

CANADA / JUDGMENT

Small v. Small

2020 BCSC 707

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 707 Small v. Small

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Small v. Small,

2020 BCSC 707

Date: 20200507

Docket: E180585

Registry: Vancouver

Between:

Oxana Small aka Oxana Kirsanova

Claimant

And

Trevor Scott Small also known as Trevor Small

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Claimant:

M. Milau

Counsel for the Respondent:

J. Stein

Place and Date of Trial:

Vancouver, B.C.

October 15-18, 2019

January 6-8, 2020

Written Submissions of the Claimant:

January 14, 2020

January 29, 2020

Written Submissions of the Respondent:

January 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 7, 2020

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INTRODUCTION

- [1] The claimant and the respondent were married in February 2003 and separated on October 11, 2015. They have two children, who are currently aged 14 and 12. On June 24, 2019, the parties consented to a final order which addressed all parenting issues. What remains for resolution in this trial are issues related to property and debt division, spousal support, and child support. Both parties consent to a final order for divorce.
- [2] The main property in issue is a home located on Magdalen Crescent in White Rock, British Columbia which was purchased in March 2007 (the "Magdalen Crescent Property"). This was the family home at the time of the parties' separation. The claimant says that the house is a family asset and she seeks an equal division of the proceeds of its sale in 2018. The respondent says that a significant portion of the proceeds consists of his excluded property. Aside from the Magdalen Crescent Property, there are disputes over the proper division of assets and debts related to a business, an investment property, vehicles, and RRSPs.
- [3] Each party seeks to impute income to the other for the purpose of calculating prospective spousal and child support. The respondent also seeks reimbursement for retroactive support payments, including in relation to his payment of special and extraordinary expenses for the children.
- [4] Finally, the claimant seeks a finding that the respondent engaged in misconduct in the litigation that constitutes family violence within the meaning of s. 183 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. She seeks to rely on such a finding in support of her claims for lump sum child and spousal support, special costs, and security for costs.

FACTUAL BACKGROUND

- [5] I will review the background facts by way of providing a narrative context to the various matters in dispute. I am greatly assisted in doing so by the parties' Agreed Statement of Facts which was filed as an exhibit at trial. Much of the narrative context is not contested. In the course of reviewing the factual background, I will note where there are material facts in dispute.

The parties' marriage and move to Canada

- [6] The claimant was born in Russia and the respondent was born in Canada. They met online in 2002, and married in Japan on February 28, 2003. At that time, the claimant was living in Russia. The respondent was living in Japan and running a business, Global Communication Service, which operated English language schools. The claimant was 23 years old at the time the parties married, and is now 40. The respondent was 34 years old at the time of the marriage and is now 51.

- [7] In July 2003, the parties moved to Canada and began to live together at a residence on Marine Drive in White Rock that was owned by the respondent and his parents (the "Marine Drive Property"). Their children, two sons, were born in Canada in May 2005 and June 2007. In 2009, the parties moved into a house that they constructed on the Magdalen Crescent Property.
- [8] The respondent did not work in Canada between 2003 and 2006. He continued to receive income from his business in Japan, which was then being managed by his cousin. He estimates that this income amounted to approximately \$7,000 to \$8,000 per month. During this period, the respondent made periodic trips back to Japan for reasons related to the business, and also for the purpose of attendance at a PhD program in Japan.
- [9] The claimant arrived in Canada on a visitor's visa. She says she was not eligible to work in Canada until July 2005.
- [10] The parties gave conflicting evidence as to their plans for the future following their arrival in Canada. The claimant says the respondent wanted her to be a stay-at-home mother, and that he wished to be the one who worked outside the home. She says that by necessity, and in any event, she had to stay home with their young children given the amount of time the respondent spent travelling. According to the claimant, she did all of the housework, with the exception of occasional grocery shopping by the respondent.
- [11] The respondent denies that he wanted the claimant to be a stay-at-home mother. He says that the parties discussed a future in which both of them would be successful in their careers. To that end, he encouraged the claimant to take steps to become independent, including taking English language training and enrolling in courses to train as a notary or real estate agent. The claimant had been a lawyer in Russia, and the respondent says he encouraged her to explore the possibility of becoming qualified to practice law in Canada. The respondent says the claimant has overstated the amount of time he spent travelling for work. He says he was equally involved in the children's upbringing, and equally responsible for household chores.
- [12] The parties' education and employment history, which is primarily relevant to the issues of spousal and child support, is reviewed in greater detail below at paras. 40-52.

The purchase of the Marine Drive Property

- [13] The respondent purchased the Marine Drive Property with his parents, Terry and Susan Small, on May 1, 2001, for a purchase price of \$580,000. The respondent and his parents took out a mortgage in the amount of \$435,000 from the Canadian Imperial Bank of Commerce (CIBC) to complete the purchase ("CIBC Mortgage 8080"). The respondent and his parents owned the Marine Drive Property as joint tenants.

- [14] The parties agree that as of the time of their marriage on February 28, 2003, the fair market value of the Marine Drive Property was \$675,000 and the CIBC Mortgage 8080 balance was \$386,963.95, leaving equity in the amount of \$288,036.05. The parties therefore agree that the respondent owned property valued at \$96,012 (one-third of the equity) as of the date of marriage.
- [15] On April 20, 2006, the respondent's parents transferred their 2/3 interest in the Marine Drive Property to the respondent. The fair market value of the property at this time was \$1.325 million and the CIBC Mortgage 8080 balance was \$301,330. As a result of the transfer, the respondent received further equity in the Marine Drive Property in the value of \$682,447.
- [16] Following the transfer of his parents' interest, the respondent executed further mortgages against the Marine Drive Property, and used the mortgage funds to pay off the CIBC Mortgage 8080.
- [17] There was conflicting evidence at trial regarding the reasons for the initial purchase of the Marine Drive Property, and the reasons behind the decision of the respondent's parents to transfer their interest to him in 2006. The respondent testified that the Marine Drive Property was purchased as an investment and that he and his parents intended to eventually sell the property and divide the proceeds. He says that when his parents transferred their interest to him in 2006, they intended this to be his inheritance.
- [18] By contrast, the respondent's father, Mr. Small Sr., testified that he and his wife jointly purchased the Marine Drive Property with the respondent in order to assist their son in qualifying for a mortgage. Mr. Small Sr. testified that he and his wife always viewed the Marine Drive Property as belonging to the respondent and did not see it as an investment for themselves. It was the respondent's home and future security. According to Mr. Small Sr., he and his wife transferred title to the respondent once he was ready and able to take over the mortgage.
- [19] There is no dispute that the respondent's parents did not financially contribute to the mortgage or property taxes on the Marine Drive Property after its purchase and up to the time they transferred their interest to the respondent. The property was rented out between 2001 and 2003, and the rental income covered the mortgage and tax. After the parties moved into the Marine Drive Property in July 2003, the mortgage and property tax were paid with the respondent's income from his Japanese school business.
- [20] The parties made renovations to the Marine Drive Property after they moved in, which included the construction of an inside staircase to connect the first and second floors. The renovations were also paid for out of the respondent's income from the Japanese school business.

The purchase of the Magdalen Crescent Property

- [21] The Magdalen Crescent Property was purchased in March 2007. The claimant and the respondent were registered as joint owners. At the time of purchase, the property consisted of a bare lot. The parties planned to continue to live in the Marine Drive Property while a house was built on the Magdalen Crescent Property.
- [22] The purchase of the Magdalen Crescent Property was financed with funds advanced to the respondent by the CIBC pursuant to a mortgage in the amount of \$1,227,500. The respondent registered the CIBC mortgage against the Marine Drive Property on March 30, 2007. Pursuant to the CIBC mortgage, the respondent received \$900,000 through a line of credit and \$327,500 through a personal loan account. These funds were used to cover the purchase price of \$856,000 on the Magdalen Crescent Property, in addition to other closing costs, and to pay out the existing mortgages on the Marine Drive Property.
- [23] There is conflicting evidence as to the respondent's intention in registering the Magdalen Crescent Property in the parties' joint names. The respondent says that the house was jointly registered for the purpose of assisting the claimant in establishing a credit presence in Canada, and also to ensure the property would remain in the claimant's name if something happened to him. The respondent maintains that the parties agreed that the land would be his alone, and that the house they planned to build would be jointly owned.
- [24] The claimant denies that there was such an agreement. She says the parties always intended the Magdalen Crescent Property to be their joint family property. The claimant relies on evidence of the parties' interdependent financial affairs after the purchase of the property as evidence of their mutual intention.
- [25] On September 20, 2007, the parties jointly registered a mortgage in favour of the Royal Bank of Canada (RBC) in the amount of \$900,000 against the Magdalen Crescent Property for the purpose of financing the construction of the house. This first mortgage was discharged from title on April 14, 2009 after the parties took out a second RBC mortgage against the property in the amount of \$2 million.
- [26] Property tax, mortgage, and insurance on the Magdalen Crescent Property was paid out of the parties' joint bank accounts.
- [27] The parties continued to live at the Marine Drive Property while a house was built on the Magdalen Crescent Property. They moved into the Magdalen Crescent Property in the spring of 2009.
- [28] A significant amount of evidence at trial was directed to the issue of the parties' respective contributions to the construction of the house on the Magdalen Crescent Property. This included the testimony of Ranghbir Gurm, who was retained as the general contractor on the project. By way of general summary, the respondent says that the claimant overstates her contributions to the construction, although he concedes that she was involved in the aesthetic aspects of the project such as choosing the colours, tiles and flooring. Mr. Gurm

confirms that the respondent was his primary contact on the project and the person that Mr. Gurm would consult about major decisions.

- [29] Starting in 2010, the parties began short-term rentals of a suite in the basement of the Magdalen Crescent Property, which they advertised through Expedia as the "Pacific Breeze" suite. The claimant says she had primary responsibility for managing the suite, including cleaning it for the next renters, although she agrees that the respondent also had involvement. Her parents also assisted. The parties rented the Pacific Breeze suite up until the time they sold the Magdalen Crescent Property in April 2018. Both parties claimed income from the Pacific Breeze suite on their tax returns.
- [30] On November 30, 2010, the respondent sold the Marine Drive Property for approximately \$1.45 million. These funds were used to pay off the line of credit and personal loan that he had taken out with the CIBC in March 2007.
- [31] The issue of contention between the parties in relation to the Magdalen Crescent Property is the respondent's claim that a portion of the proceeds of its sale is his excluded property. The excluded property claim consists of the equity that the respondent had in the Marine Drive Property at the time of the parties' marriage combined with the equity that his parents transferred to him in 2006. The respondent says this excluded property was used to finance the purchase of the Magdalen Crescent Property. He seeks an order that he receive his excluded property from the proceeds of sale of the Magdalen Crescent Property before the proceeds are otherwise divided.

The purchase of the Foster Street Property

- [32] On April 30, 2013, the parties jointly purchased an investment property on Foster Street in White Rock (the "Foster Street Property"). By this time, the claimant had sponsored her parents to come to Canada from Russia and they needed a place to live. The parties considered the purchase of the condo to be a good investment.
- [33] At the time of the purchase, the claimant's parents transferred \$48,963 to a joint account held by the parties at the RBC, and executed a gift letter in favour of the claimant. The parties also paid \$20,000 towards the purchase of the Foster Street Property from funds in their joint RBC account. These funds combined were used as a down payment.
- [34] The claimant's parents have resided at the Foster Street Property since they immigrated to Canada in 2013. During the parties' relationship, the mortgage, property taxes, and insurance on the Foster Street Property were initially paid out of their joint account. At some point in time, the parties moved to an arrangement under which these expenses were covered by the claimant's father, Anatoly Kirsanov, using a monthly income he received from the respondent's company. This arrangement continued until July 2018, with the income to Mr. Kirsanov fluctuating between \$650 and \$725 per month.

[35] There is no dispute that the Foster Street Property is a family asset. The dispute between the parties relates to the point in time at which the property should be valued for the purpose of division under the FLA. The events relevant to this dispute are set out below (at paras. 82-89) in the review of the litigation history. The respondent also seeks reimbursement for the mortgage, property tax, and insurance payments on the Foster Street Property that he says were indirectly funded by his company after the parties separated.

The pre-marital agreement

[36] The parties signed a pre-marital agreement in Japan on February 28, 2003. The respondent says he found the agreement on the internet. Neither party had legal advice before signing. The agreement included the following relevant terms:

1. All property including corporations which belongs to each of the above parties shall be, and shall forever remain, their personal estate, including all interest, rents, and profits which may accrue from said property, and said property shall remain forever free of claim by the other.
2. The parties shall have at all times the full right and authority, in all respects the same as each have if not married, to use, sell, enjoy, manage, gift and convey all property presently belong to him or her.
3. In the event of a separation or divorce, the parties shall have no right against each other by way of claims for support, alimony, maintenance, compensation or division of property existing as of this date.
4. In the event of separation or divorce, marital property acquired after marriage shall nevertheless be subject to division, either by agreement or judicial determination.

[37] The parties agree that the respondent gave the original copy of the pre-marital agreement to the claimant, but they disagree as to when that occurred and what the respondent's intentions were. The claimant says the respondent gave her the original copy of the agreement on Christmas morning of 2008 when the family was still living at the Marine Drive Property. She says the respondent stated that he was giving her the agreement because of the love and support she had provided over the years, and to show that they were a team.

[38] The respondent says that he gave the claimant the original copy of the pre-marital agreement on Christmas of 2009 after the family had moved into the Magdalen Crescent Property. He recalls taking the document out of his safe and handing it to the claimant. The respondent says he did this because there were trust issues between the parties at the time and he was demonstrating that he trusted the claimant to keep the document safe.

[39] I note that the only relevance of the pre-marital agreement in this action is to the parties' dispute over their respective entitlement to the proceeds of the sale of the Magdalen Crescent Property. Further, it is only relevant to that dispute to the extent that it provides evidence of the respondent's intention in placing title the Magdalen Crescent Property in the

parties' joint names. The substantive terms of the pre-marital agreement roughly track the framework of the property division provisions of the FLA. The respondent did not argue that the pre-marital agreement required a division of property and debt that departed from the outcome mandated by the FLA.

The parties' employment history and income

The respondent

- [40] The respondent has an MBA from Waseda University in Japan. He started but did not complete a PhD program. As noted, while living in Japan the respondent ran an English language school business. When the parties moved to Canada in 2003, the respondent transferred the business to his cousin. The respondent continued to receive a monthly salary from the business for approximately three years, from 2003 to 2006. He did not work in Canada during those years, other than a short stint assisting a friend with a liquor store business.
- [41] In 2006, the respondent began to work for Holey Soles Canada ("Holey Soles"), a company that distributed shoes similar in style to Crocs. The respondent was originally hired as an employee. He later became an independent contractor working for Holey Soles through a company he incorporated named Trevco Distribution. Around the same time, the respondent incorporated Kawami Inc. ("Kawami"), a clothing distribution company, which he operated until 2009.
- [42] In April 2008, the respondent was sued by Holey Soles. The lawsuit was settled without payment of any money. The respondent's cousin purchased the distribution rights to the Asian market and the respondent began to work for Holey Soles Japan. This employment lasted for approximately six to eight months.
- [43] The respondent incorporated Global Brand Solutions Ltd. ("GBS"), a management consulting company, in August 2009. The claimant became a shareholder of GBS in 2014. Starting in 2010, the respondent took on employment, with a series of companies through GBS, with his focus being on sales and product distribution.
- [44] Between 2012 and 2018, the respondent, through GBS, worked for three companies specializing in the marine energy sector: Corvus Energy ("Corvus"), Plan B Energy Storage ("Plan B"), and Xalt Energy ("Xalt"). GBS was paid \$120,000 to \$140,000 per year by Corvus and Plan B. The respondent says that both of these companies eventually went bankrupt. The respondent's contract with Xalt lasted only six months, from November 2017 to April 2018. He was paid approximately \$12,000 to \$13,000 per month. The contract was terminated when Xalt was bought by a German company.
- [45] The respondent says that he was paid by GBS primarily through shareholder loans, and occasionally through dividends and a salary cheque. He and the claimant engaged in income splitting. The respondent says the parties did not receive money when dividends were paid,

but rather the dividends were used to reduce the amount of the parties' shareholder's loans. GBS is currently not operating. The shareholder loans outweigh the retained earnings, and there is not enough retained earnings to dividend out the balance owing. GBS has not earned an income since April 30, 2018.

- [46] The respondent did not work at all between April 30, 2018 and November 2019. The respondent says that there are a variety of factors that conspired to prevent him from working in this period: the demands of the litigation, which included high conflict parenting issues; the work required to complete the sale of the Magdalen Crescent Property; and a fire at his rental home on July 28, 2018 that destroyed or damaged his and the children's personal belongings. On November 18, 2018, the respondent's vehicle was T-boned at an intersection by a car that ran a red light. The respondent says the injuries he suffered in the accident delayed his attempts to find employment.
- [47] In November 2019, the respondent accepted an offer of employment with Acuva Technologies ("Acuva") as Director of Sales and Business Development, North America. The respondent's annual salary is \$80,000 with the potential for an annual bonus based on revenues generated. He works full-time from Monday to Friday. The respondent continues to work on business opportunities outside of his employment with Acuva. He is presently engaged in a project involving the potential marketing of a rare Indonesian nut in Canada.

The claimant

- [48] The claimant received a law degree in Russia. At the time she married the respondent, she was working as a lawyer in Russia. The claimant quit her job to travel to Japan to marry the respondent.
- [49] The claimant worked for the respondent's company Kawami Inc. between 2007 and 2009. This was the first time that she earned income in Canada. The parties split income from Kawami. The claimant says the income she received did not necessarily reflect the work she did for Kawami. Although the claimant did not work for Holy Soles, the parties continued to engage in income splitting so that some of the respondent's income from that company was reported on the claimant's income tax returns.
- [50] Between 2010 and April of 2017, the claimant worked for GBS. The parties do not agree on the proper characterization of the claimant's duties. The claimant says she assisted the GBS bookkeeper in managing revenue, while the respondent says she worked a few hours a month organizing receipts and writing cheques. In 2015, the claimant briefly worked for Plan B, a company that had a contract with GBS, where she earned \$27 per hour.

- [51] From November 2013 to the present, the claimant has taught Bikram yoga and Pilates at various studios in the Lower Mainland. As of the time of trial, her teaching averaged six classes per week. Since October 2019, she has also worked part-time for Skip the Dishes and cleaning houses. In 2018, the claimant reported a gross business income of \$39,000 from teaching yoga and Pilates, and a net business income of \$16,120.
- [52] The claimant says she has considered alternative career options since arriving in Canada, including the possibility of going to law school to qualify to practice in this country. She says such options are not realistic due to the prohibitive cost. The claimant says she is presently unable to work more hours as she needs to focus on repairing her relationship with her children, which has become hostile.

The parties' separation and post-separation expenses

- [53] The parties separated on October 11, 2015. The claimant moved out of the Magdalen Crescent Property on December 1, 2015.
- [54] Following their separation, the parties alternated residing at the Magdalen Crescent Property with the children. The respondent resided at the home from December 1, 2015 to August 31, 2016, and the claimant from September 1, 2016 to April 30, 2017. The respondent lived at the Magdalen Crescent Property again from May 1, 2017 until July 31, 2018, when the property was sold.
- [55] The parties both rented properties during the periods of time that they resided away from the Magdalen Crescent Property. From May 1, 2017 to the present, the claimant has resided at a rented townhouse in Surrey, British Columbia. From August 1, 2018 to May 15, 2019, the respondent resided at a rented home in White Rock. In May 2019, the respondent moved to Surrey, where he currently resides.
- [56] The parties' financial affairs continued to be intertwined after separation. The mortgage for the Magdalen Crescent Property was paid out of the parties' joint account at RBC, which was funded from their joint CIBC account. Other family expenses, including child care expenses, property tax, and insurance, and each party's rent when they were living away from the Magdalen Crescent Property, were also paid out of the joint CIBC account.
- [57] For the reasons explained in greater detail later in this judgment, it is clear that post-separation family expenses were financed primarily through income that the parties received from GBS by way of shareholder's loans. Although the claimant deposited her income from yoga and Pilates teaching in the CIBC joint account until April 2017, that income was not significant.
- [58] Until April 2017, the claimant had signing authority on GBS cheques, including cheques to herself, to the respondent and to third parties. In cross-examination, the claimant agreed that she would decide in the moment, based on advice from the GBS bookkeeper, whether to make a cheque out to herself or the respondent and in what amount. The allocation of shareholder's loans to each party was, in turn, driven at least in part by whether a cheque

was made out to the claimant or to the respondent. The claimant testified that it was up to the bookkeeper to decide how GBS income would be split.

- [59] In April 2017, the respondent removed the claimant's signing authority and effectively terminated her position at GBS. The claimant ceased to have any active role in the company. She opened bank accounts in her own name in April 2017, and thereafter deposited her employment income into her personal accounts.
- [60] Although the claimant's active involvement with GBS ended in April 2017, she continued to have use and possession of a vehicle owned by GBS. GBS covered the insurance costs. Between May 2017 and April 2018, the respondent paid \$2,200 per month towards her rent of \$2,800. During the same period, the respondent also covered the Magdalen Crescent Property mortgage payments, property tax, and insurance, as well as such child care expenses as the children's private school tuition.
- [61] The respondent says that between October 11, 2015 and July 30, 2018, he spent in excess of \$250,000 to cover expenses related to the Magdalen Crescent Property, including mortgage payments, property taxes, and home insurance, and also to cover the claimant's living expenses including rent. The respondent seeks reimbursement for these expenses before the proceeds from the sale of the Magdalen Crescent Property are otherwise distributed. He also seeks reimbursement of s. 7 expenses he covered for the children in the same period.
- [62] The parties agree that as of April 30, 2018, their financial entanglement came to an end. As of that date, the respondent stopped paying the claimant's rent, the parties fully separated their bank accounts, and GBS stopped earning any income.

The litigation history - interim orders

Orders related to parenting arrangements

- [63] There has been significant conflict between the parties over time regarding the parenting of their two sons. As I noted earlier in this judgment, the parties have managed to reach a final consent order that comprehensively addresses parenting arrangements. However, the parenting issues remain relevant in at least two respects. First, the claimant seeks a finding of family violence on the basis of the respondent's alleged litigation misconduct. Second, both parties cite the high conflict nature of the parenting disputes, and their impact on the parties, as a reason why income should not be imputed to them for support reasons. For this reason, it is necessary to review the parenting orders that have been made in the litigation.
- [64] The claimant says her relationship with her children began to deteriorate in the fall of 2017. She blames the respondent for the deterioration, and has alleged that the respondent was engaged in alienating behaviour. The children have been verbally abusive to the claimant, and have occasionally threatened physical violence. Reports have been made over time to the police and the Ministry of Children and Family Development.

- [65] On March 5, 2018, Master Muir granted the claimant an ex parte order, which included a term requiring the parties to engage in a therapeutic counselling program to address the deteriorating relationship between the claimant and the children. On August 1, 2018, the parties agreed to a consent order requiring the respondent to resume family counselling with the claimant and the children at Whole Life Counselling and Mediation ("Whole Life").
- [66] The parties attended a judicial case conference ("JCC") before Justice Marchand on May 16, 2018. They consented to an order that they share custody of the children, with each party having 50% of the parenting time. The JCC order also included a term limiting the parties' electronic parenting time with the children while the children are in the care of the other parent to: (a) any time initiated by the children, and (b) 10 minutes per child every other day when initiated by the parent who does not have parenting time.
- [67] The provision of the JCC order relating to electronic communication was amended by an October 18, 2018 order of Justice Harvey to provide that the parent who did not have the children in his or her care could telephone the children once every 48 hours, but communication was otherwise prohibited. This revision was the result of an application by the claimant, who alleged that the respondent's communication with the children was interfering with her parenting time.
- [68] On March 6, 2019, the parties appeared before Justice Mayer on competing applications. The respondent sought an order setting aside the August 1, 2018 consent order requiring him to attend family counselling at Whole Life. The claimant sought remedies for the respondent's alleged breaches of Justice Harvey's order. The claimant alleged that the respondent's text exchanges with the children in February 2019, during the claimant's parenting time, exceeded the parameters of Justice Harvey's order.
- [69] On the respondent's application, Justice Mayer declined to set aside the order requiring counselling with Whole Life. He concluded that it would not be in the best interests of the children to shift to another counselling program given the time the family had spent with Whole Life.
- [70] On the claimant's application, Justice Mayer concluded that one of the text exchanges amounted to a "technical breach" of the order. He found that there was no evidence that the respondent had intended to negatively impact the claimant's relationship with the children through the communication. Justice Mayer fined the respondent \$100.
- [71] Justice Mayer also varied the order of Justice Harvey to clarify that both parties were permitted to respond to a text message from the children while they are in the care of the other parent provided the responses were brief and dealt only with the subject matter of the inquiry. By consent, Justice Mayer ordered that the previous orders of Justice Harvey and Master Muir were enforceable as conduct orders under the FLA.

Orders related to child and spousal support

- [72] In August 2018, after the respondent had stopped contributing to the claimant's monthly rent, the claimant filed an application seeking interim spousal and child support. The application was resolved by a consent order issued on November 27, 2018.
- [73] Pursuant to the consent order, the parties agreed that on an interim, without prejudice basis, support would be based on an imputed income to the claimant of \$30,000 and to the respondent of \$155,412. It was agreed that commencing November 1, 2018, and continuing on the first day of every month thereafter, the respondent would pay child support of \$1,739 and spousal support of \$1,264. The parties also agreed that the respondent would pay 75% of special and extraordinary expenses for the children, and the claimant would pay 25%.
- [74] The respondent's imputed income was based on GBS's 2018 unaudited financial statements, which recorded a net, pre-tax income of \$155,412 in 2017. As noted, GBS did not earn revenue after April 2018, and the respondent was unemployed between April 30, 2018 and November 2019. The respondent says he agreed to pay the child and spousal support at the level set out in the November 27, 2018 consent order as a stop-gap measure. At the time of the order, the trial was scheduled to proceed on June 24, 2019.
- [75] The respondent did not make timely child and spousal support payments in December of 2018, or January and February of 2019. Pursuant to a consent order issued on February 11, 2019, the respondent agreed to pay the arrears of spousal and child support, and he subsequently did so. The respondent also did not pay support in a timely way in April and May of 2019, although he had paid the arrears by the time of the first scheduled date in June 2019. The respondent was also late in making support payments in November and December of 2019 despite having received a substantial interim disposition in September 2019 from the proceeds of sale of the Magdalen Crescent Property.
- [76] At the time of trial, there was no arrears of child or spousal support owing.

Orders related to property and debt division

Sale of the Magdalen Crescent Property

- [77] The Magdalen Crescent Property was sold on April 5, 2018 for \$2.98 million. The net sales proceeds of \$1,646,976.62 were deposited into trust with the claimant's counsel on August 11, 2018 (the "Trust Funds").
- [78] There have been interim distributions to the parties from the Trust Funds. Prior to trial, the claimant had received a total of \$301,262 in interim distributions, while the respondent had received \$491,012.
- [79] On the final day of trial, each party sought certain interim orders to require further dispositions from the Trust Funds pending the release of final judgment in this case. The orders sought related to: (i) the respondent's obligation to continue to pay child and spousal

support pending judgment at the level set out in the interim consent order of November 27, 2018, and (ii) liability for payment of the outstanding GBS tax debt, which was accruing interest. The parties ultimately agreed that the claimant would continue to receive child and spousal support at the level set out in the consent order, but that a portion would be paid from the Trust Funds. The parties could not agree on an appropriate interim order to address the tax debt.

[80] In my interim ruling of January 14, 2020, I ordered that:

- i. Terms 3 and 4 of the November 27, 2018 consent order are varied and replaced with the following terms:

On an interim and without prejudice basis, commencing February 1, 2020, and continuing on the first of each month thereafter until further court order, the respondent shall pay child and spousal support to the claimant in the total amount of \$1,300.

On an interim and without prejudice basis, commencing February 1, 2020, and continuing on the first of each month thereafter until further court order, the claimant shall receive \$1,703 towards child and spousal support from the funds held in trust at Clark Woods LLP.

- ii. On an interim and without prejudice basis, the tax debt of GBS shall forthwith be paid from the funds held in trust at Clark Woods LLP.

[81] Pursuant to my order, the sum of \$69,117.97 (\$60,719.76 to the CRA and \$8,398.21 to HST) was paid out of the Trust Funds to settle the GBS tax debt. There remains a dispute between the parties as to their relative liability for this debt.

The Foster Street Property

[82] On March 15, 2018, Beebe Cline, a realtor who assisted the parties in the sale of the Magdalen Crescent Property, prepared a comparative market analysis for the parties for the purpose of establishing a list price for the Foster Street Property. Ms. Cline recommended a list price of \$425,000.

[83] At the JCC before Justice Marchand on May 16, 2018, the parties agreed to the following orders in relation to the Foster Street Property:

8. The parties will complete a joint appraisal of the Foster Street property with the appraiser to be agreed upon.
9. The Claimant will purchase the Respondent's interest in the Foster Street property at an agreed upon value or at a value determined by the court, such that at closing, the Respondent's name will be removed from title.

[84] An appraisal was subsequently prepared on July 8, 2018 by Bakerview Realty Appraisals ("Bakerview Realty"), which concluded that the fair market value of the Foster Street Property was \$380,000.

- [85] The respondent claims that, contrary to Justice Marchand's order, the claimant delayed in taking steps to buy him out of the Foster Street Property after the Bakerview Realty appraisal was completed.
- [86] The claimant says that following the judicial case conference, she received no communication from the respondent about the transfer of the Foster Street Property until November 2018. At that time, the claimant received a letter from the respondent's then-counsel suggesting that if she did not immediately purchase the Foster Street Property, she would be in breach of the JCC order. On December 20, 2018, the respondent emailed the claimant a notice to end tenancy, and indicated that her parents had 30 days to move out of the Foster Street Property because he planned to move in.
- [87] On February 11, 2019, the parties agreed to a consent order that the respondent would not evict the claimant's parents from the Foster Street Property pending the hearing of an interim application by the claimant that was set for hearing on March 6, 2019.
- [88] On February 28, 2019, Bakerview Realty provided an updated appraisal of the Foster Street Property, concluding that it had a fair market value of \$345,000.
- [89] On March 6, 2019, the parties agreed to a consent order at the hearing before Justice Mayer that the claimant would purchase the respondent's interest in the Foster Street Property for the without prejudice purchase price of \$131,250. The claimant assumed sole responsibility for the balance of the mortgage on the property, which was then \$105,531.96. The claimant's purchase of the Foster Street Property was therefore based on a value of \$368,031.96.

The BMW X3

- [90] The claimant continued to use a GBS vehicle, a 2016 BMW X3 4D (the "BMW X3"), after separation.
- [91] The parties had some discussions around a purchase price for the BMW X3, but this did not lead to a consensual resolution. By email to the claimant's counsel dated December 18, 2018, the respondent's then-counsel insisted that the claimant agree to a purchase price of \$37,000, failing which the respondent would repossess the car or report it stolen. On December 20, 2018, the respondent sent the claimant an email stating that she had 48 hours to return the vehicle, failing which he would seek police assistance to have it repossessed.
- [92] On February 11, 2019, the parties agreed to a consent order that the respondent would not telephone the police or attempt to seize the BMW X3 before the pending March 6, 2019 hearing.

[93] On March 6, 2019, the parties agreed to a consent order before Justice Mayer that the claimant would, by March 15, 2019, purchase the BMW X3 for a without prejudice purchase price of \$38,000. There was a disposition from the Trust Fund to the claimant to allow her to purchase the vehicle. The parties have agreed that the respondent received the \$38,000 as a shareholder loan from GBS. The consent order provides that either party is at liberty to make arguments at trial about adjustments to the purchase price.

ISSUES

[94] The disputes remaining between the parties give rise to the following issues:

I. What is the appropriate division of property and debt under the FLA?

II. What are the parties' incomes for the purpose of calculating child and spousal support obligations as of November 2018?

III. What is the respondent's child support obligation as of November 2018, and does the claimant owe him retroactive s. 7 expenses?

IV. Does the respondent owe spousal support to the claimant as of November 2018 and onward, and if so in what amount and for what duration?

V. Should the respondent be ordered to pay spousal and child support on a lump sum basis?

VI. Should the respondent be ordered to pay security for costs?

VII. Should a finding of family violence be made against the respondent?

[95] The claimant does not seek an order for retroactive child or spousal support prior to November 2018, other than in relation to s. 7 expenses.

ANALYSIS

Credibility

[96] Before turning to an analysis of the issues that arise for resolution, I will address concerns I had with the credibility of both parties in the evidence they gave at trial.

[97] To state the obvious, this case is one of high conflict between the parties. The litigation began with an ex parte application by the claimant seeking to prevent the respondent from directly communicating with the children, and it deteriorated from there. The claimant has maintained allegations that the respondent has engaged in behaviour designed to alienate the children from her. In the application heard by Justice Mayer on March 6, 2019, the claimant sought to have the respondent imprisoned for three days for engaging in an exchange of text messages with the children on three occasions. Only one of these occasions was found by Justice Mayer to constitute a "technical breach" of a court order.

- [98] In April and May of 2018, the claimant sent emails to the children's hockey coach, their school teachers and principal, her landlord, and to Ms. Cline, describing the respondent as emotionally abusive to her and the children, and suggesting he was engaged in parental alienation. In an application for a yoga contest in August 2018, the claimant described her former spouse as abusive and mentally ill. The latter communication was sent after the claimant had agreed to a JCC order preventing either party from disparaging the other to third parties. In the spring of 2019, the claimant posted comments to Facebook suggesting that she was the victim of narcissistic abuse, again while bound by the JCC order prohibiting such conduct.
- [99] The respondent's conduct has been equally provocative. He has failed to comply in a timely way with support orders that he consented to. The respondent's failure to pay support on time in the fall of 2019 immediately followed his receipt of \$359,000 from the Trust Funds. His failure to adhere strictly to the communication requirements of court orders, imposed to ensure the claimant's uninterrupted parenting time with her children, has led the court to fine him for breach of an order. The respondent consented to an order to resume family counselling with Whole Life and then failed to do so. Prompted only by what he perceives to be the slow pace of the proceeding, the respondent has threatened to evict the claimant's parents from their home, and to report the claimant to the police for theft of a vehicle.
- [100] What is remarkable in the midst of such hostilities is that the parties have managed since separation to maintain a shared parenting arrangement for their children and have been able to finally resolve all parenting issues by consent. This provides some measure of hope for a more stable future for the family.
- [101] The ongoing hostility between the parties spilled over into their testimony in the courtroom. It was apparent that the evidence of both parties was heavily coloured by their entrenched views of the inequities of the situation. This rendered both of them incapable of viewing events in a measured or objective way. The parties' evidence regarding their entitlement to the proceeds of sale of the Magdalen Crescent Property provides a useful illustration.
- [102] The claimant's direct evidence about her involvement in the construction of the residence at the Magdalen Crescent Property proved to be exaggerated and in many respects inaccurate. For example, in her direct evidence, the claimant spoke of having "dealt with the liens" on the property. In cross-examination, the claimant agreed that her only involvement was to advise someone over the telephone that the parties could not afford to pay the lien at the moment. In her direct evidence, the claimant insisted that she had completed various installation tasks herself, when it became apparent through Mr. Gurm's evidence that the tasks had been completed by subcontractors. The claimant became evasive and argumentative in cross-examination when pressed on such points.

- [103] The respondent, for his part, has maintained his insistence that his parents intended to purchase the Marine Drive Property as an investment for themselves despite his father's directly contrary evidence. Mr. Small Sr. was clear in his evidence that he and his wife always viewed the Marine Drive Property as belonging to the respondent and it was purchased with the expectation that it would be the respondent's home. Mr. Small Sr. obviously has no interest in undermining the respondent's position in this litigation, and he was called as a witness by the respondent. In asking the court to reject his father's evidence in favour of a narrative that strengthens his own excluded property claim, the respondent makes no attempt to reconcile the inconsistent accounts of his parents' intentions.
- [104] I do not find that either the claimant or the respondent was deliberately dishonest in giving their evidence. I do conclude that the evidence of both parties is so heavily coloured by their own subjective perspectives on the fairness of the situation that I must approach their testimony with caution when it is not supported by the documentary record.

Issue I: Property and debt division

Legal framework

- [105] Section 81 of the FLA provides that, subject to an agreement or order which states otherwise, spouses have a presumptive entitlement to an equal interest in all family property and are equally responsible for family debt.
- [106] Section 84 of the FLA defines family property to include all real and personal property that is owned by at least one spouse on the date of separation or in which at least one spouse has a beneficial interest that is not excluded property under s. 85. Family property also includes any increase in the value of excluded property since the later of the date of the relationship between the parties began excluded property was acquired: s. 84(2)(g).
- [107] Section 85(1) defines excluded property to include property acquired by a spouse before the relationship began, inheritances, gifts to a spouse by a third party, a settlement or award of damages to a spouse to compensate for injury or loss, and property derived from excluded property. The onus of proving that property should be excluded is on the party advancing the claim: s. 85(2). Section 85(1)(g) is a tracing provision clarifying that property derived from excluded property continues to be excluded property.
- [108] The FLA does not expressly address the legal framework to be applied when one party alleges that property falling within the category of excluded property changed ownership from one spouse to the other during the course of the relationship. Our Court of Appeal has held that the intention of the spouse transferring ownership is key. If the spouse transferring the property intended it to be a gift to the other spouse, and there is no agreement for it to remain excluded property, then it will become family property: *Venables v. Venables*, 2019 BCCA 281 at para. 95 [Venables]; *V.J.F. v. S.K.W.*, 2016 BCCA 186 at paras. 74-79. If a party makes no attempt to keep excluded property separate, this supports an intention to gift the property to the other spouse: *Pisarki v. Piesik*, 2019 BCCA

129 at para. 48; Wickstrom v. Ng, 2019 BCSC 1685 at paras. 160-161.

- [109] Family debt includes all financial obligations incurred by a spouse during the relationship and also after separation if it is incurred for the purpose of maintaining family property: FLA, s. 86. A party seeking division of post-separation debt bears the burden of establishing not only the existence of the debt but also that the debt was incurred during the parties' relationship or to preserve or maintain family property: Unger v. Conrad, 2018 BCSC 507 at paras. 67-69.
- [110] Section 87 of the FLA sets out that the value of family property is based on its fair market value. The value of both family property and family debt is presumptively to be determined at the date of trial.
- [111] Pursuant to s. 95 of the FLA, a court may order an unequal division of family property or family debt, or both, if an equal division would be "significantly unfair". Section 95(2) enumerates the factors that may be considered by a court in ordering an unequal division:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[112] To justify an unequal division of family property pursuant to s. 95(2), the court must find that the unfairness is "compelling or meaningful having regard to the factors set out in s. 95(2)": *Jaszczevska v. Kostanski*, 2016 BCCA 286 at para. 41 [*Jaszczevska*], quoting *Remmem v. Remmem*, 2014 BCSC 1552. Reapportionment requires something objectively unjust, unreasonable, or unfair in some important or substantial sense *Singh v. Singh*, 2020 BCCA 21 at para. 134 [*Singh*].

[113] Section 96(b) of the FLA provides that excluded property must not be divided unless it would be significantly unfair not to divide excluded property on consideration of:

- (i) the duration of the relationship between the spouses, and
- (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

[114] The test for "significant unfairness" warranting the division of excluded property is unfairness that is compelling or meaningful on a consideration of the factors set out in s. 96(b)(i) and (ii). Division will be justified where the court finds that the consequences of not dividing excluded property would be so weighty as to produce an unjust or inequitable result: *Andermatt v. Tahmasebpour*, 2015 BCSC 1743 at para. 59.

Summary of property and debt disputes

[115] The parties' arguments at trial give rise to the following issues regarding division of family property and debt that must be resolved:

- a) In relation to the Magdalen Crescent Property:
 - i. Does the respondent have excluded property in relation to the Magdalen Crescent Property, and if so in what amount?
 - ii. Are there grounds to order unequal division of the proceeds of the sale of the Magdalen Crescent Property in favour of either party?
- b) How should the GBS debt be divided?
- c) In relation to the Foster Street Property:
 - i. How should the Property be valued?
 - ii. Is the respondent entitled to reimbursement for mortgage, insurance and property tax expenses that were indirectly covered by GBS in the post-separation period?
- d) Does the respondent have an excluded property claim in relation to the parties' RRSPs?
- e) How should the parties' vehicles be valued?
- a. The Magdalen Crescent Property

The parties' positions

- [116] The respondent advances an excluded property claim in relation to the Magdalen Crescent Property proceeds in the amount of \$778,459. This is comprised of the equity he had in the Marine Drive Property as of the date of the parties' marriage (\$96,012) and the equity that was transferred to him by his parents in 2006 (\$682,447). The respondent says these excluded amounts were subsequently transferred into the equity of the Magdalen Crescent Property. The respondent seeks an order that he receive his excluded property from the Trust Funds before the remaining proceeds are divided.
- [117] In the alternative, the respondent argues that if the court finds that his excluded property became family property due to the intermingling of the parties' finances, including placing title to the Magdalen Crescent Property in their joint names, then an unequal division of the proceeds is warranted.
- [118] The claimant argues that the respondent's excluded property claim is limited to \$288,036, which is the total equity that existed in the Marine Drive Property as of the date of the parties' marriage in February 2003. The claimant says that Mr. Small Sr.'s evidence supports the conclusion that the respondent had a 100% beneficial interest in the Marine Drive Property from the time of its purchase in 2001. On the claimant's theory, the transfer of the property to the respondent in 2006 simply formalized the pre-existing ownership arrangement between the parties.
- [119] The claimant further argues that the respondent's excluded property lost its status as such due to the parties' intertwined and interdependent finances, most significantly the registration of title to the Magdalen Crescent Property in the parties' joint names. The claimant emphasizes that the entire purchase price of the property was financed by funds obtained through a mortgage on the Marine Drive Property, the parties incurred joint mortgage debt on the Magdalen Crescent Property, and they jointly built a family home on the property. The claimant says the circumstances establish an intention on the part of the respondent to gift to her any excluded property he had in relation to the Magdalen Crescent Property.
- [120] Finally, the claimant argues that if the respondent does have an excluded property claim notwithstanding their intermingled finances, then the excluded property should be divided pursuant to s. 96 of the FLA on the basis that it would be significantly unfair not to do so.
- i. Do the proceeds of the sale of the Magdalen Crescent Property include the respondent's excluded property?
- [121] It appears to be common ground between the parties that the respondent, at least at one time, had a claim for excluded property in relation to the Magdalen Crescent Property, although they disagree on its amount. The disagreement is one of timing: whether the respondent had 100% of the beneficial ownership of the Marine Drive Property at the time of the parties' marriage, as the claimant argues, or whether he only acquired 100% of the

ownership at the time of the transfer of legal title from his parents in 2006, as the respondent argues.

[122] I do not consider it necessary to resolve this dispute as I am of the view that the respondent's excluded property, whatever its value, became family property with the registration of title to the Magdalen Crescent Property in their joint names. In my view, for the reasons that follow, the only reasonable inference that can be drawn from the evidence as a whole is that the respondent intended to gift his excluded property to the claimant in purchasing the Magdalen Crescent Property for the purpose of constructing a family home.

[123] As I have noted, it is the intention of the spouse transferring ownership that is key to determining whether the transferred property remains excluded property or becomes family property: Venables at para. 95. I find that the following evidence supports the inference that the respondent intended to transfer his excluded property to the claimant at the time of the purchase of the Magdalen Crescent Property:

- a) The Magdalen Crescent Property was registered in the parties' joint names. While the respondent maintains that this was done, in part, to establish the claimant's credit presence in Canada, there is no evidence to support such an intention other than the respondent's bare assertion. Notably, the respondent also testified that a second purpose in creating a joint tenancy was to ensure that the property would remain in the claimant's name if something happened to him. In other words, the respondent expected that the claimant would own the entire property through the right of survivorship without exception for his excluded property.
- b) The parties were joint borrowers on the first and second mortgages on the Magdalen Crescent Property. Mortgage payments were made out of the parties' joint bank accounts that contained their pooled incomes, including money from GBS.
- c) GBS was a family business. As of 2014, the claimant and the respondent were equal shareholders. The claimant worked with the respondent in the company until April 2017, and they shared income from GBS.
- d) The parties also shared income from the rental of the Pacific Breeze suite that they jointly operated out of the Magdalen Crescent Property. Rental income was reported on both parties' tax returns.
- e) While there may be a dispute over the extent of the claimant's contribution to the construction of the Magdalen Crescent Property, it was clearly a family undertaking. At the time of the construction, the parties had two young children and they viewed the Magdalen Crescent Property as their long-term family home. In his examination for discovery evidence, the respondent agreed with the characterization of the construction of the house as a "joint venture".

- f) As further evidence of the intermingling of the parties' finances, when the claimant received gift money from her parents in 2013 in the amount of \$48,993, the money was deposited into the parties' joint account and used towards the joint purchase of the Foster Street Property.
- g) In the face of the parties' growing financial interdependence over time, the respondent made no attempt to keep his excluded property separate. He also took no steps at any time before, during, or after the purchase of the Magdalen Crescent Property to formalize or document his intention to retain ownership of his excluded property.
- h) I accept the claimant's evidence of the circumstances in which the respondent gave her the original copy of the pre-marital agreement. The respondent's evidence on this point is self-serving and implausible. It defies common sense to suggest that his motive was to address trust issues in the parties' marriage by demonstrating that he trusted the claimant to take care of a document. I find that the respondent's motive was, as the claimant testified, to demonstrate to her that they were a team. The gesture is consistent with an intention on the part of the respondent to share ownership of his previously excluded property with the claimant.

[124] The respondent maintains that the parties had an oral agreement that the respondent would own the land on the Magdalen Crescent Property and the parties would jointly own the house. The claimant denies that such an agreement exists. I agree with the claimant and find that the alleged agreement is inconsistent with the evidentiary record as a whole which supports an inference that the respondent intended to share his property with the claimant and not to keep it separate.

[125] I have already stated my reasons for having concerns about the credibility of both parties. In the face of the evidence to the contrary, I reject the respondent's bare assertion that he intended to maintain his excluded property in relation to the Magdalen Crescent Property, and that the parties had an oral agreement to that effect. I conclude that the entirety of the proceeds of its sale is family property.

ii. Would equal division be substantially unfair?

[126] In the event that the court concludes that the respondent has lost his excluded property claim, the respondent seeks an unequal division of the proceeds of the sale of the Magdalen Crescent Property pursuant to s. 95 of the FLA. The respondent says it would be significantly unfair to equally divide the proceeds on the primary ground that equal division would result in a "windfall" to the claimant in terms of their relative financial improvement over the course of the marriage. The respondent also cites his disproportionate contribution to expenses associated with maintaining the Magdalen Crescent Property post-separation.

[127] I will first address the respondent's arguments regarding his post-separation contributions to the maintenance of family property, including the Magdalen Crescent Property. The respondent advances three alternative bases for reimbursement to him of post-separation

contributions to family expenses as part of the property and debt division. First, he argues that his payment of family expenses constitutes family debt within the meaning of s. 86 of the FLA that should be subject to equal division. Second, he cites his post-separation contributions to maintaining the Magdalen Crescent Property as a factor that makes equal division of the proceeds of its sale significantly unfair. Third, he argues that if he does not otherwise receive credit for his contributions in the post-separation period, then the GBS debt existing as of April 2018 should be subject to equal division in recognition of the fact that the debt was incurred for family purposes.

- [128] In my view, the first two theories effectively raise a single question of whether equal division of the Magdalen Crescent Property proceeds would lead to significant unfairness. Section 87 of the FLA directs that family property and family debt is presumptively valued at the time of trial. The parties agree that the value of the Magdalen Crescent Property is its sale price on August 5, 2018, net of the mortgage debt as of that date. The net sale proceeds are presumptively subject to equal division. The respondent's request to be "reimbursed" for his post-separation payments effectively amounts to a request for unequal division of the proceeds of sale of family property.
- [129] As our Court of Appeal held in *Jaszczewska*, at paras. 38-39, entitlement to an equal share of family property exists independently of use or contribution. To the same effect, see *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 61; and *Storey v. Terry*, 2020 BCCA 30 at paras. 23-26. While a party's post-separation contributions to family property may be a relevant factor in considering whether to order unequal division, *Jaszczewska* cautions, at para. 44, that courts must be constrained in relying on post-separation contributions as a factor warranting an unequal division.
- [130] The question, then, is whether in the circumstances of the present case equal division would be objectively unjust, unreasonable, or unfair in some important or substantial sense due to the respondent's post-separation contributions: *Singh* at para. 134.
- [131] I accept the respondent's submission that he has borne a disproportionate financial burden in the post-separation period in effectively financing two family homes. This is particularly apparent after April 2017 when he began covering the claimant's housing costs and the Magdalen Crescent Property housing expenses while at the same time that the claimant stopped depositing her employment income into the parties' joint account.
- [132] However, in light of my conclusion (set out below at paras. 144-51) that the GBS debt existing as of April 2018 is family debt which is subject to equal division, the respondent's post-separation contributions are accounted for in the property and debt division. The respondent's evidence, which I have accepted, is that the parties' expenses after separation were largely financed by way of shareholder loans from GBS. As I have ordered the equal division of those loans, there is no significant unfairness in the equal division of the proceeds of sale of the Magdalen Crescent Property as a result of the respondent's post-separation contributions.

- [133] I turn, next, to the respondent's argument that equal division of the Magdalen Crescent Property sale proceeds is significantly unfair because it would provide a "windfall" to the claimant in terms of the improvement in her financial condition over the course of the marriage as opposed to that of the respondent. The respondent relies on *Venables*, in which Justice Marchand ordered unequal division to address the relative disparity in the parties' financial situations that would result from equal division: trial decision indexed at 2018 BCSC 1736. Justice Marchand's order was upheld by the Court of Appeal.
- [134] The circumstances of the parties in *Venables* were markedly different. The parties were married in 2009 when the claimant was 51 years old and the respondent 45. The claimant brought no property and no assets into the relationship. They lived in a home owned by the respondent which had an assessed value of \$203,400 at the time of the marriage, and did not significantly increase in value over the course of the marriage. The house was transferred into joint tenancy in 2013, and the parties separated in 2016. The respondent also received an inheritance of over \$160,000 during the marriage which went into joint savings and became family property. Justice Marchand concluded that the respondent's career trajectory was well-established before he met the claimant, and there was no reason to think the claimant's contributions to the household had enabled the respondent to further advance his career. Without an order for unequal division, the claimant in *Venables* would have received a significant financial benefit that was disproportionate to the parties' respective contributions of financial assets to the relationship.
- [135] In the present case, by contrast, the claimant was 23 years old when she married the respondent. She gave up a legal career in Russia to do so. The family built a life in Canada, where the respondent was born and raised. The claimant, by contrast, had to learn a new language and navigate a new culture. She also had to acquire new skills in order to be able to work. The parties had two children together and the respondent's ability to build a business and earn an income during the marriage depended on the claimant having primary responsibility for the care of their two young children much of the time. The Magdalen Crescent Property was not an asset that the respondent brought into the marriage. For the reasons I have already stated, I find that it was purchased and built for the purpose of functioning as a long-term family home and the construction of the house was a family project.
- [136] Regardless of whether the respondent was the beneficial owner of 100% of the Marine Drive Property as of the date of marriage, as argued by the claimant, it is clear that the respondent's parents always intended the purchase of the Marine Drive Property to assist the respondent in establishing a family home. I accept Mr. Small Sr.'s evidence in this regard, and I reject the evidence of the respondent.
- [137] In the circumstances of the present case, I conclude that equal division of the proceeds of the sale of the Magdalen Crescent Property would not be significantly unfair. The result is that both parties receive an equal share of the net proceeds of the sale of the Magdalen Crescent Property, which total over \$1.6 million, and for the reasons set out below they will

jointly share in the family debt that went to maintaining the property. Given the length of the parties' marriage, the sacrifices the claimant made in coming to Canada and in assuming responsibility for childcare, the parties' financial interdependence during the marriage and after separation, and the contributions of both parties to the construction and financing of the Magdalen Crescent Property, I conclude that equal division does not result in significant unfairness to the respondent.

b. Liability for GBS debt

The parties' positions

[138] The issue of how to divide the GBS debt is intertwined with the respondent's claim for reimbursement of post-separation contributions to the Magdalen Crescent Property and to the claimant's rent.

[139] As of April 2018, the total value of the parties' shareholders' loans owed to GBS was \$272,140.74. This is in addition to the company's tax liabilities. As of April 30, 2018, GBS had cash of \$5,863.10 and credit card debt of \$8,312.16.

[140] The respondent says that if he is not reimbursed for his post-separation contribution to family expenses, then the parties ought to be equally responsible for paying the GBS debt that existed as of April 30, 2018. This is because the shareholder debt was incurred to cover the expenses of running two households in the post-separation period. The claimant's share of the shareholder debt, on the respondent's theory, should be \$136,070.37.

[141] The respondent also argues that the \$69,117.97 paid out of the Trust Funds in January 2020 to cover GBS tax liabilities ought to be shared equally. The respondent says this tax liability was incurred before GBS stopped earning revenue in April 2018. The respondent says he was unable to pay the tax debt due to the financial burdens he faced, particularly when he was unemployed after April 2018.

[142] The claimant argues that her liability for GBS debt is limited to her shareholder loans owed to GBS as of April 30, 2017, and the tax liability that existed as of that date. As of April 30, 2017, the total in shareholder's loans jointly owed by the parties to GBS was \$214,243.66, of which the portion in the claimant's name was approximately \$65,000.

[143] The GBS tax liability to the Canada Revenue Agency (CRA) as of July 31, 2017 was \$37,992.43, and the HST debt was \$6,158.75. As of July 31, 2018, GBS owed \$58,688.91 to the CRA and \$7,100.60 to HST. As I have noted, a total of \$69,117.97 was paid out of the Trust Funds on January 23, 2020 to satisfy all tax liability as of that date (\$60,719.76 to the CRA and \$8,398.21 to HST).

Analysis

- [144] The evidence before me establishes, and I find, that family expenses in the post-separation period were financed primarily by shareholder loans from GBS. While the claimant stresses that her own employment income was also pooled into the parties' joint CIBC account, at least until the end of April 2017, her income was relatively modest by comparison. Indeed, the claimant appears to agree with that characterization. In resisting the imputation of income to her that is sought by the respondent, the claimant emphasizes that her earnings over time have been insignificant once amounts allocated to her through income splitting are removed.
- [145] Furthermore, the allocation of shareholder debt as between the claimant and the respondent, at least until the end of April 2017, does not appear to bear any relationship to the parties' personal patterns of consumption. As I have already noted, the claimant had signing authority on GBS cheques until April 2017. Whether a particular cheque was made out to the respondent or the claimant was a decision the claimant made in consultation with the GBS bookkeeper. The claimant agrees the loans from GBS were covering family expenses. It is illogical in such circumstances to speak of "her debt" and "his debt". It was family debt, incurred through a family business that both parties had active involvement in up until April 30, 2017.
- [146] In my view, even if the claimant was only responsible for GBS liabilities existing as of May 1, 2017, those liabilities should be subject to equal division. The value of the total shareholder's loans to the parties as of that date was \$214,243.66, of which the claimant's equal share would be \$107,121.83.
- [147] The remaining issue is whether the additional \$57,897 in shareholder's loans advanced to the respondent by GBS between May 1, 2017 and April 30, 2018 should also be subject to equal division, along with the additional tax liability that existed as of that date. For the reasons that follow, in my view these liabilities are family debt that should be equally divided.
- [148] The claimant argues that the respondent has not demonstrated that he incurred further liability to GBS in this period directly as a result of servicing family expenses. I do not agree. In my view, the inescapable inference arising from the evidence is that the additional shareholder's loans to the respondent from GBS between May 1, 2017 and April 30, 2018, were incurred for the purpose of maintaining family property. During this period of time, the property tax, insurance, and mortgage payments on the Magdalen Crescent Property alone totalled over \$52,000. In the same period, the respondent paid \$11,100 towards the claimant's rent, and over \$25,000 towards tuition, hockey fees, and dental expenses for the children.
- [149] The claimant does not point to any source of funds, other than GBS, that could conceivably have covered these expenses. By May 1, 2017, even the claimant's limited income derived from teaching yoga and Pilates was being deposited into her personal account, while the

parties' joint accounts continued to fund the family expenses. The claimant did not argue that the respondent has failed to make full financial disclosure. She also did not point to anything in the parties' extensive financial disclosure to suggest that the respondent had engaged in excessive personal consumption over the relevant time, or that he had some alternate source of income or savings. The reality is that the parties' resources were stretched by the demands of servicing two households on limited resources.

[150] Accordingly, I find that the shareholder's loans advanced by GBS to the respondent between May 1, 2017 and April 30, 2018 constitutes debt that was incurred by the respondent to maintain family property and thus is family debt within the meaning of s. 86 of the FLA. The claimant is therefore responsible for half of the shareholders' loan debt of \$272,140.74 that existed as of April 30, 2018, which is \$136,070.37.

[151] For the same reason, I conclude that the tax liability owed by GBS as of April 30, 2018 should be divided equally between the claimant and the respondent as a family debt. The respondent says, and the claimant does not dispute, that the debts to the CRA and HST paid out in January 2020 had accrued by April 30, 2018. I accept the respondent's position that he was unable to reduce the tax liability earlier due the financial burdens created by the parties' post-separation expenses. The tax liability of \$69,117.97 should therefore be equally divided.

c. The Foster Street Property

The parties' positions

[152] The circumstances surrounding the claimant's purchase of the respondent's interest in the Foster Street Property are reviewed at paras. 32-35. Taking into account the mortgage balance existing at the time of transfer, the without prejudice purchase price was \$368,531. The March 6, 2019 order of Justice Mayer provides, by consent, that either party is at liberty to argue in favour of an adjustment to the purchase price at trial. The order also provides, by consent, that the funds for the purchase of the Foster Street Property would be paid out of the Trust Funds.

[153] The respondent argues that the court should adjust the purchase price by valuing Foster Street Property as of the date of the May 16, 2018 JCC order of Justice Marchand. There is no property appraisal as of that date. As such, the respondent says the Foster Street Property should be valued at \$402,500, which is the mid-point between Ms. Cline's comparative market analysis (prepared March 15, 2018) recommending a list price of \$425,000, and the Bakerview Realty appraisal (prepared July 8, 2018) valuing the property at \$380,000. On this theory, the respondent says the claimant owes him an additional \$16,984, which is the difference between what the claimant paid him pursuant to the without prejudice valuation of \$368,531, and what she ought to have paid him if the property was valued at \$402,500.

- [154] As I understand the respondent's argument, his proposed adjustment to the purchase price of the Foster Street Property is based on the assumption that the JCC order not only required the claimant to buy the respondent out, but required her to do so immediately.
- [155] The respondent also seeks reimbursement for the monthly income paid by GBS to the claimant's father Mr. Kirsanov, which in turn was used to pay for the mortgage, property tax, and insurance for the Foster Street Property. Although the monthly income payments to Mr. Kirsanov fluctuated over time, the respondent suggests that the calculation of the reimbursement amount can be simplified by using the monthly mortgage, property tax, and insurance payments rather than the sums paid to Mr. Kirsanov. The total amount of these expenses is \$23,487.88.
- [156] The claimant resists any adjustment to the purchase price of the Foster Street Property. She says that the JCC order anticipated that the property would be valued at a later date. It also anticipated the conduct of a proper appraisal to determine the value of the property, rather than reliance on the list price recommendation of a realtor. The claimant points out that if the updated appraisal obtained in February 2019 had suggested a higher price, the respondent would no doubt be relying on that higher appraisal rather than insisting on a valuation from March 2018.
- [157] The claimant also objects to any adjustment to the division of the Foster Street Property sale price to account for income paid to Mr. Kirsanov. Alternatively, the claimant points out that if there was a reimbursement of housing expenses for the Foster Street Property, she would be entitled to 50% of the reimbursed funds as a 50% shareholder in GBS.
- i. The value of the Foster Street Property
- [158] The respondent's position on the value of the Foster Street Property assumes that the JCC order of May 16, 2018 not only required the claimant to purchase the Property from the respondent, but also to do so immediately. This is, however, not what the order said. The order provided that the parties would complete a joint appraisal, and the claimant would purchase the respondent's interest in the Foster Street Property "at an agreed upon value or at a value determined by the court". The order thus anticipated the potential for a future process of negotiation, and possible further court intervention, to establish a fair sale price.
- [159] Ms. Cline's comparative market analysis of March 15, 2018, is not a proper basis upon which to value the Foster Street Property, and the parties did not agree to use it for that purpose. On the contrary, they agreed to have an appraisal prepared, which was subsequently done. Neither party moved with particular haste after the completion of the Bakerview Realty appraisal on July 8, 2018. Although the record is not entirely clear on this point, it appears that there was some further negotiation between the parties and possibly a disagreement over the treatment of capital gains.

[160] On the record before the court, then, there are two appraisals of the Foster Street Property by Bakerview Realty, one completed July 8, 2019 (\$380,000) and one completed February 28, 2019 (\$345,000). The without prejudice purchase price the claimant paid for the Foster Street Property pursuant to the March 6, 2019 order of Justice Mayer of \$368,531 effectively split the difference between the two appraisals. I agree with the claimant that this purchase price, which is based on the appraisal evidence, best reflects the fair market value of the Foster Street Property at the time of its purchase by the claimant.

[161] Accordingly, no adjustment to the purchase price will be ordered.

ii. The respondent's claim for adjustments

[162] The respondent's claim for reimbursement of housing expenses for the Foster Street Property assumes that the housing costs were effectively covered by GBS rather than by Mr. Kirsanov. In other words, it assumes that the amounts paid to Mr. Kirsanov were not truly income, and Mr. Kirsanov simply played the role of conduit in paying housing costs out of the funds he received from GBS.

[163] The evidence does not support this characterization of Mr. Kirsanov's arrangement with GBS. The evidence is that Mr. Kirsanov was an employee of GBS and was paid a monthly income. Mr. Kirsanov reported this income on his tax returns. In return for the income he received from GBS, Mr. Kirsanov provided services that included maintenance and yard work at the Magdalen Crescent Property, child care, and maintenance and cleaning of the Pacific Breeze suite. Mr. Kirsanov used his income to effectively pay rent at the Foster Street Property, where he and his wife resided, by covering the mortgage, property tax, and insurance.

[164] I can discern no basis in the evidence upon which the respondent can claim, on behalf of GBS, reimbursement of the income that was paid to Mr. Kirsanov. Accordingly, there will be no adjustments to the purchase price of the Foster Street Property.

d. The parties' RRSPs

[165] I understand the parties to agree that, subject to the respondent's claim for excluded property detailed below, the value of each party's RRSPs as of the date of separation is subject to equal division. It appears that there is a difference in account balances of \$21,505.99 in favour of the respondent.

[166] The respondent claims that \$20,000 of the funds in his RRSP account as of the date of separation is his excluded property. The respondent says that this sum is derived from settlement proceeds that the respondent received in relation to litigation in the United States. The respondent says the settlement monies constitute "compensation for injury or loss" within the meaning of s. 85(1)(c) of the FLA and therefore is excluded property.

- [167] The circumstances of the settlement, briefly, are these. In 2007, the respondent purchased a car online from a seller in the United States. The car was stolen in the course of shipping and the respondent never received it. He initiated a lawsuit in Las Vegas, Nevada, which was settled in 2014. The respondent's settlement was comprised of compensatory damages, punitive damages, and interest. He received settlement proceeds in the amount of \$239,442.29 CDN, which he then transferred into the parties' joint CIBC account.
- [168] In 2015, the respondent transferred \$90,000 of the settlement proceeds to a CIBC joint cash investment account. From this account, \$20,000 was transferred to the respondent's RRSP and \$20,000 to the claimant's RRSP. The remainder of the settlement funds were used to pay family expenses and debt.
- [169] As I understand the respondent's argument, he does not suggest that the entirety of the settlement proceeds are excluded property, notwithstanding that the money was used primarily to pay for family expenses. Rather, the respondent says that the \$20,000 paid into his RRSP from the settlement proceeds can be directly traced to, and retains its status as, excluded property. He thus argues that this amount ought to be deducted from the value of his RRSP at the date of separation before the RRSPs are divided.
- [170] The claimant disputes the respondent's claim for excluded property in relation to the division of the parties' RRSPs. She says it is not clear on the evidence what the settlement award related to. She further points out that the car was purchased during the course of the parties' marriage and thus, she says, is a family asset.
- [171] In my view, for the following reasons the respondent does not have an excluded property claim in relation to settlement funds that were transferred into his RRSP.
- [172] First, the stolen car was purchased during the course of the parties' marriage and thus is presumptively family property. To the extent that the settlement funds represent compensation for a loss, it is compensation for a loss to both spouses within the meaning of s. 85(1)(c)(i) of the FLA. There is, therefore, no exclusion in relation to the settlement proceeds.
- [173] Second, I do not agree that the settlement funds are compensation for a loss. The evidence suggests that a majority of the settlement proceeds consisted of punitive damages. Punitive damages are awarded with an aim to punish the defendant rather than to compensate the plaintiff: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36. An award of punitive damages therefore does not fall within the scope of the exclusion in s. 85(1)(c) for a settlement to a spouse as compensation for injury or loss: *Milutinovic v. Milutinovic*, 2018 ONSC 4310 at para. 94.
- [174] Third, if I am wrong in my conclusion on the foregoing points, I find that the respondent, in any event, intended to gift the excluded property to the claimant and therefore it became family property. The settlement proceeds were paid into the parties' joint account and thereafter were spent largely to pay down family debt. While the respondent transferred

\$20,000 of the settlement proceeds into his RRSP account, he transferred the same sum into the claimant's RRSP account. This supports the inference that the respondent intended the parties to equally share in the settlement proceeds.

[175] I therefore conclude that the value of the parties' RRSP accounts as of the date of separation should be equally divided, without exclusion of any portion of the settlement proceeds.

e. The parties' vehicles

The BMW 328i

[176] On October 8, 2015, the respondent purchased a 2015 BMW 328i xDrive for \$62,400.86 (the "BMW 328i"). The total amount financed was \$63,395.11 with a contract term of 60 months ending on October 8, 2020, and 1.15% interest charges of \$2,341.59 for a total obligation of \$64,736.70.

[177] The respondent has had exclusive use of the BMW 328i since separation. In September 2019, he traded the vehicle in for \$15,000. The amount outstanding on the BMW 328i loan at the time was \$28,000, leaving \$13,000 still owing following the trade-in. The respondent's position is that this is a family debt, and that the claimant is therefore responsible for half (\$6,500).

[178] The claimant made no submission on the respondent's position regarding the debt associated with the BMW 328i, including in her reply argument. As such, I have no indication of the basis upon which she resists division of the debt.

[179] The BMW 328i was purchased during the parties' marriage and therefore is family property. The vehicle loan was also incurred during the course of the parties' marriage and therefore constitutes family debt within the meaning of s. 86 of the FLA. The best evidence I have before me is that the vehicle had a value of \$15,000 in September 2019, and the vehicle debt was \$28,000. I agree with the respondent that the claimant is responsible for half of the net debt, which is \$6,500.

The BMW X3

[180] GBS purchased the BMW X3 on October 10, 2015 for \$59,524.14. At the same time, GBS traded in a 2013 BMW 535i xDrive Gran Turismo and its net value of \$29,321.62 was applied to the purchase price of the BMW X3 as a down payment. The balance of the purchase price was financed with a vehicle loan in the amount of \$30,241.78, with a contract term of 48 months ending on October 10, 2019. With an interest rate of 3.9% over that period, the total obligation on the loan was \$32,711.04.

- [181] The claimant has had exclusive use of the BMW X3 since separation. She purchased the vehicle from GBS on March 15, 2019, for a without prejudice purchase price of \$38,000. There was an interim disposition of Trust Funds to the claimant for the purpose of the vehicle purchase. The respondent received the funds on behalf of GBS. As noted, the parties have agreed that the respondent would retain the \$38,000 as a shareholder's loan from GBS. On March 25, 2019, GBS paid off the remaining loan on the BMW X3 in the amount of \$4,714.
- [182] The respondent says that the claimant should be responsible for the full value of the BMW X3 when she took possession in October 2015, which was \$59,524.14. I presume he takes this position because GBS covered the car loan and insurance until September 2018. The respondent says he is nevertheless prepared to use the \$38,000 the claimant has already paid for the BMW X3 on a without prejudice basis as the value for property division purposes. He also seeks an order that the claimant repay the \$4,714 that GBS paid to cover the remaining amount on the vehicle loan.
- [183] The claimant says that there is no valuation evidence to support the \$38,000 without prejudice purchase price that she agreed to on March 15, 2019. The claimant subsequently received a valuation from a BMW dealer which indicates an estimated market value for the BMW X3 of \$28,584. The claimant says she should not be liable for the remaining debt on the vehicle loan as this would require her to pay more than the market value of the vehicle.
- [184] In my view, the fact that GBS covered the loan and insurance costs associated with the BMW X3 in the post-separation period has no relevance to the valuation of the vehicle. Among other considerations, I have already determined that the GBS debt existing as of April 30, 2018 is subject to equal division. I agree with the claimant that the only evidence before the court of the fair market value of the BMW X3 is the dealer's market valuation of \$28,584.
- [185] However, I agree that there should be a further adjustment to account for the fact that GBS paid the remaining vehicle loan of \$4,714 in March 2019. This payment is not captured by the order for equal division of GBS debt as of April 2018. The debt should be equally divided between the parties to ensure that there is an equal division of the net value of the BMW X3.
- [186] In the result, the claimant is entitled to receive \$2,351 from the respondent as an adjustment to the purchase price of the BMW X3. This is the difference between the divided value of the purchase price the claimant paid and the value I have determined (\$4,708), and the divided value of the loan (\$2,357).

The VW Tiguan

- [187] Since separation, the claimant's parents have had exclusive use of the parties' 2010 Volkswagen Tiguan (the "VW Tiguan").

- [188] On March 12, 2018, the claimant advised the respondent via email that she had obtained a Canadian Black Book value of close to \$12,000 for the VW Tiguan. The claimant offered to pay \$5,500 to the respondent to purchase the vehicle. There is a dispute between the parties as to whether the respondent accepted this offer. I cannot resolve this dispute on the evidence, nor do I think it necessary to do so. The simple point is that claimant has not paid any money to the respondent for the VW Tiguan. The respondent says she should pay him \$5,500 as she offered to do in March 2018.
- [189] The claimant says that in March 2019, a car dealership quoted her a trade-in value of \$6,850. She says that there is no evidence of the current value of the Tiguan, and she suggests that the vehicle is likely worth only a nominal value now.
- [190] In my view, the best evidence before the court of the value of the VW Tiguan as of the date of trial is the price of \$11,000 that the claimant offered on March 12, 2018, based on Black Book values. The claimant described this in her email as a "fair price". I agree. I therefore conclude that the value of the VW Tiguan is \$11,000, and the claimant owes the respondent \$5,500.

Issue II: Determination of income

Legal framework

- [191] Section 16 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], establishes the general rule that a spouse's income for support purposes is determined "using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III". Section 17(1) of the Guidelines provides that if the court is of the opinion that the determination of a spouse's annual income under s. 16 would not be the fairest determination of income, the court may have regard to the spouse's income over the last three years and may determine an amount that is fair and reasonable in light of any pattern of income or fluctuation in income.
- [192] Section 19(1) of the Guidelines sets out a non-exhaustive list of circumstances in which the court may impute income. These factors include:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [193] Imputing income for intentional unemployment or under-employment does not require a finding of bad faith on the part of the spouse in respect of whom the imputation is sought; it only requires a finding that he or she is not earning to capacity: *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 153.

- [194] The imputation of income should not be the product of speculation or guess-work; the court must find that the parent is realistically capable of earning the income that is sought to be imputed and whether he or she has taken reasonable steps to obtain employment commensurate with factors such as age, health, education, skill and work history: *Bourque v. Gerlach*, 2006 BCCA 157 at para. 63; *Marquez v. Zapiola*, 2013 BCCA 433 at para 37 [Marquez]; *Shen v. Tong*, 2013 BCCA 519 at paras. 81-82.
- [195] Although the legal foundation for awarding spousal support is different from that of child support, the test for imputing income for the purpose of fixing the quantum of support is similar. The test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support: *Marquez* at para. 38.

The parties' positions

- [196] Each party seeks to impute income to the other for the purpose of determining the quantum of child and spousal support. The claimant seeks to impute income of \$163,000 to the respondent, while the respondent seeks to impute income of \$40,000 to the claimant. As noted, the claimant does not seek an order for retroactive spousal or child support other than s.7 expenses.
- [197] The respondent argues that as of November 2019, his obligation to pay child and spousal support should be calculated on the basis of his actual annual employment income with Acuva. The respondent says that his present income is reasonable and the result of his bona fide efforts to find employment in accordance with his skills, experience, and capacity. He says that the claimant has provided no evidence that an imputed income of \$163,000 is feasible.
- [198] The respondent further argues that between November 2018 and November 2019, the court should impute an income of only \$40,000 to him for support purposes. The respondent emphasizes that the November 27, 2018, interim support order, which imputed an income to him of \$155,412, was made on a without prejudice basis. As such, the respondent says his support obligation should be determined as if it was an initial application.
- [199] The respondent points to various factors that he says conspired to negatively impact his ability to search for employment following the termination of his contract with Xalt in April 2018. As noted above, these include the time and effort required to prepare the Magdalen Crescent Property for final inspection and sale, and a fire at the respondent's rented residence on July 28, 2018, which destroyed or damaged his and the children's belongings. The respondent says that the injuries he suffered in the motor vehicle accident on November 18, 2018, further impaired his ability to return to work.

- [200] The respondent thus argues that between November 2018 and November 2019, both parties should have an imputed income of \$40,000. On this theory, the respondent should not have been paying any spousal or child support to the claimant prior to November 2019 as they had shared custody of the children and the same income. The respondent seeks an order that he be reimbursed for overpayment of child and spousal support in the amount of \$36,036 between November 2018 and October 2019 (12 months x \$3,003).
- [201] The respondent argues that an income of \$40,000 should be imputed to the claimant, as opposed to the \$35,000 that she agrees to. He points out that the claimant is a trained lawyer and could retrain as a notary in Canada. Instead, the claimant has chosen to teach yoga classes on a part-time basis. The respondent says that a parent should not be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
- [202] The claimant's position is that the without prejudice income that the respondent agreed to for the purpose of support in the November 27, 2018 order was fair and reasonable, and she resists any order for reimbursement of the amounts paid in the past. The claimant says that an income of \$163,000 should be imputed to the respondent for the purpose of calculating his prospective support obligations. As I understand the claimant's argument, this amount is based on GBS's 2018 net income before taxes of \$153,000, with \$10,000 added to reflect that the respondent deducted some personal expenses from his income.
- [203] The claimant argues that the respondent has provided insufficient evidence of his efforts to extend the Xalt contract or to obtain alternative income after the contract with Xalt was terminated. The claimant suggests that the respondent relied on the cushion of income from GBS and interim dispositions from the Trust Funds to cover his expenses and he therefore lacked motivation to secure work. The claimant disputes that the respondent suffered injuries in the motor vehicle accident that prevented him from working. She says his claim that the accident-related injuries have had lasting impacts is designed to minimize his obligation to pay support.
- [204] With respect to her own income, the claimant says that the interim order of November 27, 2018, assigned a fair and reasonable income to her of \$30,000 for support purposes. The claimant notes that in 2018, her actual net income was just over \$16,000, after deduction of expenses. She says there is no basis to adjust her income for the purpose of the determination of past support payments.
- [205] On a prospective basis, the claimant agrees to an imputed income of \$35,000 beginning February 1, 2020. She says that there is no evidence on which to impute to her an income of \$40,000, as sought by the respondent. The claimant says she has worked diligently to build her career as a yoga instructor, and more recently has taken on extra work cleaning houses and as a courier for Skip the Dishes. She says her opportunities are limited given that by the time she was able to work in Canada she was the primary caregiver to the parties' two young children. The claimant says she hopes eventually to increase her employment

opportunities and income. For now, she is focussed on repairing her relationship with her children.

Analysis

The claimant's income

- [206] I agree with the claimant that an income of \$35,000 should be imputed her as of February 1, 2020. I do not accept the respondent's submission that the claimant's income should be imputed at \$40,000. Indeed, it is not even clear to me the basis on which the respondent proposes imputed income of \$40,000, beyond his belief that the claimant should simply be earning more.
- [207] I have already noted the sacrifices that the claimant made in moving to Canada and starting a life with the respondent. Her career options are necessarily limited, at least at this stage, by the fact that she had to learn a new language and engage in job retraining while caring for two small children. I accept the claimant's evidence that she has maximized the job opportunities currently available to her, and that her ability to engage in job retraining is limited at this stage. I can see no basis in the evidence to suggest that she should, or could, have done more.
- [208] For the same reason, I see no grounds for adjusting the claimant's imputed income in the November 27, 2018 consent order for the purpose of determining support in the period prior the final order in this case. I accept the claimant's submission that the income imputed to her in the interim order reasonably reflected her income earning capacity between November 2018 and the time of trial. As such, I determine that the claimant's income for the purpose of determining support obligations from November 2018 to the date of trial is \$30,000. As of February 1, 2020, the claimant will be imputed income of \$35,000.

COVID-19 impacts on income

- [209] Before turning to consideration of the income to be imputed to the respondent, I must comment on the impact of the COVID-19 pandemic on the issue of prospective support. This trial concluded at the end of January 2020. Since that date, there have been public health directives that have greatly restricted business operations in British Columbia, including the mandatory closures of fitness centres and yoga studios. There is no present indication of when such restrictions might be lifted.

[210] These events do not form part of the trial record, and I have no evidence before me as to the impact, if any, of the COVID-19-related restrictions on either parties' income. However, I am being asked to determine income in a manner that will influence the parties' future financial positions. I do not think it appropriate to simply ignore post-trial events, of which I can take judicial notice, that suggest there might already have been a material change in circumstances for one or both parties since the trial concluded.

[211] I will therefore determine each party's income as of the time of trial. However, I will also give leave to either party to apply to have their income re-determined based on post-trial events. Hopefully this judgment will provide sufficient resolution of the issues in dispute between the parties that they can consensually resolve any remaining controversies. However, in the interests of justice and fairness, in my view both parties should have the opportunity to return to court to ensure that any prospective support orders reflect any COVID-19-related impacts on their incomes that are of more than a temporary nature.

The respondent's income

The respondent's income as of the date of trial

[212] I will first address the respondent's argument that his actual employment income with Acuva should be used as a basis for determining his income for the purpose of prospective support and that income should not be imputed.

[213] The determination of the respondent's income is complicated in this case by an inconsistent pattern of earnings over time. The respondent has not followed a standard employment path of either working in one field or for one employer. From 2003 until the time he took on employment with Acuva, the respondent was an entrepreneur who pursued a variety of diverse business opportunities.

[214] Between 2003 and 2006, the respondent did not work in Canada at all but rather received \$7,000 to \$8,000 per month from his English school business in Japan. This amounted to an annual income of \$84,000-\$96,000.

[215] Between 2006 and 2008, the respondent worked for Holey Soles Canada, and then Holey Soles Japan after settling his lawsuit. At the same time, the respondent started up Kawami.

[216] Because the parties engaged in income splitting, through Kawami and then GBS, the respondent's historical Line 150 income between 2006 and 2011 is not reflective of his actual earnings. It is not apparent to me how one might derive an accurate assessment of the respondent's earnings in this period of time, and neither party suggested a method to me.

[217] The respondent's highest income years were from 2012 to 2018 when he had successive contracts, through GBS, to provide management services to three marine energy companies: Corvus, Plan B, and Xalt. The respondent made his initial contact with Corvus through a hockey coaching connection. The subsequent contracts with Plan B and Xalt flowed from contacts the respondent had developed at Corvus.

[218] GBS was paid \$120,000 to \$240,000 per year by Corvus and Plan B. The respondent says he believes he was paid above market value for his services. GBS's contract with Xalt ran for approximately six months, from November 2017 to April 2018. The respondent recalls that GBS was paid approximately \$12,000 to \$13,000 per month by Xalt. He says the contract ended when Xalt was bought by a German company.

[219] The net income reported on GBS's unaudited financial statements from 2015 to 2018 is as follows:

2015 - \$86,682

2016 - \$116,006

2017 - \$155,412

2018 - \$153,880

[220] The claimant argues that the respondent's earnings, through GBS, were on an "upward trajectory". This is the basis upon which she argues for an imputed income of \$163,000; that is, the 2018 net earnings, plus \$10,000.

[221] The respondent says he did make efforts to replace the Xalt contract, but that there were no other opportunities available in the marine energy sector. He has provided evidence of his attempts to secure alternative employment after April 2018. The documentary evidence tendered by the respondent consists of:

- a print out showing seven applications the respondent submitted between April and December 2018 through a job portal at the website of a company named ABB;
- a print out showing 60 jobs the respondent applied for through LinkedIn over an unspecified period of time; and
- a collection emails and what appear to be text messages that the respondent sent and received after April 2018, concerning job and business opportunities, particularly in the marine energy sector.

[222] The respondent says he interviewed for some jobs between April 2018 and November 2019, but did not provide details. As noted, the respondent finally accepted a job with Acuva in the fall of 2019.

- [223] I conclude that the evidence does not support the claimant's position that an income of \$163,000 should be imputed to the respondent. I agree with the respondent that GBS's earnings over the 2015-2018 period were unusually high and not indicative of an earnings trend. In this period, the respondent, through GBS, managed to secure a series of lucrative, short-term contracts in a specialized field. The claimant has not provided evidence that equally lucrative opportunities were available to the respondent after the contract with Xalt ended.
- [224] At the same time, I am not persuaded that the respondent's current annual income of \$80,000 fairly reflects his reasonable earning capacity. While the respondent's earnings history is not linear, he has generally been successful in pursuing diverse business opportunities. He successfully ran an English school business in Japan, an import clothing company, and a management consulting business. While it is not easy to precisely estimate the respondent's earnings over time, it does not appear that he has earned less than \$100,000 annually between 2003 and 2018 and in some years he has earned significantly more. The respondent has the potential to earn an income above \$80,000 with Acuva depending on the revenue he generates. He continues to explore other business opportunities outside Acuva.
- [225] In my view, \$100,000 is a fair and reasonable estimate of the respondent's annual income for support purposes as of the date of trial, and I impute income to him in this amount.
- [226] For the reasons I have already stated (at paras. 209-211), the respondent is at liberty to apply to have his income re-determined for the purpose of prospective support payments in the event that his income has been reduced by the economic disruption that has come with the COVID-19 pandemic.

The respondent's income from November 2018-January 2020

- [227] The remaining issue is what income should be imputed to the respondent in the pre-trial period from November 2018 until January 2020. Pursuant to the November 27, 2018 without prejudice interim order, the respondent has paid monthly spousal and child support to the claimant in the total amount of \$3,003, since November 1, 2018. This was based on an imputed income of \$155,412.
- [228] The respondent says he agreed to the November 27, 2018 order as a stop-gap measure and because the then-scheduled trial date was only months away. However, the respondent says that the income imputed to him in the order is unreasonable light of the fact that he was unemployed at the time and had been since the GBS contract with Xalt ended in April 2018. The respondent says his imputed income between November 2018 and November 2019, when he secured employment with Acuva, should be \$40,000. I note that this roughly equates to about \$10,000 per year above what the respondent would earn at a minimum wage job.

- [229] I accept the respondent's submission that because the interim support order was made on a without prejudice basis, he is entitled to seek a determination of support in the pre-trial period without showing a material change in circumstance. A without prejudice order has been described as a form of "Band-Aid provision", often agreed to for expediency, which should not later impede a party's ability to argue for a different result: *Sandhu v. Bhullar*, 2016 BCSC 59 at para. 42; *Burchhardt v. Geismayr*, 2019 BCSC 1850 at para. 30-32.
- [230] The question as it relates to the pre-trial period is whether the respondent made adequate efforts to secure alternative, commensurate employment after the termination of the Xalt contract in April 2018.
- [231] I have already reviewed the evidence of the respondent's employment search after April 2018. While I accept that the respondent did make some effort to secure employment, the evidentiary record does not indicate that he acted with diligence in pursuing either employment or business opportunities. Viewing the evidence in the most favourable light possible, the documentary record suggests that the respondent applied for about 65 jobs over a 19-month period, which is three to four applications per month. The respondent testified that he had some job interviews during this time, but did not provide details.
- [232] Further, I do not accept that someone with the respondent's level of education, business skills, and employment history was only capable of earning an income of \$40,000 during this time. Indeed, the respondent himself appears to acknowledge that an imputed income of \$40,000 would constitute under-employment. He attributes his failure to work more in this period to the stress of the litigation, the need to prepare the Magdalen Crescent Property for closing, and the fire at his rental property. The respondent cites the injuries he suffered in the November 18, 2018 motor vehicle accident as a factor that limited his ability to work.
- [233] Both parties tendered evidence at trial on the question of what, if any, impacts the accident had on the respondent's earning capacity. The respondent tendered affidavits from a chiropractor and a naturopath from whom he received treatment. His family doctor, Dr. Lourens Perold, was called as a witness by the claimant. No expert evidence was tendered by either party.
- [234] The medical evidence suggests that the respondent experienced soft tissue injuries in the accident. The respondent says he also suffered a concussion, but the medical evidence is not clear on this point. In early December 2018, Dr. Perold ordered a CT scan after the respondent complained of having headaches and cloudy memory. The CT scan did not show any acute injury. The respondent advised Dr. Perold in December 2018 that he had reduced his workload to 50%, although he was not then employed. This is described in Dr. Perold's notes as a "self modified" work schedule. Dr. Perold did not certify that the respondent was unable to work.

- [235] On the basis of the limited medical evidence adduced at this trial, and in the absence of any expert evidence, I cannot conclude that the respondent's accident-related injuries had any significant impact on his ability to work in the pre-trial period. I also do not accept that the other stressors in the respondent's life at the time, including the ongoing stress of the litigation, provide a legitimate excuse for his unemployment or under-employment.
- [236] Accordingly, and for the reasons already stated, I find it reasonable to impute an income to the respondent of \$100,000 for the purpose of determining his support obligations as of November 2018. In my view, the respondent had the capacity to earn such an income as of that date.

Issue III: Child support and s. 7 expenses

Legal Framework

- [237] Section 9 of the Guidelines applies when each spouse has the children at least 40% of the time. In a situation of shared parenting, s. 9 directs that the following factors should be considered in the determination of child support:
- 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.
- [238] A simple set-off of the table amounts for each spouse serves as a useful starting point for determining support under s. 9 of the Guidelines. However, a simple set-off has no presumptive value in the s. 9 analysis; full consideration must also be given to the factors listed in s. 9(b) and (c): *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 49.
- [239] Section 7 of the Guidelines gives the court discretion to order payment of an amount over and above the regular table amount to cover special or extraordinary child care expenses, having regard to the necessity and reasonableness of the expense. Special and extraordinary expenses are listed in ss. 7(1)(a) to (f) of the Guidelines:
- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
 - (b) that portion of the medical and dental insurance premiums attributable to the child;
 - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

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

[240] Section 7 expenses must be proven to be "special" or "extraordinary" because the basic table amounts of child support are designed to cover the "ordinary" costs of raising a child: *Clarke v. Clarke*, 2014 BCSC 824 at para. 49 [Clarke]. The cost of providing food, shelter, clothing, and other necessities are not special or extraordinary: Clarke at para. 49.

[241] Section 7(2) provides that special or extraordinary expenses are to be shared by the spouses in proportion to their respective incomes.

[242] The principles applicable to a claim for retroactive child support orders, set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], also govern a claim for retroactive s. 7 expenses: *Semancik v. Saunders*, 2011 BCCA 264 at para. 38 [Semancik]. The factors to be considered in determining whether a retroactive award is appropriate, as set out in D.B.S. at paras. 100-116, include: whether the recipient parent has a reasonable excuse for why the order was not sought earlier; blameworthy conduct on the part of the payor parent; the circumstances of the child; and whether any hardship would be caused by a retroactive award.

[243] In D.B.S., the Court established that the date of retroactivity is the date when effective notice was given to the payor parent that child support should be paid or increased. "Effective notice" consists of any indication from the recipient parent that child support needs to be paid or renegotiated. Once such indication has been given, the payor parent can no longer assume that the status quo is fair and their interest in certainty is less compelling: D.B.S. at para. 121.

[244] However, once the recipient parent raises the issue of child support, they are still obliged to move the discussion forward. A prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned. Absent blameworthy conduct by the payor parent, it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given: D.B.S. at para. 123.

[245] Where the application for a retroactive order relates to s. 7 expenses, it is particularly important that the recipient parent has informed the payor parent in a timely manner of the details of the expenses as they occur: Semancik at paras. 55-57.

Analysis

The respondent's prospective child support obligations

- [246] As of the date of trial, I have imputed income of \$35,000 to the claimant and \$100,000 to the respondent. As I understand the parties' positions, they agree that the set-off approach is a fair manner of determining the respondent's support obligations in this situation of shared custody, having regard to all of the factors listed in s. 9 of the Guidelines.
- [247] Under the 2017 Federal Child Support Tables, the claimant would owe monthly child support in the amount of \$562, and the respondent would owe monthly support of \$1,522. Accordingly, starting February 1, 2020, the respondent must pay the claimant \$960 per month in child support.
- [248] In relation to s. 7 expenses, the parties agree that, in addition to those expenses expressly listed in s. 7, the following qualify as special or extraordinary expenses:
- the children's private school tuition fees;
 - contributions to the children's RESPs at KF Financial; and
 - hockey registration fees, and reasonable costs for equipment and travel to tournaments.
- [249] Each party objects to categories of s. 7 expenses claimed by the other party. I agree with the claimant that the costs of the children's cell phone plans is not a special or extraordinary expense: J.D. v. Y.P., 2015 BCSC 321 at para. 76. I also agree with the respondent that hot lunches, gym memberships, haircuts, and school supplies are not special or extraordinary expenses.
- [250] I will therefore direct that the parties will share the expenses s.7 expenses I have listed above at para. 248, along with any other s. 7 expenses agreed to by the parties or ordered by the court. The claimant agrees to pay 33% of the s. 7 expenses on a prospective basis. The court's order will thus reflect that as of February 1, 2020, the respondent shall pay 67% of s. 7 expenses, and the claimant will pay 33%.

Reimbursement of pre-trial child support

- [251] As I have determined the parties' incomes to be different than those that were the basis for the interim, without prejudice order of November 27, 2018, there needs to be an adjustment for child support paid by the respondent in the pre-trial and pre-judgment period. The adjustments are as follows:

- i. November 2018-January 2020: the respondent paid monthly child support of \$1,739 based on an imputed income for him of \$155,412, and for the claimant of \$30,000. I have determined the respondent's income in this period is \$100,000, and the claimant's income is \$30,000. Using the set-off approach, the respondent's monthly child support obligation was \$1,038 rather than \$1,739. He is entitled to reimbursement in the amount of \$10,515 for over-payment of support in this period (15 months x \$701).
- ii. February 2020 and onward: as of February 1, 2020, the respondent's child and spousal support obligations have been governed by my interim order of January 14, 2020. In accordance with that order, starting February 1, 2020, the respondent has paid \$1,300 monthly child and spousal support to the claimant, and the claimant has received \$1,703 from the Trust Funds. I will address the mechanism by which to make adjustments for these payments after I have dealt with the respondent's obligation for spousal support.

Retroactive s. 7 expenses

- [252] The respondent seeks reimbursement from the claimant of retroactive s. 7 expenses from the date of separation to the present. He says he incurred s. 7 expenses over that period in the total amount of \$150,122, to which the claimant has made no contribution. The expenses are comprised of the children's private school tuition and related fees, hockey expenses, dental care, contributions to the children's RESPs, and cell phone expenses.
- [253] The respondent says that the claimant collected receipts for the parties until April 2017, and was well aware of the expenses that the respondent was incurring from the time the parties' separated. He says that the effective date of notice of his claim for retroactive expenses is, at the very latest, March 26, 2018, which is the date the respondent filed his counterclaim claiming, inter alia, special and extraordinary expenses for the children.
- [254] The claimant agrees to pay 25% of reasonable and necessary s. 7 expenses incurred by the respondent after April 30, 2018. Before that date, the claimant says that the family expenses were paid out of the CIBC joint account that both parties had contributed to since separation. She says that the respondent's calculations do not account for contributions she has already made to the claimed s. 7 expenses. The claimant also disputes that she received effective notice of the respondent's claim for retroactive s. 7 expenses.
- [255] For the following reasons, I conclude that the respondent is not entitled to reimbursement of s. 7 expenses incurred prior to May 1, 2018.
- [256] First, I do not agree that the claimant received effective notice of the respondent's claim for reimbursement of retroactive s. 7 expenses simply because she saw the receipts that now form the basis for the claim. There is no evidence that the respondent put the claimant on any form of notice prior to filing his counterclaim on March 26, 2018 that he would be seeking reimbursement of retroactive s. 7 expenses. It is unnecessary for me to resolve the controversy between the parties as to whether the respondent's counterclaim constitutes effective notice because the claimant, in any event, agrees to reimburse the respondent for

reasonable s. 7 expenses incurred after April 30, 2018.

- [257] Second, up until April 30, 2018, the parties' finances remained intermingled. Family expenses continued to be paid primarily out of the parties' joint CIBC account, which was largely funded by the GBS shareholder's loans. I have already determined that the GBS shareholder's loans should be equally divided as family debt as of April 30, 2018. The respondent would be doubly compensated if the claimant was additionally required to reimburse him for a portion of family expenses incurred up to April 30, 2018.
- [258] The respondent says he incurred just over \$44,000 in s. 7 expenses between April 30, 2018 and the date of trial, of which approximately \$3,000 was cell phone expenses for the children. If one removes the cell phone expenses, which are not properly claimed as s. 7 expenses, the claimant would owe the respondent \$10,250 (25% of \$41,000). The claimant objects to certain other expenses claimed by the respondent such as food purchased on the ferry on the way to a hockey tournament, \$300 for a hockey stick, and claims based on receipts that do not indicate what was purchased. She agrees to pay the respondent \$7,525.11 towards retroactive s. 7 expenses incurred after April 30, 2018.
- [259] The claimant says she has incurred approximately \$12,400 in s. 7 expenses prior to trial, and she seeks contribution from the respondent of \$9,300 (75% of \$12,400). The respondent says that the claimant has included costs incurred in relation to hot lunches, a gym membership, haircuts, and school supplies which are not special or extraordinary expenses. The respondent also objects to the inclusion of the cost of \$1,774 towards Whole Life counselling when the evidence is unclear as to whether the counselling sessions were for the claimant or the children. The respondent agrees to pay his proportionate share of the respondent's s. 7 expenses once those costs are removed.
- [260] I agree with the respondent that the claimant has included expenses in her claim for reimbursement that are not s. 7 expenses. However, I disagree that the Whole Life counselling expense should be excluded. The supporting invoice evidences that the costs incurred primarily related to the provision of counselling to the children. If the expenses for hot lunches, a gym membership, haircuts, and school supplies are removed, the s. 7 expenses incurred by the claimant prior to trial total approximately \$10,900. The respondent's proportionate share is \$8,175.
- [261] In the circumstances, given the apparent parity in the parties' respective claims for reimbursement of retroactive s. 7 expenses after April 30, 2018, in my view it would be most equitable to make no order for retroactive s. 7 expenses.

Issue IV: Quantum of spousal support

Legal framework

- [262] Pursuant to s. 15.2(6) of the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.), spousal support is intended to:

- (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 time period.

[263] These objectives are mirrored in s. 161 of the FLA.

[264] Pursuant to s. 15.2(4) of the Divorce Act, in making a spousal support award the court must consider "the condition, means, needs and other circumstances of each spouse", including "the length of time the spouses cohabited", "the functions performed by each spouse during cohabitation", and "any order, agreement or arrangement relating to support of either spouse".

[265] Once entitlement to support is established, which is conceded by the respondent in the present case, the issue becomes the appropriate amount and duration of support. The Spousal Support Advisory Guidelines [SSAG] have been endorsed in British Columbia as a useful tool in determining the quantum of support: *Chutter v. Chutter*, 2008 BCCA 507 at para. 100. Quantum refers to both the amount and the duration of spousal support.

[266] Support in the present case is calculated pursuant to the shared custody, "with child support" formula set out in the SSAG. The SSAG calculation will provide a range for amount and duration of spousal support, which is only the first step in the spousal support analysis. It must then be determined, based on factual considerations specific to the case, where within the range to situate support.

[267] Chapter 9 of the SSAG provides additional guidance on determining where, within the range, support should be located. The following is a non-exhaustive list of factors which may be considered:

- strength of any compensatory claim;
- recipient's needs;
- age, number, needs, and standard of living of children (if any);
- needs and ability to pay of payor;
- work incentives for the payor;
- property division and debts; and

- self-sufficiency incentives.

Analysis

The amount and duration of the respondent's prospective spousal support obligations

- [268] Counsel have each provided me with their respective SSAG calculations based on the income they have asked the court to impute each party.
- [269] The claimant's calculation is based on an imputed income to the respondent of \$163,000, and to the claimant of \$35,000. The claimant's calculation does not account for s. 7 expenses. Based on these income figures, the SSAG "with child" support calculation suggests a mid, low, and high range of monthly support of \$2,103, \$2,851, and \$3,051 for a duration of 6.5 to 13 years from the date of separation. The claimant seeks an order for lump sum spousal support in the amount of \$133,500, which she says is the present value of an award of spousal support in the mid-range for a duration of eight years.
- [270] The respondent says the claimant's SSAG calculation is flawed, even assuming that she used the right income, because her calculation does not account for estimated s. 7 expenses, even those the parties have agreed upon. His calculation includes annual s.7 expenses in the amount of \$24,522, which consists of the estimated cost of the children's private school tuition (\$12,000), medical expenses (\$400), RESP contributions (\$5,122), cell phones (\$1,500), and hockey fees, equipment, and travel (\$5,500). The respondent's calculation is based on employment income of \$80,000 for the respondent and \$40,000 for the claimant. Using these figures, the SSAG suggests a low, mid and high range of monthly spousal support of "0", "0" and \$268, respectively, for a minimum duration of 6.25 years and a maximum duration of 12.5 years.
- [271] The respondent says there are no circumstances that would warrant an award of spousal support in the high end of the range in the present case, and therefore the respondent should not be required to pay any support. Alternatively, the respondent says that any spousal support he is ordered to pay should consist of periodic payments that terminate in 2024.
- [272] In light of my findings regarding the imputation of income, neither of the parties' SSAG calculations are of assistance in determining the appropriate level of support. I accept the respondent's submissions that s. 7 expenses ought to be factored into the SSAG calculation, but I do not agree with the amount he has included. In my view, \$19,500 is a reasonable estimate of s. 7 expenses for the purpose of the SSAG calculation. This amount is sufficient to cover the estimates of the children's tuition, medical expenses, RESP contributions, and a modest amount of hockey-related expenses. For the reasons already stated, I do not agree that the children's cell phone costs are a proper s. 7 expense.

- [273] Using incomes of \$100,000 and \$35,000 for the respondent and claimant respectively, and including \$19,500 in s. 7 expenses, the "with child" SSAG calculation suggests a low, mid, and high range of monthly spousal support of \$314, \$654, and \$1,008, for a duration of 6.35 to 12.7 years.
- [274] In my view, an award of spousal support in the mid to upper range is appropriate in this case. There are two factors that I find particularly persuasive in locating support along the range. The first is the strength of the claimant's compensatory claim to spousal support in light of the career sacrifices she made to support the family and the respondent's various business activities. The second, and related, factor that warrants support above the mid-range is that the claimant faces inherent employment disadvantage relative to the respondent as a result of the sacrifice she made in giving up an established career in moving from Russia to Canada. While the claimant is certainly to be encouraged to work towards a position of self-sufficiency, it can be expected to take her longer to do so than might otherwise have been the case.
- [275] I consider that it is fair in the circumstances to order the respondent to pay the claimant monthly spousal support in the amount of \$850. While I acknowledge that this will result in some disparity in terms of the parties' net disposable income, I nevertheless find that support at this level is justified by the factors I have identified. As for duration, in my view it is appropriate for the respondent's spousal support obligation to continue for a further six years, terminating as of May 30, 2026.

Reimbursement of pre-trial spousal support

- [276] As I have determined the parties' income to be different than provided for in the interim, without prejudice order of November 27, 2018, there needs to be an adjustment for spousal support paid by the respondent in the pre-trial and pre-judgment period, and an adjustment for child support paid after February 2020. The adjustments are as follows:
- i. November 2018-January 2020: the respondent paid monthly spousal support in the amount of \$1,264. I have determined the respondent's income in this period is \$100,000, and the claimant's income is \$30,000. Using the same estimate of \$19,500 for s. 7 expenses, the SSAG calculations suggest a low, mid and high range of \$434, \$770 and \$1,105, respectively. For the reasons already stated, in my view an award of spousal support towards the higher end of the range is appropriate. I conclude that \$1,000 is the amount of spousal support that ought to have been paid by the respondent in the pre-trial period, rather than the \$1,264 that he paid. He is entitled to reimbursement in the amount of \$3,960 (15 months x \$264).
 - ii. February 2020 and onward: as of February 1, 2020, child and spousal support obligations were governed by my order of January 14, 2020. Pursuant to the order, the claimant has for four months (February-May) continued to receive \$3,003 per month in total, with the respondent paying \$1,300 and the remainder paid out of the Trust Funds. I have concluded that the respondent's actual support obligation in that period was \$1,810 per month (\$960 for child

support, \$850 for spousal support), rather than \$3,003. The claimant thus received an overpayment of \$4,772 from the Trust Funds, which should be adjusted for in the distribution of the proceeds.

Issue V: Should lump sum support be ordered?

Legal framework

[277] Section 11 of the Guidelines permits the court to order that child support be paid periodically, in a lump sum, or in a lump sum and periodic payments. A lump sum award of spousal support is also permitted under s. 15.2 of the Divorce Act. The same considerations apply where lump sum awards are sought for spousal support or child support: *Santelli v. Trinetti*, 2019 BCCA 319 at para. 164 [Santelli].

[278] Lump sum support awards are exceptional, and should only be made where there is a special need or specific circumstances that renders it appropriate. The circumstances that may warrant a lump sum award are summarized by our Court of Appeal in *Santelli* at paras. 163-166 and *Parton v. Parton*, 2018 BCCA 273 at paras. 47-48. They include:

- i. the existence of animosity between the parties, which might favour a lump sum award to reduce future sources of conflict;
- ii. other reasons that it might be desirable to terminate contact between the parties, including a history of domestic violence;
- iii. providing capital to meet immediate need on the part of the dependent spouse;
- iv. a history of non-compliance with court orders that suggests the payor spouse is unlikely to comply with support orders in the future;
- v. the difficulty of enforcing a periodic support order where the payor spouse lives outside of Canada; and
- vi. a lack of proper financial disclosure from the payor spouse.

[279] The advantages to be gained by a lump sum award must be balanced against any disadvantages to the payor spouse. A lump sum support award should not be made where the payor does not have the ability to make a lump sum payment without undermining his or her future self-sufficiency: *Santelli* at para. 166.

Analysis

[280] The claimant seeks a lump sum award of spousal support in the amount of \$133,500, which is the present value of a further eight years of spousal support based on an imputed income to the respondent of \$163,000 and to the claimant of \$35,000. The claimant additionally seeks an award of \$21,000 for 12 months of child support to cover the period in which the parties will be in family counselling. The claimant says such an award is justified by the respondent's previous disregard for support orders, the risk that he will not make periodic

payments in the future, and the level of animosity between the parties.

- [281] I do not agree that the circumstances of the present case warrant an exceptional award of lump sum support. The respondent does have a history failing to consistently pay support orders in a timely manner. While this conduct is obviously not to be condoned, there is a broader context to consider. The respondent voluntarily supported the claimant for a period of almost three years after separation, including paying \$2,200 towards her rent each month, without the need for a court order. In an effort to avoid a contested interim hearing over child and spousal support, he agreed to a without prejudice support order that imputed income to him at a level that exceeded what I have found he was realistically capable of earning. The respondent's failure to make timely support payments was to some extent the result of financial constraints that he faced in making such payments.
- [282] There are presently no arrears outstanding, and the respondent has indicated his commitment to meeting his future support obligations. I accept that his expression of commitment is genuine.
- [283] There is undeniably animosity between the parties, but that without more does not warrant a lump sum support award. Despite their animosity, the parties have shown an impressive ability to work consensually towards a shared parenting regime. Prior to the originally scheduled trial date of June 24, 2019, the parties settled the parenting issues, which had been the most contentious part of this proceeding. This provides some measure of hope that the parties can move towards a more cooperative approach in the future once they have the closure of a final determination of the remaining issues.
- [284] Finally, I also accept that the lump sum support order sought by the claimant would result in hardship to the respondent. Such an award would consume a significant portion of the respondent's entitlement to the proceeds of the sale of the Magdalen Crescent Property, which is the family asset of greatest value. As such, it would undermine the respondent's ability to obtain self-sufficiency in the future.
- [285] For these reasons, I order that the respondent's child and spousal support payments are to be made on a periodic, not lump sum, basis.

Issue VI: Security for costs

- [286] The claimant seeks an order pursuant to Rule 22-1(6) of the Supreme Court Family Rules, B.C. Reg. 169/2009, that the respondent receive no monies from the Trust Funds until the issue of costs has been resolved. In effect, she seeks an order for security for costs.
- [287] The principles that govern an order for security for costs in a family proceedings were reviewed by Justice Harris in *L.S. v. G.S.*, 2016 BCSC 1130 at paras 31-35. The principles may be summarized as follows:

- a) The purpose of an order for security for costs is to protect a litigant from the possibility that it will be unable to recover costs from its opponent if the litigant is ultimately successful in the litigation.
- b) The test for ordering security for costs against an individual is generally more stringent as compared to a corporate plaintiff. The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances.
- c) The court should consider such factors as the ability of a party to pay costs, if ordered, the merits of the case, the level of costs, and any prejudice to the parties.
- d) An important consideration in making an order for security for costs against an individual is access to justice.

[288] The present case is somewhat unusual in that the claimant applied for an order for security for costs in the course of trial and the application is being resolved in the final judgment. I accept that the court would have jurisdiction in an appropriate case to make an order in the terms sought by the claimant if there was a concern that she would be unable to recover trial costs absent the order.

[289] I conclude that an order for security for costs is not appropriate in the present circumstances. For the reasons already stated in rejecting the claimant's request for an order for lump sum costs, I do not agree that the respondent has been guilty of the type of repeated and wilful non-compliance with court orders that leads to reasonable apprehension that he will not comply with orders, including costs orders, in the future. The respondent will have the ability to pay any costs order out of the proceeds he will receive from the sale of the Magdalen Crescent Property. It is not even clear at this stage that the respondent will be liable to pay any costs award given the parties' divided success in this proceeding.

[290] For these reasons, I dismiss the claimant's application for an order for security for costs.

Issue VII: Family violence

[291] The claimant seeks a determination that the respondent's conduct throughout the proceedings constitutes family violence. As I understand her argument, the claimant says that such a determination would provide support for her claims for lump sum child and spousal support, special costs, and security for costs.

[292] The question of whether a party's conduct constitutes family violence within the meaning of s. 1 of the FLA typically arises where protection orders are sought under Part 9 of the FLA or parenting arrangements are in issue. No protection orders are sought in this trial, and all parenting issues were resolved by consent prior to trial.

- [293] The claimant has referred me to no authority in support of the proposition that a finding of family violence is, on its own, germane to an application for lump sum support, security for costs, or special costs. Each of these remedies is in fact governed by a distinct legal framework and set of governing principles. There may be cases in which the same underlying conduct could be cited in support a finding of family violence and an order for lump sum support, security for costs, or special costs. For example, a history of domestic violence within the family relationship is a factor that might support an award of lump sum support where such a history has impacted the ability of the dependent spouse to become self sufficient: *N.K. v. M.H.*, 2020 BCCA 121 at para. 70.
- [294] The relevant question, it seems to me, is not whether the conduct relied upon in support of any such remedy meets the statutory definition of family violence in the FLA, but rather whether the conduct is established and meets the test for lump sum support, security for costs, or special costs. In the present case, I do not consider it helpful or necessary to complicate the analysis by embarking on an inquiry of whether the respondent's conduct in the litigation amounts to family violence within the meaning of the FLA when such a determination can have no practical utility.
- [295] I have already explained my reasons for concluding, based on the applicable law, that this is not an exceptional case warranting an award of lump sum support or an order for security for costs. The established test for special costs requires proof that a party has engaged in reprehensible conduct in the litigation that is deserving of the court's rebuke: *Sandhu v. Mangat*, 2019 BCCA 238 at paras. 7-9; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at para. 57.
- [296] The claimant can only seek an order that the respondent pay her costs as special costs if she is entitled to an award of costs to begin with. My preliminary view is that the parties should each bear their own costs given their divided success in this proceeding, and that neither party has engaged in reprehensible conduct that would warrant an award of special costs. However, as the parties' positions on costs are obviously informed by these reasons for judgment, I will give both parties leave to provide additional submissions on costs if they cannot reach agreement on an appropriate costs order.

DIVORCE AND NAME ACT CHANGE

- [297] The parties both seek an order of divorce. They have been living separate and apart since October 2015. I am satisfied that the requirements for a divorce order pursuant to s. 12 of the Divorce Act are met in this case. I therefore grant an order of divorce that will take effect on the 31st day after the date of this judgment.
- [298] The claimant seeks a name change under s. 5 of the Name Act, R.S.B.C. 1996, c. 328, to change her surname to her maiden name, "Kirsanova". I order that the claimant's surname be changed to Kirsanova.

SUMMARY OF ORDERS

[299] In conclusion, I make the following orders:

Orders by consent

1. Subject to section 12 of the Divorce Act, the claimant, Oxana Small also known as Oxana Kirsanova, and the respondent, Trevor Scott Small also known as Trevor Small, who were married at Tokyo, Japan on February 28, 2003, are divorced from each other, the divorce to take effect on the 31st day after the date of this judgment.
2. Subject to s. 5 of the Name Act, the claimant's surname is changed from "Small" to "Kirsanova".
3. BY CONSENT, the parties will equally divide the following expenses, such that the Claimant will reimburse the Respondent \$7,770.10:
 - a. Magdalen Crescent Property sale costs of \$4,230; and
 - b. Kawami debt of \$11,310.20.
4. BY CONSENT, the parties will cooperate and share the cost of having the claimant removed as a shareholder of GBS Ltd.
5. BY CONSENT, the respondent will receive the \$38,000 payment from the claimant to GBS for the BMW X3 as a shareholder loan.
6. BY CONSENT, the respondent's claims for reimbursement for veterinary costs for Prana and cell phone invoices paid on behalf of Lydia Kirsanova are dismissed.

Child and spousal support

7. Commencing February 1, 2020, pursuant to the Divorce Act the respondent will pay child support to the claimant of \$960 per month for the children until such time as they cease to be children of the marriage.
8. Commencing February 1, 2020, the parties will share s. 7 expenses on a 67/33 basis, with the respondent paying 67% and the claimant 33%, provided the claimed expenses are accompanied by a receipt. Section 7 expenses shall include, in addition to those expressly listed in s. 7 and any other expenses agreed to by the parties:
 - a. the children's private school tuition fees;
 - b. contributions to the children's RESPs at KF Financial; and
 - c. hockey registration fees, and reasonable costs for equipment and travel to tournaments.
9. Commencing February 1, 2020, pursuant to the Divorce Act the respondent shall pay the claimant \$850 per month in spousal support until May 30, 2026.

10. The parties will exchange all income and tax records as required by the Guidelines by June 1st of each year.
11. The claimant will reimburse the respondent for his overpayment of child support between November 2018 and January 2020 in the amount of \$10,515.
12. The claimant will reimburse the respondent for his overpayment of spousal support between November 2018 and January 2020 in the amount of \$3,960.
13. There will be an adjustment to the distribution of the Trust Funds to account for the overpayment to the claimant of \$4,772 in child and spousal support for February, March, April and May of 2020.
14. Either party is at liberty to apply to court for a redetermination of the child and spousal support set by this order to address COVID-19 impacts on income.

Property and debt division

15. From the Trust Funds, the following amounts will be deducted:
 - a. \$60,719.76 paid to the CRA on behalf of GBS;
 - b. \$8,3898.21 paid for HST on behalf of GBS;
 - c. BY CONSENT, \$44,000 will be paid to ReConnecting Families; and
 - d. BY CONSENT, there will be a holdback of \$21,000 for ReConnecting Families.
16. The remaining proceeds in the Trust Funds will be equally divided between the parties, subject to an adjustment for the interim distributions already received by each party and the overpayment to the claimant of child and spousal support for February, March, April, and May of 2020.
17. The parties shall be equally responsible for the GBS shareholder's loan debt existing as of April 30, 2018.
18. The claimant shall retain the Foster Street Property without adjustment to the purchase price.
19. The parties' RRSPs as of the date of separation shall be subject to equal division, without exclusion of any portion of the settlement proceeds received by the respondent.
20. The claimant shall reimburse the respondent \$6,500 for her share of the vehicle loan on the BMW 328i.
21. The respondent shall reimburse the claimant \$2,351 for the purchase of the BMW X3.
22. The claimant shall reimburse the respondent \$5,500 for the purchase of the VW Tiguan.
23. The claimant's application for a declaration of family violence is dismissed.

24. The claimant's application for security for costs is dismissed.

[300] As a result of the fact that there was insufficient trial time to permit the parties to complete, or indeed begin, closing submissions in-person, the court has only received the parties' final argument in writing. In the event that there are issues arising from these reasons for judgment that require clarification, the parties are at liberty to request that a judicial management conference be scheduled by telephone within 30 days of release of these reasons for judgment.

COSTS

[301] My preliminary view is that in light of their divided success in this proceeding, each party should bear their own costs. If either party seeks an alternate costs order, they are at liberty to provide further written submissions on costs, not to exceed three pages, within 30 days of the date of this judgment.

"Horsman J."

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