upon which Mr. Ross should share the 2016/2017 education expenses, I decline to order that Mr. Ross make any contribution to them. He will continue to pay the \$600 monthly regular child support payment even so.
- [128] In addition, the 2010 Order will continue to apply to any future education costs after this school year based on the agreement reflected in that order. The only order I would make is to amend the 2010 Order to provide that such future expenses, commencing in the 2017/2018 school year, will include any tuition, books and accommodation costs after deduction of any other sources of payment, such as scholarships or bursaries. These shared expenses will not include meal costs since Mr. Ross will be paying regular child support payment that would cover such expense. Ms. Ross will be required to advise Mr. Ross in advance of incurring such education expenses and also provide evidence of payment.
- [129] In addition, Ms. Ross seeks an order confirming that the expenses set out in s. 7(1)(c) of the Guidelines (regarding health expenses) constitute special and extraordinary expenses. Her evidence is that the Child needs glasses or contact lens. Orthodontic expenses were incurred in earlier years so Ms. Ross does not advance any claim for those, although Mr. Ross was surprised to hear of this only after the fact.
- [130] A very unfortunate situation revealed in the evidence is that Mr. Ross has had no contact with his daughter since the fall of 2011 when she went back to live with Ms. Ross. What he knows about his daughter's life has only been revealed to him through Ms. Ross' affidavits filed in this proceeding. He has no idea why this has happened, and why the Child continues to rebuff his efforts to re-establish their relationship. Ms. Ross does not address this matter in her evidence, although one might hope that she is encouraging the Child to renew contact with her father.
- [131] In large part, Mr. Ross has been kept in the dark as to his daughter's life since the fall of 2011. One example relates to Ms. Ross' evidence, disclosed in November 2016, that the child was diagnosed with anxiety disorder in February 2016, while she was in high school, and that she was diagnosed with ADHD in August 2016.
- [132] On this health front, Ms. Ross has again shown that she only selectively complies with orders of this Court, while stridently demanding strict compliance by Mr. Ross as is evidenced on this application. By paragraph 8 of the Consent Order, Mr. Ross shares joint guardianship of the Child and Ms. Ross has an obligation to advise Mr. Ross of significant matters affecting the Child. She is also obligated to discuss with Mr. Ross any significant decision concerning the Child, including those relating to her health. Ms. Ross failed to comply with this aspect of the Consent Order in failing to advise Mr. Ross about ongoing health problems in the Child's life.

- [133] Having said that, I agree with Ms. Ross that the health expenses set out in s. 7(1)(c) of the Guidelines are appropriately included as special expenses which should be shared by the parties in the future. Ms. Ross' line 150 income for 2015 was \$94,044 and \$92,778 after deduction of union dues. All things considered, after factoring in Mr. Ross' Guideline \$65,000 income for 2016, they should share any such expenses on a proportionate basis. However, Mr. Ross agrees to pay one-half of such reasonable and necessary expenses, which is ordered for so long as the Child is a child of the marriage.
- [134] As with the education costs, Ms. Ross will be required to advise Mr. Ross of any such health expenses in advance, save for emergencies. In addition, Mr. Ross will be required to pay his share of those expenses after receipt of evidence of payment that exceeds \$100 annually, and after any reimbursement through Ms. Ross' insurance coverage.

Conclusion

- [135] I order that Mr. Ross pay the sum of \$16,130 in respect of arrears of child support from 2011-January 2017, which amount will be paid to Ms. Ross within 30 days of this judgment. Mr. Ross' Guideline income is set at \$65,000 per annum of this period of time. Ms. Ross' 2015 Guideline income will be \$92,778.
- [136] Mr. Ross argues, I think justifiably, that much of the relief sought by Ms. Ross at the outset of this application was ill-conceived and in part, doomed to fail.
- [137] Indeed, various relief sought and arguments in her notice of application - that Mr. Ross be found in contempt; that Mr. Ross be required to file a "properly" prepared Financial Statement; an order that Mr. Ross pay past special and extraordinary expenses; that personal vehicle expenses were paid for by RGY; and, that shareholder loans in RGY were repaid to Mr. Ross - were abandoned at different times throughout the submissions of Ms. Ross' counsel.
- [138] Ms. Ross also sought an order that Mr. Ross pay her \$5,000 pursuant to the Family Law Act, S.B.C. 2011, c.25, s. 213(2)(d)(ii) arising from her arguments that Mr. Ross has failed to provide certain or proper documentation. This serious allegation was also abandoned in the midst of Ms. Ross' counsel's submissions.
- [139] Accordingly, fully half of the items of relief sought in the notice of application and other various subsidiary issues were abandoned by the end of Ms. Ross' counsel's submissions or by the end of the hearing. This circumstance alone would justify an award of costs to reflect the waste of time and effort on Mr. Ross' and his counsel's part to meet such allegations.
- [140] In addition, Mr. Ross reserved the right to speak to the matter of costs once the outcome of Ms. Ross' application was known. By any measure of the outcome of this application, Mr. Ross has been substantially successful. Accordingly, on a preliminary basis, Mr. Ross is awarded his costs of this application under Appendix B to the Supreme Court Family Rules, on the basis of ordinary difficulty.

[141] If either party should wish to seek a different order of costs, such an application must be filed within 30 days of the release of these reasons and the hearing to determine the matter should be set as soon as possible. Failing such application(s) being filed, my above costs award shall stand.

"Fitzpatrick J."

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Prepared on 30 October 2026 · Esheria