
CANADA / JUDGMENT

S.G. v. K.G.

2012 BCSC 1937

COURT

Supreme Court of British Columbia

DECIDED

20 December 2012

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2012 BCSC 1937 S.G. v. K.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.G. v. K.G.,

2012 BCSC 1937

Date: 20121220

Docket: E091081

Registry: Vancouver

Between:

S.G.

Claimant

And

K.G.

Respondent

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Claimant:

K. Oliver

Counsel for the Respondent:

T.L. Jackson and

C. Howard

Place and Date of Trial:

Vancouver, B.C.

October 24-28, 2011,

November 7, 2011,

November 23, 2011,

January 16-20, 2012,

January 23-24, 2012

April 10, 2012, April 13, 2012 and

June 20-22, 2012

Place and Date of Judgment:

Vancouver, B.C.

December 20, 2012

- [1] This case concerns the financial consequences of the breakdown of a 16 year marriage. The claimant was born on July 2, 1960, and at trial was 51 years of age. The respondent was born on May 12, 1958, and at trial was 54 years of age. The parties met sometime in 1992 and commenced cohabitation in December 1992 or January 1993. They were married on July 22, 1993. They lived together until November 2008. At that time, there was a brief separation but the couple reconciled about a month later. However, the attempt at reconciliation did not succeed and they ceased to cohabit in February 2009, although they were living in the same house. On July 29, 2009, this Court granted a declaration pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] that there was no reasonable prospect of reconciliation between the parties.
- [2] There are three children of the marriage: a son, C.L. born September 1994; another son, C.K. born September 1996; and a daughter, M.W., born October 1997. From the date the parties separated, they have shared physical custody of the children on a weekly alternating basis. At the time of the trial, the children were all enrolled in high school in Vancouver. No issues were raised in this case with respect to custody, guardianship or parenting time. However, the parties have agreed that there should be an order for the continued involvement of a parenting coordinator as they have found her to be of assistance in communicating about the children.

- [3] The respondent has been employed as an investment advisor since he was approximately 26 years old, some years prior to his marriage to the claimant. Throughout his career he has been very successful. At the time of the marriage he was already well established and earning in excess of \$1,000,000 per year. With the exception of 2009, the year in which the parties separated and he changed employers, the respondent has continued to earn in excess of \$1,000,000 per year.
- [4] When the couple met, the claimant was employed as a night manager at a restaurant in Vancouver. She was earning an income of approximately \$80,000 per year, including tips. She owned a half interest in a house in West Vancouver.
- [5] After the parties began to live together it became apparent that their work schedules were incompatible. The claimant worked nights at the restaurant and would often not get home from work until two in the morning. The respondent had to be at work by 6:00 AM, in time for the markets to open in the Eastern Time zone. This meant that he had to be up by 5:00 AM. The parties agreed that the claimant would quit her job and go to work for the respondent. She was so employed until sometime in 1994, when the claimant went on maternity leave.
- [6] I am satisfied that after the birth of C.L., the parties agreed that the claimant should stay at home and assume the role of wife in a traditional marriage. The claimant did not work outside of the home after the birth of the first child, although she received some income through income splitting with the respondent. When the children were older there were some steps taken to find employment for the claimant, but those were not pursued.
- [7] The claimant has not been employed since the parties separated. She has not tried to find work. Her evidence is that she wishes to devote her full time and energy to the care of the children of the marriage while they are with her. She testified that it is impractical for her to find employment on the weeks that she does not have them living with her. In the result, the claimant has earned no employment income since the date of separation.
- [8] Despite the respondent's evidence that he did not wish to live a lavish lifestyle, there is no question that the parties, while married and living together, did lead an expensive lifestyle. That consumed substantially all of the respondent's very considerable income. By the trial of separation, they had saved a relatively small amount given the respondent's income.
- [9] When they were first married, the parties lived in rented accommodation in a three-level condominium in Vancouver. In 1995, they purchased a home in the Dunbar area for \$1,235,000. They resided in that home for the next ten years, during which time they paid off the original mortgage of \$916,000. The home was sold in 2005 for net proceeds of sale of approximately \$1,862,000.

- [10] In 2005, prior to the sale of the Dunbar property, the parties purchased another west side property in Vancouver. They demolished the house that was on the property and constructed a new home of approximately 7,600 square feet. The combined cost of purchasing the property and constructing the new home was approximately \$4,400,000.
- [11] In August 2008, the parties sold the west side property for approximately \$6,700,000. At the time of sale, the west side property was encumbered with a mortgage of \$1,870,000. The parties received net proceeds of \$4,612,000 from the sale.
- [12] The parties put \$3,168,200 towards the purchase of another home on the west side of Vancouver and deposited the balance of the proceeds of sale, some \$1,444,000, into their joint investment account. This property was purchased in August 2008, shortly before the parties' first separation in November 2008. The parties spent approximately \$450,000 in renovating this house, which was sold in November 2009, after separation.
- [13] In addition to their primary residences, the parties owned a property in Palm Valley, California, from mid-1996 to April 2004 when it was sold for US\$390,000.
- [14] Throughout the period of cohabitation, the parties either owned or leased expensive automobiles, and spent a large proportion of the respondent's after-tax income on their living expenses, although they paid down mortgages registered on their various homes. I will return to a more detailed discussion of the financial circumstances of the parties when I consider the issues of child support and spousal maintenance.
- [15] The parties finally separated in February 2009, when the respondent moved into a basement bedroom. They moved into separate residences in August 2009. For a time they retained ownership of their home and entered into a "birds' nest" arrangement whereby the children lived full time at the home and the claimant and respondent spent alternate weeks living there. This arrangement of course required the parties to maintain three households, one for the claimant, one for the respondent and one shared household for the children. That arrangement terminated in November 2009, when the matrimonial home was sold.
- [16] The net proceeds of sale after deduction of a mortgage of approximately \$840,000 were eventually divided equally between the parties, with each party receiving \$1,233,132. In July 2009, the parties divided most of their financial assets equally. As a result of the division of the financial assets and the sale proceeds from the matrimonial home, each party received \$2,324,490.
- [17] On September 10, 2009, the respondent resigned his position as an investment advisor at CIBC Wood Gundy and accepted an offer of employment with ScotiaMcLeod. There is a paucity of documentary evidence with respect to the length of time the respondent was in discussions with ScotiaMcLeod about joining them. However, I am satisfied that the respondent was in discussions with ScotiaMcLeod prior to the date of this Court's declaration that there was no reasonable prospect of reconciliation between the parties. My conclusion that this was so is based on the evidence of Mr. B. of ScotiaMcLeod that

discussions had been going on for some weeks prior to the execution of a letter of employment agreement on September 10, 2009. I will review the terms of this letter when I address the issue of family assets.

- [18] On September 21, 2009, the parties consented to an order of this court whereby the respondent was ordered to pay interim child support of \$5,210 per month and interim spousal support of \$12,000 per month effective August 1, 2009. The respondent has paid those amounts since the date of that order.
- [19] The parties both live in rented accommodation in downtown Vancouver, with the children living with them on a week on, week off basis.

Principal Issues

- [20] The issues to be determined are summarized in the respondent's written argument as follows:

- a) identification and division of family assets;
- b) determination of the respondent's income;
- c) imputation of income to the claimant;
- d) determination of quantum of child support;
- e) determination of the childrens' section 7 extraordinary expenses;
- f) determination of quantum and duration of spousal support; and
- g) costs.

- [21] In addition, there are a number of ancillary issues that I will address at the end of these reasons.

Family Assets

- [22] Although the parties divided most of their financial assets in July 2009, there are some family assets that remain to be accounted for. However, the main issue between the parties is whether the respondent's investment advisor business activities have created a family asset subject to valuation and division.
- [23] The claimant's position is that such a family asset exists and should be divided. The respondent's position is that he was and continues to be an employee and that he has no property interest arising out of his employment. In the alternative, the respondent says if such an asset is found to exist, there should be a reapportionment of 100% of it in his favour.
- [24] There is no question that the respondent's legal status has always been that of an employee of the various investment firms for which he has worked. However, it is also clear that in the course of this career, he has developed a relationship with a large number of clients who look to him to manage their investments. The loyalty of most of these clients is to the

respondent rather than to his employer. By November 2009, the total investments being managed by the respondent and his co-manager had a value in excess of \$150,000,000, of which over \$100,000,000 was attributable to the respondent. These investments generated considerable fee and commission income.

- [25] The relationship between an investment advisor and his or her clients together with the value of the assets under management and the revenue they generate, is often referred to as the advisor's book of business. I will use that term in these reasons.
- [26] It is common ground that investment firms are willing to pay large bonuses to investment advisors who agree to come to work for them and are able to bring a significant book of business with them. What is in issue is whether the book of business is property that is subject to division as a family asset and, if it is, what value should be placed on it and whether it should be reapportioned in the respondent's favour.
- [27] Just as investment firms are willing to offer significant incentives to recruit successful investment advisors from other firms, those other firms offer significant incentives to retain such investors.
- [28] Prior to joining ScotiaMcLeod, the respondent had been employed for a number of years by CIBC Wood Gundy. While employed by CIBC Wood Gundy, the respondent participated in a number of such incentive programs, all of which involved some form of deferred compensation entitlement.
- [29] Four of the programs in which the respondent participated at CIBC Wood Gundy are relevant to this case.
- [30] The first three of these programs had the same basic structure. One was called the Transition Loan and Bonus Program (TLBP). The second was called the Invest in You Program. The third was called Partnering for Success or P4S. I will refer to these programs as the Loan Advance Plans. These programs were structured as loans advanced to the respondent coupled with a commitment to the respondent to pay him additional salary over and above his commission income for a number of years, with the total amount of the additional salary equalling the amount of the loan.
- [31] For some of the Loan Advance Plans, the additional salary was payable over 60 months. For some it was payable over 120 months. Although the additional salary was notionally payable to the respondent, it was in practice paid directly to CIBC Wood Gundy to retire the loan to which it related. As long as the respondent continued to be employed at CIBC Wood Gundy, the Loan Advance Plans amounted in substance to an advance payment of additional salary. However, if the respondent left CIBC Wood Gundy before the loan was repaid, his salary would cease and any unpaid loan balance became payable on demand.

[32] The general arrangement for all Loan Advance Plans is described in a letter dated November 28, 2005 from CIBC Wood Gundy to the respondent with respect to the Invest in You Program as follows:

The Loan is repayable in 120 equal monthly instalments. You will also be receiving 120 monthly bonuses (see "Your Bonus", below) to be applied towards your Loan. The first loan payment will be deducted from your after-tax earnings on or about February 15, 2006. Subsequent loan payments will be deducted from your regular monthly payments over the next 119 months. While the Loan is interest-free, the imputed interest, in accordance with the Income Tax Act (Canada), will be calculated for tax purposes using Canada Revenue Agency's prescribed rate and included in income, beginning on or about February 15, 2006 and continuing until the Loan is repaid in full. Further details of the Loan are described in the accompanying loan agreement documentation.

Your Bonus

Provided that you continue to be actively employed as a CIBC Wood Gundy Investment Advisor and serving your clients in a satisfactory fashion, you will be granted a taxable bonus of 120th (1/120th) of your original Loan amount for 120 months. The first monthly bonus payments will be included in your regular monthly payments over the next 119 months.

If for any reason your employment as a CIBC Wood Gundy Investment Advisor terminates, the monthly bonuses will cease in the same month you are no longer a CIBC Wood Gundy Investment Advisor. If you receive an approved leave of absence for beyond two consecutive months, then on each such occasion the monthly bonus payments shall be suspended, until the last day of the month following the last month you were on approved leave of absence, and the number of monthly bonuses shall be extended for the same period. Nevertheless, no such suspension shall last longer than five years. ...

[33] The fourth program involved the respondent being granted what were called Restricted Share Awards. These granted the respondent the right to receive what he referred to as "phantom shares" which were annual bonuses based on his performance. The bonuses were calculated with reference to the value of CIBC shares. However, payment of the bonuses was deferred for a number of years. If the respondent left CIBC Wood Gundy before his right to receive the bonus vested he lost the right to receive the deferred bonus. I will refer to this program as the Phantom Share Plan.

[34] The extent of benefits under the incentive programs was related to the respondent's performance and income as an investment advisor. The respondent was a successful and productive advisor and as a consequence had received substantial advances and had become entitled to significant deferred bonuses by July 29, 2009.

- [35] The Loan Advance Plans and Phantom Share Plan have relevance to the issue of division of family assets in this case. I will deal with those issues after considering the issue of whether the respondent's book of business generally was a family asset.
- [36] The respondent commenced employment with ScotiaMcLeod on September 10, 2009 pursuant to a letter agreement executed by the respondent and ScotiaMcLeod on that date.
- [37] The letter agreement contains provisions setting up a plan similar in structure to the Loan Advance Plans with CIBC Wood Gundy. Pursuant to these provisions, and in addition to his commission income of 51% of all gross commissions generated in his managed accounts, ScotiaMcLeod agreed to pay the respondent a salary of \$271,768 per year from the date of commencement of his employment until the anniversary date of his hire in 2018.
- [38] It is common ground that this salary was paid to the respondent to provide him with funds to repay a loan from the Bank of Nova Scotia in the amount of \$1,950,000. The letter agreement also provided that the respondent would be entitled to a further payment of \$600,000 if the assets under administration by himself and his co-manager reached \$150,000,000 within 15 months of the respondent's hire date. The respondent reached the target very quickly. By December 7, 2009, the total amount advanced to him was \$2,550,000. After crediting three installments made in repayment of the loan, the net amount owing as of December 14, 2009 was \$2,520,862.97.
- [39] The amounts paid to the respondent by ScotiaMcLeod were in substance a signing bonus. According to Mr. B., who gave evidence on behalf of the respondent, the advance was structured as a loan to permit ScotiaMcLeod to amortize the cost of his payment over a number of years to minimize the impact on the financial results of the branch from paying it in one year. There is also no doubt that this structure had the advantage to ScotiaMcLeod of making it financially unattractive for the respondent to move to another employer.
- [40] This conclusion is consistent with the way the loan is structured as well as the language of paragraph four of the letter agreement. That paragraph refers to the second advance as an Asset Bonus. Upon the required level of assets under management being achieved, the loan was increased by \$600,000 and the respondent's monthly salary was increased to \$29,111.13, being the amount required to pay out the increased loan in full by September 14, 2018.
- [41] It is the claimant's position that the arrangements between the respondent and ScotiaMcLeod with respect to the bonus and loan amounted in substance to a realization by the respondent of the goodwill attached to his book of business. The claimant's position is that the goodwill in the book of business existed as of the date of the section 57 declaration, that the goodwill was property and that it was a family asset which should be divided between the parties. The claimant does not assert that the full amount of the payment received by the respondent was received for the goodwill. However, the claimant's position is that a significant portion of it should be regarded as the realization of a family asset that existed prior to separation that was subject to division under the FRA.

- [42] The respondent's position is that the additional salary payable to the respondent pursuant to the letter agreement should properly be regarded as salary or income and should be taken into account in determining spousal maintenance and child support, but should not be regarded as the realization of a family asset.
- [43] The respondent submits that the financial arrangements were agreed to in order to assist him to move his client base from CIBC Wood Gundy to ScotiaMcLeod to compensate him for the adverse effect that that move would inevitably have had on his income in 2009, to compensate him for the loss of benefits under the Phantom Share Plan, to repay the balance of the amounts owing under, and to replace income from clients who did not follow him to ScotiaMcLeod.
- [44] I accept the respondent's evidence that some of the advance was to meet the above objectives. However, I am also of the view that a portion of the payment represented an additional bonus to persuade the respondent to move to ScotiaMcLeod, bringing with him his book of business.
- [45] The claimant's analysis of the consideration provided to the respondent at the time he went to work for ScotiaMcLeod is set out in her counsel's written argument as follows:
1. The Claimant seeks a declaration that the Respondent's Book of Business is a family asset to be divided equally;
 2. An Order that the \$2.55 million received by the Respondent by way of loans/income be dealt with as follows:
 - i. \$250,000.00 is to be allocated as loss of income over the September - December 2009 period. That amount is to be added back into the respondent's income in 2009 for the purpose of calculating retroactive child and spousal support;
 - ii. \$250,000.00 received as compensation for sunk costs incurred during the marriage is a family asset to be divided;
 - iii. \$350,000.00 is to be allocated as a family debt to repay CIBC for the outstanding balance on its loans and bonuses as at the date the respondent left their employ;
 - iv. \$400,000.00 for deferred comp lost as a result of the move from CIBC to Scotia McLeod be declared as a family asset to be divided evenly;
 - v. \$1,300,000.00 calculated and negotiated between the respondent and Scotia McLeod as the present value of the future income stream of the respondent's Book of Business is a family asset to be divided equally.
- [46] The claimant seeks an order that the respondent pay her one-half of the after-tax benefit received from items ii, iv, and v above, subject to a reapportionment to take item iii into account.

- [47] To be common property, the book of business must of course be property. The claimant relies on *McLean v. McLean*, [2004] O.T.C. 904 [McLean], in support of the proposition that an investment advisor's book of business can be regarded as property, subject to division as a family asset.
- [48] In *McLean*, the husband was in a similar position to that of the respondent in this case. Through the years, he and his associate had built up a very considerable book of business that he brought with him when he went to work for ScotiaCapital, a predecessor of ScotiaMcLeod, in 1996. When he commenced employment with ScotiaCapital, he received a signing bonus of \$200,000 payable at a rate of \$20,000 per month for ten months. This was in addition to 50% of the commission income generated from his accounts. Like the respondent in this case, Mr. McLean did not own any of the assets contained in his client book of business nor did he have any contractual relationships with those clients that obligated them to continue to use him as their investment advisor.
- [49] Mr. McLean did not change employers after the date of separation, however there was a finding by the trial judge that ScotiaMcLeod had a comprehensive policy dealing with the death or retirement of an investment advisor. A copy of that policy was marked as an exhibit at the trial. The policy provided an accommodation for retiring investment advisors to "sell" their book of business to another investment advisor approved by ScotiaMcLeod.
- [50] The claimant relies on *McLean* in support of her submission that the respondent's book of business is property. *Vogelsang J.* held that the right of the husband to transfer and receive value for his book of business on retirement was property despite the fact that it was not realizable at the time of separation. At para. 40-41 he stated as follows:

40 Mr. Hainsworth argued that the right to compensation for the book of business is too speculative and falls far short of reasonable inclusion in the family property scheme. There may be some support for that proposition in some cases. In *Iurincic v. Iurincic* (1998), 40 R.F.L. (4th) 258 (Ont. Gen. Div.), Professor McLeod said in his annotation at p. 259:

If something does not admit to a once-and-for-all valuation and division, a court should not include the asset in the accounting. It is unfair to include a tenuous interest to a future income stream in the property accounting. A payor may be forced to account for the value of something that he or she never receives. True disability pensions, like jobs, should be treated as support assets, not property assets.

41 Mr. McLean's interest in his clients' book does not appear tenuous at all to me. He received significant compensation when he joined ScotiaMcLeod in the hope and expectation that he would bring along the majority of his book of business. He certainly did so, and that reflects on his skill and ability as a promoter and experienced account executive. There was, and remains, an existing policy to compensate him when he retires and leaves the employ of ScotiaMcLeod. It bears directly on his client activities at that time and includes the extent of his client book at separation. There is nothing illusory or uncertain about his position, and it must be remembered that it is very much in the joint interests of Mr. McLean, ScotiaMcLeod and the new investment

executive to come to a compensation agreement. The only reasonable probability is that he will take up this opportunity and receive a financial benefit.

[51] At paragraph 48 of his reasons Vogelsang J. continued as follows:

48 I find that the client book or "book of business" that Mr. McLean held at the date of separation represented an asset to him which, augmented by growth in his professional work, will yield him the opportunity to obtain a measure of income at his retirement or withdrawal when the template agreement is made, consonant with the ScotiaMcLeod compensation policy.

[52] It is apparent from the above quotation and from his approach to valuation, that Vogelsang J. conceptualized the interest of Mr. McLean in his book of business as analogous to a right to receive a pension or termination payment on leaving employment. He acknowledged the difficulties in valuing that interest in his reasons.

[53] In *R.A.C. v. V.L.C.*, 2009 BCSC 825 [R.A.C.], Griffin J. was also called upon to consider the nature and value of an investment advisor's interest in his book of business. In *R.A.C.*, the claim was that the respondent should be deemed to have disposed of her interest in the book of business when she left one employer to go to work for another. Griffin J. therefore had to consider whether the book of business was property at the date of the alleged disposition and its value at that date. She dismissed the claim with respect to the book of business.

[54] The claimant was seeking a compensation order rather than a division of the value of the book of business. Griffin J. described the claim before her at paragraph 199 as follows:

[199] The plaintiff says that V.L.C.'s Scotia McLeod book of business of as of May 2007 was a potential family asset subject to division, but that V.L.C. unilaterally chose to abandon that asset in May 2007, when she left for RBC. As such, the family asset is no longer available for division and the plaintiff says he should receive a compensation order based on V.L.C.'s disposition of "property", pursuant to section 66(2)(c) of the Family Relations Act.

[55] The claimant in *R.A.C.* was therefore advancing a claim for relief based on the value of the book of business at the time of its deemed disposition, before the breakdown of the marriage. He was not making a claim based on the present value of what the respondent could reasonably expect to receive from disposing of the book of business on retirement. The expert evidence tendered in that case was directed to valuing the book of business on the assumption that it had been disposed of when the respondent left ScotiaMcLeod.

[56] In this case there is a dichotomy in the claimant's submissions on this issue. On the one hand she relies on McLean in support of her claim that the book of business is a family asset. On the other hand, she seeks to value that asset on a different basis than it was valued in McLean, that is, on the assumption that the respondent disposed of it or at least realized value from it when he joined ScotiaMcLeod.

- [57] The claimant seeks to distinguish R.A.C. Her counsel submits that Griffin J.'s decision turned on her finding that R.A.C. had failed to prove that V.L.C.'s book of business had any value. He relies on paragraph 223 of the decision:
- [223] I am therefore not persuaded on the totality of the evidence that V.L.C.'s book of business at Scotia McLeod was a family asset, or property that she disposed of, of any net value within the meaning of the Family Relations Act.
- [58] I do not read Griffin J.'s reasons as narrowly as the claimant. It seems to me that she reached two conclusions. The first was that the book of business was not property of V.L.C. This seems to be the conclusion reached at para. 209-210 of the decision. The second was that there was no evidence that the book of business, assuming it to be property, had any value.
- [59] The first conclusion is based on the fact that the respondent had no right to control or direct the business of her clients to any purchaser and that it therefore could not be said that she had any proprietary interest in the book of business. I am not sure that the fact that an investment advisor has no power to deliver her clients to a purchaser or control them in any way means that he or she has no property interest in the goodwill of his or her connection to those clients.
- [60] There is no statutory definition of property in the FRA. Other statutory definitions of property, such as that contained in the Interpretation Act, R.S.B.C. 1996, c. 238, seem to focus on the divisibility of property rather than its essential characteristics. They are therefore of little assistance in dealing with the issue before me.
- [61] In McLean, Vogelsang J. examined the question of whether the interest of an investment advisor was property. I need not reproduce what he said here. However, I agree that the essential characteristic of property is that it is something that can be transferred for value, that is, something that a third party is prepared to provide value to acquire. While property excludes purely personal rights, such as the right to work, it seems to me it would include anything that another person would pay to acquire. The definition contained in Jowitt's Dictionary of English Law, 2nd ed (London: Sweet & Maxwell, 1977), at p. 1447 describes property as anything having a money value, especially with reference to transfer or succession.
- [62] As a matter of principle, I see no reason why the value accumulated in an investment advisor's book of business could not be characterized as analogous to goodwill of any business. Goodwill is defined in Merriam-Webster's online dictionary as follows:
- b (1) : the favor or advantage that a business has acquired especially through its brands and its good reputation (2) : the value of projected earnings increases of a business especially as part of its purchase price (3) : the excess of the purchase price of a company over its book value which represents the value of goodwill as an intangible asset for accounting purposes

- [63] In this case, the goodwill belongs to the respondent because it is to him that the clients are loyal. However, I agree with Griffin J.'s observations in R.A.C. that the only way in which any material value can be realized from a disposition of the book of business is by the respondent contractually binding himself not to compete with the purchaser.
- [64] In this case I am satisfied that it was the respondent himself that ScotiaMcLeod was interested in recruiting. I do not think it is accurate to characterize the essence of the transaction with Scotia McLeod in this case as a disposition of the respondent's book of business. The respondent had the same relationship with his clients both before and after he moved from CIBC Wood Gundy to ScotiaMcLeod. He had the same right to move to another firm and make a similar arrangement with that firm. While there were obvious practical obstacles to his so doing, there was no evidence before me that he was legally precluded from moving to another firm.
- [65] Based on the documentation itself and on Mr. B.'s evidence, I conclude payment of \$2,550,000 was in substance a signing bonus to the respondent. It provided him both with funds to cover the costs of moving to ScotiaMcLeod and a further incentive to move. The agreement took the form of a loan. The reason for this was explained by Mr. B., as I have outlined in para. 39 above.
- [66] I have considerable sympathy for the position advanced by the claimant. On the evidence before me I am satisfied that a successful investment advisor such as the respondent does have realizable value in his or her book of business. This is reflected in the life goals ten-year plan executed by the claimant and respondent in 1997. At that time the respondent, who prepared this document, had as part of his long-term financial planning included a provision for sale of his business, that is his book of business as an investment advisor, for \$3,000,000. The fact that there is value in the book of business is also reflected in the terms of paragraph six of the September 10, 2009 letter agreement providing for forgiveness of the loan if the respondent ceases to act as an investment advisor.
- [67] I did not find the respondent's explanation as to why the life goals ten-year plan document is no longer relevant to be convincing. His evidence was that the plan to sell his business reflected the policy of his then employer that permitted investment advisors to sell their book of business to another advisor on retirement. The respondent testified that this option was no longer available at ScotiaMcLeod. However, that evidence was inconsistent with that given by Mr. B., who testified that ScotiaMcLeod had a policy of permitting retiring investors to sell their practice to other advisors. I find that it is open to the respondent to sell his book of business on retirement.
- [68] It seems to me that the opportunity for a retiring investment advisor to sell his book of business does have the essential characteristics of property and therefore is an asset as defined in the FRA. However, I am also of the view that without an agreement not to compete, the book of business would have little or no value to a purchaser.

- [69] Further, a sale on retirement is not the basis of the claim before me. The claim is based on the receipt of funds by the respondent in 2009, either directly or as evidence of the value of the book of business at the triggering event. In this case, the respondent has not retired or otherwise withdrawn from employment as a financial advisor. He cannot be said to have disposed of the goodwill attaching to his book of business.
- [70] I find that the payment made by ScotiaMcLeod to the respondent had two significant components. The first was to compensate the respondent for the losses that he would suffer as a result of changing the investment house for whom he worked. The second was a signing bonus. While there is no question that ScotiaMcLeod was anxious to acquire the customer base being served by the respondent, I accept the evidence of Mr. B. that it was the respondent's talents as an investment advisor, and in particular his ability to attract clients, that ScotiaMcLeod principally sought when it recruited him.
- [71] I am therefore unable to conclude that the financial arrangements made between the respondent and ScotiaMcLeod constituted a disposition of the respondent's book of business or is an indicator of its value as of July 29, 2009.
- [72] As in R.A.C., in this case there was no claim made to me on the basis that the respondent will in the future be able to sell his book of business on retirement. There was no evidence presented to me that would permit me to determine the present value of that right as of the separation date or trial. Accordingly, I am unable to make any award to the claimant with respect to the respondent's book of business.
- [73] However, the financial arrangements with ScotiaMcLeod are relevant with respect to two issues:
- a) The valuation of the respondent's vested rights under the Phantom Share Plan.
 - b) The respondent's claim for reapportionment with respect to the amount he paid to CIBC Wood Gundy to satisfy the balance owing to it under his Loan Advance Plans.
- [74] The respondent testified that he made sure that the amount of the payment he negotiated with ScotiaMcLeod was sufficient to retire his obligations to CIBC Wood Gundy under his Loan Advance Plans and to compensate him for the loss of his vested rights under the Phantom Share Plan.
- [75] In addition, I am satisfied that the financial arrangements were structured to ensure that the respondent did not lose a significant amount of income in 2009 as a result of the disruptions inherent in transferring from CIBC Wood Gundy to ScotiaMcLeod.
- [76] It does seem to me that the respondent's accrued entitlement under the Phantom Share Plan was property belonging to him as of the date of the section 57 declaration in this case. It has all the characteristics of property described above. The fact that the right to receive it was contingent does not mean it was not property.

- [77] In his evidence, the respondent acknowledged that he was fully compensated by ScotiaMcLeod for the loss of his interest under the Phantom Share Plan and placed a value of \$560,000 on his interest.
- [78] The respondent's interest in the Phantom Share Plan was disposed of after the triggering date of July 29, 2009. Therefore I cannot order a division of the interest itself pursuant to s. 56 of the FRA. However, I am satisfied that this is a case in which fairness dictates that I should make a compensation order in favour of the claimant pursuant to s. 66(2)(c) of the FRA. The respondent did not account for this asset at the time the financial assets of the parties were divided. However, he clearly considered it to be an asset. He listed it on his May 22, 2009 financial statement as a financial asset. He lost the right to recover benefits pursuant to the Phantom Share Plan when he resigned. However, he obtained compensation for that loss from ScotiaMcLeod, thereby effectively obtaining the benefit of the Phantom Share Plan.
- [79] There is no dispute that the compensation received by the respondent from CIBC Wood Gundy was used for a family purpose and is therefore a family asset. It therefore seems to me fair and equitable that he be required to compensate the claimant for his realization of the value of this asset.
- [80] However, fairness also requires me to discount the amount received by 40% to reflect the fact that it is taxable in the respondent's hands. The respondent has stated that his overall rate of tax is 40%. Accordingly, I find that the amount divisible is 60% of \$560,000 or \$348,000. I can see no basis for a reapportionment of this amount. The claimant is therefore entitled to a compensation order in respect of this asset of one-half of \$348,000, that is \$174,000.
- [81] The respondent seeks a reapportionment of the division of family assets to compensate him for the \$343,503.51 he had to pay to CIBC Wood Gundy pursuant to the terms of his Loan Advance Plans. He seeks an order that the claimant pay him one-half of this payment.
- [82] His evidence was that the funds initially advanced pursuant to these loans were used mostly for family purposes, although a small percentage was used by him to invest in his brokerage business. The respondent's submission is that fairness requires that the claimant compensate him for one-half of this liability through a reapportionment of the family assets.
- [83] It is common ground that the FRA does not provide for a division of liabilities. However, it is clear that such liabilities can be taken into account in determining whether it is appropriate to reapportion the family assets on the basis of fairness pursuant to s. 65 of the FRA.
- [84] The primary policy objective guiding the court's discretion in a division of property is fairness: *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241, 11 B.C.A.C 262; see also: *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 S.C.R. 550.

- [85] In his submissions with respect to the characterization of the funds received by the respondent from ScotiaMcLeod in 2009, the claimant's counsel characterized the receipt of the amount necessary to pay CIBC Wood Gundy as payment of a family debt. The claimant clearly does not dispute that the proceeds of these loans were used primarily for a family purpose. It seems to me that the burden of their repayment should fall equally on both parties.
- [86] In this case, the respondent's liability to pay the loans arose only upon his decision to move to a competitor. The loans to the respondent were always intended to be repaid from the respondent's earnings at CIBC Wood Gundy in substantially the same way as was the ScotiaMcLeod advance of 2009.
- [87] I conclude that I should treat the payments made on account of the Loan Advance Plans consistently with my treatment of the funds received in respect of the Phantom Share Plan. By September 14, 2018, the respondent will receive pre-tax income in an amount equal to the amount he paid to CIBC Wood Gundy. Based on a tax rate of 40%, his net cost to repay the loans is therefore only 40% of the amount he paid. Accordingly the claimant should only be responsible for 1/2 of that net payment. The respondent has also acknowledged that some portion of the proceeds of the Loan Advance Plans was used for business purposes. Taking these factors into account I find that fairness requires the claimant to pay \$60,000, that is, one-half of 40% of \$300,000 to the respondent in respect of the loans.
- [88] There are a number of other family assets which have not yet been accounted for between the parties. The first is a Mercedes Benz automobile retained by the respondent when the parties separated. The only evidence of value of that automobile was from the respondent and does not appear to be controversial. I accept the respondent's valuation of the automobile at \$28,000.
- [89] In addition, there was considerable evidence led with respect to personal expenses paid by the parties from their joint funds between February 2009 and March 2010. The respondent has summarized his position in his written argument as follows:

(a)

Respondent's personal expenses paid from joint funds

\$ 30,914.00

(b)

Claimant's personal expenses paid from joint funds

\$ 29,395.80

Difference

\$ 1,518.20

- [90] The respondent's position is that the claimant is owed \$1,518.20 with respect to these personal expenses to produce an equal division of all financial assets. The claimant did not appear to take issue with this submission in her counsel's oral or written submissions. I accept the respondent's submissions with respect to this issue. However, that amount should be divided in half to reflect the fact that one-half of the funds withdrawn did belong to the respondent. The net amount payable by the respondent to the claimant in respect of this item is \$759.10, rounded to \$760.
- [91] The respondent has a Merrill Lynch deferred compensation benefit with a nominal value of approximately \$6,000. He was not cross-examined with respect to this account and the claimant's counsel made no submission with respect to it. I assume that the respondent will be subject to tax on any amounts that he receives from the account. Rather than allowing this account to remain undistributed and subject to further controversy, I direct that the respondent make a compensation payment of \$1500 to the claimant in respect of the account. Upon making this payment the respondent will be entitled to retain all funds in the account.
- [92] I am satisfied that in all other respects the family assets have been divided appropriately in accordance with the provision of the FRA.
- [93] In summary, the claimant is entitled to a compensation payment in respect of family assets as follows:

1/2 of after tax amount in respect of the Phantom Share Plan

\$ 174,000

Less 1/2 of 40% of \$300,000 in respect of CIBC Wood Gundy loan repayment

\$ (60,000)

1/2 of value of Mercedes Benz

\$ 14,000

Equalization payment for joint account

\$ 760

Compensation payment re: Merrell Lynch account

\$ 1,500

Net payable by respondent to claimant

\$ 130,260

Child Support

- [94] As indicated above, there are three children of the marriage. All are in their teenage years. However, based on the evidence before me, including the expectation of the parents, I have little doubt that the children will continue to be children of the marriage after they graduate from high school because they will pursue higher education.
- [95] As the parties share equal parenting time with the children of the marriage, child support must be determined pursuant to s. 9 of the Federal Child Support Guidelines SOR/97-175 (the "Guidelines"). Section 9 provides as follows:
9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [96] The leading case on s. 9 of the Guidelines is *Contino v. Leonelli-Contino*, 2005 SCC 63, [2009] 3 S.C.R. 217 [Contino]. That case makes it clear that the court must address each of the considerations set out in s. 9 in an attempt to arrive at a fair contribution from both parents to the appropriate standard of living for the children of the marriage. The table amounts for child support are only the starting point for an analysis of this question.
- [97] Counsel for the respondent submits that the analysis contained in *Contino* is of limited application to the facts in this case because of the very different facts of that case. I agree that some of the issues addressed in *Contino*, particularly with regard to the "cliff effect" are not present in this case. Nevertheless, the Supreme Court was clearly providing guidance on the proper approach to fixing child support in all cases of shared physical custody. I therefore consider that I am bound to follow the analytical approach set out in *Contino* in considering this issue.
- [98] The first step in a *Contino* analysis is to determine the table amount of child support applicable to each of the parties. This in turn requires me to determine their respective guideline incomes for support purposes.
- [99] I have concluded that for the purposes of determining the table amount of the respondent's support obligation, I should use the respondent's line 150 income, less adjustments to income provided for by the Guidelines. The line 150 income includes amounts received by the respondent to repay the loan he received in 2009. However, the respondent is in the same position with respect to that portion of his income as with the balance of his income because he has already received the proceeds of the loan. Therefore, each year some portion of the loan will be repaid and therefore in theory, should become disposable income

to him.

- [100] The respondent submitted that I take an average of three years of income, including 2009, to determine his Guidelines income. However I am satisfied that 2009 was an anomalous year. Over the course of his career the respondent has demonstrated an ability to earn in excess of \$1,000,000 per year in income. In 2009, his Guidelines income fell to \$556,920. However, in 2009 the respondent changed employers to be able to pursue investment strategies that presumably will result in higher earnings for himself. In addition, part of the additional funds he received in 2009 were to compensate him for this drop in income. In 2010 and 2011, the respondent's income returned to or exceeded his pre-2009 income. In 2011, his income for child support purposes was \$1,256,840.
- [101] I can see no reason why I should not use the respondent's 2011 income as the basis for determining his table amount payable. It is the most current information available and does not differ markedly from 2010.
- [102] It is more difficult to impute an income to the claimant. The claimant has not worked outside of the home since 1993. She graduated from high school in what was then called the general program. At the time she met the respondent, she was employed as a manager at a successful Vancouver restaurant, earning an income, including tips, of approximately \$80,000 per year. However, the evidence before me is that employment in the restaurant industry may not be readily available to persons of the claimant's age. She had been out of the work force for some 19 years as of the conclusion of the trial and some 16 years at separation.
- [103] The claimant has approximately \$1,800,000 in financial assets and no substantial liabilities. In 2010, the last year for which I was provided complete information, she earned \$67,366 in investment income.
- [104] The claimant has made no effort to find employment or upgrade her employment skills since separation. Her stated position is that her children need her and that she will not return to the workforce until they are independent.
- [105] I am also troubled by Mr. Nordin's vocational assessment of the claimant in which he questioned whether she had put forward her best efforts in her vocational testing. The claimant's counsel suggested that she has a learning disability that may explain her test scores. I do not accept that explanation. I cannot reconcile her test results with her demonstrated ability to hold a responsible managerial position before her marriage. In addition, the claimant presented no medical evidence to substantiate any disabilities that might explain her test scores or impact on her employability.

- [106] I am satisfied that the claimant could find employment in the hospitality or retail services industry. I also think that the claimant might be able to find employment as a server in restaurants catering to a more mature clientele than her previous employer. She is obviously fit, has no physical barriers to such work and does appear to be younger than her actual age.
- [107] I have concluded that I should impute some employment income to the claimant for the purposes of determining her applicable table amount of child support. I do not think that the claimant has made an adequate effort to find employment or to retrain herself to do so. I also find that had she done so within a reasonable time after separation, she would now be employed.
- [108] I therefore conclude that it is fair and reasonable to impute an income from employment of \$30,000 to her. The \$30,000 is based on the range of incomes set out in Mr. Nordin's report. I also am of the view that the claimant should be able to earn a net return of 2.5% on her investments after deduction of management fees. While it is difficult to determine with certainty, this would appear to be consistent with the respondent's stated return on his financial assets. On his January 15, 2012 financial statement, he reported \$41,461 in income on \$2,150,000 in financial assets. Taking her investment income together with her potential employment income into account, I impute an income of \$75,000 per year to the claimant.
- [109] The claimant's counsel submitted that it is unfair to attribute any substantial investment income to her because she wishes to purchase a home of her own. He relied on the high cost of purchasing housing, particularly on the west side of Vancouver, in support of his submission that a substantial part of her savings will be consumed should that occur. However, as of the date of these reasons the claimant has not done so. In addition, the budget on which she relies for child and spousal support includes \$5,100 per month for rent. While this does not affect the table amount of child support, I do think it is fair to impute some investment income to her given the relevance of her expenses to an overall s. 9 analysis of child support.
- [110] According to the Guidelines, the above incomes result in table amount payments of the respondent paying the claimant \$20,203 and the claimant paying the respondent \$1,483.
- [111] The next step in the s. 9 analysis is to consider the increased cost of a shared custody arrangement.
- [112] In this case the main factor tending to increase costs arising from a shared physical custody arrangement is the necessity of both parents maintaining large homes. As stated above, the claimant pays \$5,100 per month for rent. The respondent pays a similar amount.
- [113] Given the magnitude of the respondent's income and the significant financial assets owned by both parties, the considerations set out in s. 9(c) are the most important in determining the appropriate level of child support.

- [114] A review of the financial statements of both parties shows that each has high monthly expenses. The claimant's monthly expenses as of her September 2011 financial statement were \$21,876. The respondent's were \$122,693 as of his January 15, 2012 financial statement. The respondent's expenses include \$40,000 per month for taxes and \$29,111 for principal and interest payments to the Bank of Nova Scotia in respect of the \$2,550,000 advance made in 2009.
- [115] The respondent's financial affairs are complex. It is difficult to ascertain with precision what his available monthly cash flow is because I do not know how much of the \$2,550,000 advance remains available to him. In this regard I find it somewhat perplexing that the value of his financial assets, including business interests, as of December 31, 2011, was only \$2,155,638 given the amounts he received on division of the family assets and the cash advance he received in 2009. In that year, the respondent received a distribution of \$2,324,490 from the division of family assets plus the loan advance of \$2,550,000. However, the respondent's evidence in this regard was not challenged and I therefore accept it as accurate.
- [116] What is apparent is that both parties are living beyond their means. The respondent submits that he cannot afford to pay more than \$5,210 in child support in addition to a substantial amount of spousal support. His position is that there should be time limited spousal support in the range of \$5,000 to \$12,000 per month, resulting in what he submits should be total spousal and child support of \$17,210, which was the amount ordered to be paid for interim maintenance.
- [117] I note however that the respondent is maintaining two residences at a monthly cost of almost \$11,000. In addition he owns three automobiles. He spends \$3000 per month on food and meals outside the home and \$1,000 per month on clothing. His monthly budget for personal spending money is \$1,500. Notwithstanding his assertion that he cannot afford to pay more than he is presently paying for child and spousal support, in 2010 he purchased a condominium in Penticton for a second residence. His mortgage payments, strata fees and insurance on that residence exceed \$3,700 per month.
- [118] I am satisfied that the respondent is capable of paying child support in excess of the interim award of \$5,200 per month. In the preceding paragraph I have outlined some of what might be described as excessive expenditures on his part. I am aware that a significant part of the respondent's income goes to repay the loan advanced to him in 2009. However, at the same time the respondent should be able to utilize an equivalent after-tax amount of the proceeds of that loan to meet his monthly expenditures.
- [119] The claimant for her part claims to spend a total of \$2,450 per month on food and meals out in addition to \$1,000 per month to the children for meals and spending money. She also has a provision for \$18,000 per year for vacations. Her combined budget for entertainment and clothing is \$1500 per month or another \$18,000 per year. On the other hand, the claimant's financial statement makes no provision for income tax, presumably because she has been

able to deduct her legal fees from her income. This is however only a temporary situation. She will no doubt be required to pay a significant amount of income tax once this litigation concludes. I am satisfied that the claimant has been encroaching on her capital to maintain her lifestyle.

[120] Section 4 of the Guidelines provides for a discretionary award for child support in respect of incomes in excess of \$150,000 per year. The discretionary provisions of s. 4 with respect to incomes in excess of \$150,000 are substantially similar to those set out in s. 9(c), and it would therefore seem that a separate s. 4 analysis is unnecessary in this case.

[121] In fixing child support I must consider what amount is reasonably necessary to maintain the children's pre-separation standard of living in both homes in which they live. The claimant's submission is that an award at or near the straight set off amount is appropriate in this case. However, the authorities suggest that the greater the excess of the payor's income over the discretionary threshold the greater the need for a careful analysis of the actual means, needs and circumstances of the parties and the children to arrive at a fair award.

[122] In this case I am satisfied that the respondent has the resources to pay more than the interim amount of \$5,200 per month in child support. I am also satisfied that the claimant does require more than that amount to maintain a standard of living for the children that approaches their pre-separation standard.

[123] For the reasons that I will give below I have decided that the respondent should pay \$15,000 per month in spousal support. Taking this award into account together with the financial information provided by the parties, and with a view to the objectives set out in s. 9 of the Guidelines, I have concluded that I should fix child support in this case as follows:

1.

Payable by the respondent

\$9,000 per month

2.

Payable by the claimant

\$1,500 per month

[124] The amounts ordered for child support shall be set off and in the result the respondent shall pay the claimant child support of \$7,500 per month.

Extraordinary or Special Expenses

[125] The respondent submits that special expenses should be shared equally. In her submissions the respondent's counsel put forward a budget of \$3,754 per month for special expenses. The respondent also seeks reimbursement of one-half of \$37,463 that he paid for the items

summarized in paragraphs 152-53 of his written argument. The respondent acknowledges that the claimant has paid \$2,524 in special expenses and that she should be reimbursed for 50% of that amount. After setting off the amounts paid by the claimant the respondent seeks an order that the claimant pay him \$17,469 for past s. 7 expenses.

[126] The expenses listed by the respondent include many items commensurate with the affluent life style of the parties, such as tennis and golf club expenses and hockey travel expenses for trips to the United States. However, both parties appear to accept them as reasonable.

[127] The guiding principle with respect to extraordinary expenses is set out in s. 7(2) of the Guidelines as follows:

The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[128] In this case, I can see no basis for departing from the guiding principle. Contino does make it clear that I have the discretion to vary the percentage of extraordinary expenses borne by the parties from one based on a proportion of income. However, I can see nothing that persuades me that it is appropriate to do so in this case. I do not accept that such a division would impose any hardship on the respondent. Given the disparity of income between the parties it seems to me fair that the extraordinary expenses be borne in proportion to the parties' respective incomes and calculated in accordance with the Guidelines.

[129] I have attached a Divorcemate calculation of the respective shares of extraordinary expenses to be borne by the parties as Schedule A to these reasons. For simplicity of calculation, I order that the respondent should be responsible for 80% and the claimant for 20% of extraordinary expenses.

[130] While there was some dispute in the evidence I accept the figures that the respondent has provided for s.7 amounts expended and paid by both parties as accurate. The combined amounts total almost exactly \$40,000. The claimant's share of the expenses is 20%, or \$8,000. She has paid \$2,524 to date. She is therefore ordered to pay the respondent \$5,476 to apportion the special expenses in accordance with these reasons. This amount may be satisfied by deducting it from the net amount payable by the respondent in respect of family assets.

Spousal Support

[131] Spousal support is governed by both s. 15.2 of the Divorce Act and s. 89 of the FRA.

[132] Sections 15.2(4) and 15.2(6) of the Divorce Act provide as follows:

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

...

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[133] The parties agree that the claimant is entitled to spousal support. However, they disagree on the amount and duration of support.

[134] The claimant's submission is that there should be a combined award of spousal support and child support in an amount that will result in the parties having a roughly equal share of net disposable income ("NDI") as that term is defined in the Spousal Support Advisory Guidelines ("SSAG").

[135] The respondent's position is that such a division is inappropriate in the circumstances of this case because of the large amount of income he earns. The respondent submits that the application of the SSAG table amounts to incomes far in excess of \$350,000 results in an unduly large award. His counsel, Ms. Jackson, submits that I should make an award based on the pure discretion approach referred to in the SSAG. In her written submissions, Ms. Jackson argues that the respondent should retain a minimum of 60 to 65% of the total NDI to provide the respondent with the incentive to continue to work hard and the claimant with the incentive to obtain self sufficiency.

- [136] Ms. Jackson places particular reliance on the decision of Stromberg-Stein J. in *Bozak v. Bozak*, 2008 BCSC 1458 [Bozak], in support of her submission that there should be a modest time limited amount of spousal maintenance in this case.
- [137] However, I think that there are important factual distinctions between *Bozak* and this case. Ms. Bozak was considerably younger than the claimant in this case. In addition she was found to have the ability to earn an income that would, together with her assets, allow her to enjoy a standard of living that approximated the pre-separation standard. Ms. Bozak owned her own house post separation with the ability to pay off the mortgage on that house. In addition the Bozaks were found to have had a much more modest lifestyle and to have been able to save considerable amounts pre-separation. Dr. Bozak's income, though substantial, was considerably less than the respondent's, as was the discrepancy between the parties' incomes. Finally Ms. Bozak's financial statement, as adjusted at trial, showed she needed only \$6,500 per month to meet her reasonable expenses. In this case the respondent acknowledges that the claimant's reasonable expenses would exceed \$20,000 per month before making any provision for income tax.
- [138] The principles applicable to an award of spousal maintenance have been considered in numerous cases. In *Moge v Moge*, [1992] 3 SCR 813, the Court outlined and explained the compensatory and non-compensatory grounds for an award of spousal support pursuant to the Divorce Act. While the respondent concedes that the claimant is entitled to receive spousal maintenance, his counsel's submissions seem to suggest that there is no compensatory basis for such an award. Most of the respondent's submissions with respect to spousal maintenance focused on the failure of the claimant to take any steps to achieve economic self-sufficiency and the need to provide incentive for her to do so.
- [139] On the other hand, the claimant's submissions made only general submissions as to the basis for making an award on compensatory grounds. Her counsel's written submissions contain extensive quotes from the Court of Appeal decision of *Chutter v. Chutter*, 2008 BCCA 507, 86 B.C.L.R. (4th) 233 [Chutter]. The facts in *Chutter* are somewhat different than the facts in this case. In *Chutter*, the parties were married for 28 years. Although the parties' marital income was considerably lower than those in this case, the Chutters managed to accumulate considerably more assets, dividing approximately \$8,000,000 by agreement. In addition the wife worked outside the home for a significant percentage of the marriage but also was chiefly responsible for child care.
- [140] Despite these distinguishing facts, I do find considerable guidance from the reasons for judgment in that case. At para. 53 of *Chutter*, Rowles J.A. quoted with approval from the judgment of Martinson J. of this court in *W. v. W.*, 2005 BCSC 1010, 47 B.C.L.R. (4th) 348 as follows
- [53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

- [11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

[Emphasis in Chutter.]

- [141] In this case I am satisfied that there is a basis for the awarding of spousal maintenance on compensatory grounds. At the time of the marriage the claimant was earning what by the standards of that time was a considerable income of \$80,000 from her employment as a restaurant manager. She also had an interest in a house in West Vancouver. I accept her evidence that she quit that job, which required her to work nights, to accommodate the starting of a family and to be able to spend more time with her husband. I also am of the view that the claimant did have a greater role in child care than did the respondent although I am also satisfied that the respondent was an active and involved father.
- [142] I have not overlooked the evidence that indicates that the claimant was less than enthusiastic about finding employment outside the home as the children grew up and became more independent. It must however be remembered that one of the children did have learning disabilities that required extra attention from both his parents. In addition, I am satisfied that the parties chose to involve themselves in the lives of their children to a larger extent than many parents of teenage children. As I have already indicated, I infer from the evidence and from the obvious demands of the respondent's business that the claimant did devote a considerable amount of her time to attending to the children of the marriage.
- [143] In considering the compensatory ground I have taken into account the fact that the respondent was earning roughly \$1,000,000 per year when the parties married. This therefore is not a case in which the wife supported her husband's education or professional training. However, I do not think that the compensatory principle is limited to cases in which the parties start from the ground up in financial terms. While the respondent was

more involved in child care than many fathers in his position, the bulk of his activities were directed to his career. By remaining at home and assuming primary child care responsibilities, the claimant contributed to the overall welfare of the family. I think that the respondent's counsel's submission that the claimant was advantaged by the marriage ignores her indirect contribution to the welfare of the economic unit of the parties.

- [144] I am also satisfied that the claimant has suffered economic disadvantage as a result of the breakdown of the marriage. Her economic circumstances are now clearly inferior to those of the marriage. Without an award of considerable spousal maintenance her standard of living will fall markedly below that of the marriage and the standard of living that the respondent will have after separation.
- [145] Taking these considerations into account I am satisfied that there are compensatory grounds for the making of an award of spousal maintenance.
- [146] I am also of the view that there are non compensatory grounds for awarding spousal maintenance in this case. There does appear to be some overlap in the authorities between the two grounds. In Chutter, Rowles J.A., in her discussion of the non-compensatory ground, referred to *Allaire v. Allaire* (2003), 170 O.A.C. 72 as follows at para 56:
- [56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:
- [21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
- [147] Similarly, in *Tedham v. Tedham*, 2005 BCCA 502, 47 B.C.L.R. (4th) 254 [Tedham], Prowse J.A. stated at paragraphs 50- 53 as follows:
- [50] The limited-term order made in this case reflects an aspect of the "sink or swim" philosophy and assumes that Ms. Tedham is capable of swimming; that is, of making her own way without relying on Mr. Tedham for support. While she has proven that she can contribute to her own support, there is no evidence that she is capable of earning anything resembling the income which would permit her to live in accordance with the standard of living of the parties during marriage (even after adjusting for the contributions the parties received from her parents and Mr. Tedham's inheritance). Mr. Tedham, on the other hand, with his track record as a successful businessman with substantial income, has the ability to sustain a standard of living commensurate with that enjoyed during the marriage.

[51] In *Moge*, Madam Justice L'Heureux-Dubé went on to observe (at p. 864) that the Act promoted "[t]he doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown" by recognizing and accounting for both the economic disadvantages incurred by the spouse who made sacrifices by staying home to care for the home and children, and the economic advantages conferred on the other spouse. She elaborated on this view in the following passage (at p. 870) of her reasons:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement [citations omitted]. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution [citation omitted].

[52] In this case, a 16-year marriage in which Ms. Tedham stayed home to take care of the home and the children called for a support order which, after taking into account Ms. Tedham's ability to contribute to her own support, provided a standard of living reasonably commensurate with that enjoyed during the marriage and which compensated Ms. Tedham, to the extent possible, for the losses she had suffered by remaining out of the paid work-force for so many years. In that regard, the court in *Moge* discussed (at p. 867) the nature of the loss suffered by spouses (like Ms. Tedham) who removed themselves from the work-force in order to assume a homemaking role:

The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance [citations omitted]. As persons outside of the work force cannot take advantage of job-retraining and the upgrading of skills provided by employers, one serious economic consequence of remaining out of the work force is that the value of education and job training often decreases with each year in comparison to those who remain active in the work force and may even become redundant after several years of non-use. All of these factors contribute to the inability of a person not in the labour force to develop economic security for retirement in his or her later years.

[53] In summary, the *Moge* decision distanced itself from the clean-break theory of divorce which had elevated the objective of self-sufficiency to the governing factor in making a spousal support order.

[148] I take it from these reasons and other authorities that in the case of longer marriages with a marked discrepancy in the respective income of the spouses the marital standard of living is relevant in determining the needs of the recipient.

- [149] A former spouse is of course not entitled as a matter of course to maintain his or her pre-separation lifestyle. In *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 53 B.C.L.R. (4th) 52, Saunders J.A. stated as follows at paras. 68-69:
- [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from a business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to spousal support, their absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
- [69] Both the question of hardship to Mrs. Hodgkinson (15.2(c)) and her self-sufficiency (15.2(d)) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain the highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in these circumstances she is entitled to a degree of comfort well beyond "basic needs".
- [150] I think that the respondent's submissions on the amount and duration of spousal support do not adequately take into account the parties' pre-separation standard of living. It is obvious that both parties cannot enjoy their pre-separation lifestyle while living apart. However I do think that the amount of spousal maintenance awarded should be considered from the perspective of a standard of living that is reasonably available to them in their separate lives.
- [151] However, I agree that the claimant has not made an adequate effort to earn income from employment. I also accept that any award must continue to provide the respondent with a real incentive to continue to work at his lucrative but taxing occupation.
- [152] I have reviewed the financial statements of both parties. While I have identified several areas in which the claimant could economize, I am satisfied that her budget does reflect the amount she will require to have and provide her children with a standard of living that does approach her pre-separation standard. I am also of the view that there is no reasonable prospect of the claimant ever earning sufficient income to meet those expenses out of her own resources.
- [153] In my assessment of the claimant's income I have already imputed income to her that she is not yet earning. Based on the evidence before me I can see no reasonable basis for concluding that she ever will be able to earn materially more than \$35,000 to \$45,000 per year in employment income, and that \$30,000 is the appropriate amount to impute to her at this time. In this regard I refer in particular to the evidence of Mr. Nordin in his vocational assessment of the claimant.

- [154] It is more difficult to assess the condition, means, needs and other circumstances of the respondent. He is apparently in good health. He is obviously very able and very successful at his chosen occupation. It is assessing his means and needs that present the greatest challenge.
- [155] The respondent has a very high line 150 income. However, a significant portion of that income goes to repaying the bonus advanced to him in 2009.
- [156] The respondent's counsel submits that he does not have the means to pay more than the interim amounts of child and spousal support, totalling \$17,210 per month. However, she has not persuaded me that the respondent could not make higher maintenance payments without suffering any undue hardship. I have already referred to some expenditures of the respondent that seem to be inconsistent with his asserted financial difficulties. To these I should add the purchase of an automobile for \$51,000 in 2010 for C.L. to drive.
- [157] I also continue to be perplexed by the discrepancy between the amounts of cash received by the respondent in 2009 and the extent of his assets as shown in his 2010 and subsequent financial statements. Of the more than \$4,800,000 the respondent received in 2009, the only specific capital expenditure I was made aware of was the payment of approximately \$350,000 to CIBC Wood Gundy to repay the unearned balance outstanding on the Loan Advance Plans, the purchase of the Penticton Property and the automobile for C.L. I also recognize that the respondent did top up his 2009 income from the proceeds of the loan and has incurred substantial legal fees. However, the identified amounts of payments fall far short of \$2,550,000.
- [158] As I have already stated it would not be appropriate for me to conclude that the respondent has failed to meet his disclosure obligations in this case. However I do think that the absence of clear and specific evidence as to how the sums received in 2009 were disbursed makes it difficult for the respondent to satisfy me that he is unable to pay any more maintenance than that set out in the interim order.
- [159] Taking all of the above considerations into account I order that the respondent pay spousal support to the claimant in the amount of \$15,000 per month.
- [160] I did not utilize the SSAG table amounts in arriving at the above spousal support because of the respondent's very high income. In my view, even the low range table amount of spousal support for his Guidelines income would produce an award that is unfair to the respondent. I have utilized the pure discretion approach referred to in the SSAG by considering the pre-separation standard of living, the ages of the parties, the likely income the claimant could earn and as imputed to her, the nature of the respondent's source of income and the financial assets available to both parties as well as the specific concerns I have outlined above.

- [161] In my view it is important to give the respondent an incentive to continue to work at his very demanding and competitive occupation. At the same time I also take into account that in this case the claimant faces the prospect of committing a very significant amount of capital towards the purchase of a new home and that such a purchase will limit the amount she can expect to earn from investment income.
- [162] While I did not utilize the table amounts set out in the SSAG in arriving at my award, I note that based on the respondent's table income of \$1,256,000 and the claimant's imputed table income of \$75,000, the combined spousal and child support ordered results in the respondent retaining 67% of NDI. However, this does not take into account the \$29,111 per month that the respondent has committed to repay the Bank of Nova Scotia and accordingly does overstate the actual amount of disposable income available to the respondent.
- [163] I have concluded that the amount of spousal maintenance and child support I have ordered will permit both parties and their children to have a lifestyle that is reasonably commensurate with that enjoyed pre-separation.

Duration

- [164] The respondent argues that ongoing spousal support should terminate after five years, which, when the duration of interim maintenance is taken into account, would result in eight years of spousal support.
- [165] My review of the authorities and the SSAG leads me to conclude that in this case I should be cautious about imposing a time limit on spousal support. In *Tedham*, Prowse J.A. allowed an appeal from an award of time-limited spousal support in a 16-year marriage and substituted an award of indefinite maintenance. The decision to do so appears to have been based on the Court's conclusion that there was no prospect of Ms. Tedham ever becoming self-sufficient in the sense of becoming capable of supporting herself at a level in keeping with the standard of living she enjoyed during the marriage. At paras. 37-38, Prowse J.A. stated as follows:
- [37] Thus, even accepting that Ms. Tedham's efforts to obtain employment were less than reasonable in the circumstances, this fact alone could not justify the time-limited order with a three-year termination date. The other objectives of a support order, which were significant in this case, were overshadowed by the objective of self-sufficiency and the failure to fully recognize that the objective of self-sufficiency is qualified by the words, "in so far as is practicable".

[38] It is apparent that the assumption underlying the time-limited order was that Ms. Tedham was capable of becoming economically self-sufficient; that is, capable of supporting herself at a level in keeping with the standard of living she enjoyed during the marriage without the aid of financial support from Mr. Tedham beyond the three-year cut-off date. In my view, the evidence simply does not support that conclusion.

[166] Section 8.5 of the SSAG states as follows:

8.5 Duration under the Basic Formula

In most cases where there are dependent children, the courts order "indefinite" spousal support, usually subject to review or sometimes just left to variation. Even when the recipient spouse is expected to become self-sufficient in the foreseeable future, courts typically have not often imposed time limits in initial support orders. Where the recipient spouse is not employed outside the home, or is employed part-time, the timing of any review is tied to the age of the children, or to some period of adjustment after separation, or to the completion of a program of education or training. As the recipient spouse becomes employed or more fully employed, spousal support will eventually be reduced, to top up the recipient's employment earnings, or support may even be terminated. In other cases, support is reduced or terminated if the recipient spouse remarries or re-partners.

In practice, where there are dependent children, few "indefinite" orders are permanent. Many intervening events will lead to changes or even termination. Some of these issues are canvassed in Chapter 14, which deals with variation, review, remarriage, second families, etc. By making initial orders indefinite, the current law simply postpones many of the difficult issues relating to duration and recognizes the fact-specific nature of these determinations.

[167] In this case I have decided that I should not make an order that spousal support terminate after a definite period. I think that the claimant is in a less favourable position than Ms. Tedham. There clearly is no prospect of her ever being able to earn sufficient employment income to maintain a standard of living in keeping with her marital standard of living. The amount of spousal support I have ordered already takes into account an imputed income close to the level that the claimant is capable of earning as opposed to her actual income. Even with this level of spousal support the respondent will still be in receipt of almost 67% of NDI, including income imputed to the claimant.

[168] Section 8 of the SSAG recommends that for marriages of 10 years or more there be the same range on duration of spousal support under the with-child formula as under the without-child formula; that is one-half to one year of maintenance for each year of marriage.

[169] Given this recommendation I think it is appropriate to order indefinite maintenance but provide for a review after eight years. By that time the children of the marriage will either be independent, or more likely close to completing their post-secondary education. The respondent will be approaching an age when he may wish to cut back on his employment activities and income. In addition, the duration of spousal maintenance will still be well

within the recommended range set out in the SSAG. I note that s. 8.5 of the SSAG suggests that few longer marriages with children will fall within the lower end of the range.

- [170] Nothing in these reasons of course precludes either party from applying for a variation on a material change in circumstances.

Retroactivity of Award

- [171] The claimant seeks an order that the awards I have made in this case be made retroactive to the effective date of the interim consent maintenance order, that is, August 1, 2009.
- [172] The respondent opposes any retroactive effect for the order, relying on Bozak, at para. 60. In that paragraph reference is made to L.S. v. E.P. 1999 BCCA 393, 67 B.C.L.R. (3d) 254. In addition this question was addressed by the Court in D.B.S. v. S.R.G., 2006 SCC 37, [2006] 2 S.C.R. 231.
- [173] I have considered the cases referred to by counsel and the history of this proceeding. Despite my expressed concerns about what became of the funds received by the respondent in 2009, I am unable to conclude that he has engaged in any blameworthy conduct or failed to meet his disclosure obligations in this case. I am also unable to find that the children or the claimant have suffered any hardship while the interim order was in place. The respondent has diligently made the payments required under that order. With respect to arrears of child support, I can see no material benefit to the children from making a retroactive award. In addition the delay in bringing this action to trial is in part attributable to the claimant's successful application to adjourn the trial.
- [174] In all the circumstances I have concluded that I should not exercise my discretion to make a retroactive award in this case beyond ordering that the respondent will commence making the increased support payments effective December 1, 2012.

Ancillary Matters

- [175] At para. 251 of her written submissions, the respondent's counsel set out a listing of the specific orders she sought. Unfortunately I neglected to ask the parties to prepare a Scott Schedule setting out their position with respect to each of the claims they sought. However I believe that I understand the position of the parties well enough to permit me to deal with each of the matters listed by respondent's counsel without asking for further submissions.
- [176] The first issue is over who should manage and maintain the Registered Educational Savings Plans (RESPs) and investment accounts that the parties have established for the children. I agree that because of his expertise as a financial advisor, the respondent is better qualified to have management and control of the RESPs and investment accounts. I therefore order that the respondent continue to manage them.

- [177] I order that no funds be withdrawn from the RESPs or the children's investment accounts without agreement of the parties or court order. I also order that the respondent provide monthly statements to the claimant showing the amounts and investments held and any monthly activity in the accounts.
- [178] There was a dispute over whether the claimant has refused to give the respondent access to family videos and photographs to permit him to copy them. The claimant is not opposed to providing the videos and photographs as long as the respondent does the same. It is regrettable that a court order is necessary on this issue. However given that the request remained outstanding at the conclusion of argument I order that within 30 days of the release of these reasons the parties provide all family videos and photographs in their possession to the other party, who will have 45 days to copy them and return the originals. Either party can fulfill his or her obligation under this order by providing electronic copies to the other party. Any expense involved in the copying will be borne by the party incurring it.
- [179] The claimant will have the right to claim the amount for an eligible dependant on her income tax returns for M.W. and the respondent may claim the amount for C.K. for all periods commencing January 1, 2012.
- [180] For the 2012 and all subsequent taxation years the parties shall be entitled to claim for tax purposes one-half of any educational tax credits with respect to C.L. and the other children of the marriage as the right to claim such credits arises in the future.
- [181] I do not order that there be any requirement to refile any past income tax returns with respect to these claims.
- [182] There will be an order for the continued involvement of a parenting co-ordinator until further agreement or court order. The costs of the co-ordinator will be shared equally.

Costs

- [183] The parties will be at liberty to make an application with respect to the costs of this action. If notice of intention to make such an application is not given by February 1, 2013, each party shall bear his or her own costs.
- [184] The parties will have liberty to apply with respect to any ambiguities in these reasons or any matter that I have overlooked.

"The Honourable Mr. Justice Sewell"

Schedule A

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