
CANADA / JUDGMENT

Stobo v. Cohoon

2022 BCSC 817

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Supreme Court of British Columbia

DECIDED

17 May 2022

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2022 BCSC 817 Stobo v. Cohoon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stobo v. Cohoon,

2022 BCSC 817

Date: 20220517

Docket: E191361

Registry: Vancouver

Between:

Aleka Jennifer Stobo

Claimant

And

Reid Gordon Cohoon

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs 75-76, 78, 80-82, 84, 90-91 and 93 on November 8, 2022.

Before: The Honourable Justice Francis

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

February 22-25, 28 and

March 2-4, 2022

Place and Date of Judgment:

Vancouver, B.C.

May 17, 2022

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I. Introduction

- [1] In this family law dispute, the primary issues are division of family property and spousal support.
- [2] The parties met and began cohabiting in 1995 when they were both in their early 20s. They were married in 2007 and separated in January 2019. They have a daughter, born in 1996, who is now an adult.
- [3] In the early years of their relationship, neither party made much in the way of income and they had no assets. When their daughter was a baby, they lived in a van and had what Ms. Stobo described as a "hippie lifestyle." For a period of time they made a living making and selling drums at craft fairs. Eventually, Mr. Cohoon made his way into the film industry where he worked as a grip, and then a key grip, on film sets around the Lower Mainland. Mr. Cohoon continues to work as a key grip in the film industry and he has established success in that field.
- [4] Mr. Cohoon operates his business through two solely owned corporations. 10823292 BC Ltd. is a company through which Mr. Cohoon charges out his personal services as a key grip (the "Service Company"). 0818033 BC Ltd. dba Reid Grip ("Reid Grip") is a company through which Mr. Cohoon rents grip equipment out to film productions. Expert evidence was provided to assist the Court in valuing these two companies (the "Companies") for the purposes of family property division.
- [5] For the first few years after the birth of their child, Ms. Stobo stayed home and did not engage in paid employment. In 2003, she enrolled full-time in the midwifery program at the Department of Medicine at UBC. Upon completing that course in 2007, she commenced working as a midwife. She worked as a midwife until late 2021, operating through a company of which she is the sole officer, director and shareholder: Coast Midwifery Ltd. ("Coast

Midwifery"). She testified that she was not happy as a midwife and by 2017, she had started to explore alternative career options. In 2018, she enrolled in an executive MBA program. She graduated with her MBA in the spring of 2020. In February 2022, a few weeks before trial, Ms. Stobo accepted a full-time job as a relationship manager with Allan Financial.

- [6] The parties purchased a house at 1947 Templeton Drive, in Vancouver (the "Home") in 2003. They continued to own the Home at the time of trial. Over the years, the amount of secured debt on the Home has fluctuated. As at the date of their separation in early January 2019, a home equity line of credit on the Home (the "LOC") had a balance of approximately \$475,000. The Home's appraised value as of December 6, 2021 was \$1,630,000.
- [7] Between 2013 and 2016, Mr. Cohoon received inheritance funds from the estate of his late Father in the amount of approximately \$1,050,000 USD (the "Inheritance"). Some of those funds were used to purchase equipment for Reid Grip and some were used to retire debt on the Home.
- [8] The parties agree that the Inheritance funds received used by Mr. Cohoon to purchase equipment for Reid Grip retained their character as excluded property and are not subject to division. For the purposes of trial, the parties agreed that \$383,400 USD was used for equipment purchases for Reid Grip, although they disagree about the current value of Mr. Cohoon's exclusion with respect to these funds.
- [9] More controversial is the Inheritance funds Mr. Cohoon used to retire debt on the family home. In August 2016, Mr. Cohoon used funds from the Inheritance to retire all secured debt on the Home, which at the time consisted of two mortgages and the LOC. The total amount of debt retired at that time was \$667,885. Mr. Cohoon submits that he did not intend to make a gift to the family when he paid off the secured debt on the Home and he should be entitled to an exclusion for the inherited funds used for this purpose.
- [10] After separation, Ms. Stobo withdrew \$50,500 from the LOC to make a tuition payment for her MBA program. She seeks to have this amount included in the family debt, for which the parties are equally responsible.
- [11] In all the circumstances, Mr. Cohoon seeks an order for unequal division of family property on the basis that an equal division would be significantly unfair to him. He also challenges Ms. Stobo's entitlement to spousal support. The parties consent to the granting of a divorce and, on the last day of the trial, I made the divorce order.

II. Issues

- [12] The issues this Court must determine are:
 - a) With respect to division of property:
 - i. Is the portion of the Inheritance that was used to pay down secured debt on the Home excluded property?

- ii. What is the net value of the Companies that is family property after accounting for the exclusion related to the Inheritance?
- iii. In valuing the Companies for the purposes of family property division, should distributive taxes be deducted?
- iv. How should the shareholder loans, the wine collection and other items of family property be dealt with?
- v. Does the tuition payment withdrawn by Ms. Stobo post-separation constitute family debt?
- vi. Should family property be divided unequally on the basis of significant unfairness?
- b) With respect to spousal support:
 - i. Does Ms. Stobo have an entitlement to spousal support on a compensatory and/or non-compensatory basis?
 - ii. If Ms. Stobo has an entitlement to support, what is the quantum and duration of support payable?

III. Division of Property

A. Facts

- [13] The Inheritance consisted of the following receipts of funds by Mr. Cohoon from his father and his father's estate:
- a) An inter vivos gift from Mr. Cohoon's father in the amount of \$100,000 USD in the early summer of 2013. These funds were used to purchase equipment for Reid Grip.
 - b) A distribution from the estate of Mr. Cohoon's father in November 2013 in the amount of \$200,000 USD. Part of this distribution was used to retire tax judgments that were registered on the Home and part of it was used to purchase equipment for Reid Grip.
 - c) A distribution in July 2016 of \$600,000 USD. These funds were primarily used to retire secured debt on the Home in the amount of \$667,885.
 - d) A distribution in December 2016 of approximately \$157,000 USD. These funds were used to purchase equipment for Reid Grip.
- [14] Mr. Cohoon testified that, when he retired the secured debt on the Home in August 2016, his purpose was to improve the financial circumstances of the family. He was "constantly feeding the fire of debt" and this caused him much stress, particularly because he worked in an industry with little job stability. He testified that, at the time he received the \$600,000 USD portion of the Inheritance in the summer of 2016, the monthly payments on the two mortgages and the LOC amounted to \$8,000 a month. It made sense to him to pay off the debt on the Home to end the high interest payments.

[15] Mr. Cohoon also gave evidence about wishing to purchase a rental property after the debts on the Home were paid off. His long-term goal was to find a source of passive income that would provide more income stability than he had been able to enjoy during his career in the film industry. This appears to have been a goal of both parties for some time. As early as 2011, they explored purchasing a rental property in Whistler as an additional source of income. Mr. Cohoon testified that he and Ms. Stobo had discussions about "making our money work for us" and that he was concerned about their financial future in the face of Ms. Stobo's extravagant spending habits. I accept his testimony as credible in this regard. It is clear that Mr. Cohoon was concerned about retirement and aware that, in light of the parties' financial circumstances in around 2016, a change would need to be made in order to enable them to retire comfortably at the end of their working lives.

B. Law re: excluded property

[16] Pursuant to s. 85 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], inheritances to a spouse are excluded property and do not form part of the family property subject to presumptive equal division under s. 81 of the FLA. However, excluded property can become family property where one spouse gifts excluded property to the other: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 75.

[17] In determining whether a spouse has made a gift of excluded property, the presumption of advancement that pertains to gifts between spouses applies: *V.J.F.* at para. 77. However, like any evidentiary presumption, the presumption of advancement only applies if the evidence is insufficient to establish the transferor's actual intent at the time of the transfer: *Fuller v. Harper*, 2010 BCCA 421 at para. 42; and *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 40. In all cases, the court must look at the evidence with respect to the transfer to determine whether the transferor intended to make a gift when the transfer was made.

C. Is the portion of the Inheritance that was used to pay down secured debt on the Home excluded property?

[18] In this case, Mr. Cohoon took no steps to document that the portion of the Inheritance that he used to pay down the secured debt on the Home was intended to be excluded property and not a gift to the family. Nor did he testify to this at trial. Mr. Cohoon testified that his primary reason for paying off the debts on the family home was to eliminate the high monthly debt servicing costs.

[19] The historical use of the LOC supports the conclusion that Mr. Cohoon intended to make a gift to the family when he used a portion of the Inheritance Funds to pay off the debts on the Home. The debts on the family home were a joint obligation, accrued by the high living costs of the couple, who regularly used the equity in the Home to fund their lifestyles.

[20] Counsel for Mr. Cohoon submits that he paid off the debt on the Home with the intention of making the \$600,000 LOC available to him later to purchase an investment property. While I accept that the couple had, over the years, some discussions about purchasing an

investment property, I do not accept that Mr. Cohoon's plans in this regard were anything more than speculative at the time he paid off the debts on the Home. His evidence, at its strongest, was that his long-term hope was to purchase an investment property. However, the evidence does not establish that this ever manifested itself in a concrete plan. It is clear on the evidence that Mr. Cohoon intended the family to benefit from the payment of the secured debts on the Home and in doing so, he was making a gift to the family. There is no exclusion available with respect to these funds.

D. Value of Excluded Property Invested in Reid Grip

- [21] A joint expert business valuator, Kiumars Ghanavizchian, was retained by the parties to prepare a valuation report of Reid Grip and the Service Company. His updated report, dated February 23, 2022, was tendered into evidence (the "Valuation Report"). According to the Valuation Report, the combined fair market value of Reid Grip and the Service Company was \$1,090,000 as at February 23, 2022.
- [22] The parties agree that \$383,398 USD of Inheritance funds was used to purchase equipment for Reid Grip, and this is excluded property. However, they do not agree on the present value of the exclusion.
- [23] The Valuation Report opines on the present value of the \$383,398 USD (converted to \$449,087 CAD by the valuator) that Mr. Cohoon used to purchase equipment for Reid Grip. Due to the depreciation of the equipment, the present value of the exclusion is lower than the amount Mr. Cohoon invested.
- [24] According to the Valuation Report, the en bloc fair market value of Reid Grip's issued and outstanding shares at the date of trial, based on an asset valuation approach, is \$800,000. In the Valuation Report, Mr. Ghanavizchian sought to estimate the fair market value of the assets acquired with excluded funds as a percentage of their original cost. He concluded that the fair market value of Reid Grip's assets that were acquired with excluded funds approximated 59% of those assets' original cost in Canadian dollars.
- [25] Based on the expert's valuation, Mr. Cohoon calculates the portion of Reid Grip that is family property as follows:
- a) $\$449,087 \text{ (excluded property invested in Reid Grip)} \times .59 \text{ (surviving value as per Valuation report)} = \$264,961;$
 - b) $\$1,090,000 \text{ (FMV of Companies)} - \$264,961 = \$825,039 \text{ (value of portion of the Companies that are family property).}$

[26] Ms. Stobo submits that the portion of the Companies that is family property, i.e. the net value of the Companies after deducting the excluded property, has a value of \$841,300. Ms. Stobo's estimate is marginally higher than the \$825,039 posited by Mr. Cohoon. The difference between the two amounts appears to be based on adjustments made by counsel for Ms. Stobo to the tax shield that would be attributed to the excluded property versus the family property. These calculations were not put to the expert.

[27] I prefer Mr. Cohoon's calculation in this regard, as it reflects the methodology used by the valuator and is a broadly fair approach to family property in accordance with the Valuation Report. The value of the excluded property in the Companies is \$264,961 and therefore the portion of the Companies that is family property has a value of \$825,039.

E. Should distributive taxes be factored into the valuation of the Companies?

[28] Mr. Cohoon submits that, in valuing the Companies for property division purposes, the Court must take into consideration the distributive taxes associated with liquidating assets of the Companies.

[29] Mr. Cohoon was asked on direct examination how he would fund a family property compensation payment if ordered to make one to Ms. Stobo. He testified that he was not certain, as it depended on the amount of the payment, but he would consider borrowing money against the equipment owned by Red Grip, or selling some of it.

[30] Our Court of Appeal has considered the issue of whether a spouse's business should be valued for property division purposes with reference to the tax that would be payable on the disposition of the business or its assets. In *Ouellette v. Ouellette*, 2012 BCCA 145, the trial judge found that Mr. Ouellette did not intend to sell his interest in his business and would use the proceeds from the sale of the family home to pay Mrs. Ouellette for her share of his business interest (para. 27). In those circumstances, the Court of Appeal held that the trial judge made no error when he declined to take the speculative costs of disposition of Mr. Ouellette's business into account in valuing his business (para. 32).

[31] In *Maguire v. Maguire*, 2016 BCCA 431, the Court of Appeal summarized the case authorities under the Family Relations Act, R.S.B.C. 1996, c. 128 on this point:

[38] The case law that developed under the FRA provided that there is no absolute rule as to whether tax consequences should or should not be taken into account in the division of family assets. Where there is evidence that a division of family assets will attract tax consequences, an allowance should be made for tax. Where it is not clear when or in what amount taxes will be exigible, an allowance may not be made: *Murchie v. Murchie* (1984), 1984 CanLII 754 (BC CA), 53 B.C.L.R. 157 at para. 390 (C.A.); *Halpin* at para. 63; *McPherson v. McPherson* (1988), 1988 CanLII 4732 (ON CA), 48 D.L.R. (4th) 577 at 583 (Ont. C.A.). Likewise, where taxes are "speculative" the court may not take taxes into account: *O'Bryan v. O'Bryan* (1997), 1997 CanLII 4045 (BC CA), 43 B.C.L.R. (3d) 296 at para. 54 (C.A.); *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 31-32.

- [32] I discern from these authorities that distributive taxes should not be considered where the taxes are unlikely to be triggered in the foreseeable future and where any quantification of quantum is speculative.
- [33] In *Sanai v. Mahmoud*, 2017 BCCA 155, the Court of Appeal found that the trial judge erred by failing to allow for the distributive tax burden the husband would face as a result of allocating assets to the wife that did not attract tax (namely the family home) while allocating corporate assets to the husband that attracted personal tax when distributed. The husband's argument, similar to the one made by Mr. Cohoon in this case, was that he was allocated assets of a lesser value than the assets allocated to the wife, because of the latent tax associated with the corporate assets. Justice Saunders described the scenario as: "the respondent received apples and the appellant received oranges" (para. 28).
- [34] In *Sanai*, the Court of Appeal rejected the proposition that distributive taxes should only be considered in cases in which it is proven that the asset must be sold in order for the non-owning spouse to realize their interest in the asset:
- [31] The judge referred to the relevant authorities before him, and said:
- [163] In determining the amount of the compensation order, disposition costs, including tax consequences, must be taken into account if an asset must be sold in order for the non-owning spouse to realize his or her interest in the asset. They need not be taken into account "when it is not known when, if ever, the asset would be sold", or where those costs are "hypothetical and speculative"
- [32] While this statement is correct, it is incomplete, and does not give effect to the first premise, which is to the extent the circumstances of the asset permits, and provided there is evidence on which to do so, the parties are entitled to equality of treatment (see *Stein* at para. 9). To that end, assets should be put upon the same level for fairness and proper assessment of the relative outcomes. This removes opacity and allows for a clear view of the equivalence of wealth distributed, absent which an order may effect an unintended and unrecognized redistribution, and may ricochet onto the support orders made. The principles of fairness and presumptive equal division apply, with due regard to the practical character of the assets and inherent limitations.
- [33] I consider that the law, correctly understood, does not limit the requirement of an allowance for distributive taxes to cases in which the asset must be sold to allow the non-owning spouse to realize his or her interest in the asset.
- [35] The principles laid out by Saunders J.A. in *Sanai* apply with equal force to the division of family property under the FLA: *Hopson v. Hannon*, 2021 BCSC 99 at para. 65. In *Hopson*, Justice Warren summarized the approach to latent taxes in the following manner:

- [66] In my view, the principle that emerges is that a tax liability should be taken into account where it is inherent (or put another way, inevitable), whether or not it arises directly from the property division order (such as where the asset must be sold to give effect to that order), but not where it is speculative. Ultimately, the question is whether the evidence establishes that the tax liability is inherent.
- [36] In this case, I am satisfied that Mr. Cohoon will inevitably incur a tax liability when he seeks to draw money from behind the corporate curtain. The parties would not be equally treated if the compensation payment payable to Ms. Stobo for her interest in the Companies were taken from Mr. Cohoon's interest in the Home, such that she received primarily tax paid assets and Mr. Cohoon received primarily assets with latent unpaid taxes.
- [37] The expert report of Darren Koyanagi sets out the estimated tax payable by Mr. Cohoon on various liquidation scenarios. The first two scenarios involve the complete liquidation of the Companies, a highly improbable turn of events in light of Mr. Cohoon's trial testimony that he intends to keep working. The second two scenarios are more realistic. Scenario 3 in Mr. Koyanagi's report considers the taxes that would be payable if Mr. Cohoon withdrew \$420,650 from the Companies in a single year for the purposes of paying out Ms. Stobo. Scenario 4 considers the tax that would be payable if Mr. Cohoon withdrew \$399,250 from the Companies in a single year.
- [38] Mr. Koyanagi's report provides an evidentiary basis for ascertaining the tax associated with Mr. Cohoon extracting funds from the Companies in order to pay Ms. Stobo for her interest in the portion of the Companies that are family property.
- [39] I find that in order to "level the field" on the division of family assets, it is appropriate to make an allowance for distributive personal income taxes. Since neither of Mr. Koyanagi's scenarios approximate the precise amount of the equalization payment payable to Ms. Stobo for her interest in the Companies, I find that a fair amount is somewhere between Mr. Koyanagi's third and fourth scenario. A notional tax amount of \$157,000 was posited by Mr. Cohoon's counsel and in my view this amount is fair. Deducting \$157,000 from the \$825,039 value of the Companies that is family property, the net value divisible between the parties with respect to the Companies is \$668,039. Ms. Stobo's equal share of family property pertaining to the Companies is \$334,019.50.

F. Other family property issues

1. Shareholder loans

- [40] At the time of separation, Mr. Cohoon had shareholder loans due to him from the Companies in the amount of \$59,738. Ms. Stobo had shareholder loans due to her from Coast Midwifery in the amount of \$73,354. Since separation, Ms. Stobo has caused Coast Midwifery to pay out the shareholder loans to her and she has used the funds to pay for her personal living expenses.

- [41] While the parties agree that a shareholder loan is an asset for family property division purposes, they disagree about the appropriate valuation date. Mr. Cohoon argues that one of two scenarios should apply. Either the date of separation should be used to determine the value of Ms. Stobo's shareholder loan for family property division purposes, or the \$73,354 she extracted tax free from Coast Midwifery, post-separation, should be factored into determining her Guideline income.
- [42] Family property is presumptively valued at the date of trial: s. 87 of the FLA. If a shareholder loan is valued at separation date, and the indebted corporation is valued at trial, inconsistencies in the valuation arise. The appropriate date for valuing a shareholder loan is the date of trial: Namdarpour at para. 85.
- [43] Mr. Cohoon argues that this case is different from other family law cases in which a shareholder loan was drawn down between separation and trial. This is because Ms. Stobo funded a number of Coast Midwifery's business expenses, such as corporate tax, through the family asset of the LOC. She then was able to fund her living expenses by extracting money from Coast Midwifery tax free. This has resulted in an unfair advantage to her.
- [44] At various times, both Ms. Stobo and Mr. Cohoon availed themselves of the opportunity to draw funds out of their companies on a tax advantageous basis by using their shareholder loan accounts. They have also both used family assets to pay their corporate debts. For example, in June 2018, Mr. Cohoon drew down \$20,000 on the LOC and put those funds into Reid Grip.
- [45] Neither party observed a bright line between their corporate and personal affairs. Since both parties used the LOC on occasion to fund their respective corporations, and then enjoyed the tax advantages of taking income from their shareholder loan accounts, I do not agree that unfairness is suffered by Mr. Cohoon. In these circumstances I am not prepared to depart from the general rule that shareholder loans should be valued as at the date of trial and not the date of separation.

2. Wine collection

- [46] The parties collected wine over the course of their marriage. I have no expert evidence valuing the wine collection. Mr. Cohoon estimates that it was worth over \$4,800.
- [47] After their separation, the parties attended a number of meetings with their counsel in an attempt to resolve some of the issues relating to their separation and divorce. At a January 23, 2019 meeting, the parties agreed that "neither party will touch the wine collection."
- [48] Since then, much of the wine collection has been consumed. Ms. Stobo says that the parties' daughter drank some of the wine, and she has replenished some of it over time. When Ms. Stobo moved out of the Home in June 2021, she took what was left of the wine collection with her.

[49] Ms. Stobo's counsel has submitted that his client is prepared to give Mr. Cohoon the approximately 50 bottles of wine and port remaining in the wine collection, in satisfaction of Mr. Cohoon's claim to a 50% share. In the absence of any valuation evidence, this is a pragmatic means of resolving the issue and I order that the remaining wine collection be given to Mr. Cohoon.

3. Other family property

[50] Ms. Stobo's counsel prepared a Scott Schedule, but in the course of submissions advised the Court that it contained errors. Mr. Cohoon's counsel did not provide a Scott Schedule. I understand that there are a number of bank accounts and lesser value items of family property, but I did not hear complete submissions on these and it is not clear whether there are any remaining disputes with respect to the them.

[51] If there are issues relating to any of the family property not expressly dealt with in this judgment, and the parties are unable to agree, they have leave to appear before me to speak to those remaining issues.

G. Family debt

[52] Section 86 of the FLA defines family debt as follows:

86. Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

[53] As at the date of separation, there was approximately \$475,000 owing on the LOC. On January 4, 2019, after separation, Ms. Stobo withdrew \$50,500 from the LOC to pay for an installment of her tuition fees for her MBA (the "Post-separation Withdrawal"). While Mr. Cohoon appears to accept that the \$475,000 balance on the LOC at date of separation was family debt (subject to his argument with respect to unequal division of family property and debt, discussed below), he submits that the Post-separation Withdrawal should be treated as Ms. Stobo's debt alone.

[54] In *Schneider v. Owers*, 2019 BCSC 528, Justice Armstrong set out the proper approach to debt incurred post-separation:

[268] At the outset, it must be clear that family debt is only debt extant at the time of separation unless incurred for the purpose of maintaining family property after that date. Thus, if a loan extant at the date of separation is increased by one party after separation, the increase in debt is not family debt unless incurred to maintain family property.

- [55] Ms. Stobo argues that the Post-separation Withdrawal was made to maintain family property because her pursuit of the MBA was a decision made by the parties jointly, with a view to benefitting the family as a whole.
- [56] Mr. Cohoon submits that he never supported the MBA and did not believe it would benefit the family. The family had, as of 2016, finally gotten out of debt. At that point, staying the course in their respective professions would have brought the promise of future economic security. Having Ms. Stobo reduce her working hours in 2018 so she could go back to school and obtain another university degree, funded from the equity in the Home, was antithetical to all of the concerns that Mr. Cohoon very clearly had about the couple's future.
- [57] On its face, Ms. Stobo's decision to leave a lucrative career in midwifery, in her mid-40s, to pursue a \$100,000 executive MBA program, had little prospect of financially benefitting the family. It may well have been in the interests of Ms. Stobo's personal development, but it was not an endeavour that served a family purpose. Therefore, the Post-separation Withdrawal cannot be characterized as a debt incurred for the purpose of maintaining family property.
- [58] I therefore find the additional \$50,500 withdrawn by Ms. Stobo from the LOC post-separation is not family debt. Rather, it is debt for which she is solely responsible. The family debt is limited to the amount payable on the LOC at the date of separation, which was approximately \$475,000.

H. Unequal division of family property and family debt

- [59] Pursuant to s. 95 of the FLA, the Court may order an unequal division of family property or family debt on the basis of significant unfairness. The relevant factors are enumerated at s. 95(2):

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

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (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.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [60] The origins of formerly excluded property can be considered by a judge in determining whether it would be significantly unfair to divide family property equally pursuant to s. 95 of the FLA: *Venables v. Venables*, 2019 BCCA 281 at para. 110.
- [61] An unequal division under s. 95 requires "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42.
- [62] Mr. Cohoon primarily relies on two factors enumerated under s. 95(2) that are relevant to a finding of significant unfairness. One factor is whether the family debt was incurred in the normal course of the relationship between the spouses: FLA, s. 95(2)(d). The other factor is whether a spouse substantially reduced the family of family property, not acting in good faith: FLA, s. 95(2)(g).
- [63] In this case, Mr. Cohoon submits that Ms. Stobo's use of the LOC after 2016 calls for an unequal division of family property. He argues that the lion's share of debt incurred on the Home since 2016 has been for the benefit of Ms. Stobo, to the detriment of Mr. Cohoon. This is particularly unfair because he used Inheritance funds to pay off the secured debt on the Home in 2016. He makes two primary submissions in this regard:

- a) Mr. Cohoon has borne a disproportionately heavy burden in financing Ms. Stobo's career. Even if the final \$50,500 tuition payment is not family debt, the remainder of the tuition for Ms. Stobo's MBA was funded from the LOC. Mr. Cohoon has worked in excess of full time for most of the marriage in order to fund Ms. Stobo obtaining two university degrees and building a career. This is manifestly unfair.
- b) The consumer spending engaged in by Ms. Stobo in the last few years of marriage was unreasonable, beyond the means of the parties, and not in good faith. Ms. Stobo thwarted Mr. Cohoon's plan to develop a passive income source by engaging in excessive spending and living beyond the family's modest means.

[64] I will deal with each of these issues separately.

1. Contributions to Ms. Stobo's career

- [65] The parties met when they were young and without firm career plans. They have each developed their own successful career paths, each unquestionably shaped and aided by contributions from the other spouse.
- [66] Mr. Cohoon has worked at a physically and mentally challenging job since early in the marriage. The film industry demands long and irregular hours over short periods of time. People who work in this industry tend to take breaks between projects in order to recover from the demanding pace of the work. Mr. Cohoon testified that he rarely did this, and that he tended to go from project to project, in order to maximize his income. He finds the work of being a key grip to be satisfying, but tiring, and more difficult as he ages. He would like to retire at some point.
- [67] Interestingly, Ms. Stobo's complaints about the work of being a midwife echo Mr. Cohoon's complaints about the film industry. Her hours were long and unpredictable. During those periods of time that she practiced alone and had no locum, she was on call almost all the time. She found the work exhausting and the pace increasingly unsustainable. Ultimately, she decided to leave midwifery and obtain an MBA so she could transition into a different career.
- [68] The essence of Mr. Cohoon's unfairness argument is that, while he was tired and unhappy with his work, he kept at it in order to support his family. When Ms. Stobo became tired and unhappy with her work, she enrolled in a \$100,000 MBA program and reduced her working hours to accommodate her course load, allowing Mr. Cohoon to shoulder more of the burden of financially supporting the family. Mr. Cohoon has contributed to the funding of two university degrees for Ms. Stobo, while he has not had similar opportunities.
- [69] The problem with Mr. Cohoon's argument is that it fails to recognize the significant sacrifices both parties made in order to benefit one another's careers. It is true that Mr. Cohoon's income helped fund Ms. Stobo's education. It is also true that the years Ms. Stobo spent out of the workforce raising their daughter allowed Mr. Cohoon to work long hours and advance his career in the film industry. It is precisely these kinds of mutual sacrifices

and conferrals of benefit, impossible to quantify with precision, present in almost all marriages in different degrees and capacities, that have caused our law makers to put in place a presumptive equal division. To suggest that Mr. Cohoon suffered significant unfairness because Ms. Stobo ended the marriage with two university degrees and he had none is to consider significant unfairness through an overly narrow lens that fails to take into account the many other benefits he obtained over the course of the marriage as a result of the contributions of Ms. Stobo, including career benefits.

2. Ms. Stobo's spending habits

- [70] It cannot be questioned that this family lived beyond their means. A review of credit card bills from 2018 demonstrates that the family engaged in a breathtaking amount of spending on luxury clothing, expensive cosmetic procedures, high-end travel and fine dining. Because their income was insufficient to meet the consumer spending that they engaged in, the couple drew down on the equity in the Home to pay credit card bills. Mr. Cohoon asks me to find that Ms. Stobo was solely responsible for the reckless spending that increased their family debt. He submits that Ms. Stobo essentially spent the Inheritance on her own business expenses, education, and luxury shopping, while he did not enjoy similar benefits.
- [71] Upon reviewing all of the evidence, particularly the evidence of the families' spending pattern during the last few years of the marriage, I find that funds drawn down on the LOC since Mr. Cohoon paid it off in 2016 were spent in the normal course of the relationship. While Mr. Cohoon took pains to show that Ms. Stobo was a financially reckless person, in contrast to his more measured approach to money, the evidence does not bear this out. For example, at different times, both Ms. Stobo and Mr. Cohoon had judgments for unpaid income tax registered on title to the Home, and both spent enormous sums of money on luxury items such as Rolex watches and expensive travel. For their final Christmas in 2018, after they had decided to separate, Mr. Cohoon purchased a \$10,000 Chanel purse for Ms. Stobo. Mr. Cohoon's attempt to characterize himself as a financially prudent person, who suffered unfairness at the hands of his overspending spouse, is not borne out by the facts of this case.
- [72] The funds owing on the LOC were incurred in the normal course of the relationship and were incurred in good faith. While there is much reason to question the financial prudence of the lifestyle Mr. Cohoon and Ms. Stobo adopted, it is unquestionably a lifestyle they both participated in.
- [73] I am therefore not satisfied that significant unfairness would arise from an equal division of family property and family debt in this case. The family property and family debt should be equally divided. Should there be further disagreement between the parties as to the precise amount of compensation payable to effect that division, or should orders be sought with respect to the sale of the Home, the parties have leave to come back before me to speak to these matters.

IV. Spousal support

[74] No claim is being made for retroactive spousal support in this case. Therefore, the only issue before me with respect to spousal support is Ms. Stobo's entitlement to prospective spousal support, and if entitlement is established, the quantum of support that should be payable.

A. Entitlement

1. Compensatory

[75] Ms. Stobo seeks an order for spousal support pursuant to Part 7 of the FLA. Mr. Cohoon submits that spousal support should be determined under the Divorce Act, R.S.C. 1985, c. 3 [Divorce Act]. The parties seem to agree that there is no meaningful difference between the two statutes as they pertain to the facts of this case. In accordance with the doctrine of federal paramountcy, it is preferable to make the orders under the Divorce Act and under the FLA only in the alternative: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20. I have, therefore, proceeded to decide the issue of spousal support in this case in accordance with the Divorce Act.

[76] Ms. Stobo's entitlement to spousal support must be determined with reference to the factors set out at s. 15.2(4) of the Divorce Act, namely:

- a) The length of time the spouses cohabited;
- b) The functions performed by each spouse during cohabitation; and
- c) Any order agreement or arrangement relating to support of either spouse.

[77] Entitlement to spousal support may be based on compensatory or non-compensatory grounds. Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse: *Chutter v. Chutter*, 2008 BCCA 507 at para. 50. Non-compensatory support is grounded in the "social obligation model" of marriage. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state: *Chutter* at para. 54.

[78] With respect to Ms. Stobo's compensatory claim, I find it relevant that the parties met when they were young adults and neither had assets or firm plans about their career futures. Within a year of their meeting, Ms. Stobo was pregnant. A decision was made that she would stay home with the parties' daughter for a period of time, and this enabled Mr. Cohoon to work and build his business and reputation in the film industry. It is not seriously contested that Ms. Stobo performed the majority of domestic responsibilities in the home. Meanwhile, Mr. Cohoon pursued a career in an extremely challenging industry, with punishingly long hours and almost no time flexibility. Mr. Cohoon would not have been able to pursue a career in the film industry if Ms. Stobo had not been home looking after the parties' child and maintaining the home.

- [79] In *Parton v. Parton*, 2018 BCCA 273 at para. 41, Justice Dickson cited the following passage of Justice Martinson in *W. v. W.*, 2005 BCSC 1010, which I find to be apt:
- [14] It is sometimes argued that the disadvantage to the primary parent is off-set by the advantage that person receives by obtaining a share of the assets accumulated. In my respectful view this approach does not take into account how the advantages and disadvantages can arise based on the roles spouses play.
- [15] Raising children is a round the clock endeavour. The primary income earner is in a position to earn money to accumulate assets often in large part because that person is relieved of many aspects of that 24 hour a day job. When the relationship ends, it is not just the secondary earner who receives assets. The primary earner also receives a share, often half, of the assets.
- [16] Therefore, in a typical case, the primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher income earning ability because of full participation in the work force, substantially unencumbered by child care responsibilities. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse often does not have the same income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award.
- [80] Due to the roles played in the marriage, Mr. Cohoon's career trajectory was uninterrupted. Ms. Stobo spent seven years as the primary parent and homemaker. This alone gives rise to a compensatory claim.
- [81] It must be noted that the parties did not have a traditional marriage for the entirety of their long relationship. While Ms. Stobo stayed home to look after their child from 1996 until 2003, once she commenced her full-time education to become a midwife, the roles in the marriage became much more equal. Ms. Stobo was able to obtain the education she required to pursue the career she wished to have.
- [82] Nevertheless, the fact remains that Mr. Cohoon would have been unable to achieve the substantial success he has achieved in the film industry were it not for the contributions of Ms. Stobo. I therefore find that Ms. Stobo has established entitlement to spousal support on a compensatory basis.
2. Non-compensatory
- [83] Non-compensatory claims involve claims based on need. "Need" can include a significant decline in the standard of living from the marital standard. This is based on the notion that in long marriages, the spouses should not be economically disadvantaged by the breakdown of the marriage: *McKenzie v. McKenzie*, 2014 BCCA 381 at para. 111.

[84] Ms. Stobo's entitlement on non-compensatory grounds is somewhat harder to discern in this case than in other long marriages, in part because the parties lived so far beyond their means, that the marital standard, while lavish, was unsustainable for both parties. Put another way, Ms. Stobo can no longer afford the lifestyle she enjoyed with Mr. Cohoon, but neither Ms. Stobo nor Mr. Cohoon could afford that lifestyle while they were enjoying it. Both parties are now left in a state of relative financial precariousness. I do not find that Ms. Stobo is particularly economically disadvantaged by the breakdown of the marriage and therefore I find that her entitlement on non-compensatory grounds is weak. Nevertheless, having found entitlement on compensatory grounds, I will proceed to assess quantum and duration of support.

B. Guideline Income of the Respondent

[85] Section 16 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] is the starting point for determining a parties' income for the purposes of spousal support:

16 Subject to sections 17 to 20, a spouse's annual income 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.

[86] Mr. Cohoon derives all of his income from the Companies. In cases where a spouse earns income through a corporation, section 18 of the Guidelines applies:

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

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

[87] In addition to valuing the companies, Mr. Ghanavizchian prepared a Guideline income report of Mr. Cohoon. He opined on two scenarios, only the second of which accounts for the actual amortization on the equipment of Reid Grip as determined by the equipment appraisal that was prepared for trial. Under that scenario, Mr. Ghanavizchian opined that Mr. Cohoon had the following Guideline income:

2016: \$335,000

2017: \$335,000

2018: \$169,000

2019: \$238,000

2020: \$160,000

- [88] Broadly speaking, the expert derived these values by determining Mr. Cohoon's Line 150 income with adjustments pursuant to Schedule III of the Guidelines, deducting actual dividends received by Mr. Cohoon, and adding the pre-tax corporate income available to Mr. Cohoon as shareholder. He then adjusted the amounts to account for the actual depreciation of the tools and equipment of Reid Grip.
- [89] While the expert did not consider Mr. Cohoon's 2021 income, his unaudited draft financial statements for the Companies were in evidence. They demonstrate that revenues in 2021 were considerably higher than in 2020, suggesting that the Companies have recovered from the reduction in revenue in 2020 due to the Covid-19 related shutdown of the film industry.
- [90] Ms. Stobo submits that I should set Mr. Cohoon's Guideline Income at \$275,000 per annum. She derives this amount by taking the Guideline figures provided by the expert for 2016-2020, adding back personal expenses of Mr. Cohoon that she alleges were paid by Reid Grip, and averaging his income for the last five years.
- [91] I am satisfied that Mr. Cohoon took an extremely expansive approach to the travel and meal expenses deducted from his income for tax purposes. For example, he expensed \$33,193 on meals in 2020. Meanwhile, he testified that when he is working, meals are provided on set at no cost, he admitted that some of the meals he expensed were meals he had with Ms. Stobo, and he testified that he did not work for a large portion of 2020 due to the Covid-19 pandemic. As such, I do not accept that Mr. Cohoon reasonably incurred \$33,193 in business related meal expenses in 2020.
- [92] Similarly, Mr. Cohoon appears to have expensed a number of trips that were not business related. In 2018, he went to Thailand to visit his brother. In 2019, he went to Thailand and Bali with his daughter. He testified that these trips were for the purpose of scouting locations for a film project he was working on. However, emails in evidence suggest that the film project he referred to was abandoned in 2016. I do not accept that there was any legitimate business purpose to these trips.
- [93] Ms. Stobo's proposed calculations involve adding back 50% of the meal expenses and 80% of the travel expenses in each year. In my view, while there clearly was a personal component to the expenses deducted by Mr. Cohoon, the reductions proposed by Ms. Stobo are too high. Mr. Cohoon testified about an expensive Christmas party he threw annually and various gifts and events that were used to market his business. In my view, it is appropriate to add back \$10,000 for each of 2016 and 2017, and \$15,000 for 2018-2020, to account for the personal component of the meals and travel expenses claimed by Reid Grip. The calculations would therefore be as follows:

2016

2017

2018

2019

2020

Scenario 2 income for Reid Grip and the Service Company

(minus the personal expenses previously added back by expert)

\$335,105 -

\$ 2,786 =

\$332,319

\$335,057

\$168,872 -

\$ 5,000 =

\$163,872

\$238,087 -

\$ 3,000 =

\$235,087

\$160,322 -

\$ 300 =

\$160,022

Add back for personal meals and travel

\$10,000

\$10,000

\$15,000

\$15,000

\$15,000

Adjusted Pre Tax Corporate Income

\$342,319

\$345,057

\$178,872

\$250,087

\$175,022

[94] The average of these amounts is \$258,271.

[95] Mr. Cohoon argues that a further discount from his income should be made because:

- a) He must save funds in Reid Grip to acquire new equipment to keep the company viable;
- b) Each year the equipment of Reid Grip gets older and Mr. Cohoon's ability to earn income from its rental decreases; and
- c) With respect to the Service Company, Mr. Cohoon works in excess of 60 hours a week and this is not sustainable.

[96] With respect to the first point, I take guidance from the decision of our Court of Appeal in *Kowalewich v. Kowalewich*, 2001 BCCA 450 at paras. 58 and 59:

[58] It seems to me regard should also be had to the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business. Justice Drake cautioned about not killing the goose who lays the golden eggs. Monies needed to maintain the value of the business as a viable going concern will not be available for support purposes. In my view they should not be included in determining annual income. In *Hollenbach v. Hollenbach*, 2000 BCCA 620, the trial judge recognized the need for a reserve for depreciation as an appropriate factor to be considered in a real estate business. Justice Dorgan recognized Mr. Kowalewich's business expansion plan as a valid business purpose in a retail business.

[59] I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.

[97] I am satisfied that any equipment rental business must make regular reinvestment in new equipment in order to stay profitable. Some adjustment to the pre-tax corporate income available to Mr. Cohoon is warranted for this purpose. If such an adjustment is made, then the related concern about the age of the equipment no longer garnering significant rental income is no longer applicable.

[98] No expert evidence was provided about the amount that would need to be set aside annually in order to ensure that the equipment remains current. Without such evidence, I am required to do my best to estimate this amount in ascertaining Mr. Cohoon's Guideline income. As equipment is a fundamental component of Mr. Cohoon's business, I expect he will spend a significant amount on re-investment. Therefore, I have assessed this amount at roughly 20% of the average pre-tax corporate income of the Companies, in the amount of

\$50,000.

[99] In terms of Mr. Cohoon's complaint about his working hours, I am not prepared to discount his Guideline income on this basis. Both he and Ms. Stobo chose to build careers in fields with long and unpredictable hours. Those are the paths they have taken and pursued for many years. Long hours are part and parcel of working in the film industry. I am not prepared to discount Mr. Cohoon's Guideline income on the basis that he is tired of working in such a demanding job.

[100] In all of the circumstances I find that a fair Guideline income for Mr. Cohoon is \$200,000.

C. Claimant's Guideline Income

[101] Ms. Stobo submits that her Guideline income should be set at \$70,000, which is her current annual salary at the job she commenced two weeks prior to trial.

[102] Mr. Cohoon submits that income should be imputed to Ms. Stobo on the basis that she is intentionally underemployed.

[103] Ms. Stobo's career trajectory has been unusual and this makes determining her Guideline income difficult. She spent many years training to be a midwife, and ran a lucrative practice for approximately 14 years. She continued to practice midwifery even while obtaining her executive MBA, and only quit the practice in the fall of 2021. In early February 2022, she took what appears to be an entry level job at Allan Financial that earns her a salary of \$70,000 a year.

[104] Ms. Stobo submits that I should not look at her midwifery income at all in determining her Guideline income. This is because she left midwifery and does not intend to return. She testified at length about her dissatisfaction with the midwifery profession and the many physical and emotional challenges of running a midwife practice. However, as with Mr. Cohoon, this is the profession she chose and practiced successfully for many years. In ascertaining Guideline income, I must consider the income earning capacity of a party, not their preferred career path. Ms. Stobo, in her midwife practice, has the capacity to earn significantly more income than she currently makes in the financial industry. This is the measure of her income earning capacity.

[105] The pre-tax corporate income for Ms. Stobo's professional corporation, Coast Midwifery Inc. for 2016-2020 is as follows:

2016: \$119,331

2017: \$73,601

2018: \$38,072

2019: \$9,227

2020: \$100,681

- [106] From August 2018 - April 2020, Ms. Stobo was pursuing her MBA and she only worked part-time as a midwife. In order to determine her income earning capacity, the amounts need to be adjusted to reflect what she would have earned in those years if she had worked full time.
- [107] Also, like Mr. Cohoon, Ms. Stobo ran many personal expenses through her business and deducted them from her business income for tax purposes. This included meals and entertainment of \$5,000 - \$6,000 a year. She also appears to have expensed most or all of her automobile costs, although she was unable to say what proportion of her actual automobile costs were deducted as a business expense.
- [108] Mr. Cohoon proposes certain add-backs to determine Ms. Stobo's actual income for Guideline purposes for the years 2018, 2019 and 2020. He proposes to add back \$8,350 in 2018, \$11,500 in 2019 and \$6,000 in 2020.
- [109] I am satisfied that many of the expenses that Mr. Cohoon takes issue with were indeed reasonable business expenses. For example, as a midwife, Ms. Stobo was required to have a dedicated phone and a pager which would be entirely business-related expenses. However, I find that some discount is appropriate to account for the fact that she too appears to have expensed personal meals and a personal component of her automobile use. There are some significant expenses that she was unable to explain at trial, such as \$9,773 under "Office and Miscellaneous" expenses in 2016. It is impossible to calculate a precisely accurate discount, but in my assessment, adding back an additional \$5,000 a year is fair.
- [110] Further, Ms. Stobo appears to have deducted a portion of her MBA tuition as an expense of Coast Midwifery, notwithstanding the fact that the tuition was not paid by the company but rather was paid from the LOC. In 2018, she claimed \$10,023 of education expenses. In 2019, she claimed \$61,268 of education expenses. On cross-examination, she was unable to say what these expenses related to. I find that, given the timing, and the modest education expenses claimed as business expenses in prior years, it is most probable that a large portion of these amounts relate to Ms. Stobo's MBA and were not properly deducted as expenses of the company.
- [111] The following table summarizes my analysis of Ms. Stobo's Guideline income for the years 2016 - 2020:

2016

2017

2018

2019

2020

Revenue

\$155,684

\$113,843

\$94,961

\$97,804

\$156,170

Pre tax corporate income

\$119,331

\$73,601

\$38,072

\$9,227

\$100,681

Add back for education expenses

N/A

N/A

\$9,000

\$40,000

N/A

Add back for personal expenses

\$5,000

\$5,000

\$5,000

\$5,000

\$5,000

Adjust for full time work

N/A

N/A

\$52,072 + 40%

\$54,227 x 2

\$105,681 + 10%

Total available income

\$124,331

\$78,601

\$72,901

\$108,454

\$116,249

[112] Applying the same approach as was applied to Mr. Cohoon, Ms. Stobo's average income across these five years is \$100,107.

[113] I therefore set Ms. Stobo's Guideline income at \$100,000.

D. "Double Dipping" concern

[114] Mr. Cohoon argues that it would be an error to award spousal support based on income Mr. Cohoon derives from Reid Grip because his interest in the company has already been divided with Ms. Stobo. In the Valuation Report, the shares of Reid Grip were valued on an asset basis and not as a going concern. Therefore, Mr. Cohoon argues that Reid Grip is analogous to the kinds of passive investment discussed in the "double dipping" cases such as *Boston v. Boston*, 2001 SCC 43, *Puiu v. Puiu*, 2011 BCCA 480 and *Baryla v. Baryla*, 2019 BCCA 22. In these cases, the Courts have expressed caution in applying the formulas set out in the Spousal Support Advisory Guidelines ("SSAG") because the parties' income subject to the analysis is derived from an asset that is being divided.

[115] Counsel for Ms. Stobo submits that the "double dipping" cases have no application here, as that principle only applies to cases in which the parties are solely living off passive investment or pension income. Ms. Stobo relies on *Nicholl v. Nicholl*, 2020 BCCA 173, for the proposition that there is a significant difference between the division of a pension between spouses (as in *Boston*) and the equalization of the value of an income-producing business that remains in the control of one spouse. In *Nicholl*, the Court of Appeal described the distinction at para. 70:

[70] Here, Mr. Nicholl was left with a valuable income-producing asset that was owned by the couple throughout their relationship. Payment of Ms. Nicholl's share of the asset does not diminish the company's value; indeed, Thirdwave may continue to increase in value. Further, the acquisition by Mr. Nicholl of Ms. Nicholl's interest in the company would not change the company's ability to produce income.

- [116] Counsel for Mr. Cohoon seeks to distinguish Nicholl on the basis that the company in that case was valued as a going concern, unlike Reid Grip, which was valued on an asset basis. However, I am not persuaded that this distinction makes a difference to the analysis. Irrespective of the valuation methodology used by the valuator, Mr. Cohoon, like Mr. Nicholl, has been left with a valuable income producing asset. He controls Reid Grip, he controls its operations, and he controls the income he takes from it. Indeed, he testified that his equipment is old, much of it needs replacing or upgrading, and it is necessary for him to keep funds invested in the company, rather than take them as income, in order to do this. In these circumstances, the analogy between Reid Grip and the kind of pension discussed in Boston breaks down. Reid Grip is very clearly an operating business controlled by Mr. Cohoon and not a passive income source that has been divided with Ms. Stobo.
- [117] Even if it were appropriate to subject Mr. Cohoon's income from Reid Grip to the Boston analysis, the "step-by-step" approach described by professors Thompson and Rogerson in *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice, 2016) is still necessary. As the learned professors helpfully set out:

Addressing Boston issues requires a step-by-step approach. The SSAG starting point in assessing spousal support is usually the full incomes of both parties. First, Boston creates an exception to this general approach. The payor thus bears the burden of convincing the court to use an income less than his or her Guidelines income under this exception. By way of actuarial or other evidence, the payor must prove to the court that some portion of his or her current pension income has already been divided as property. Second, if the payor does meet this initial burden of proving the "double-dipping" exception, then the burden shifts to the recipient to convince the court that the hardship or need exception applies under Boston.

- [118] Even if Boston applied, the burden would be on Mr. Cohoon to show that some portion of his income from the Companies has already been divided as property such that "double dipping" would arise if his Guideline income is used for the purposes of spousal support. Mr. Cohoon has not tendered such evidence. In fact, he did not even testify that he would necessarily sell assets of Reid Grip to fund the payment to Ms. Stobo. He testified that he may borrow the funds, or he may sell some of his equipment. I therefore am unable to find that Mr. Cohoon has met the threshold of demonstrating that some portion of his income has already been divided as property and I find that the "double-dipping" issue does not arise in this case.

E. Application of the Guidelines

- [119] In determining the amount of spousal support, the SSAG provide for a monthly range of \$3,000 (low), \$3,500 (mid) and \$4,000 (high) for an indefinite duration.

- [120] I find this is an appropriate case for the low range. While Ms. Stobo has a compensatory claim for spousal support, this was a modern marriage, in which Ms. Stobo had ample opportunities to pursue her educational and career aspirations. Her income earning capacity is strong and there is every reason to anticipate post-MBA success in her new field. Spousal support shall be payable to Ms. Stobo in the amount of \$3,000 per month, commencing March 1, 2022.
- [121] With respect to duration, it is relevant that Ms. Stobo is commencing a new career path. Her future income is uncertain. As a result, I order that spousal support shall be for an indefinite period but subject to a review that may be initiated by either party at any time after December 31, 2024.
- [122] The parties are ordered to exchange copies of their income tax returns within 30 days of filing, and to provide financial statements for their companies within 30 days of the statements being finalized.

V. summary of orders made

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

- a) All equity in the Home is family property, notwithstanding Mr. Cohoon's use of Inheritance funds to pay down secured debt on the Home;
- b) The net value of the Companies that is family property, after accounting for Mr. Cohoon's exclusion relating to the Inheritance and distributive taxes, is \$668,039;
- c) The parties' shareholder loans in their respective corporations are family property to be valued at date of trial;
- d) Ms. Stobo shall deliver the remaining wine collection to Mr. Cohoon;
- e) The \$50,500 withdrawn post-separation by Ms. Stobo is not family debt;
- f) Family property and family debt should be divided equally between the spouses;
- g) The parties have leave to appear before me to address any further issues relating to property division that are not addressed in these reasons for judgment;
- h) Ms. Stobo is entitled to spousal support in the amount of \$3,000 per month on an indefinite basis, subject to a review that may be initiated by either party any time after December 31, 2024; and
- i) The parties shall exchange income tax returns and financial statements annually.

VI. Costs

[124] I did not hear submissions from the parties on costs. It is my preliminary view that success was divided and the parties should bear their own costs. However, if there are matters relating to costs about which I am unaware, the parties may schedule a brief hearing before me to speak to same.

"Francis J."

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Prepared on 29 October 2026 · Esheria