
CANADA / JUDGMENT

T.N. v. J.C.N.

2015 BCSC 439

COURT

Supreme Court of British Columbia

DECIDED

23 March 2015

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2015 BCSC 439 T.N. v. J.C.N.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.N. v. J.C.N.,

2015 BCSC 439

Date: 20150323

Docket: E093681

Registry: Vancouver

Between:

T.N.

Claimant

And

J.C.N. also known as J.C.S.

Respondent

Before: The Honourable Madam Justice Dardi

Reasons for Judgment on Issues other than Parenting

Counsel for the Claimant:

A.L. Perry

M. Perry

Counsel for the Respondent:

G. Gordon

A.C. Kaderly

F. Gropper, A.S.

Place and Dates of Trial:

Vancouver, B.C.

February 3-7, 11-14, 17-21,

March 3-7, March 31-April 3

April 28-30,

May 1 & 2, May 20,

June 30 & July 11, 2014

Written Submissions:

January 29, February 4, 5 and 10, March 3, 2015

Place and Date of Judgment:

Vancouver, B.C.

March 23, 2015

introduction

- [1] The marriage between the parties in this case, who were formerly described as the "golden couple", has ended in complex, protracted, and costly litigation. Their high-conflict matrimonial case culminated in a 31-day trial.
- [2] Judgment was reserved following the trial. I delivered oral reasons for judgment on the parenting issues, on August 29, 2014 (the "Parenting Reasons"). These reasons for judgment deal with the remaining issues under reserve, which are primarily financial in nature.
- [3] I issued a memorandum to counsel on December 29, 2014, requesting further submissions on the calculation of the compensation payment to be made to the respondent. The parties appeared before me on January 9, 2015, and I set the dates for the delivery of the written submissions. The further submissions were filed on January 9, February 4, 5, and 10, and March 3, 2015.

- [4] On January 24, 2015, claimant's counsel notified Supreme Court Scheduling that the claimant was proceeding with an application to re-open the trial. At an appearance on February 6, 2015, I set the date for that application as March 20, 2015. On March 16, 2015, counsel advised the court that the claimant had withdrawn his application filed March 11, 2015, and that therefore the court should proceed with issuing reasons for judgment based on the evidence at trial. These are those reasons.
- [5] In order to protect the privacy and well-being of the parties' child and, given the small community in which the parties and their child reside, I have used pseudonyms for the name of the parties' child, and the town in which the parties reside.
- [6] The parties married on June 20, 1986, and separated on or about July 30, 2009. They have one child, "X", who is 11 years old.
- [7] The claimant, Dr. T.N., is a successful medical practitioner in "Y", a city in northern British Columbia. The parties moved there in 1995. The respondent, Ms. J.C.N., developed a serious alcohol addiction by late 2006. Her addiction had a severe and deleterious impact on her marriage and her relationship with X.
- [8] After a number of unsuccessful attempts at treatment, Ms. N. entered the Orchard Residential Treatment Centre (the "Orchard") in December 2012. She has maintained sobriety since that time. Ms. N. completed and was discharged from the Orchard's program on July 23, 2013. Since then, she remained living in Vancouver. At trial, she expressed the intention to relocate to Y. X continues to reside in the family home with her father in Y.
- [9] On February 27, 2012, a declaration of no prospect of reconciliation between the parties was granted under s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].

issues

- [10] The issues I must determine fall into three categories: division of family assets, spousal support, and child support.

(A) Division of Family Assets

- (i) Is Dr. N.'s Infiniti a family asset?
- (ii) Is Ms. N.'s jewelry a family asset?
- (iii) Should the non-corporate account (MD Management Investment Account) of \$190,555 that Ms. N. liquidated be taken into account in the division of assets?
- (iv) What is the amount of compensation payment Dr. N. must pay to Ms. N. in order to effect equal division of the non-corporate assets?
- (v) What, if any, payment should be made to Ms. N. with respect to the goodwill of the company through which Dr. N. conducts his medical practice?

(B) Spousal Support

- (i) What is Dr. N.'s income?
- (ii) What, if any, income should be imputed to Ms. N.?
- (iii) What is Ms. N.'s entitlement to spousal support?
- (iv) What amount of support should be ordered?
- (v) What is the appropriate duration of the award?
- (vi) Should security for spousal support be ordered?

(C) Child Support

- (i) What amount of child support, if any, should be payable by Ms. N.?
- (ii) What is the amount of special expenses, and how should those expenses be allocated?

(D) Payment of Therapy Costs

- (i) How should the costs of therapy be divided?

Chronology of facts

- [11] The following is a chronology of relevant facts.
- [12] Dr. N. was 53 years old and Ms. N. was 52 years old at the time of trial. The parties met while attending university in Alberta. Ms. N. obtained a graduate degree in nursing. Dr. N. obtained a graduate degree in neuroscience and a medical degree. Thereafter, Dr. N. completed specialty training in ophthalmology at the University of Ottawa. During their years in Ottawa, Ms. N. acted as a nursing director at a children's hospital in Ottawa.
- [13] The parties moved to Y in 1995 to enable Dr. N. to open an ophthalmology practice. Since its inception, Dr. N. has operated his practice through an incorporated company (the "Company"). Ms. N. became the sole shareholder of a separate company, V. Inc., which held the medical practice name.
- [14] Initially, Dr. N.'s practice operated out of the local hospital, but in 1996, the practice was moved to its current location in Y.
- [15] Ms. N.'s was involved in the establishment and management of Dr. N.'s practice in Y. In approximately late 1999, the parties moved to Edmonton for one year to enable Dr. N. to pursue specialty training in refractive surgery. A locum assumed Dr. N.'s practice in Y. The parties ultimately decided to return to Y in 2000 and Dr. N. continued to develop his practice. It is common ground that Dr. N. is a successful medical practitioner and his practice is very profitable.
- [16] I will return to Ms. N.'s contribution to Dr. N.'s medical practice in the spousal support section of these reasons.

- [17] From the time of X's birth in 2003, up to the development of her serious alcohol addiction consequent upon her anxiety disorder, Ms. N. was a devoted, involved, and capable parent.
- [18] The parties eventually hired a nanny, Ms. B.T., who commenced work for the parties in September 2004. Since that time, except for a period between June 2012 and March 2013, Ms. B.T. has worked as a nanny for X in some capacity.
- [19] Sadly, by late 2006, Ms. N. was suffering from severe anxiety and an alcohol addiction. Her problematic behaviour, consequent upon her alcohol addiction, steadily deteriorated through to her final admission to the Orchard in December 2012.
- [20] At trial, Ms. N. was forthright in acknowledging that she suffers from an alcohol addiction consequent upon her anxiety disorder. Ms. N. was absent from home while she attended various residential treatments in October 2008, and again in February, May, and November 2009. Ms. N., at Dr. N.'s insistence, left the family home in or around August 2009 and moved into an apartment in Y. She resumed living in the matrimonial home for a brief interval of sobriety in October 2009. After relapsing into her addiction, she once again left for treatment in November 2009 and never moved back into the family home.
- [21] A considerable amount of trial time was consumed with testimony on the events which transpired during the years when Ms. N. was struggling with her alcohol addiction. I see no benefit in reciting in these reasons the multitude of other incidents which caused considerable distress to X and her father.
- [22] Dr. N. did the best he could in very difficult circumstances. He was operating a very busy medical practice and relied on a support system to assist him with X's care.
- [23] By 2012, Dr. N. was involved in a new relationship. For the most part, his new partner spent time at the family home on the weekends and eventually accompanied X and her father on vacation. Dr. N. has maintained this relationship.
- [24] In November 2009, Dr. N. retained counsel and commenced these proceedings. Ms. N. eventually also retained counsel. In 2012, the parties, with the assistance of professional therapists, engaged in efforts to resolve the parenting issues. Unfortunately Ms. N., while denying this to all concerned, remained in the grips of her addiction.
- [25] When confronted by her therapist, Ms. N. acknowledged the severity of her addiction and agreed to enter rehabilitation at the Orchard on December 24, 2012. It is uncontroversial that since then, Ms. N. has not consumed alcohol. As noted above, she completed the program on July 23, 2013.
- [26] On March 14, 2013, Ms. N. voluntarily enrolled in the Soberlink program operated by the Orchard. Since her enrollment in the program, her blood alcohol content has been monitored electronically. Four tests occur every day, three of which are scheduled, and one of which is random. The tests transmit her alcohol blood readings to the monitor of the program.

- [27] Ms. N. has purchased a townhouse in Y where X and her father reside. Her counsel informed the court that Ms. N. anticipated relocating there by January 15, 2015. She is without employment and has been so since separation.

Monies Paid to Ms. N. Post-Separation

- [28] In 2010, Ms. N. reported Line 150 income of \$85,777. This figure consisted of employment income from Dr. N.'s medical practice of \$80,000 and some miscellaneous dividend and interest income from investments in her name. She reported similar Line 150 income in 2011 and 2012.
- [29] In addition to income from the medical practice and investment income, Ms. N. had the use of a joint credit card after separation. From the date of separation up until October 2012 the card was paid by Dr. N. each month. On her own evidence, substantially all of Ms. N.'s charges on this credit card were on account of her legal fees. The evidence shows that Dr. N.'s final payment was to clear the outstanding balance on the credit card - approximately \$10,000 for charges incurred by Ms. N. - in May 2013. The evidence was confusing and difficult to follow as to precisely how much the Company or Dr. N. paid in legal fees for Ms. N. in the pertinent period. However, the evidence establishes that the amount was substantial: in the range of \$95,000 for 2012 alone.
- [30] Until April 2013, Ms. N.'s health costs, including her addiction treatment, were paid by the Personal Health Services Plan ("PHSP") - a private health plan in place for the family's benefit. In addition, Ms. N. had the use of a corporate credit card that she used for health-related expenses.
- [31] The preponderance of the evidence supports a finding that, from the time of separation up until October 2012, substantially all of Ms. N.'s expenses were paid by Dr. N., the Company, and/or the PHSP. This included her legal fees, the rental costs for an apartment Ms. N. rarely used, and all of her treatment costs. Notably, any income tax associated with draws from the Company that were for Ms. N.'s benefit (other than salary and dividends) was attributable to and paid for by Dr. N. personally. The evidence regarding precisely how much associated personal income tax he incurred was not well-developed. However, I am satisfied that constituted a significant benefit to Ms. N.
- [32] Commencing in January 2013, Ms. N. was paid the sum of \$15,000 per month as dividend income on the shares which she held in the Company. For the months of January, February, and March 2013, Ms. N. received her dividends plus her salary from the practice, which was approximately \$6,660 per month. As of April 2013, Ms. N. was formally discharged as an employee of the medical practice and, accordingly, she ceased receiving salary. In addition, she was removed as a beneficiary of the PHSP. She continued to receive monthly dividends from the Company until October 2013, when interim spousal support was ordered.

- [33] On October 11, 2013, Master Keighley, in reasons indexed at 2013 BCSC 1870, ordered that Dr. N. pay interim spousal support to Ms. N., in the amount of \$22,000 each month, commencing October 1, 2013 and continuing on the first day of every month until further order of the court. The order was made without prejudice to Ms. N.'s right to seek retroactive support.
- [34] I note at this juncture that in order to decide the issues as framed in this proceeding, and given my conclusion that Ms. N. is not entitled to any retroactive spousal support, it is not necessary for me to make any findings on precisely how much Dr. N. expended in supporting Ms. N. prior to Master Keighley's order for interim spousal support. I will address the claim for retroactive spousal support later in these reasons.

Orders on Parenting Issues

- [35] In the Parenting Reasons pronounced on August 29, 2014, I made orders as follows:
- (1) An order for joint custody under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), with Dr. N. to have primary residence of X until further order of the court or the written agreement of the parties;
 - (2) An order that the parties are guardians of X pursuant to s. 39 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] and one or both parties are authorized to refer any disputes regarding the exercise of parental responsibilities to the parenting coordinator, S.F.; and
 - (3) An order, pursuant to the provisions of s. 224 of the FLA, that Ms. N., Dr. N., and X were to attend the Family Forward Program operated by Alyson Jones & Associates.
- [36] I ordered a parenting schedule up until March 2015. I anticipated that by the end of March 2015, the parties, with the assistance of the reintegration team of therapists and the parenting coordinator, would agree to a further graduated increase in Ms. N.'s parenting time with X.
- [37] I also ordered that Ms. N., at her own cost, shall continue to participate in the Soberlink Program until February 28, 2015. Further, I ordered that if Ms. N. consumed any alcohol, her parenting time would be immediately suspended, with liberty for either party to apply for further orders.

analysis

(A) Division of Family Assets

- [38] The authorities direct that the court should first make the appropriate division of assets before considering the issue of support because a person's asset base is relevant to support: *Foster v. Foster*, 2007 BCCA 83 at para. 50; *Narayan v. Narayan*, 2006 BCCA 561 at para. 33; and *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 86.

- [39] The issue of division of property is governed by the FRA, as this action was commenced prior to the FLA coming into force in March 2013.
- [40] The starting point in this analysis is that each spouse is presumptively entitled to 50% of the family assets. In final submissions, neither party sought judicial reapportionment of their presumptive one-half interest in the family assets under s. 65 of the FRA. Although, Ms. N.'s pleadings seek reapportionment, her counsel conceded in oral submissions that an equal division of family assets is appropriate in this case.
- [41] On the totality of the evidence, I find that an equal division of the family assets would not be unfair. Accordingly, the parties are entitled to share in the family assets equally.
- [42] The parties agree the following are family assets:
- (a) the shares in the Company;
 - (b) the former family home located at C. Crescent (the "Property");
 - (c) an RRSP account in Ms. N.'s name with a value of \$351,574;
 - (d) an RRSP account in Ms. N.'s name with a value of \$29,628;
 - (e) an RRSP account in Dr. N.'s name with a value of \$349,237;
 - (f) a TFSA account in Ms. N.'s name with a value of \$18,829;
 - (g) a TFSA account in Dr. N.'s name with a value of \$19,940;
 - (h) an unregistered investment account at MD Management Investment held in Ms. N. name, which was cashed in by Ms. N., yielding a net of tax proceeds of \$180,000 (the "Unregistered Account").
- [43] The parties also hold a joint investment account in trust for X with a value of \$61,534 (the "Informal Trust") and an RESP account with a value of approximately \$38,000 (the "RESP Account").
- [44] During the latter stages of 2013, each party drew on their respective portion of their home equity line of credit (the "HELOC"), secured by the Property. This line of credit was segmented by Royal Bank of Canada (RBC) pursuant to a consent order pronounced in November 2013, providing each party with \$260,000 in credit. Ms. N. has drawn \$212,759 of her portion of the facility. Dr. N. drew \$67,000 from this facility in order to purchase a new vehicle (the "Infiniti"). Dr. N.'s draw of those funds occurred before the account was bifurcated in November 2013. Dr. N. drew a further \$177,000 in December 2013 and January 2014, for a total of \$244,000.
- [45] The parties have agreed that:
- (i) Ms. N. will transfer her interest in the Property to Dr. N.;

(ii) For the purposes of the division of assets, Ms. N. will be responsible for \$212,759 of the HELOC indebtedness and Dr. N. will be responsible for \$244,000; and

(iii) Dr. N. will retain the Property and will also assume all indebtedness on the HELOC, which is secured by the Property.

[46] Ms. N. is entitled to an equalization payment with respect to the Property, calculated as follows:

Property

Fair Market Value

\$690,000

Notional one-half interest:

\$345,000

Ms. N.'s share of the HELOC:

- \$212,759

TOTAL:

\$132,241

[47] There is a dispute as to whether Ms. N.'s jewelry and Dr. N.'s Infiniti are family assets, and whether the Unregistered Account should be taken into account in determining the appropriate equalization payment. I will address these disputed items and then determine the appropriate compensation order on a global basis later in these reasons.

Infiniti Vehicle

[48] Dr. N. purchased a new SUV, the Infiniti, in June 2012. The cost was approximately \$67,000. He purchased the Infiniti with funds he borrowed on the HELOC. I accept that Mr. Michael Byrne, who has been the corporate accountant since 1995, advised Dr. N. that in order to avoid the risk of onerous tax consequences, he should not use corporate funds to purchase his new vehicle.

[49] The authorities establish that the proper date for determining whether an asset is properly characterized as a family asset is the date of the triggering event: *Fisher v. Fisher*, 2009 BCCA 567 at para. 60. As noted above, the triggering event in this matter occurred on February 27, 2012, when a declaration of no prospect of reconciliation was granted under s. 57 of the FRA. The Infiniti was purchased some three years after separation and several months after the triggering event.

[50] In all the circumstances, I conclude that the Infiniti is not a family asset that should be included in the division of assets.

- [51] In any case, Dr. N. has agreed to be solely responsible for the debt he incurred on the HELOC, which includes the debt financing he incurred to purchase the Infiniti. It would be most unjust if Ms. N. were to be compensated for any interest in this asset.

Jewelry

- [52] Dr. N. seeks \$12,500 as compensation for his 50% share in Ms. N.'s jewelry.
- [53] In her financial statement sworn February 6, 2014, Ms. N. lists jewelry as an asset with value "unknown". At trial, Ms. N. testified regarding the acquisition and disposition of various items of jewelry, including tendering receipts and appraisals of various items. She purchased some items, some items were gifted to her, and some items are no longer in her possession.
- [54] There were no current appraisals of the jewelry tendered at trial. Dr. N. submits, somewhat arbitrarily, that the value of the jewelry should be set at \$25,000 for purposes of any compensation payment. Since I am not persuaded any of Ms. N.'s jewelry is a family asset, it is not necessary for me to address valuation.
- [55] Section 58(2) of the FRA defines a family asset as "property owned by one or both spouses and ordinarily used by a spouse for a family purpose". As the wording of the section indicates, the key to the analysis is the nature of the use to which an asset is put: *Chera v. Chera*, 2008 BCCA 374 at para. 69.
- [56] The preponderance of the evidence I prefer supports a finding that Dr. N. gave Ms. N. jewelry intending it to be an unconditional gift to her. I also find, on the totality of the evidence, that the jewelry items gifted to Ms. N. by others or purchased by her, were her personal assets. There is no evidence tendered that any of Ms. N.'s jewelry were purchased as investments, or otherwise used for a family purpose.
- [57] In all the circumstances, I conclude that all of Ms. N.'s jewelry is hers alone and is not a family asset.

The Unregistered Account

- [58] It is common ground that the Unregistered Account was a family asset.
- [59] As of January 22, 2014 the Unregistered Account had a value of \$190,555. Ms. N. cashed out the account, and after tax it yielded \$180,000. In order to accomplish a fair equalization, the personal tax liability Ms. N. incurred should be deducted in determining the amount of a compensation order: *Laxton v. Coglon*, 2008 BCCA 414 at para. 52. Accordingly, Dr. N. should notionally receive a credit for \$90,000, reflecting his entitlement to half of the after tax value of the Unregistered Account.
- [60] However, there is a controversy as to whether this notional credit should be taken into account in determining the amount of the compensation payment to be made to Ms. N. Ms. N.'s counsel urges that the \$90,000 be characterized as retroactive lump sum spousal support

and therefore "ignored" in the division of family assets. Ms. N.'s primary contention in support of her claim for retroactive spousal support is that from April through September 2013, she was required to pay her treatment costs, legal fees, and other ongoing expenses from the monthly dividend income of \$15,000.

- [61] The exercise of judicial discretion in considering the relevant factors in relation to retroactive spousal support requires flexibility and a holistic view of each case on its merits. In determining whether to order retroactive spousal support, the court should consider whether the applicant spouse has already enjoyed the financial advantages that he or she would have received from that support, the conduct of the payor, the reason the recipient spouse has delayed seeking support, and any hardship to the payor spouse that may be occasioned by granting the order: *Kerr v. Baranow*, 2011 SCC 10 at paras. 207 and 212.
- [62] In my view, the most important factor in the analysis is the totality of the funds that Ms. N. received from Dr. N. and the Company since separation, a substantial portion of which was received on a tax-free basis. I have outlined what she received earlier in these reasons. Since separation, Dr. N. has also been the sole source of financial support for X.
- [63] Ms. N. emphasized that, in contrast to her financial situation, certain financial advantages accrued to Dr. N. because of his continuing role in the Company. Her counsel sensibly acknowledged that there were legitimate income tax concerns underlying Ms. N.'s termination as an employee of the Company in April 2013. Moreover, her counsel did not seriously dispute the propriety of her termination as a beneficiary of the PHSP. To the extent Ms. N.'s counsel asserts that the payment of dividends to Ms. N. is a valid consideration because of the potential reduction of the value of the Company, I note that neither valuator mentioned this as a factor in the valuation of the Company.
- [64] Ms. N. also pointed out that Dr. N. was able to pay his legal fees, at least until December 2013, from his income whereas he had stopped paying Ms. N.'s legal fees by 2013. I am not persuaded that this constitutes blameworthy conduct on Dr. N.'s part, or that this in itself justifies an award for retroactive spousal support. Generally, legal fees are not to be considered when assessing spousal support issues: *Oliver v. Oliver*, 2011 BCSC 1126 at para. 107. I will return to the issue of legal fees in the section on spousal support.
- [65] On the totality of the evidence and applying the governing legal principles, I am not satisfied that there is any principled basis to make an award for retroactive spousal support. In the result, Dr. N. is to be credited \$90,000 for his share of the Unregistered Account.

Global Compensation Payment

[66] In all the circumstances, it is appropriate to make an equalization payment or compensation order on a global basis to adjust the division of the non-corporate family assets. As noted above, \$132,241 is due to Ms. N. as an equalization payment for the Property. However, in light of my findings in relation to the Unregistered Account, I have subtracted the \$90,000 due to Dr. N. from the equalization payment. Therefore, on my calculations, Dr. N. is required to pay Ms. N. \$42,241 to equalize the division of the non-corporate assets.

Summary of Distribution of Non-Corporate Family Assets

- [67] The parties achieve equalization of the family assets and debts, with a total compensation payment by Dr. N. to Ms. N. of \$42,241. Dr. N. shall have 90 days from the date of these reasons for judgment to make this payment to Ms. N. Upon receipt of this payment, Ms. N. shall deliver the necessary conveyancing documents to transfer her interest in the Property to Dr. N. This is conditional upon her being released from any personal covenants on the HELOC.
- [68] Dr. N. shall retain the Infiniti as his sole property and Ms. N. shall retain the Camry automobile and her jewelry as her sole property.
- [69] The parties' TFSA accounts held in their respective names shall be equalized as of the date of equalization.
- [70] The parties' Registered Retirement Savings Plan described in their respective Form 8 Financial Statement - Dr. N.'s sworn February 3, 2014 and Ms. N.'s sworn February 6, 2014 - shall be equalized between the parties pursuant to the Income Tax Act (Canada) as of the date of equalization.
- [71] The parties' Canada Pension Plan credits shall be equalized from the date of marriage to the date of separation. Although Ms. N. sought an order as of March 1, 2013, she provided no submissions as to why the court should order that post-separation accruals should be divisible.
- [72] At trial, Dr. N. submitted that Ms. N. should retain the sole benefit of her Ontario HOOP Pension. However, in his written submissions dated January 29, 2015, he appears to resile from that position. Unless the parties agree otherwise, this pension shall be divided pursuant to Part 6 of the FRA.
- [73] Dr. N. and Ms. N. shall continue as joint account holders of the RESP Account and the Informal Trust account for the benefit of X.
- [74] The parties agree that the chattels located in the home at the Property are family assets. They have divided the contents of the former family home between them. Accordingly, there is no need to address the issue. Any items purchased by either party since separation are his or hers alone.

- [75] Ms. N. seeks an order that "the parties' airline and hotel loyalty points shall be divided equally as of February 3, 2014". There was no evidence adduced at trial on this item. In the absence of the parties' agreement regarding division of these travel-related benefits, I am not persuaded it would be just to make the order sought.
- [76] If counsel cannot agree on the mechanics of the above distribution, they are at liberty to apply for such further orders as may be necessary to implement these reasons for judgment.

Valuation of the Company

- [77] The parties agreed that Dr. N. should retain all the shares of the Company and that Ms. N. would be compensated for 50% of the value of the shares of the Company. The controversy regarding the valuation of those shares was a central issue at trial.
- [78] Mr. Ron Tidball was retained by Dr. N. to evaluate the fair market value of the shares of the Company. He produced several reports, and his valuation included \$100,000 for the value of goodwill related to Dr. N.'s ophthalmology practice.
- [79] Mr. Christopher Halsey-Brandt was retained by Ms. N. to critique Mr. Tidball's reports. He adjusted Mr. Tidball's treatment of inter-corporate transactions in fiscal year 2013, resulting in an upward adjustment of \$200,000 to Mr. Tidball's valuation. Mr. Tidball acknowledged that such an adjustment was appropriate. In the result, Mr. Tidball's valuation was adjusted to \$3,420,865, which the parties agreed to round to \$3.4 million.
- [80] After the conclusion of the trial, counsel informed the court that in June and July 2014, 50% of \$3.4 million - \$1.7 million - had been transferred to Ms. N.'s holding company by way of a corporate reorganization, pursuant to the provisions of the Income Tax Act. By agreement, Ms. N. has retained the shares of V. Inc., of which she is the sole shareholder, but she has transferred the name to Dr. N.
- [81] The outstanding issue is whether Ms. N. is entitled to further compensation for the goodwill of the Company. Ms. N. asserts that goodwill is undervalued at \$100,000 and she contends that a proper valuation of goodwill is in the range of \$350,000 to \$550,000. Dr. N. strenuously opposes this assertion.

Expert Evidence

- [82] With respect to the goodwill to be ascribed to the shares, the parties have adduced the competing expert opinions of two qualified business valuers.
- [83] Mr. Tidball, of Campbell Saunders & Co. Chartered Accountants, was retained by Dr. N. and prepared three reports which address goodwill and the valuation of the Company. The reports are dated April 4, 2012, February 6, 2013, and January 2, 2014.

- [84] Mr. Halsey-Brandt, of Blair Mackay Mynett Valuation Inc. was retained by Ms. N. to prepare responding reports. Mr. Halsey-Brandt prepared three "critique" reports dated October 16, 2012, May 16, 2013, and February 3, 2014.
- [85] Dr. N. had previously retained Mr. Clayton-Schultz to estimate the fair market value of the shares in the Company as of August 31, 2010. Mr. Schultz's report, dated November 25, 2011, was referred to in cross-examination. However, neither party sought to adduce it in evidence. Accordingly, in these reasons, I have considered the Schultz report only to the extent it was referred to in cross-examination.
- [86] The only issue in contention between Mr. Tidball and Mr. Halsey-Brandt was the value of the Company's commercial goodwill. Both experts agreed that commercial goodwill is an intangible asset; it is defined as the amount of the fair market value of the enterprise as a whole exceeds the fair market value of its non-operating assets. The acquirer of commercial goodwill must be economically better off having paid for the goodwill of an existing enterprise rather than starting a new one. In contrast, personal goodwill relates to the reputation, skill, and other characteristics that would attract patients, clients, or customers to an individual, in preference to someone else. Personal goodwill by definition cannot be transferred to another individual.
- [87] The following facts inform the expert opinions:
- (i) The Company is the personal service corporation through which Dr. N. provides his ophthalmology services to a population of approximately 80,000 in northern British Columbia.
 - (ii) The Company employs six technicians and an office manager in addition to Dr. N.
 - (iii) Dr. N. started his own practice in 1995 as a new venture and I accept Dr. N.'s evidence that he was up and running within a few days of his arrival in Y. Dr. N. took the position of a departing ophthalmologist who had operated in a hospital in a nearby town. Dr. N. completely relocated the practice to Y within a few months of his arrival.
 - (iv) In addition to his practice in Y, Dr. N. also performs laser eye surgery in Vancouver approximately eight times per year and the revenue from that laser eye surgery has exceeded \$100,000 in recent years.
 - (v) Mr. Tidball, found Dr. N.'s income from his ophthalmology practice to be as follows:

2011

\$1,125,861

2012

\$1,238,661

2013

\$982,626.

(vi) Since opening his practice in 1995, Dr. N. has been the only ophthalmologist in the northern region of British Columbia, outside of Prince George. Currently, Prince George has four ophthalmologists.

(vii) As at trial, the ophthalmology services waiting list in the area for Dr. N. was six months to one year for non-emergent cases, and three months for cataract surgery.

(viii) Dr. N. operates at the local hospital in Y. He typically exercises five days per month in operating time, and on occasion up to six days per month. Dr. N. cannot transfer his hospital privileges and corresponding operating time to any other medical practitioner. This is determined by the regional health authority and is subject to a protocol for applying for such privileges.

(ix) The Northern Health Authority manpower plan, established by the pertinent Medical Advisory Committee, calls for one ophthalmologist in the catchment area Dr. N. currently services.

(x) In or around late 1999 or 2000, before he left for his sabbatical in Edmonton, Dr. N. advertised his "lucrative" practice for sale - with no pricing information - in the Canadian Journal of Ophthalmology for approximately six months. He did not receive any expressions of interest whatsoever.

(xi) In 2000, Dr. N. offered his locum an option to buy his practice. He offered equipment-pricing with no goodwill component. The locum, who had some personal issues with Dr. N., chose not to buy the practice.

(xii) As noted by Mr. Tidball, the "Rural Retention Program premium adjustment" is applicable in Y. This is an incentive payment program offered by the B.C. government to recruit and maintain rural medical practitioners. This underscores the challenges in attracting practitioners to rural locations.

(xiii) Fifty percent of the ophthalmologists in Canada have an office-based practice and do not operate in a hospital. The evidence falls short of establishing that operating time is more lucrative than clinical time.

[88] In his first report dated April 4, 2012, Mr. Tidball concluded that a potential purchaser would pay Dr. N. in the range of \$100,000 to avoid the non-productive time required to establish a new medical practice. He stated as follows:

In our opinion, there is little basis to assume that an ophthalmologist wishing to practice in [Y] would pay any goodwill for the practice of [Dr. N.], considering that the acquirer would not acquire the skills and client relationships of [Dr. N.] and that a significant waiting list exists in [Y]. In addition, based on our general knowledge of business, professional practices outside of Great Vancouver, Victoria and Kelowna, are less desirable and accordingly, command lower prices. In our opinion, it is unlikely that [Dr. N.] would have competing bidders for his practice due to this

factor. Nevertheless, somewhat arbitrarily, we assumed that a prudent potential purchaser might be willing to pay, say, \$100,000 for goodwill related to the replacement costs associated with hiring and training staff, setting up office administration, the lease of premises, and other start-up costs.

[Emphasis added.]

[89] On the other hand, Mr. Halsey-Brandt, after considering various factors which he contends were not considered or sufficiently assessed in Mr. Tidball's report, concluded that the value of Dr. N.'s goodwill practice is in the range of \$400,000 to \$600,000. He anchored his analysis in a theoretical methodology based on a seller's discretionary earnings ("SDE"), which is the pre-tax income, after payment of third party expenses, generated by a seller. He adopted this concept from the Schultz report, although he did not adopt Mr. Schultz's conclusions.

[90] In his final report dated February 3, 2014, Mr. Halsey-Brandt adjusted his valuation as follows:

9.02 From our review of the Company's financial statements for the fiscal year ended August 31, 2013, we note that [Dr. N.'s] practice revenue declined by about 12% between fiscal 2012 and 2013. We understand that a portion of this decrease was the result of [Dr. N.] reducing the amount of time he practiced ophthalmology and a portion was from the impact of the cataract surgery fee reduction. For purposes of this report, we assumed that the portion of the decrease in revenue resulting from the surgery fee reduction accounted for a 10% decrease in [Dr. N.'s] SDE, as previously anticipated. Accordingly, our conclusion as to the goodwill inherent in [Dr. N.'s] practice would also decrease by approximately 10%, to between approximately \$350,000 and \$550,000, as at a current valuation date.

[Emphasis added.]

[91] In his testimony, Mr. Tidball underscored that the most significant factor in valuing the goodwill of the Company was the rural nature of Dr. N.'s practice. Notably, Mr. Tidball carried out independent research regarding the market for doctors in Northern B.C. He attached pertinent literature to his report and interviewed the four ophthalmologists currently practicing in Prince George. None of these four ophthalmologists paid any amount for goodwill in relation to their existing practices. In 2008, one of these ophthalmologists had offered his practice for sale to a new doctor who chose not to purchase it, even though the sale price did not include any goodwill. The new ophthalmologist chose to open his practice in Prince George "from scratch", rather than acquiring the practice offered for sale. The same vendor doctor indicated that he does not expect to receive any amount for goodwill when he retires in the near future.

- [92] The evidence supports a finding that, although comparable, Prince George, which is a larger urban centre than Y, is likely a more desirable location to a medical practitioner than Y, for reasons including peer and specialty support. Notably, Mr. Tidball testified that in Y, there are three internal medicine physicians who conduct their services Y by flying in from Vancouver on a rotating schedule because they are not willing to live in Y, which is somewhat remote.
- [93] Mr. Tidball acknowledged in cross-examination that there are distinctions between Prince George ophthalmology practices and Dr. N.'s. Insofar as the billings of the Prince George ophthalmologists being lower than those of Dr. N., Dr. N. credibly explained the differential - at least in part - by pointing out that for lifestyle and other reasons, they each worked less hours than Dr. N. Since 2007, the Prince George ophthalmologists have had less operating time than that which is available to Dr. N. However, Mr. Tidball went on to explain that even so, the Prince George practices, in broad terms, were comparable "houses next door".
- [94] In contrast, Mr. Halsey-Brandt did not contact any medical doctors in northern B.C. or any rural medical practitioner at all, except for Dr. N. Mr. Halsey-Brandt's failure to speak to the Prince George ophthalmologists or any other northern B.C. medical practitioner or to investigate transactions of medical practices in rural locations in B.C. undermines the reliability of his opinion. Mr. Halsey-Brandt spoke to two ophthalmologists and two other physicians in the Lower Mainland. In my view, the information garnered from those individuals does not provide a reliable foundation for his valuation approach.
- [95] Mr. Halsey-Brandt also appears to have entirely discounted the fact that Dr. N. had no response when he previously offered his practice for sale. Notably, at this time, Dr. N. described his practice as "lucrative". While recognizing that this advertisement was some years ago, Mr. Tidball emphasized that it is a relevant consideration and is reflective of the lack of desirability of Y's rural location. I agree.
- [96] In all the circumstances, I do not consider it safe to rely on Mr. Halsey-Brandt's opinion. Overall, I found his analysis and his criticisms of Mr. Tidball's approach unpersuasive. Mr. Halsey-Brandt's analysis of the value of the commercial goodwill focused on economics and insufficiently addressed the practical realities of marketing the practice. In particular, his reports failed to adequately reflect the significance of the rural location of Dr. N.'s practice.
- [97] In my view, Mr. Tidball was an objective witness, who thoroughly and carefully explained the rationale behind his opinion on goodwill. He persuasively discounted the factors upon which Mr. Halsey-Brandt grounded his opinion. Mr. Tidball's years of relevant experience and knowledge enhanced the weight to be accorded to his testimony. His opinion was not weakened in the face of a thorough cross-examination aimed at exposing the alleged deficiencies in his reports.

[98] In the end, I have more confidence in Mr. Tidball's opinion and I accept his opinion in preference to that of Mr. Halsey-Brandt. Mr. Tidball valued the goodwill in the Company at \$100,000, and I accept that evidence as an accurate valuation. That sum was reflected in the compensation payment of \$1.7 million dollars transferred to Ms. N.'s holding company. Accordingly, Ms. N. is not entitled to any further compensation with respect to the shares in the Company.

[99] Although I understand that the corporate transfers have already been effected, in the interest of clarity, there shall be an order that Dr. N. shall pay to Ms. N. one-half of the value of the Company in the most tax-efficient manner possible, pursuant to the provisions of the Income Tax Act (Canada) on the following terms:

- (a) Dr. N. shall cause the Company to transfer \$1.7 million in market value from its investment account to Ms. N.'s holding company;
- (b) Concurrently with the corporate transfer, the following shall occur:
 - i. Ms. N. shall transfer her shares in the Company to Dr. N. or at his direction pursuant to the applicable sections of the Income Tax Act (Canada);
 - ii. Ms. N. shall retain the shares in V. Inc. but will transfer the name to Dr. N.;
 - iii. In the event there are unanticipated corporate or tax issues arising from the corporate transfer of Ms. N.'s shares in the Company to Dr. N., or the retention by Ms. N. of the shares in V Inc., either party shall have liberty to apply.

(B) Spousal Support Issues

[100] In assessing Ms. N.'s claim for spousal support, I must address the following issues:

- (i) What is Dr. N.'s income?
- (ii) What, if any, income should be imputed to Ms. N.?
- (iii) What is Ms. N.'s entitlement to spousal support?
- (iv) What amount of support should be ordered?
- (v) What is the appropriate duration of the award?
- (vi) Should security for spousal support be ordered?

(i) Dr. N.'s Income

[101] The starting point in the analysis on spousal support is determining the income of the parties. It is logical and practical in this particular case that the determination of the parties' income for spousal support purposes be the same as that income attributed to the parties for purposes of determining their child support obligations. Although the extent of the payor's obligation may ultimately differ, in both circumstances, the court's first task is to determine the income level that fairly reflects the payor's ability to pay support: *Aelbers v.*

Aelbers, 2010 BCSC 1574 at paras. 12 and 13.

[102] Accordingly, I will address Dr. N.'s income first before undertaking an analysis in relation to the entitlement and quantum of support.

Legal Framework

[103] There is no statutory framework setting out how to calculate income for spousal support purposes. However, the Spousal Support Advisory Guidelines, ("SSAG") which as the name indicates are advisory and not legislative, incorporate the methodology for defining income under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines") as a starting point.

[104] The court in *P.K.C. v. J.R.R.*, 2014 BCSC 932, conveniently summarized the pertinent provisions of the Guidelines:

[88] Usually, the total income of a spouse in a given year can be based on the "Total Income" a spouse reports in their T1 General Tax form issued by CRA: Guidelines, s. 16. But if a spouse's pattern of annual income shows this would not be the most fair and reasonable way to fix Guidelines income for support purposes, the court may consider fluctuations in a spouse's income over the previous three years. The court can also consider nonrecurring income during that three-year period and fix an amount the court finds proper: Guidelines, s. 17(1).

[105] The authorities establish that the court must first determine, on the most current sources of income information available, whether s. 16 would fairly determine a payor's annual income. Section 17 permits the court to depart from that determination if it is not the fairest means of assessing income. In circumstances where there is a material difference between the historical pattern of income and the determination under s. 16, the court should assess the fairness of the s. 16 figure: *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263, 1999 CanLII 4073 (BCSC) at para. 28.

[106] In evaluating fairness, it is crucial for the court to consider the reasons which gave rise to the difference between the two figures and for the court to examine whether any increases or decreases in income are likely to be permanent. If there is a degree of permanence associated with an increase or decrease in income, the s. 16 determination of income may be the fairest determination: *Fuzi v. Fuzi*. Conversely, if the court concludes that s. 16 would not fairly determine a payor's annual income, the court may set the income at an amount it deems fair and reasonable: *Grossi v. Grossi*, 2005 BCCA 47 at para. 25. If a payor's income historically fluctuates, is unpredictable, or the estimate of current income is not reliable, the usual approach endorsed by the authorities is to average income in accordance with s. 17: *J.E.H. v. P.L.H.*, 2013 BCSC 752 at para. 167.

Discussion

[107] Ms. N.'s position is that the fairest determination of Dr. N.'s income is to choose the average of his income earned in the most recent three fiscal years, 2011 to 2013. Dr. N. counters with the submission that his income, for spousal support purposes, should be \$982,626 which represents the income he earned in 2013. At trial, neither party suggested that Dr. N.'s 2014 income to date should be factored into the calculation.

[108] Mr. Tidball, who as I mentioned was retained as an accounting expert by Dr. N., found Dr. N.'s income to be as follows :

2010

\$1,302,517

2011

\$1,125,861

2012

\$1,238,661

2013

\$982,626.

[109] Michael Byrne, the Company's accountant, also provided a year-to-year analysis of the Dr. N.'s income from 2006 to 2013. Mr. Byrne calculated Dr. N.'s income for 2009 - the year in which the parties separated - to be \$1,119,233. He calculated Dr. N.'s 2013 income to be \$1,000,976. Notably, while not precisely equivalent, Mr. Byrne's calculations closely mirror those of Mr. Tidball.

[110] In any case the accuracy of Mr. Tidball's computations of income, were not challenged by Ms. N. For purposes of setting spousal support, I accept Mr. Tidball's calculations of income.

[111] I turn to the central question: in all the circumstances, what is the fairest approach for fixing Dr. N.'s income for purposes of determining his support obligations?

[112] Dr. N. testified that in or around January 2013, he ceased working Fridays, except for the eight times per year he performs Lasik surgery on Fridays in Vancouver. Dr. N. stated the reasons for his reduced work schedule included the necessity for being available for X. He also referenced the strain of these proceedings. It was apparent to the court that this litigation has taken a significant toll on Dr. N. Based on Dr. N.'s evidence, I am satisfied that the pattern of a reduced work week upon which he embarked in 2013 is more likely than not to be permanent.

[113] On the totality of the evidence, I find that Dr. N. conducted himself reasonably in reducing his work schedule in 2013. I add that I have no hesitation in concluding that in doing so, Dr. N. has endeavoured to act in X's best interests. In all the circumstances, I find his stated intention to carry on with this established pattern reasonable.

[114] Ms. N. submits that since Dr. N. is "in his prime earning years of his vocation", spousal support should be based on his historical income. In the end, and given my findings about the permanence of Dr. N.'s reduced work week, I reject that submission. In all the circumstances, I find the fairest and most reliable determination of Dr. N.'s income for purposes of both child support and spousal support to be what he earned in 2013: \$982,626.

What, if any, Income Should be Imputed to Ms. N.?

[115] Before turning to the issue of quantum of support, I must consider whether any income should be imputed to Ms. N. In broad terms, Dr. N. submits that income should be imputed to Ms. N. on the basis of her income-generating investment account and on the basis of an annual amount representative of the wage that Dr. N. submits she is capable of earning. Ms. N. disputes that any imputation of income is appropriate.

[116] It is well-settled that parents have a joint obligation to earn income to support their children, commensurate with their relative capabilities to contribute to the performance of that obligation. Section 19 of the Guidelines allows the court to impute income to a spouse as it considers appropriate. The courts have generally favoured relying on that imputation for spousal support purposes as well. The SSAG endorse the application of the provisions of s. 19 of the Guidelines when assessing spousal support.

[117] The recent decision of the Court of Appeal in *Marquez v. Zapiola*, 2013 BCCA 433 summarized the principles which inform the analysis of the imputation of income. The court clarified that for the purposes of both child and spousal support there is a broad judicial discretion to impute income to either spouse: *Marquez v. Zapiola* at para. 36. While recognizing the legal foundation for awarding spousal support is different than that of child support, the court observed that the test for imputing income for the purposes of fixing the quantum of spousal support is similar to that of child support. The test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support: *Marquez v. Zapiola* at para. 38.

Investment Income

[118] As I mentioned, an investment account with a market value of \$1.7 million has been transferred to Ms. N.'s holding company. At trial, the parties agreed that the reasonable rate of return on this account is 5.3%. Accordingly, at that rate of return this asset would generate income of \$90,000 per annum. In closing submissions, Dr. N. posited that \$90,000 of investment income should be imputed to Ms. N. However, in written submissions dated January 29, 2015, Dr. N. shifted his position and suggested 5% as a conservative estimate which would yield an income of \$85,000 per annum to Ms. N.

- [119] Section 15.2(4) of the Divorce Act mandates that the court shall consider the "means" of each spouse, which is typically the basis for setting income for spousal support. The Court in *Leskun v. Leskun*, 2006 SCC 25, at para. 29, citing, with approval, its earlier decision in *Strang v. Strang*, [1992] 2 S.C.R. 112, 39 R.F.L. (3d) 233 at 119, reiterated that the proper interpretation of "means" includes "all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits". If the court concludes that a spouse's stated income does not reflect their "means" or ability to earn income, the court can impute or attribute income at a level commensurate to their means: *L.F. v. B.F.*, 2012 BCSC 1073 at para. 153.
- [120] Section 19(1)(e) of the Guidelines allows the court to impute income as it considers appropriate if the spouse's property is not reasonably utilized to generate income.
- [121] As noted above, Dr. N. submits that \$85,000 of investment income should be imputed to Ms. N. Ms. N. counters with the assertion that no income should be imputed to her because it would jeopardize her financial future. In developing this contention, Ms. N. points to Dr. N.'s stated present intention to retire at age 60, which would impact his future ability to pay her spousal support. Ms. N. argues that in order to cover her expenses after he retires, she would require the use of any accrued income on her investment account. She relies on *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal refused, 33002 (May 28, 2009), in which the Court reversed the decision of the trial judge to impute income to Ms. Chutter on her registered retirement savings (RRSP) valued at \$1.0 million. Ms. N. argues that the reasoning in *Chutter* can be analogized to her circumstances. However, an RRSP is a special financial vehicle established by federal income tax legislation and is subject to special rules. It is distinguishable from an investment portfolio held in a closely-held holding company.
- [122] In all the circumstances, I am not persuaded that there any merit to Ms. N.'s submissions on this point. Accordingly, I conclude that it is appropriate to impute investment income to Ms. N. I turn to consider the question of the amount of income to be imputed to Ms. N.
- [123] Ms. N. disputes the proposed amount of \$85,000 per annum, which is calculated using a 5% return on the \$1.7 million transferred to Ms. N.'s holding company. She urges that if the court imputes income, it should do so on the investment account having a value of \$1.0 million. This submission is grounded in her assertion that she will have to pay outstanding legal fees and will incur tax liabilities in order to pay this liability. Ms. N. testified that she owed \$412,000 in legal fees as of trial. On her counsel's calculations, because of the tax consequences, she will be required to dispose of \$700,000 in the investment account to pay her legal fees.
- [124] Counsel for Dr. N. has raised the issue that Ms. N. may be entitled to claim certain tax deductions in relation to her legal fees expended in this case. However, no evidence was adduced on this point.

[125] In my view, Ms. N.'s outstanding obligation to pay legal fees is not a proper consideration in determining how much income should be imputed to her. Generally, post-separation debts should not be considered in assessing spousal support issues unless those debts were incurred for a family purpose: *Burridge v. Burridge*, 2008 BCSC 588 at paras. 61-62.

[126] However, in certain circumstances the court has recognized a narrow exception to this general rule. As Madam Justice Fenlon observed in *Oliver* at para. 107:

. Legal fees are not generally considered when assessing income and spousal support issues in part because an award of costs may offset a party's expenditures, and because a party who has incurred excessive legal fees could end up being indirectly compensated for those fees in the form of greater support from the other spouse. However, in the exceptional circumstances of this case, where each party has incurred roughly the same significant legal fees, and where those fees are incidentally in evidence before the Court, I am of the view that it is appropriate to work with the parties' actual assets as of the date of trial to determine their investment income. I emphasize that in most cases such evidence is neither desirable nor appropriate.

[Emphasis added.]

[127] In my view, the circumstances of this case do not warrant an exception to the general rule.

[128] In considering a question such as this, the courts must be assiduous in striving to treat separating spouses with an even hand. On the evidence the court is unable to analyze how the payment of Dr. N.'s legal fees may negatively impact him financially. It would be unjust to factor in the payment of legal fees in the assessment of Ms. N.'s SSAG income, without engaging in a corresponding analysis for Dr. N.

[129] Having regard to all of the circumstances, I conclude that it is appropriate to impute income to Ms. N. on the income generated on her investment account without deduction for legal fees. Applying the agreed rate of return, I therefore impute income of \$85,000 to Ms. N., which I find reflects Ms. N.'s "means".

Employability

[130] Dr. N. submits that additional income should be imputed to Ms. N. because she should be pursuing employment. At trial, Dr. N. submitted that at least \$60,000 should be imputed to her on that basis. However, Dr. N. resiled from that position in his further written submissions; he asserted contradictory submissions that \$50,000 and \$55,000 would be reasonable.

[131] Ms. N. counters with the submission that there is no evidence that she is employable and no evidence of any employment opportunities that would be available to her in Y.

[132] Section 19 of the Guidelines empowers a court to impute income to a spouse where the spouse is "intentionally under-employed or unemployed".

[133] Appellate courts have underscored the importance of the objective in the Divorce Act of striving for economic self-sufficiency, while recognizing that the attainment of full economic self-sufficiency may not be practicable in every case: *Jendruck v. Jendruck*, 2014 BCCA 320 at para. 16. In those circumstances where a court deems that a spouse's effort to contribute to their own support is insufficient, the court may impute income for underemployment. In doing so, the court places the consequence of the inadequate effort on that spouse. Imputing income provides a means of assessing and encouraging self-sufficiency: *McEachern v. McEachern*, 2006 BCCA 508. When imputing income, the court must consider what is reasonable in the circumstances, including the age, education, experience, skills and health of the spouse, and other matters, such as the availability of work. The party seeking to have the income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding: *Marquez v. Zapiola*, at para. 36. The imputation of income should not be the product of guesswork or speculation: *J.C. v. R.C.*, 2015 BCSC 406 at para. 102.

[134] With these general principles in mind, I turn to consider the pertinent facts in this case. These facts may be summarized as follows:

- Ms. N. has a post-graduate university degree. Notably, her master's degree was in Family Systems Nursing, which pertained in part to the study of psychology and family therapy. I have outlined her related employment history prior to her move to Y, earlier in these reasons;
- Ms. N. acquired employment experience in setting up, administering, and managing a medical practice after her relocation to Y;
- Ms. N. has not kept up her nursing credentials;
- Ms. N. has made no inquiries about full-time or part-time employment since leaving the Orchard in July 2013. She testified that her plans were to continue to focus on her recovery and on re-establishing her relationship with her daughter. She also expressed a desire to involve herself in volunteer work with Alcoholics Anonymous;
- The testimony of M.M., Ms. N.'s Alcoholics Anonymous sponsor; A.L., a former nursing colleague; and Dr. A.G., who is a medical specialist practicing in Y, all of whom were called as witnesses for Ms. N., support a finding that Ms. N. is intelligent, articulate, capable, and hard-working. Dr. A.G. related to the court that in the spring of 2008 she offered Ms. N. a position as the program manager in the University of Northern B.C.'s rural medical program, which Ms. N. declined;
- Dr. Patrick Fay, a medical doctor and addiction specialist, was called as an expert witness. He is the head of clinical team at the Orchard and supervised Ms. N. in her recovery. Ms. N. continues to consult Dr. Fay. I accept his evidence that, from his perspective, there are no impediments to Ms. N. now being employed. According to Dr. Fay, it would be healthy for an individual in recovery to be employed in a position they enjoy;

· As I outlined in the Parenting Reasons it is clear that Ms. N. is committed to her recovery from addiction.

[135] To the extent that Dr. N. asserts that Ms. N. should be applying for disability payments, I reject that submission. Such an assertion is entirely at odds with Dr. N.'s primary contention that Ms. N. is currently employable. Further, it is inconsistent with the preponderance of the evidence - particularly Dr. Fay's uncontroverted evidence - regarding the current status of Ms. N.'s health.

[136] I recognize that Ms. N. is now 53 years old and that she has been out of the conventional workforce for some 19 years. Since leaving the Orchard in July 2013, Ms. N. has not pursued any options for employment in either Vancouver or Y. She is plainly unreceptive to pursuing any remunerative employment options. Although she indicated an interest of involving herself further into the recovery counselling milieu, she has not indicated any willingness to make efforts to be paid for that work. In my view, this cannot serve as a basis upon to resist the imputation of income.

[137] I do not accept Ms. N.'s assertion that she has no realistic prospect of obtaining any form of gainful employment for the rest of her life. Ms. N. has now been in recovery for over two years. Although it may not be reasonable or realistic for her to renew her nursing qualifications, she is obligated to take reasonable steps to earn some income. Of course, Ms. N. may pursue volunteer work, but not in substitution for remunerative work.

[138] The totality of the evidence supports a finding that Ms. N. is highly competent, intelligent, articulate, and hard-working. She has a post-graduate university degree and related experience. On the medical evidence, she currently has no health constraints which would impede her capacity to engage in remunerative work. She has established connections in both in Vancouver and in Y. In my view, given her many positive attributes, her organizational skills, her training, and her experience, there is a realistic prospect that Ms. N. can obtain some form of gainful employment. It would be reasonable for her to pursue an office administration position, or some educational or counselling-related work.

[139] In assessing Ms. N.'s employment capacity, I recognize however that her opportunities are likely to be more constrained in Y than they would be in a major urban centre. Accordingly, I am mindful that full-time work may not be available to her in Y. Nonetheless, it is incumbent upon Ms. N. to make reasonable efforts to become more self-sufficient. Given that her relocation to Y was scheduled to occur in January 2015, Ms. N. should be permitted a reasonable opportunity to settle in and to pursue employment options. Therefore, I conclude that at this time it is not appropriate to impute employment income to Ms. N.

[140] However, I am of the view that by September 1, 2015, it would be reasonable to expect that Mr. N. will be gainfully employed at least on a part-time basis. This would account for the time required to relocate and provides Ms. N. time to arrange her affairs in Y. Given her education and experience, it is unlikely that Ms. N. would be confined to entry-level positions paying minimum wage. Taking all of the factors outlined above into account, I

have concluded that commencing September 1, 2015, it would be fair and reasonable to impute income of \$25,000 annually to Ms. N.

[141] I have not overlooked Dr. N's assertion that Ms. N. has the present capacity to earn an annual income of \$50,000 - \$55,000 in Y. I am not persuaded that there is rational evidentiary basis for this assertion. However, I add that, going forward, it is incumbent upon Ms. N. to make genuine efforts to secure remunerative employment commensurate with her skills, experience, and education, with the overall objective of becoming more economically self-sufficient to the extent practicable in her overall circumstances.

What is Ms. N.'s Entitlement to Spousal Support?

Legal Framework

[142] Ms. N.'s claim for spousal support must be considered in the context of the governing statutory and jurisprudential framework.

[143] Section 15.2 of the Divorce Act provides the legislative framework for ordering spousal support in this case. In determining a claimant's entitlement to support, this Court must apply the conceptual framework formulated by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, and consider the objectives set out in s. 15.2(6) of the Divorce Act:

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

[144] There are three conceptual models for determining entitlement to spousal support: compensatory, non-compensatory, and contractual. The authorities establish that these models are not mutually exclusive and there is no single basis of support or objective under the Divorce Act that supersedes another. The basis for spousal support, being contractual compensation, or needs-based, or a combination thereof, will impact the quantum and duration of an award: *A.K. v. N.K.*, 2012 BCSC 1499 at para. 115.

[145] The fundamental underpinning for an order of spousal support is the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown: *Chutter v. Chutter* at para. 49.

[146] The authorities recognize that marriage is a joint endeavour, and the longer the relationship endures, the greater will be the presumptive claim to an equal standard of living on dissolution. The Court of Appeal in *McEachern v. McEachern* affirmed the importance of the marital standard of living in lengthy marriages. *Prowse J.A.* emphasized, at para. 47, the following passage found at para. 84 of *Moge*:

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

[Emphasis in original.]

[147] The authorities caution about the potential danger of double recovery that arises from the interaction between property division and spousal support. However, the courts have also recognized that property division may not necessarily obviate the need for a spousal support order: *Chutter*; *Tedham v. Tedham*, 2005 BCCA 502.

Discussion

[148] Ms. N. seeks spousal support on both compensatory and non-compensatory grounds. Ms. N. argues that her age, the length of the marriage, her career sacrifices, her assistance in establishing Dr. N.'s medical practice, and her addiction issues establish a basis for support on both grounds.

[149] Dr. N. acknowledges Ms. N.'s entitlement to spousal support but challenges her assertion that she is entitled to an award of spousal support on compensatory grounds. Dr. N. contends that in light of all of the circumstances, her economic contributions were insignificant. Further, Dr. N. argues that it was Ms. N.'s alcoholism, and not her role in the marriage, that impaired her career opportunities.

[150] It is well-settled that compensatory support is intended to provide redress to a recipient spouse for their efforts which conferred an economic benefit or advantage on their spouse. Compensatory spousal support also addresses the economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown: *Chutter* at paras. 50-51.

- [151] Ms. N. worked as a public health nurse in Calgary from 1985 until 1989, when she embarked on her master's program. During the early years of the marriage, from 1986 until 1989, she was the major income-earner while Dr. N. pursued further education. In 1991, Ms. N. completed a master's degree in family systems nursing. In 1991, consequent upon Dr. N.'s enrollment the ophthalmology program at the University of Ottawa, Ms. N. declined an invitation at the University of Calgary to become their first special case doctoral student in the nursing program. Instead, Ms. N. travelled to Kingston with Dr. N. so that he could pursue a one-year internship as preparation before commencing his ophthalmology program. While in Kingston, Ms. N. worked as a sessional instructor in the nursing faculty at Queen's University. In 1992, when Dr. N. commenced his studies at the University of Ottawa, she obtained a position as the manager of continuing education at the Children's Hospital of Eastern Ontario. Approximately a year later, she was promoted to the Director of Nursing Professional Development and Research.
- [152] In 1995, Ms. N. left her director position and Dr. N. and Ms. N. moved to Y to enable Dr. N. the opportunity to establish his ophthalmology practice. Upon their arrival in Y, Ms. N. was interviewed for and offered the position of assistant director of public health nursing with the Northern Health Authority. I accept Ms. N.'s evidence that she and Dr. N. concluded that she should decline that offer, and that it would be most opportune if she assisted with the management of Ms. N.'s medical practice.
- [153] Ms. N. served as the practice manager until 2005. From 1995 to 2000, Ms. N. was very involved in Dr. N.'s travelling clinics which entailed packing the ophthalmology equipment in their car and holding clinics in other towns in northern B.C. She was very involved in the planning and building of the new premises to which the practice moved in 1996. Ms. N. oversaw staffing: she developed a job interview protocol, and was involved with the staff's job performance reviews. She also assisted with the design and implementation of systems within the office.
- [154] In his testimony Dr. N. minimized, to a certain degree, Ms. N.'s role in the practice. I prefer Ms. N.'s evidence that Dr. N. often referred to her as his "right hand" and that she and Dr. N. worked together as "a good team". The totality of the evidence supports a finding that between 1995 and 1999, when the parties went to Edmonton, Ms. N. made a significant contribution in establishing and managing the successful operation of Dr. N.'s practice. Further, the evidence establishes that she continued to meaningfully contribute, albeit to a lesser extent, after their return from Edmonton and until the onset of her alcoholism.
- [155] Applying the governing legal principles, I conclude that Ms. N. has a clear claim for compensatory support. She supported Dr. N. while he completed his education and training, relocated to Y to further Dr. N.'s career, thereby disrupting her own career, and she made a significant contribution to the establishment of his successful medical practice over the course of a decade. Dr. N.'s income-earning capacity was thereby enhanced, which conferred an economic benefit on him. In contrast, Ms. N. forwent career opportunities because of her role in the marriage, thereby diminishing her prospects for future financial

success. It is a reasonable inference that Ms. N. would have otherwise acquired employment experience and opportunities for advancement that would have improved her earning capacity.

[156] I am not persuaded that Ms. N.'s compensatory claim was negated by her illness, which for the most part, disabled her from late 2006 to 2012. In my view, such a notion is ill-conceived.

[157] I also find that Ms. N. is entitled to non-compensatory spousal support or "needs-based support" as is sometimes described. Her entitlement to support on this ground was uncontroversial.

[158] In Chutter, the Court of Appeal expressed the objective of non-compensatory support as follows at para. 54:

... Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[159] In Chutter, the claimant wife had medical problems that prevented her from working more than part-time. In considering whether she was entitled to spousal support under the non-compensatory model, the Court found that it was not realistic to expect her to work more, whereas her husband earned a substantial income and would be able to live without depleting any of his capital assets. In the result, in addition to reapportionment of assets, the wife was awarded non-compensatory support. The Court observed that the concept of "needs" extends beyond the basic necessities of life and varies according to the circumstances of the parties: Chutter at para. 55. The Court reiterated that self-sufficiency is a relative concept encompassing more than the ability to meet basic expenses at para. 61, citing the decision of the Ontario Court of Appeal in Fisher v. Fisher, 2008 ONCA 11 at para. 53:

Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation.

[160] In Yemchuk v. Yemchuk, 2005 BCCA 406, the husband successfully appealed the decision of the trial judge in which his claim for spousal support was dismissed on the basis that he had not established any need. Madam Justice Prowse concluded that the trial judge's analysis of the husband's need, framed in terms of whether he could meet his stated expenses with his available income, was "unduly restrictive" and "too narrow": Yemchuk at paras. 41 and 48. In the context of a long-term marriage, the assessment of need must take into account the marital standard of living and the relative post-separation standard of living.

- [161] The authorities support the view that entitlement to spousal support is not precluded in high-net worth cases such as this one: Chutter at para. 80. Appellate authorities have consistently endorsed the notion that spouses in long marriages should not be economically disadvantaged by the breakdown of the marriage, and that after a long marriage, the spouses should have approximately the same standard of living upon separation, without unreasonably encroaching on capital, at least until retirement: *McKenzie v. McKenzie*, 2014 BCCA 381 at paras. 108 and 111.
- [162] The division of family assets will assist Ms. N. with her financial circumstances. However, without encroaching on her capital assets, it is unlikely that she will be able to enjoy a standard of living commensurate with that which the parties enjoyed during the marriage. Taking into account the factors and objectives set out in the Divorce Act, the interdependency of the parties' economic interests over the course of their marriage, and the significant disparity in the parties' standard of living following the break-down of the marriage, I find that, notwithstanding the division of assets I have ordered, Ms. N. is in need, and Dr. N. has a corresponding ability to pay support.
- [163] In conclusion on this threshold issue, I find that Ms. N. is entitled to spousal support on both a compensatory and non-compensatory basis.

What Amount of Spousal Support Should be Ordered?

- [164] Having determined the entitlement of Ms. N. to spousal support and the income of each of the parties, I now turn to the question of the quantum of the prospective spousal support payable.
- [165] In *Yemchuk*, the Court of Appeal accepted the SSAG, which lack any legislative status, as a useful tool to assist judges in assessing quantum and duration in spousal support. In subsequent decisions, the court has restated the utility of the SSAG in establishing the appropriate range of spousal support in order to ensure "a pattern of predictable awards": *Mann v. Mann*, 2009 BCCA 181 at para. 72; see also *Chutter*; *Redpath v. Redpath*, 2006 BCCA 338; and *Holland v. Novotony*, 2009 BCSC 1754 at para. 172. However, the appellate authorities have also repeatedly stated that while the SSAG are a significant consideration, they are not to be slavishly applied, without regard to all the circumstances of a particular case.
- [166] I turn to the question of whether it is appropriate to consider the SSAG in high income cases. Section 11 of the SSAG describes a "ceiling" and a "floor", which is an "attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results." The SSAG ceiling for a payor's income is set in s. 11.1 at \$350,000 gross annual income. However, this is not an "absolute" ceiling or a cap: *Smith v. Smith*, 2008 BCCA 245 at para. 31; *Hathaway v. Hathaway*, 2014 BCCA 310.
- [167] In *Hathaway*, a recent decision of the Court of Appeal, the court made the following observations on "the ceiling":

[48] In *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* (2010), the authors comment that "[t]he formulas are not to be applied automatically above the ceiling, although the formulas may provide an appropriate method of determining spousal support in an individual case, depending on the facts" (emphasis in original). The authors state that "[a]bove the ceiling, spousal support cases require an individualized, fact-specific analysis" (emphasis in original). Lastly, the authors note that "[f]ar too often, in these high-income cases, lawyers and judges fail to consider the SSAG formula ranges at all, in arriving at their conclusions."

[Emphasis in original.]

[168] The court in *Hathaway* recognized that the determination of an appropriate amount of spousal support may be a matter of pure discretion. The court also clarified that it does not follow that a court cannot order spousal support in an amount that reflects the guideline formulas. In essence, the jurisprudence requires that the court exercise its discretion on a principled basis. In the final analysis, the SSAG are advisory and the ultimate determination of the appropriate amount of spousal support in high income cases is a matter of judicial discretion that is governed by the factors and objectives set out in s. 15.2(4) and (6) of the *Divorce Act*.

[169] Counsel each provided me with their respective SSAG calculations, including a variety of income scenarios for both parties. Both parties included s. 7 expenses in their calculations.

[170] Ms. N. asserted that spousal support should be set at \$30,000 per month. Notably, this figure was based on a higher income calculation for Dr. N. than I have fixed, and with no imputation of income to Ms. N.

[171] On the other hand, Dr. N. submitted that spousal support should be set at \$23,500, terminable upon his retirement.

[172] Dr. N.'s income is well-above the notional ceiling of \$350,000, and in such circumstances I am mindful that the use of the SSAG must be approached with caution.

[173] X lives primarily with Dr. N., suggesting the application of the custodial payor formula. The authors of the SSAG describe the custodial payor formula as a hybrid because spousal support and child support flow in opposite directions. The only case presented to the court with a custodial payor with an income over \$350,000 is *T.T. v. J.M.H.*, 2014 BCSC 451. In *T.T.*, Madam Justice Fleming observed as follows with respect to that formula:

[148] The formula actually involves first deducting grossed up amounts of child support from each spouse's gross income and then applying the without child support formula. It does produce a lower range of spousal support than the application of the other formulas because it recognizes the obligations that fall on the custodial parent, his or her responsibility for post-separation child care, the priority given to child support, the length of the marriage, the often older age of the remaining children and the non-custodial parent's prior contributions to the children's care: *Cassidy v. McNeil*, 2010 ONCA 218 at

para. 72.

- [174] In this case, applying the incomes I have found for each party, I have considered the SSAG calculations using the custodial payor formula. For reasons I will address later, I have concluded that special expenses should be set at \$46,870 as sought by Dr. N. The SSAG calculations, using the custodial payor formula are: (\$19,385, \$22,616, and \$25,847), assuming an investment income for Ms. N. of \$85,000, and (\$18,923, \$22,077, and \$25,231) assuming an income of \$110,000 (\$85,000 + \$25,000) for Ms. N.
- [175] In setting spousal support, I have also considered the parties' lifestyle which, while not lavish, was indisputably very comfortable. They arranged an extensive and expensive renovation on their home in Y, and with the assistance of an interior designer furnished it with custom-made and expensive furnishings. They often travelled to Vancouver to spend weekends shopping and dining out in restaurants. They travelled to Hawaii, went on ski vacations, and took two cycling trips to Europe.
- [176] Ms. N. has claimed monthly expenses as \$24,141.64. Those expenses include parking in Vancouver and the costs associated with renting an apartment in Vancouver. Given her relocation to Y, those budgeted costs totalling \$2,990 should be deducted. However, I recognize that Ms. N. will continue to have expenses associated with her trips to Vancouver to attend reintegration therapy. She no longer will incur the expenditures of \$700 per month for supervision costs and meetings with Greg Daily. The Soberlink monitoring expense of approximately \$422 terminated in February 2015. In all likelihood, the costs for her coaching and related parenting therapy will decrease over time. In my view, the amounts budgeted for some of her personal expenses, such as hair and beauty care, and a personal trainer are excessive.
- [177] While some of his stated expenses are inflated, I accept Dr. N. has significant expenses. In order to effect the division of assets he has had to assume an increased indebtedness.
- [178] The authorities establish that with incomes over \$350,000, an individualized fact-specific determination must be engaged. In reaching my conclusion, in addition to considering the SSAG calculations as part of my overall assessment, I have taken into account the objectives and factors set out in the Divorce Act, Ms. N.'s compensatory claim, her needs, the standard of living during the marriage, the post-separation standard of living, the disparity in the parties' income and earning capacity, the division of assets, and both parties' stated current expenses. An additional factor which informed my analysis is "work incentive", which considers the importance of incentivizing the payor spouse to continue their efforts: *Cork v. Cork*, 2014 ONSC 2488 at para. 32; *G.(S.) v. G.(K.)*, 2012 BCSC 1937 at para. 161. In short, it is important for all parties that the payor spouse, Dr. N., is given some incentive to continue to work at his very demanding occupation.

[179] Balancing all of the relevant factors, I award spousal support of \$24,000 per month, commencing April 1, 2015. Having determined that it is appropriate to impute of \$25,000 to Ms. N. on September 1, 2015, monthly spousal support payments from that date forward will be \$23,500 per month.

[180] Dr. N. seeks an order support payments be made to Ms. N. in two monthly installments on the 1st and 15th of each month by post-dated cheques or by automatic deposit to her bank account. That is appropriate in the circumstances, and I make an order accordingly.

What is the Appropriate Duration of Support?

Position of the Parties

[181] Ms. N. submits that there should be an order for indefinite spousal support.

[182] Dr. N. argues that his obligation to pay spousal support should terminate upon his retirement.

Review

[183] Neither party has asked the court to order a review. I am mindful of the observations made by the Supreme Court of Canada in *Leskun v. Leskun* concerning the limited utility in matrimonial proceedings of a reviewable spousal support order. However, in my view, this is a case where a reviewable order is called for.

[184] I have attributed income to Ms. N. which effectively requires her to obtain some form of employment. There is always some uncertainty in attempting to forecast future events which will impact upon separating spouses. However, I find there is a genuine and material uncertainty regarding whether Ms. N. can realistically attain a level of remuneration higher than what I have imputed to her. In my view, a review is essential, particularly given the fact that she has yet to embark on any steps to achieve self-sufficiency. I expect Ms. N.'s realistic prospects for future employment will be clarified by the stipulated review date. The issue to be reviewed at a future date is Ms. N.'s employment status, including the diligence with which she has pursued remunerative employment with the aim of becoming financially self-sufficient, as far as practicable. I order a review of the quantum of spousal support on either party's motion after March 1, 2017. I am seized of that review.

Dr. N.'s Retirement

[185] Dr. N. acknowledges that the SSAG presumes that spousal support in this case should be indefinite. However, he forcefully asserts that his support obligation should end when he retires. Dr. N. argues that because of the substantial assets Ms. N. has received, he should not be required to support her past his retirement.

- [186] There is no absolute rule for determining the duration of a spousal support order, or a "magical cut-off date" for support: *Bockhold v. Bockhold*, 2010 BCSC 214 at para. 56. In the case of a lengthy marriage, with a clear entitlement to spousal support having been established, the weight of authorities favours an indefinite order: *Tedham* at para. 78. The court in *Chutter* endorsed the postulation of the authors of the SSAG, that indefinite support does not mean permanent support, nor does it mean that support will continue at the same level as the initial determination.
- [187] There is uncertainty as to when Dr. N. will in fact retire and what his financial circumstances will be at that point. He is now 54 years old. Dr. N. has stated that he would like to retire at age 60, however he candidly acknowledged that there is no certainty as to the date of his retirement. Of course, if he will actually retire depends on a number of factors, including his health and his financial and personal circumstances.
- [188] In all the circumstances, I am not persuaded that it is appropriate to make the order as sought by Dr. N. As set out above, I have concluded that Ms. N. has established entitlement to spousal support on both compensatory and non-compensatory grounds. Having regard to the totality of the evidence, including the length of the marriage, Ms. N.'s age, and the income disparity between the parties, and applying the governing legal principles, I conclude that the order for spousal support should be indefinite. The parties are at liberty to apply to vary my order upon a material change of circumstances under s. 17(1) of the Divorce Act.
- [189] Although Dr. N.'s eventual retirement from his medical practice was raised at trial, in light of the very real uncertainty of when he will actually retire, I conclude that his retirement is not an event that will become certain within an identifiable or designated time frame, such that it should properly be the subject of a review. In all the circumstances, Dr. N.'s retirement will constitute a material change in circumstances. To be clear, this order does not preclude the court on a variation proceeding, taking into account any significant reduction in income, if and when Dr. N. retires.
- [190] Commencing May 31, 2015, the parties shall exchange income tax returns by May 31 each year and provide copies of assessments and reassessments (if any) within seven days of receipt of their respective documents from Canada Revenue Agency.

Should Security for Spousal Support be Ordered?

[191] Ms. N. seeks the following orders regarding security for spousal support:

- (a) Dr. N.'s spousal support obligation bind his estate;
- (b) Ms. N. be designated as the irrevocable beneficiary on the \$600,000 BC Medical Association life insurance policy. Dr. N. is the insured and the owner of the policy;
- (c) Ms. N. be designated as beneficiary on the \$1.6 million life insurance policy owned by the Company. The current beneficiary is the Company. Dr. N. is the insured.

Legal Framework

[192] Section 15.2(1) of the Divorce Act confers the court with jurisdiction to order security for spousal support payments. Recent jurisprudence has observed that it appears to be an unsettled question in this province as to whether the court has the jurisdiction under the Divorce Act to make a support order enforceable after the death of a payor spouse. Notably, however, in *Waters v. Conrod*, 2007 BCCA 230, the Court of Appeal, at para. 33, without any commentary on the jurisdiction question, cited with approval and applied the test articulated in *Jackh v. Jackh* (1980), [1981] 1 W.W.R. 481 (B.C.S.C.):

Assuming that the power exists, I do not consider this to be an appropriate case in which to exercise it. The cases in which it has been exercised appear to have had the common elements of a wife in extremely necessitous circumstances and a husband in relatively affluent circumstances with assets available which could conveniently be charged with the payments .

[Emphasis in original.]

[193] The Court in *Waters* went on to state at para. 34:

[34] In *Ripley v. Ripley* (1991), 52 B.C.L.R. (2d) 362, this Court accepted *Jackh* as "the correct approach". In rejecting the submission that the maintenance award should be secured, the Court considered that the payee was not in extreme necessitous circumstances, and that the payor had responsibilities to both a second spouse and his child by that second spouse.

Discussion

[194] I note that Dr. N. did not dispute the court's jurisdiction under the Divorce Act to order that the spousal support would be enforceable after his death. Neither party raised the question of whether s. 170 and s. 171 of the FLA are engaged in the circumstances of this case.

[195] It is not necessary for me to decide either question. For the reasons that follow, I do not consider this to be an appropriate case in which to make an order that Dr. N.'s spousal support obligation should bind his estate.

[196] Firstly, Dr. N. has agreed to retain Ms. N. as the irrevocable beneficiary of his BC Medical Association group term life insurance policy, which has a payout amount of \$600,000. Dr. N. has agreed to continue to pay the annual premiums.

[197] Secondly, the authorities establish that a determining factor in the cases in which courts have secured a support order was "the extremely necessitous circumstances" of the recipient spouse. The investment account valued at \$1.7 million has been transferred to Ms. N.'s holding company. In addition, she has RRSPs valued in excess of \$350,000 and a TFSA account of approximately \$19,000. I have ordered indefinite spousal support, notwithstanding the division of assets. However, this does not mean that Ms. N.'s circumstances justify the order that she seeks. In my view, the \$600,000 policy is sufficient to meet any need for spousal support she may have after Dr. N.'s death. Ms. N.'s

circumstances cannot, on any analysis, be described as necessitous within the meaning contemplated by the pertinent authorities. In all the circumstances, I cannot conclude that there is any principled basis upon which to order that Dr. N.'s support obligations should bind his estate.

[198] I turn to consider Ms. N.'s submission that she should be designated as the beneficiary on the \$1.6 million life insurance policy owned by the Company.

[199] The Company owns two life insurance policies each with a payout amount of \$1.6 million: one on Ms. N.'s life, and the other on the first to die of the parties. The beneficiary of both these policies is the Company. I note that after the division of assets is effected, Dr. N. will be the sole shareholder of the Company. As such, in all likelihood, the insurance proceeds payable on his death will eventually devolve to his estate. I have already concluded that Dr. N.'s estate should not be bound by the spousal support obligation. Moreover, there is no evidence before the court as to any income tax or estate planning considerations associated with the corporate obtention of these policies. In the absence of such evidence, and having regard to the considerations outlined in the pertinent authorities, I am not persuaded that it would be appropriate to make the order sought by Ms. N.

[200] In summary on this issue, I conclude that there is no principled basis to augment the security for spousal support beyond the existing \$600,000 insurance policy.

(C) Child Support

[201] The Guidelines set out a basic amount that a parent is required to pay on the basis of his or her income. This is often referred to as the "Table" amount. Pursuant to s. 3(1) of the Guidelines, the presumptive rule is that the amount of support for a child under the age of majority is the Table amount as determined by the income of the payor parent. The total amount of child support is that sum, together with any special or extraordinary expenses, payable under s. 7 of the Guidelines. The guiding principle in s. 7 indicates that these expenses are to be shared between the spouses in proportion to their respective incomes.

[202] Basic child support shall be determined pursuant to the Guidelines. Ms. N. shall commence paying child support on April 1, 2015. The parties have leave to apply if they are unable to agree on the quantum of child support payable by Ms. N.

[203] The Court of Appeal in *Bodine-Shah v. Shah*, 2014 BCCA 191 summarized the governing principles with respect to expenses under s. 7 of the Guidelines:

[66] Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of

the child, and the overall cost of the activities. They also must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation. See *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 at paras. 81-82 (C.A.). In assessing "means", the court may consider the parties' capital assets, income distribution, debts, third-party resources, access costs, support obligations, receipt of support, and any other relevant factor: *Delichte v. Rogers*, 2013 MBCA 106, 37 R.F.L. (7th) 81 at para. 38. Courts may consider whether the non-custodial parent was consulted regarding the expense, though a lack of consultation does not automatically preclude a finding that the expense is reasonable and necessary: *Delichte* at paras. 39, 44.

[204] The parties have agreed that Ms. N. shall pay 35% and Dr. N. shall pay 65% as their respective share of X's expenses under s. 7 of the Guidelines . The parties have leave to apply if they seek a different allocation based upon these reasons for judgment.

[205] The s. 7 expenses claimed by Dr. N. are as follows:

- Child care expenses, with a total maximum annual cost of \$36,000;
- Health expenses, including the expenses associated with X's therapist in the Family Forward Program and her flights to Vancouver, up to a maximum of \$10,000;
- Education expenses with a total annual cost of \$870.

[206] On the totality of the evidence, I am satisfied that Dr. N. requires a full-time nanny in Y in order for him to earn income and for the proper supervision of X. I find the special expenses he has claimed are reasonable and in the best interests of X. I am not persuaded that there is any merit to Ms. N.'s submission that the child care expenses and medical expenses are excessive.

[207] If the parties are unable to agree on any other s. 7 expenses, the issue shall be referred to the parenting coordinator for resolution.

[208] In the event that Ms. N.'s parenting time reaches 40% of the time, basic child support shall be determined pursuant to s. 9 of the Guidelines, with liberty to apply.

(D) Payment of Therapy Costs

[209] In the Parenting Reasons, I made an interim order that the costs of the Family Forward Program would be shared equally. I noted that the final determination on this issue would be addressed concurrently with the other outstanding financial issues.

[210] In all of the circumstances of the case, I conclude the fairest allocation is for the parties to share the costs in proportion to their respective incomes. In my view, this is consistent with the approach to special and extraordinary expenses under the Guidelines.

[211] The parties will have liberty to apply in the event they are unable to make the appropriate adjustments and calculations.

(E) Divorce

[212] The parties requested that the pronouncement of the divorce be adjourned generally. The parties have leave to appear to address the issue.

SEIZED

[213] I will remain seized of all issues in this case except in the case of an emergency or if in the event I am unavailable to hear an application within a reasonable time frame.

summary

[214] In summary, the orders are as follows:

- (i) Dr. N. shall pay to Ms. N., within 90 days of the date of the release of these reasons, the sum of \$42,241, in order to equalize the non-corporate family assets of the parties;
- (ii) Upon payment of the compensation payment, Ms. N. shall transfer all of her title and interest in the Property to Dr. N.;
- (iii) Upon the said transfer, Dr. N. shall assume sole responsibility for the HELOC and Ms. N. shall be released from any personal covenants with the Royal Bank associated with the HELOC;
- (iv) The parties shall otherwise remain solely responsible for the discharge of their respective debts incurred since separation;
- (v) Dr. N. shall retain the Infiniti as his sole property and Ms. N. shall retain the Camry automobile and her jewelry as her sole property;
- (vi) The parties' registered retirement savings plan accounts described in their respective Form 8 Financial Statements - Dr. N.'s sworn February 3, 2014 and Ms. N.'s sworn February 6, 2014 - shall be equalized by the parties, pursuant to the Income Tax Act (Canada) as of the date of equalization;
- (vii) The parties' tax-free savings shall be equalized as of the date of equalization;
- (viii) Dr. N. and Ms. N. shall continue as joint account holders of the RESP Account and the Informal Trust account for the benefit of X;
- (ix) Dr. N. shall pay to Ms. N. one-half of the value of the Company in the most tax-efficient manner possible, pursuant to the provisions of the Income Tax Act (Canada) on the following terms:
 - (a) Dr. N. shall cause the Company to transfer \$1.7 million in market value from its investment account to Ms. N.'s holding company;
 - (b) Concurrently with the corporate transfer, the following shall occur:

- (i) Ms. N. shall transfer her shares in the Company to Dr. N. or at his direction pursuant to the applicable sections of the Income Tax Act (Canada);
- (ii) Ms. N. shall retain the shares in V. Inc. but will transfer the name to Dr. N.;
- (iii) In the event there are unanticipated corporate or tax issues arising from the corporate transfer of Ms. N.'s shares in the Company to Dr. N. or the retention by Ms. N. of the shares in V. Inc., either party shall have liberty to apply.
- (x) The parties' Canada Pension Plan credits shall be equalized from the date of marriage to and including the date of separation;
- (xi) Ms. N.'s Ontario HOOP pension shall be divided pursuant to Part 6 of the FRA unless the parties agree otherwise;
- (xii) Dr. N. shall pay to Ms. N. \$24,000 per month in spousal support commencing April 1, 2015, through to August 1, 2015, pursuant to s. 15.2 of the Divorce Act;
- (xiii) Dr. N. shall pay to Ms. N. \$23,500 per month in spousal support commencing on September 1, 2015;
- (xiv) Either party are at liberty to apply for a review of the quantum of spousal support after March 1, 2017;
- (xv) The parties have the right to apply for a variation of the spousal support order under s. 17(1) of the Divorce Act;
- (xvi) Dr. N. will cause Ms. N. to be named as the irrevocable beneficiary on the \$600,000 BCMA policy;
- (xvii) Commencing April 1, 2015, Mr. N. shall pay child support to Dr. N. pursuant to the Guidelines and shall pay 35% of the following special expenses;
 - (a) Child care expenses, with a total annual cost of \$36,000;
 - (b) Medical expenses up to a total cost of \$10,000;
 - (c) Educational expenses with a net total annual cost of \$870;
 - (d) Any other special expenses shall be by agreement of the parties or if there is a disagreement between them, this issue shall be referred to the parenting coordinator for resolution.
- (xviii) In the event Ms. N.'s parenting time reaches 40% of the time, basic child support shall be determined pursuant to s. 9 of the Federal Child Support Guidelines, with liberty to apply;
- (xix) Commencing May 1, 2015, the parties shall exchange income tax returns by May 31 each year and provide copies of assessments and reassessments (if any) within seven days of receipt of the respective documents from the CRA;

(xx) The parties are at liberty to apply for further directions as may be necessary to implement these reasons for judgment.

Costs

[215] The parties have leave to address the issue of costs following the release of these reasons for judgment. The parties should estimate the length of time required to address the issues of costs, and contact Supreme Court Scheduling to set a hearing of suitable length before me, within 90 days of the date of the release of these reasons.

"Dardi J."

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Prepared on 28 October 2026 · Esheria