

CANADA / JUDGMENT

Williams v. Williams

2020 BCSC 597

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Supreme Court of British Columbia

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2020 BCSC 597 Williams v. Williams

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Williams v. Williams,

2020 BCSC 597

Date: 20200420

Docket: E025065

Registry: New Westminster

Between:

Donna Darlene Williams

Claimant

And

Michael James Williams

Respondent

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Claimant:

John (Jack) J. Hittrich

Counsel for the Respondent:

Richard Yalowsky

Place and Dates of Trial:

New Westminster, B.C.

October 22-26, 2018

December 12, 2018

January 25, 2019

April 10; May 21, 2019

August 6, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 20, 2020

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Introduction

- [1] The trial in this family law case concerned the respondent's application to vary a spousal support order by Mr. Justice Cole on November 24, 2008 in reasons indexed as *Williams v. Williams*, 2008 BCSC 1603 ("trial judgment" or "trial reasons"). He also seeks to extinguish his future support obligations because he plans to retire. In the trial reasons, Cole J. made a wide range of findings informing his conclusions on questions of spousal support and asset distribution. These findings are important to this application.
- [2] In the spring of 2015, the respondent asked the Court to decide this application at a summary hearing; Mr. Justice Saunders declined and ordered the application to proceed to trial due to credibility issues concerning the applicant's evidence.

Background

- [3] The claimant and respondent are both 62 years old.
- [4] The trial reasons set out the lengthy history of the parties' relationship that informed the decisions concerning spousal support. When the claimant was 16 years old, she became pregnant while in grade 10. She dropped out of school and her son, John Sterne, was born June 1974 and after his birth, the parties lived together. They were married February 1982 and Jennifer, their biological child, was born May 26, 1982.
- [5] The claimant contends they began living together in December 1974; the respondent denied moving in 1974 and said he did not live with the claimant "on a regular basis" until sometime "around 1982".
- [6] The parties' marriage was tumultuous punctuated by frequent incidents of physical abuse of the claimant by the respondent.
- [7] Throughout their relationship, the respondent was a financially and physically controlling partner; he was also physically abusive to the claimant. The claimant was never allowed a joint bank account with the respondent.
- [8] Before the birth of their daughter, the plaintiff worked as a waitress and survived on public assistance part of the time. She also worked intermittently in the claimant's business, often on weekends and as holiday replacements.
- [9] During the marriage, the respondent acquired a number of properties, either directly or indirectly, and developed the roofing and drainage businesses he carried out through different corporate entities.
- [10] In February 1994, the respondent inveigled the claimant to sign a very disadvantageous marriage agreement. The marriage agreement dramatically limited the claimant's entitlement to a share of family assets in the event of separation. Cole J. described the respondent's behaviour at this time as follows:
- [61] I am satisfied that the defendant is an overbearing, controlling and manipulative individual who forced the plaintiff into signing this Agreement. Although the physical altercation between the parties when the defendant pulled her hair and removed her from the car does not constitute duress because the agreement was signed some days later, I am satisfied that the Agreement should be set aside. The threat that her failure to sign the Agreement would lead to a divorce is the sort of coercive behaviour that was found to be sufficient grounds to set aside a matrimonial contract

[Internal citations omitted.]

- [11] Mr. Justice Cole said this agreement was wholly inadequate and varied the agreement to ensure that "all the assets were family assets and that the plaintiff would be provided with a support order that reflected the economic disadvantage she suffered as a result of her role in the marriage and its breakup": see para. 63.
- [12] There were times throughout the marriage when the parties separated intermittently but their final separation occurred March 15, 2006; this proceeding was begun June 12, 2006. Mr. Justice Saunders granted the parties divorce on July 28, 2015.
- [13] Both parties developed drug dependencies and the respondent began a methadone program in 1981 and the claimant also began taking methadone in 1982.
- [14] Overall, the marriage was tumultuous and the claimant was heavily influenced by the respondent's violent temper and drinking. She feared him.
- [15] The respondent currently lives at a property at 197th Street in Langley; this residence includes his business office as well as living space. He charges his business for storing material at his home. This property is a 5000 square-foot home with two basement suites. The respondent believes he could rent the entire property for between \$2000 and \$3000 per month. For some time, he rented the basement for \$600 per month.
- [16] The respondent provided no other evidence concerning the rental values of his properties.

The Reasons for Judgment

- [17] The order following the trial judgment contained the following terms:
2. The assets of the marriage are to be reapportioned 60% in favour of the plaintiff, and the total family assets due to the plaintiff being fixed at \$1,418,251.44.
 6. There will be a transfer of all the R.R.S.P.s owned by the parties into the name of the plaintiff.
 10. The defendant is to pay spousal support to the plaintiff in the amount of \$4500 per month, payable on the first day of each and every month, beginning with September 1, 2008.
- [18] In addition to these terms, the court provided for the division of family assets and debt and made orders concerning sale of the matrimonial home, payment of a debt to the respondent's father, transfer of all shares in the respondent's companies to the respondent, and sole ownership of another property.
- [19] Mr. Justice Cole made findings and comments relevant to this application including the following:

Credibility

[36] Because the issue of credibility directly affects so many of the issues in this trial, I have decided to deal with it first. The evidence of the defendant conflicts with that of almost every witness called on behalf of the plaintiff. I am satisfied that the defendant will do and say anything in order to deprive his wife of fair compensation. For the reasons below, I find that the defendant and his father, Alfred Williams, were not credible witnesses and I reject their evidence.

[37] The defendant has admitted that he forged his wife's name on corporate documents in order to have 749175 B.C. Ltd. transferred into his name.

[38] The defendant's son, John Sterne, alleges that he saw the defendant deposit money into a safe in Alfred Williams' garage. I am satisfied that the defendant lied when he gave evidence in the examination for discovery that there was no safe in his father's garage - at trial the defendant did acknowledge the existence of the safe, but said that he did not put money into the safe and did not discuss the safe with his son.

[]

[73] John Sterne worked part-time and then full-time for the company, quitting in May of 1993. He said he spoke frequently about finances with the defendant, who told him he had a million dollars, and could raise another \$500,000 from Albert Williams. John Sterne testified that he saw his father putting bundles of cash into a safe in Albert Williams' garage. This occurred on two occasions and on two other occasions he saw his father bending over the safe and "doing something." He said this took place over a 2 to 3 week period, around February of 2007. He said he saw his father with cash many times and that he, not uncommonly, picked up cash from customers for his father. John Sterne said that the amounts ranged from \$5,000 to \$55,000 and that he counted the money. He said it was not unusual for his father to count cash at home. Sometimes the cash would be counted into a pile of \$100 bills three inches thick. The largest amount of cash he saw was \$75,000. His father frequently told him he got the cash from the jobs.

[]

[76] The defendant says that he received \$20,000 to \$30,000 in cash per year but that was when he was running the company Williams Roofing. He says that this no longer happens in the New Company. However, when cross-examined the defendant admitted that he now does side jobs, working through the New Company with his brother's permission. The defendant testified that those cash jobs amount to approximately \$20,000 per year.

[]

[107] The defendant has not discharged his onus to prove the amount of money owed to Alfred Williams. I am satisfied that Alfred Williams and the defendant will do and say whatever is necessary in order to fabricate debts, hide assets, and at least in the case of the defendant,

to file fraudulent documents with the Canada Revenue Agency. I am not satisfied as to the total amount of money that has been paid by the defendant to Alfred Williams as I am satisfied that there are many cash deposits that have been held by Alfred Williams and/or deposited in the safe located on his property

[108] There may be monies that are legitimately owed by the defendant to his father. Those I cannot ascertain. However I am satisfied that the defendant has "stashed away" sufficient funds to cover any of those debts that may be legitimate. When I say he "stashed away" sufficient amounts of funds, it is only an estimate on my behalf and I base that estimate on the fact that the defendant has collected substantial amounts of cash through the various roofing businesses, his inability to explain large sums of money in his personal Bank of Montreal account for 2003 to 2005, the accepted evidence of John Sterne that on two occasions he saw the defendant hiding money in the safe in Alfred Williams' garage, and the plaintiff's evidence of the defendant going with Alfred Williams to deposit cash in Alfred Williams' account.

[]

[118] The defendant argues that his income consists of \$32,500 as an employee of the New Company, rent on the Industrial Road property of \$19,000 a year, plus side jobs that he gets. He claims that his total income is \$70,000.

[119] As I have already indicated, the court does not have all the particulars of the defendant's income and the court is satisfied that the defendant has still hidden significant funds. The defendant will continue to be supported by the new business. His transportation costs and telephone are paid for by the New Company. He lives rent free, the Company covers all the taxes on the property he occupies above the business. And there is the ability of the defendant to generate substantial sums of money by doing work for cash or taking trades in return for work done, all of which he does not declare on his income tax. There is a concern that the defendant will require an operation on his ankle and will be on crutches for up to six months, however I am satisfied that because he is a manger and not a labourer, he will be able to work through most of the period during which he is recuperating from his ankle reconstruction.

[120] I am satisfied that the defendant has the capacity to earn a minimum of \$150,000 a year and I input his income accordingly.

[20] Mr. Justice Cole also concluded that the respondent's explanations concerning deposits and withdrawals from bank accounts were tenuous and that his valuation of the business was not reliable because he had personally taken cash payments and cheques for work done by his company. The court inferred a value of \$100,000 for the respondent's roofing and drainage business in the total assets.

- [21] In a similar way, in this trial, the respondent spent considerable effort in trying to identify the sources of several deposits to his various bank accounts. He testified that he kept personal money in one corporate bank account in case funds were needed for his businesses. The respondent was a poor witness generally and his inability to understand or explain sources of his bank deposits and banking records seriously undermined the reliability and credibility of his testimony.
- [22] On another point, the respondent said that on occasion he took his tenant's welfare cheques and cashed them in exchange for payments to him of \$150 by the tenant.
- [23] The trial judge eventually concluded that the values for identifiable family assets totalled \$2,363,752. He accepted the claimant's evidence that she had limited ability to become economically self-sufficient whereas the respondent was a skilled businessperson. Thus, he ordered an unequal division, apportioning 60% in the plaintiff's favour and 40% to the respondent.
- [24] In summary, the claimant was to receive \$1,418,251 of family assets. The claimant was given various RRSPs and the respondent retained ownership of his businesses and a property located on Industrial Road.
- [25] He also awarded the claimant \$4500 per month in spousal support and \$18,000 in spousal support arrears.

The Settlement Agreement

- [26] The respondent took an appeal from the trial decision. Before the hearing of that appeal, the parties settled the dispute and on March 3, 2010 entered into a settlement ("settlement agreement") with terms to be included in a variation consent order. Thus, the dispute at the centre of the appeal from the trial decision was resolved.

- [27] The settlement agreement began:

Subject to the defendant performing the terms 1,2,3, and 4 as soon as practicable, the parties have agreed to vary the November 24, 2008 trial order of Mr. Justice Cole, a copy of which is attached in schedule "A", as set out in these minutes of settlement.

- [28] The settlement terms most important to the current dispute were set out in paras. 14 to 17, as follows:

14. Specifically in consideration of the terms set out herein, the amount owing to the plaintiff from the defendant by way of property division under the November 24, 2008 order is reduced to \$1,100,000 which shall be satisfied by the plaintiff receiving the \$75,000 as set out in paragraph two herein and the first \$1,000,025 from the net sale proceeds of the property upon sale and if there is any equity above this amount, the equity shall be divided equally between the parties.

17. In consideration of the terms herein, the spousal support terms of the November 24, 2008 order are hereby varied and the plaintiff has agreed to accept \$2700 per month in spousal support from the defendant and the defendant has agreed to pay \$2700 per month in spousal support on the second day of each and every month, commencing February 2, 2010 without any adjustments or deductions, until such time the property is sold at which time the spousal support shall increase to \$4500 per month. Either party is at liberty to apply to vary spousal support payments upon a significant material change in circumstance.
- [29] Interestingly, the parties did not take the step necessary to incorporate the settlement agreement into a consent order varying the trial judgment order. I intend to deal with this application on principles applicable to a variation of a consent order with particular emphasis on the term permitting a variation application of a spousal support order "upon a significant material change in circumstance". Where I refer to variation of a consent order I am referring to the parties' obligations as if the original order had been varied.
- [30] Initially, this application was filed July 3, 2015 and came before Mr. Justice Saunders who made an order fixing the respondent's spousal support arrears at \$19,741.82. The court confirmed that pending hearing of the variation application, Cole J.'s imputation of income to Mr. Williams would remain at \$150,000 per year until the application was heard and referred the balance of the issues to the trial list.
- [31] Between August 2015 and January 2017 the respondent paid \$1800 per month spousal support. From February 2017 March 2018 he paid \$2100 (less \$100 for February and March 2018). He has paid no spousal support from March 2018 to the present. The arrears of spousal support to January 2019 are \$129,500.

Issues

- [32] The first question to be addressed is whether the respondent has established that a "significant change in circumstances" occurred since the making of the settlement agreement. One aspect of this application is the respondent's spousal support obligations from July 2015 to July 31, 2018 and the second is the period from August 2018 to the present and ongoing. It is presumed that Cole J.'s imputation of income to the parties was correct at the time.
- [33] For the purposes of this application, the parties' circumstances as of November 24, 2008 represent the baseline against which any changes in the respondent's circumstances might affect his spousal support responsibilities. If I accept a significant change in circumstances has occurred, there must be an assessment of the support amount payable and arrears due up to July 31, 2018.

- [34] Next, the respondent seeks an order to terminate Ms. Williams' spousal support after December 2019. He bases this claim on his intentions to wind up his businesses and begin retirement; he has not fully executed that plan at present. The claimant's quantum of support from August 2018 to December 2019 and whether support should be ended at the end of 2019 as proposed by the respondent will be addressed.
- [35] Finally, if the claimant's support continues, she seeks an order for a lump sum payment to obviate the difficulties in obtaining payment from the respondent.

Analysis

Law and Underlying Principles Concerning Variation Applications

- [36] In the claimant's original statement of claim she asked for a divorce but claimed spousal support only under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. The claimant did not rely on the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [DA or Divorce Act] as a foundation for her support claim. This obviated any need for a divorce order to precede her final spousal support order made by Cole J. and I am satisfied that support was ordered under the authority of the FRA. On this point, the claimant incorrectly suggested that the court could treat the trial judgment as a final order under the DA.
- [37] The statutory framework for this application is contained in various parts of the Family Law Act, S.B.C. 2011, c. 25 [FLA or Family Law Act] including:

Objectives of Spousal Support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Setting aside agreements respecting spousal support

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].
- (6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

Orders respecting spousal support

165 (1) On application, the court may order a spouse to pay to a designated person the amount the court considers appropriate as spousal support after taking into consideration section 160 [duty to provide support for entitled spouse].

- (2) An application under subsection (1) may be made
 - (a) by either spouse or both,
 - (b) on behalf of a spouse, by a designated agency under the Adult Guardianship Act after an investigation conducted under Part 3 of that Act, or
 - (c) if the right to apply for an order under this section is assigned to a minister under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, by the minister to whom the right is assigned in the name of the government or the name of the person who made the assignment.
- (3) The court may not make an order respecting spousal support if the spouses have an agreement described in section 164 (1) [setting aside agreements respecting spousal support], unless all or part of the agreement is set aside under that section.

Misconduct of spouse

166 In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably

- (a) causes, prolongs or aggravates the need for spousal support, or
- (b) affects the ability to provide spousal support.

Changing, suspending or terminating orders respecting spousal support

167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
- (3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
 - (a) the order is necessary to relieve economic hardship that
 - (i) arises from a change described in subsection (2) (a), and
 - (ii) is related to the relationship between the spouses, and
 - (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

Review of spousal support

168 (1) An agreement or order respecting spousal support may provide for a review of spousal support, and for this purpose may provide for

- (a) the review to occur on or after a specified date, after a specified period of time or after a specified event has occurred,
- (b) the type of family dispute resolution by which the review will take place,
- (c) the grounds on which a review will be permitted, and

- (d) the matters to be considered for the purposes of a review.
- (2) On review, a court, on application, may do one or more of the following:
 - (a) confirm an agreement or order respecting spousal support;
 - (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
 - (c) make an order under section 165 [orders respecting spousal support].
- (3) In making an order under this section, the court is not required to consider any of the matters referred to in sections 164 [setting aside agreements respecting spousal support] and 167 (2) [changing, suspending or terminating orders respecting spousal support].
- [38] The respondent seeks to vary the original spousal support order as it should have been varied under the settlement agreement. He asserts that the trial judge's order should be varied because he has experienced a significant material change in circumstances.
- [39] The respondent framed this application as coming under s. 164(5) to vary a written agreement respecting spousal support. In my view, the settlement agreement did not vary support but allowed the parties to apply to vary the original order and temporarily interrupted support at \$4500 per month until the parties' house sold.
- [40] In this application, the respondent does not seek an order to "set aside or replace with an order made under this division all or part of an agreement". His notice of application seeks variation of the support order terms which I construe to mean the support order terms that were to be varied by further application to the court. This is significant because different factors must be considered as described by Fitch J (as he then was) in *Megson v. Megson*, 2014 BCSC 2467 [Megson]:
- [159] Second, the type of change motivating judicial intervention under s. 164(5) is change resulting in significant unfairness. What is contemplated is judicial intervention where the change is so substantial that the agreement negotiated by the parties has, in light of that change, become significantly unfair. The threshold standard could not possibly be lower than a material change in circumstance. Further, the suggestion that an agreement has become significantly unfair as a consequence of changes since the agreement was made in the condition, means, needs or other circumstances of a spouse would have to take account of what was foreseen at the relevant time. While not necessarily determinative, what was foreseen by the parties will have a bearing on the question of whether a change has rendered an agreement significantly unfair.
- [41] This application is more properly considered under s. 167(1) and (2); that is the application seeks a change to an order respecting spousal support prospectively and retroactively. The requirement in s. 164 to consider significant "unfairness" is not part of the analysis.

- [42] Section 161 of the FLA sets out the objectives of spousal support orders. This provision is similar to the objectives for applications to vary spousal support orders under s. 17(7) of the DA. *L.M.P. v. L.S.*, 2011 SCC 64 [L.M.P.], was decided under the DA, but the principles concerning variation of support orders are applicable to this case. The framework requires a determination of whether an applicant has proved significantly changed circumstances with a focus on the changes in circumstances from the time the order was made.
- [43] The original support order was made under the FRA and the FLA applies to the variation of the order. The applicant argued that the test is whether there has been a "material change in circumstances" and whether the circumstances in this case warrant a variation of the second order. The question centers on whether the alleged change, if known at the time of settlement or the order, would likely have resulted in different terms: see *Willick v. Willick*, [1994] 3 S.C.R. 670 at 732.
- [44] In *L.M.P.*, the Court also said:
- [33] The focus of the analysis is on the prior order and the circumstances in which it was made. *Willick* clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the *Willick* approach to variation applications requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement.
- [45] The respondent must prove that his circumstances materially changed after reaching the settlement agreement (order) and that the changes have been significant. It is important to focus on how the "significant changes in circumstances" have affected the respondent's financial ability to meet the support obligations. In order to satisfy the test, material changes must have some degree of continuity and permanence; temporary changes in circumstances may not rise to the level of a significant material change contemplated by the parties: see *L.M.P.* at para. 35.
- [46] If the applicant establishes a significant change in circumstances warranting a variation, then the court assesses the appropriate variation to be made in light of the change in circumstances: *L.M.P.* at para. 31.
- [47] The court has considerable discretion to make findings concerning changes in circumstances as set out in s. 167.
- [48] Significant changes might not be material if those changes were contemplated by the court or parties. The court must consider whether the parties intended to capture changes in particular circumstances: see *L.M.P.* at para. 39. The focus on alleged material changes engages consideration of whether the change, if known at the time of the earlier order or agreement would have resulted in different terms: see *L.M.P.* at paras. 31-33.

- [49] When an agreement stipulates a particular change or type of change contemplated by the parties, the inclusion of that descriptor guides the court's determination of what is meant by a "material change of circumstances": see L.M.P. at para. 42.
- [50] The terms of any proposed variation to the 2008 order will be informed by the circumstances extant at the 2008 trial and proven changes since then: see L.M.P. at paras. 47-50. Overall a varied order must continue to reflect the objectives set out in s. 161 of the FLA.
- [51] Taking into account the circumstances surrounding the original order, it is important to recognize that compensatory awards generally remain in place until compensation has been achieved, even if the recipient spouse has achieved a degree of self-sufficiency: *Tedham v. Tedham*, 2005 BCCA 502 at para. 60.
- [52] In *M.H.W. v. D.K.W.*, 2019 BCSC 1011, N. Smith J. concluded that where spousal support orders are made on compensatory and non-compensatory grounds, entitlement will continue as long as either ground is applicable: see at para. 35.
- [53] Mr. Justice Cole's reasons granted the claimant spousal support on both compensatory and non-compensatory grounds. At the time, the claimant was clearly in need and had satisfied the evidentiary burden to achieve compensatory support with very little prospect of being able to increase her income.
- [54] Nothing in the evidence at this trial persuades me that the claimant's entitlement to compensatory support has changed or that she remains seriously in need of support.
- [55] Spousal Support Advisory Guidelines [SSAG] are used as a tool to analyze quantum and duration of spousal support: see *Rozen v. Rozen*, 2016 BCCA 303 at para. 43 and *Beninger v. Beninger*, 2007 BCCA 619 at paras. 51-53.

The Parties' Positons

- [56] As noted above, on this application, the respondent does not seek to set aside or vary the settlement agreement. As noted above, his application is made on the basis that the parties agreed to vary the original spousal support order; thus, the inquiry focuses on ss. 167 and 168 of the FLA.

The Respondent

- [57] The respondent's application to vary spousal support is founded on the differences he alleges evolved between 2010 and 2018 concerning the income imputed to him at trial and his actual income from 2015 to the present. Next, he contends his current transitioning into retirement and winding down of his businesses justify a claim to reduce and terminate his ongoing support. He has suffered some physical difficulties that he claims have affected his ability to perform some physical aspects of his work since 2008; some of those concerns were contemplated by the trial judge in the process of imputing income.

- [58] The respondent seeks a reduction in his arrears of spousal support to \$40,100 in contrast to the \$129,000 claimed by the claimant because of reduced circumstances since 2015. He contends that his Guideline income for spousal support averaged for the years 2015 to 2018 should be \$74,044. He argued that his support for 2015 should be varied to \$2666 per month, to \$2627 per month for 2016, to \$2612 for 2017, and to \$2601 for the period January 18 to July 18, 2018. He argues that he should have paid \$2,666 per month for the five months beginning August to December 2018.
- [59] Finally, he requests an order that Ms. Williams' spousal support be reduced to \$1039 commencing January 1, 2019 and that her entitlement to support terminate at December 31, 2019.
- [60] The respondent argued that material changes to his personal circumstances since August 2015 have been proven because his income since then has reduced significantly; second he is now "transitioning to retirement".
- [61] The respondent described injuries that occurred in 2009 due to an earlier knee injury and replacement. A left ankle injury requiring surgery in 2010 and a shoulder injury that happened in 2010. He said he was able to work in spite of his knee replacement. He has not followed through with post surgery therapies and believes his right knee now needs to be replaced.
- [62] Although his shoulder and knee problems make it more difficult to climb roofs, he has not been prevented from that type of work. Only recently since his last ankle injury in 2018 has he concluded that he cannot do the physical aspects of the work.
- [63] Although he provided no opinion evidence to support these complaints and diagnoses, trial judges have discretion to consider evidence dealing with the impact of medical conditions on work capacity: see *Turpin v. Clark*, 2009 BCCA 530.
- [64] He said that his work in roofing and drainage involves lifting, climbing, staff management, estimations, when prospective customers seek estimates, he performs measurements and calculates quotations. His work required access to roofs usually obtained on ladders. He said he has not quoted on new work since February 2018.
- [65] He said he cannot rely on employees to do the estimations and quotations for customers because they lack experience. He lost his driver's license in August 2018 and suffers from sleep apnea that interferes with his ability to drive. Due to his drug use in his early 20s, he currently uses methadone.
- [66] The respondent did not address the impact of his injuries and surgeries between 2010 and 2018. He said that his company's revenues did not diminish from 2010 to 2018; he testified that the revenues from individual jobs increased, but the number of contracts reduced as the revenue for each job increased.

- [67] He did not address the issue of what impact his physical limitations had over those eight years on his business. Things changed starting in February 2018 for reasons he did not connect to the company's past performance.
- [68] He continues to enjoy square dancing between two and four times per week and two hours on each occasion and this recreational activity is not compromised by his physical injuries and limitations.
- [69] At the time of the 2008 trial, the respondent had said he was suffering an ankle injury and expected to be on crutches for six months. Mr. Justice Cole was satisfied that the respondent would be able to work through most of that recuperation and ankle reconstruction by performing management duties. This was one of the bases upon which his imputed income was set at \$150,000.
- [70] The respondent suffered an ankle injury in February 2018 and remained off work and in receipt of benefits from WorkSafe BC until July 2018. I accept that the respondent's decline in health and resulting decrease in ability to earn income was not contemplated at the time of the consent to varying the trial judgment regarding spousal support. However, at that time Cole J. took into account that he was expecting to undergo ankle surgery and be on crutches for six months; nevertheless, the court said the respondent "is a manager and not a labourer and will be able to work through most of the period during which he is recuperating from his ankle reconstruction". The court also concluded the respondent had not provided full particulars of his income; had hidden significant funds; and would continue to be supported by his business.
- [71] Although these latter matters constitute a material change that may warrant a variation and reduction to his monthly support, they must be considered in light of the fact that any variation must reflect changes since the 2008 order and the settlement.
- [72] He argued that the question cannot be answered by simply looking at his line 150 income. He notes that the value of his business was divided in 2008 and ongoing support should not be based on the current value of that business.
- [73] He also argued that an assessment of the amount of income he has earned during the three-year period from August 2015 to July 31, 2018 should be based on the monies paid to him through bank accounts and bank accounts of his companies. He proposed to provide the court with an analysis of the income reflected in his bank records and urged the court to attribute those amounts to his income for these three years.

The Claimant

- [74] The claimant argued that she has no work experience, no training and no ability to be economically self sufficient. She was in a long-term marriage and was completely dependent on the respondent throughout the 46 years since they became partners.

- [75] She also argued that the respondents' decision to stop working at age 62 should not be considered a significant change in material circumstances: see *Gajdzik v. Gajdzik*, 2008 BCSC 160 at para. 47.
- [76] She contends the respondent has been unreasonably resistant to paying support and is currently in arrears of \$129,500. She points out that he is, nonetheless, prepared to pay a lump sum for any ongoing spousal support.
- [77] The claimant concedes that after February 2018 the respondent's circumstances were materially altered and that reconsideration of the spousal support amounts was appropriate.
- [78] Although the claimant's earlier contention that the respondent's retirement prospects were not a "material change in circumstances", I am prepared to accept that concession from the claimant and will address the question of the amount of ongoing spousal support if any and consideration of a lump sum payment.
- [79] The claimant contends the respondent lacks any credibility in his assertions concerning his income; this argument was underscored in the reasons of Cole J.
- [80] The claimant contends there is no basis for a retroactive variation of spousal support because no significant material change in circumstances occurred between March 3, 2010 and the present. She contends that spousal support of \$4500 per month was made based on an imputation of income at \$150,000 at a time when the respondent's declared income was significantly lower than his income during the period 2015 to 2018.
- [81] She argued the respondent was unable to explain the source of funds deposited to some of his accounts and was confusing and contradictory in his attempts to explain deposits to other accounts; she believes it is not possible to ascertain the respondent's true income or earnings over the last 3.5 years.
- [82] She pointed out that a significant component of his companies' income and financial resources, including amortization, should be taken into account in measuring his income for support purposes. She argues that he is not fairly or properly accounting for property rents but uses expenses to unfairly reduce his taxable income. Overall, the claimant contends the respondent's income for support purposes between 2015 and 2017 ranges from \$149,000-\$170,000.
- [83] The claimant contends the respondent has failed to prove that health problems are interfering with his ability to work and have induced him to close his business and retire. She contends he cannot be believed on these assertions. She contends his decision to wind down his business and retire is capricious and motivated by a desire to stop spousal support.
- [84] Overall, the claimant argued that taking into account the extent and value of the respondent's assets he has sufficient resources to fund spousal support.

- [85] The respondent did not address the underpinnings of the imputed income and does not point to any persuasive evidence about how his circumstances unfolded after 2015 and whether those circumstances are significantly different from those extant (or within contemplation of the parties) at the time of the settlement agreement or the 2008 order.
- [86] She contends that, excluding the value of family property conceded to him in the settlement agreement, his other assets and investments would be capable of generating income of \$123,000 to \$205,000 per year if invested (or possibly rented out). Also, the increase in the value of his assets since 2008 is demonstrative of the fact that his circumstances have not significantly deteriorated since then.
- [87] The claimant argues this is a long-term 31-year marriage during which she raised two children and was economically dependent on the respondent for 46 years. Her support claim is compensatory and needs-based.
- [88] Finally, the claimant contends that a lump sum spousal support order is necessary to ensure a clean break between the parties and to eliminate the cost and expense associated with enforcing her spousal support orders.

Significant Material Change in Circumstances

- [89] The starting point for the analysis is the determination of the respondent's circumstances at the time of the settlement agreement and the original order. Mr. Justice Cole's trial reasons inform the court concerning the parties' circumstances at the time; there was little information offered by the respondent concerning the court's 2008 findings.
- [90] Significant changes in circumstances must be substantial, unforeseen and continuing. Any changes in amounts and duration of a spousal support obligation must be assessed against the changes occurring since the previous order.
- [91] It is the respondent's burden to prove a significant material change when an imputation of income is the basis of the order under consideration. In *Trang v. Trang*, 2013 ONSC 1980 [Trang], the court addressed this question:
46. But if the original support order was based upon "imputed" income, a more comprehensive analysis is required on a motion to change. The court must consider:
- a. Why did income have to be imputed in the first instance? Have those circumstances changed? Is it still appropriate or necessary to impute income, to achieve a fair result?
 - b. How exactly did the court quantify the imputed income? What were the calculations, and are they still applicable?

- [92] In the process the respondent must address the basis of the original order imputing income and the significant changes to those circumstances that have occurred since. He is required to demonstrate that the imputation in income is no longer necessary because the quality and reliability of his evidence on the application to vary displaces any concerns the court may have had when making the original order: see Trang at para. 52.
- [93] In *Lessard v. Mahoney*, 2019 BCSC 551 [Lessard], Fitzpatrick J. followed the reasoning in Trang and concluded that an applicant seeking to vary support based on a previous imputation of income carried "the heavy onus of presenting full and detailed financial information as to his present and past financial circumstances": see para. 45. He also bears the onus of showing why the imputation of income to him is no longer appropriate or why the imputed income is no longer appropriate. Last, he further bears the onus of satisfying the court that to not cancel or reduce the arrears, would be "grossly unfair".
- [94] The salient details of the respondent's testimony concerning his change of circumstances include:
- a) his income between 2015 and 2018 was significantly less than the amount imputed in the trial judgment;
 - b) he plans to retire and has been winding down his business;
 - c) his company is for sale for but no offers have yet been received;
 - d) he holds obligations to his employees who continued to work for WRD 2015 at the time of trial;
 - e) WRD 2015 continued to do significant amounts of business in 2018 earning substantial revenues. These revenues were less than 2017;
 - f) he told his staff that he was planning on "retiring" but was still taking on some work;
 - g) he might take on some on jobs in the future; and
 - h) he is not prepared to do the heavy physical parts of WRD 2015 business and wants to withdraw from work challenges into the future.
- [95] Further, any variation of the order warranted by the respondent's changed circumstances must reflect the differences between the original circumstances as found by Cole J. and the current circumstances. Overall, it is my view the respondent did not clearly meet the burden resting on him on this point.

Parties' Assets

The Respondent's Assets

- [96] One factor that must be taken into account is the measure of the respondent's assets other than those assets divided at the time of trial: see *Walters v. Walters*, 2011 BCCA 331 at para. 36.
- [97] Any changes in the respondent's support obligations taken into consideration most importantly changes in the respondent's "condition, means, needs or other circumstances of either spouse". Clearly the respondent's assets reflect his means, condition and circumstances.
- [98] In this case, the value attributed to equity family property in 2008 was \$2,363,752; the respondent received a disproportionate share of these assets, \$1,263,752, and the claimant received the balance. Examining the parties' financial statements against the findings of Cole J. assists in analyzing the respondent's income for support purposes. In the trial judge's reasons, he concluded that the value of the parties' assets net of indebtedness were:
- a) Williams roofing and 618082 B.C. Ltd. valued at \$100,000;
 - b) the parties' residence at the time valued at \$1,034,000;
 - c) Industrial road property \$300,000;
 - d) RRSPs \$36,000;
 - e) Van Citibank account \$88,972;
 - f) Williams Roofing and Drainage Ltd. and 618082 B.C. \$100,000; and
 - g) Mutual funds \$804,680.

Total assets \$2,463,752

- [99] I have concluded from the respondent's 2018 F8 financial statements and various financial statements included in the F8's statements, the respondent or his corporations currently own the following real properties and assets with values as set out below:
- a) Industrial road property clear title \$750,000;
 - b) Property at 25032-28th Ave., Langley- value \$1,680,000;
 - c) Property at 8071 - 197 Street, Langley \$2,840,000;
 - d) RRSPs and cash \$51,500;
 - e) Less Outstanding mortgage debt's \$1,065,000.

Total value of these assets net of mortgage debt is \$4,256,500

- [100] In addition, the respondent is the sole owner of shares in 1058901 B.C. Ltd. (Chilliwack Holdco) that purchased a warehouse in Chilliwack acquired at a cost of \$1,726,000 financed with a mortgage of \$1,203,000; thus the equity at the purchase date was \$523,000. This sum corresponds with his claim there is a \$472,875 shareholders' loan reflected in the Chilliwack Holdco financial statements.
- [101] It is clear the respondent reduced his shareholder loan to Chilliwack Holdco by \$18,460 between 2017 and 2018.
- [102] The parties did not provide any expert opinion evidence concerning the value of the respondent's properties. It is clear from his negotiations concerning the sale of some properties the values of some exceed the amounts set out in his F8 financial statement. Bearing in mind that neither party provided appraisal evidence concerning the value of these lands, I find the value of the respondent's total assets at this time are likely in the range of \$4.8 million net of indebtedness not including any value attributable to his business interests including ownership of a substantial number of motor vehicles.
- [103] At trial, the respondent said he had listed the 197 Street property for \$3,900,000 without success. He had listed the industrial road property for sale for \$1,375,000 but had only one offer at \$935,000 which he rejected. WRD 2015 is currently listed for sale at \$375,000; he has received no offers to date.
- [104] The 28 Avenue Langley property was purchased in January 2018.
- [105] In 2010 the respondent purchased property at 19081 74th Avenue in Surrey for \$1,090,000. Twenty months later he sold this property for \$2 million.
- [106] The respondent is the sole shareholder and director of a number of corporations including:
- a) Williams Roofing & Drainage (2015) Ltd. (WRD 2015);
 - b) 0762203 B.C. Ltd (Old Williams Roofing and Drainage Ltd) (Old WRD);
 - c) 0993755 BC Ltd. (Vehicle Holdco#2);
 - d) 1049075 BC Ltd. (Vehicle Holdco#1); and
 - e) 1058901 BC Ltd. (Chilliwack Holdco).
- [107] There are some shareholder's loans owed to the respondent by these companies (excluding Chilliwack hold Co.) totaling \$34,600 in 2018. Shareholders loans are in the nature of shareholder investment in companies that will ultimately be repaid from company assets.
- [108] Neither party tendered evidence concerning the fair market value of either parties' assets. Thus, the only evidence available is found in the BC Assessment Authority valuations and the parties' anecdotal observations.

The Claimant's Assets

[109] Although Mr. Justice Cole granted the claimant 60% of the family property equaling \$1,418,251, she received only \$1,100,000 in the settlement agreement. Of that sum, she received only \$960,000 in 2015. All of those funds were invested in the purchase of a residence now valued at \$1,129,000. She owes \$170,000 on a first mortgage and \$16,400 on other debt. She has financial assets of \$40,000.

Respondent Income

[110] The starting point for this analysis is in the determination of the respondent's income in 2018 to 2019 and 2008 to 2010.

[111] The Federal Child Support Guidelines, SOR/97-175 [CSG or Guidelines] and SSAG are essential considerations in this analysis.

[112] Section 16 of the CSG establishes that annual income for support purposes is the "total income" in the T1 general form and is adjusted in accordance with Schedule III of the Guidelines. Section 17 instructs the court to consider an average of the last three years of income if the payor's income determined under s. 16 would be unfair.

[113] Section 19 of the CSG sets out circumstances under which the court can impute income:

Imputing Income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;

- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

The Respondent's Income from July 2015 to August 2018?

- [114] At the 2008 trial, the respondent filed an F8 financial statement indicating his annual income was \$89,906. At trial he testified that his income was \$70,000 but was not believed on this point by the trial judge. Based on all of the evidence Cole J. imputed income of \$150,000 to the respondent, in part because he did not believe the respondent had been truthful and forthcoming in his disclosure of income and assets. There was evidence the respondent performed work and made trades for income not included in the company financial statements. Overall Cole J. was not able to accurately ascertain the respondent's income and was satisfied the respondent did not declare all of the income he received and support was then based on his imputed income.
- [115] The respondent argued that close analysis of the respondent's companies' financial statements was not necessary to establish his actual income from 2015 to July 31, 2018. He contends that an examination of his bank accounts during those three years is sufficient to permit accurate findings about his yearly incomes.
- [116] Full disclosure is extremely important to the support analysis. The shortcomings in the respondent's testimony about his financial affairs, bank accounts and unexplained deposits may persuade the court to impute additional income for support purposes: see *Van Deventer v. Van Deventer*, 2000 BCCA 9 at paras. 12 to 15.
- [117] The claimant argues it is reasonable to infer that some of the respondent's income is not reflected in his financial statements or the statements of his companies and that some cash receipts for roofing jobs were received directly by him and not recorded in the company records.
- [118] On this point, it is important to remember it is the respondent's burden to address issues concerning the imputation of income and why that imputation is no longer necessary.
- [119] In my view, the correct assessment of the respondent's income begins with calculation of his line 150 income. Next, I must consider inclusions to his income for support purposes stemming from:
- a) income earned by his corporations;
 - b) revenue not recorded in corporate financial statements (cash jobs);
 - c) personal benefits he acquired because personal expenses were recorded as company costs; and

- d) funds available for spousal support but otherwise deducted as amortization expenses to his companies should be included for spousal support purposes.

[120] I will analyze those categories after discussing the respondent's assets.

[121] Finally, I must consider what, if any, income I should impute to the respondent based on the items in the preceding paragraph and any other evidence that might suggest his actual income is different than his declared incomes.

[122] Overall, I must take into account all of the respondent's financial resources in ascertaining his ability to pay spousal support.

Line 150 Incomes

[123] Mr. Williams' reported Line 150 incomes were:

a. 2014

\$116,503

b. 2015

\$96,647

c. 2016

\$77,212

d. 2017

\$97,457 (including investment income

but not capital gains)

Income from Corporations and Amortization as a Source of Funds for Support Purposes

[124] Net income from a corporation solely owned by a spousal support payor is deemed to be income to the shareholder/spouse for the purposes of determining the quantum of the support obligations. The CSG provide:

Shareholder, director or officer

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

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

Adjustment to corporation's pre-tax income

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

[125] The respondent started the business Williams Roofing and Drainage in the late 1980s. Over time he carried on this business in different corporate entities and earned income available to him for support purposes. For business reasons he also incorporated other companies generally used to enhance the main business of roofing and drainage work.

[126] In assessing the respondent's income for spousal support purposes, the income from his corporations must be taken into account together with an assessment of those corporate expenses that were incurred for his personal use and non-cash amortization expenses.

[127] The claimant contends that amortization expenses for real estate should be included in the shareholder/spouse's income available to pay spousal support.

[128] In this case, the respondent is the sole shareholder and director of his corporations and had unfettered access to funds available after consideration of non-cash amortization expenses. The inclusion of capital cost allowances into a payor's income was addressed in *Egan v. Egan*, 2002 BCCA 275 at para. 30.

[129] In *S.C. v. D.A.*, 2012 BCSC 1061, I concluded as follows:

[77] Amortization expenses are those amounts properly deducted from taxable income to reflect the diminution in value of the capital asset during the course of the taxpayer's business in any given year. Amortization expenses relating to real estate are added into income for Guideline purposes due to the expectation that real estate is not regularly replaced and may not depreciate over many tax years. The expenses on less permanent capital assets are not added back into income when there is evidence that they more realistically reflect a business's needs to replace those assets on an ongoing basis.

[130] It does not assist the respondent to suggest that he used any of these funds to reduce his shareholder's loans. Shareholder's loans constitute debts of a corporation and amortization represents a deduction from income for tax purposes. The respondent's shareholder's loan decreased by approximately \$18,000 between 2017 and 2018 and with those reductions the equity in the company increased by an equivalent amount. In any event, shareholder's

loans represent a portion of the respondent's equity in the business which, in the fullness of time, are paid out from the capital of the business. Shareholder's loans do not affect the income of a corporation nor funds available for support. Amortization expenses stand on a different footing and may be included in the respondent's income for spousal support purposes.

[131] I am satisfied that, at all times, the respondent was aware of his obligations and the evidentiary burden to provide evidence concerning his companies' profit and amortization expenses. In *Chapman v. Summer*, 2010 BCCA 237, the court reaffirmed the obligation on the respondent when dealing with income available for support purposes from corporations owned by the payor:

[16] In *Hausmann v. Klukas*, 2009 BCCA 32, Madam Justice Kirkpatrick observed that often the court is faced with "confusion created by the conflicting accounting evidence" presented by parties. She stated in para. 50 that this is neither necessary nor desirable and should be relatively straightforward, which led her to a consideration of the onus in such circumstances: it is on the shareholder spouse. Kirkpatrick J.A. reviewed existing authority and adopted the following statement of the law:

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While Bartkowski says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by Kowalewich.

[17] The task at hand is to determine the husband's available income. What he did with the money is not relevant. In my view, the judge erred in deducting from the husband's draws amounts that had been paid to the wife.

[Emphasis added.]

[132] The respondent referred to the principle concerning amortization set out in *Richardson v. Richardson*, 2013 BCCA 378 at para. 52:

[52] As I will explain, I am of the view that the trial judge erred in holding CCA on real property can never be included in the income of a payor who is the sole controlling shareholder of a corporation that claimed such an allowance as a deduction in determining its pre-tax income. Indeed, I am of the view that such claims should be included absent evidence to support a finding that allowing such a deduction to be used to reduce the amount of money available for child support is reasonable in all the circumstances. In this regard it is important to keep in mind that a CCA claim does not involve any actual expenditure in the taxation year in which it is claimed but, rather, is a means by which taxable income can be reduced to take account of the fact that assets depreciate over time; there is no outflow of cash. Further, while there are limitations on the amounts that can be claimed, it is the

taxpayer who decides whether to claim the deduction and the amount of that deduction.

- [133] The respondent argues that amortization expenses should not be included in his income and relies on Fitzpatrick J.'s review of the authorities in *Ross v. Ross*, 2017 BCSC 371 [Ross], concerning lifting the corporate veil to ensure that a paying spouse's income is properly assessed.
- [134] In *Ross*, the facts were significantly different than exist in this case; there the Court was satisfied that the payor parent held 50% of the shares as a co-shareholder and was at arms' length because he did not control the subject company. The Court also found that the respondent was not hoarding income in any way and declined to add the amortization amounts back into the payor's income for support purposes.
- [135] In *Ross*, the court also concluded that there had been no warning that the claimant would seek to include amortization expenses as money available to pay spousal support and the process was unfair. *Ross* was a much different case in which the applicant was seeking a support order without any indication she wanted support based on amortization expenses in circumstances where the payor owned one half of the company's shares.
- [136] The circumstances in this case are distinguishable from those cited in *Klimm v. Klimm*, 2018 BCSC 5 [Klimm] at paras. 32 to 37 (a case referred to by the respondent). In *Klimm*, the court was considering amortization expenses related to personal property such as vehicles, equipment and computers. At the time the payor spouse no longer owned a motor vehicle. In the context of those facts the court did not deem it reasonable to add back amortization costs to the respondent's income. The issues concerning personal property are considered on a different footing than cases involving real property.
- [137] The burden of proving reasonableness of deductions such as amortization expenses rests with the spouse making that deduction. Thus, the respondent was obliged to fully disclose the information and documentation he relied on; it was not the claimant's responsibility to hire professionals to assess and challenge the reasonableness of deductions: see *Wiebe v. Treissman*, 2017 BCSC 1523 at para. 94.
- [138] In argument in this case the respondent said he anticipated the claimant's reliance on amortization allowances forming part of his income available for support purposes. He also testified in chief about the amortization expenses attributed to Chilliwack Holdco. Thus the argument that accounting for amortization expenses was a surprise is not supported. He referred to the issue and it is clear he anticipated the claimant's argument on this point before he finished his testimony concerning the financing/equipment needs of his corporations.

- [139] There is a heavy burden on sole shareholders of companies to disclose information and explain reasons why amortization allowances are not resources available to pay spousal support. The respondent carried the obligation to explain his current circumstances that included income available from Chilliwack Holdco including details about salaries, shareholder's loans and amortization.
- [140] On December 12, 2018 the respondent was permitted further testimony but did not address the amortization issues concerning any of his companies.
- [141] In this case, the respondent did not provide any information concerning the depreciation costs charged for property plant and equipment. For the most part, these expenses were modest and do not ordinarily form part of the income available for support except where the expense was not necessary to advance the company's business. There was little evidence provided by the respondent concerning the capital needs of the operating companies; his express intentions to wind down the business, sell the company and retire suggests the company will not require replenishment of depreciable assets.
- [142] Last, the respondent concedes that any expenses of his corporations that provide personal benefits to the respondent will be included in income available for support purposes. Lastly, some corporate amortization expenses may also be included in the shareholder/spouse's income for support purposes. The contributions of the respondent's corporations to his ability to fund spousal support payments is important to deciding the issues raised by the respondent. The involvement of his corporations is set out below.

Old WRD

- [143] At the time of the 2008 trial, Cole J. determined the value of the respondent's business Old WRD was \$100,000. This finding was in the face of the respondent's claim that the business was worth only \$12,000. The court noted that the respondent generated substantial cash income at least \$15,000-\$20,000 per year or more that was not included in the company revenues. The respondent's shares in his businesses were family property and were awarded to him in the trial judgment.
- [144] By 2015, WorkSafe BC claims had been made against Old WRD prompting the respondent to incorporate WRD 2015. Since then, all of the respondent's roofing and drainage business has been reflected in WRD 2015 financial statements. The financial statements for each of the respondent's companies were in evidence as were the respondent's Form F8 financial statement from June 2015.
- [145] Old WRD had some business income from 2015 to 2018. Its before tax income in 2015 was \$2680; \$7892 for 2016; \$2278 in 2017; and a 2018 loss of \$5839. For the year 2015, the company claimed \$6,050 in amortization expenses, \$3734 in 2016, \$3533 in 2017 and \$2785 in 2018.

Vehicle Holdco#1

[146] Vehicle Holdco#1 incurred a \$2044 loss in 2016, and an \$18,291 loss in 2017, and profit of \$12,004 in 2018. During the same years the company reported amortization expenses of \$18,426 in 2016, \$31,325 in 2017, and \$22,227 in 2018. Based on the company financial statements, there were no significant purchases of plant or equipment across these three years.

Vehicle Holdco#2

[147] Vehicle Holdco#2 was used to purchase vehicles leased to WRD 2015 for between \$23,000 to \$45,000 in the years 2016 to 2018. It is apparent from the statements that the company was not replacing its capital assets at the same rate; the reduction in book value of the assets from 2016 to 2018 was approximately \$57,000. The respondent did not provide any information concerning the company's requirements for ongoing purchases. It operated at a cumulative loss of \$8,331. During this time cumulative amortization charges were \$71,978. As such, I am satisfied that the amortization costs for the vehicles should be included in the respondent's income for those years.

[148] Holdco#2 owned vehicle(s) valued at \$22,987 in 2016. Between 2016 and 2018 the company did not acquire new capital equipment/vehicles. In 2015, this company lost \$10,371 but earned \$10,017 in 2016. In 2017 it earned net income of \$4081 and \$2085 in 2018. This company's amortization for each of the years 2016 to 2018 was \$4,292, \$3,020 and \$1,307 respectively.

WRD 2015

[149] WRD 2015 reported income before taxes of \$45,599 in 2016, \$31,499 in 2017 and \$ (-3357) in 2018. This company recorded amortization expenses for 2016 of \$5,594, in 2017 of \$10,569 and for 2018 of \$16,010. In 2018, it purchased one new vehicle at a cost of \$46,399 and some roofing equipment for \$2,000. Net of all liabilities including shareholder's loans the equity in this company was \$63,131.

Chilliwack Holdco

[150] In this case, significant amortization expenses of \$53,485 were recorded in regard to the land owned by Chilliwack Holdco for 2017 and 2018 representing notional depreciation of the real property. Over those two years the corporation's losses before taxes were \$515 and by the end of 2018 the company had \$19,862 in cash. There were no details of actual depreciation of any assets owned by the corporation and I am satisfied that those expenses of \$52,455 represent income available to the respondent for spousal support.

[151] Chilliwack Holdco was incorporated to carry out the purchase of rental property in Chilliwack in 2017. Income before taxes in 2017 was \$(-124) and in 2018 \$(-391). However, amortization on the building for those two years was \$17,988 in 2017 (less than one year)

and \$35,497 in 2018. Further, in 2018 the respondent paid some \$26,064 as salaries and wages; he also paid Ms. Colpitts \$20,000 in 2018 which he said was credited against his shareholder loan account. He is also taking \$2,000 per month (\$26,064 for the year) from the company as wages. Accordingly, income available from this company to pay support was \$51,561 in 2018 and \$16,744 in 2017 (before deduction of \$515 in losses) which were funds available for spousal support.

[152] I conclude that the respondent will continue to receive \$51,500 per annum from Chilliwack Holdco and that amount will be included in his income for support purposes.

Respondent Submissions Regarding His Income

[153] The respondent argued two possible methods for calculating his income from August 1, 2015 to July 31, 2018. The first method would involve an assessment of the amount of money paid to the respondent from his company and other sources during this timeframe with adjustments for additional benefits he received. He conceded that where payments have not been taxed, a gross up of the amount should be applied.

[154] The respondent argued that the average income before tax gross up from 2015 to July 31, 2018 was \$74,044. Including the tax gross up for 2018 on an average basis up to July 2018 his Guideline income would have been \$100,043.

[155] Method 2 suggested by the respondent requires an analysis of the sources of income with modest tax gross ups. On this basis he suggests the respondent's income should be assessed at \$59,004.

[156] It is notable that the respondent contends his WorkSafe BC disability pension should not be included in his income for support purposes.

[157] In summary the respondent contended that the best method for ascertaining his income for the period August 1, 2015 to July 31, 2018 would be an examination of the deposits to his bank accounts during that time period. He said adjustments could be made for additional benefits that Mr. Williams received over time. From this concession, I also conclude the respondent was receiving funds into his accounts in respect of income from other sources not recorded in his records.

[158] On this application, the respondent did not address the trial judge's findings concerning his available income for support purposes and the imputation of income at that time. Mr. Justice Cole concluded that the respondent had taken significant sums out of Old WRD resulting in the imputation of income at \$150,000. Moreover, the respondent was unsure of whether he received some cash deposits to his personal account in 2015 from company sales; he claimed he was no longer receiving cash from sales. However he was unsure if a \$12,000 deposit in March 2015 came from a cash sale.

- [159] Overall, he could not provide an accurate accounting nor was he able to explain in this trial the sources of multiple deposits to his personal accounts. More likely than not, I conclude he was continuing to receive personally some cash payments for work done by his company.
- [160] The respondent argued that his employment income for 2015 was \$54,405. He received rents from his company and other deposits from unknown sources. He accepts that the net payment of property taxes was \$2,727 from his company to himself. He received \$2,620 in employment insurance benefits and \$38,603 from unknown sources. He argued that his income for 2015 was \$116,268.
- [161] He claims that in 2016, he received \$48,360 employment income, rental payment of \$2772, and employment insurance benefits of \$6228. He had income from unknown sources of \$14,827. The respondent submits that all income from unknown sources should be attributed to his personal income at 80% of the amount reported and his total income for 2016 should be \$83,364.
- [162] In 2017 his employment income was \$62,868 with rental payments for tax of \$3216. He had investment income of \$15,389 and rental income of \$6,187. He has disability income of \$13,012 from a WorkSafe BC pension and other income from unknown sources of \$38,354. His total income for 2017 should be assessed at \$139,026.
- [163] Finally, in 2018 the respondent asserts his income was \$11,289 from employment and \$5,000 received by way of rent from his company. He had deposits into his account from unknown sources of at least \$5,249. He received his WorkSafe BC pension of \$13,014. He argued that the disability pension is not intended as a wage loss replacement item but represents compensation for workplace injury. As a result, he argued this amount should not be included in his income for support purposes; he also claims the pension will end on his 65th birthday, June 18, 2022.
- [164] During 2018 he received \$19,803 WorkSafe disability payments in relation to his February 2018 ankle injury.
- [165] In summary, he said, employing one scenario his income for 2018 should be measured at \$72,044 to be grossed up for the non-taxable portion of his income. This suggestion did not take into account the impact of amortization charges on spousal support.
- [166] Mr. Williams confirmed that from May 1, 2018 to October 3, 2018, WRD 2015 received revenues of \$439,067 but there was no estimate of the income he would have derived from these revenues or earnings by the year end 2018 (over and above any salary taken from the company). These revenues were received at a time he claimed to be disabled.
- [167] In summary, the respondent contends that his income for support purposes should be inferred at:

Method 1

Method 2

2015

\$102,114

\$116,268

2016

\$100,872

\$83,364

2017

\$100,380

\$124,092

2018

\$100,043

\$59,004

[168] If these calculations were correct the respondent contends that his average income for the ranges of spousal support for 2015 were \$3108 at the low-end to \$3725 at the high-end based on the higher incomes. For 2016, the low-end spousal support calculation is \$2,080 with the high-end support being \$2,607. For 2017, he argues low end support should be set at \$3,353 and the high-end assessed at \$4,041. Finally, for the year 2018, low-end spousal support is \$1,319 and high-end \$1,437. On this calculation, the respondent contends he should owe \$40,000 for spousal support arrears.

Claimant Submissions Regarding Respondent's Income

[169] The claimant contends that the respondent's income for support purposes should be assessed as follows:

2015

\$119,778

2016

\$139,198

2017

\$176,064

- [170] Thus, on average the claimant contends the respondent's income over three years was \$151,680 annually. Interestingly, this amount is close to the amount of income imputed to the respondent by Cole J.
- [171] The claimant derived her calculations about his income by taking into account the respondent's line 150 incomes for 2015, 2016 and 2017. She contends there was unknown cash income grossed up for taxes of \$67,628 in 2015; \$18,534 in 2016; and \$47,941 in 2017. She also contends that \$10,000 per year should be attributed to his income for corporate benefits he took and used personally (grossed up). Finally, she contends that a rental income should be added back to the respondent's income at \$4551 for 2015; \$4702 for 2016; and \$6563 for 2017. Last, she contends that amortization expenses should be added back to his income at \$6,050 for 2015; \$9,328 for 2016; and \$14,102 for 2017.
- [172] The claimant contends there is no basis to exclude the respondent's WorkSafe BC pension benefits from income for support assessments.

Conclusion: Respondent's Income from July 2015 to December 2019

- [173] In his testimony and submissions at this trial, the respondent did not adequately address the facts or circumstances leading to Mr. Justice Cole's imputation of income as they relate to his alleged change in circumstances. The settlement agreement concerned a delay in the payment of support at \$4500 per month ordered at that time until after sale of the family home and reapportionment of the family assets.
- [174] In my view, the respondent failed to address the "heavy onus of presenting full and detailed financial information as to his present and past financial circumstances" that resulted in the previous imputation of income: see Lessard at para. 45.
- [175] On the uncontradicted evidence and submissions of the respondent, he received money between 2015 and the trial that cannot be accounted for and may or may not be income for support purposes. This concession is consistent with Cole J.'s findings.
- [176] The respondent also conceded that he received some personal benefit from corporation expenses throughout. An example of corporate expenses benefitting the respondent is found in telephone costs ranging from \$16,000-\$18,000 from 2016 to 2018. The respondent used a cell phone and provided cell phones to his brother; there was no breakdown of the extent to which these expenses and others benefited the respondent or were essential to the operations of his businesses.
- [177] Finally, although he testified that he had not been doing "cash work" for money not recorded in the financial statements he also said there was a possibility that he had received income of \$12,000 in 2015 deposited to his personal account and not recorded in company records.

- [178] Under CSG and SSAG the starting point should be the respondent's T1 (line 150) income during each year from 2015 to 2017. His income for 2018 had not been determined when this trial began or when it concluded.
- [179] I am also satisfied that there should be additions to his income amounts representing the net profit of each of his corporations as reported in the financial statements of those businesses. Those amounts are noted above.
- [180] Next, there should be an inclusion in the respondent's income for spousal support purposes amounts equal to the amortization expenses recorded for those companies in each year. I recognize that, for the most part, amortization expenses concerning personal property do not result in an attribution of those sums to income for support purposes except where there is insufficient evidence that the company is or intends to continue to add plant and equipment to the business.
- [181] In this case, the respondent has told the court that he intends to retire and is winding his businesses down and does not intend to continue to operate those businesses. In the result, I am satisfied that plant and equipment replacements are not necessary for the continued and ongoing operations of his corporations; rather amortization expenses are non-cash expenses which will not be necessary to maintain the company or replenish its equipment and should be added back as money available for spousal support.
- [182] The respondent concedes some expenses incurred by the companies provided personal benefits to the respondent independent of his role as director or employee of his company. He argued that these amounts should be estimated at \$5000 per year, whereas the claimant contends it should be \$10,000 per year. There was a paucity of evidence to assist the court in making this assessment and in the absence of any other evidence I will attribute \$7,500 per year to the respondent's income for support purposes.
- [183] One of the features of the respondent's application involves an assessment of the differences between the underlying findings and imputation of income in 2008 against the facts extant from 2015 to 2018. Accepting Cole J.'s decision to impute income at \$150,000 as correct, the respondent was obligated to demonstrate why that imputation of income at that time is no longer appropriate.
- [184] The 2008 decision, informed by testimony at trial was that the respondent received monies in cash from side jobs that were not reported in the financial statements of the company. He said he was not receiving cash from off book work done by the company but he was not certain on that point. He did not explain why, or to what extent this change in behaviour could have affected Cole J's decision.

- [185] The respondent did not suggest that the trial judgment was no longer appropriate based on changes in the facts after the settlement agreement. At this trial, the respondent's testimony was simply unreliable on the respondent's actual income. Although he denied receipt of income from side jobs, on many occasions he could not identify the source of funds deposited to his bank accounts. This proposition was not addressed by the respondent in argument.
- [186] The dramatic increase in the respondent's assets (taking into account the large capital gain on one property sale) lends more support to Cole J.'s conclusion that the respondent was not forthcoming in disclosing all of his income and/or assets. In this application, there is a heavy burden on the respondent and I am satisfied he has not discharged that burden to prove "significant material changes in his circumstances". The respondent contends that the test for material change is based on what the parties actually contemplated at the time of their agreement, not what was reasonably foreseeable: see *Megson; Dedes v. Dedes*, 2015 BCCA 194 at para. 25. He argued that his decline in health and reduced income from his businesses demonstrated the significant changes in his means and other circumstances since 2008.
- [187] At trial there was no testimony by either party concerning what was contemplated when they agreed to vary Cole J.'s order. The claimant said that after judgment, the respondent told her he would not follow through with his obligations under that judgment. He appealed the judgment and allowed their residence to go into foreclosure because one of his company's debts were secured against title to the home. She said she lost her horses and was without money and was resigned to accept what the respondent dictates rather than continuing the litigation. She conceded that the settlement agreement permitted her to live in the home for three years. In fact, the house from which the claimant's portion of the settlement funds was to be paid was not sold until April 2015.
- [188] Taking into account that the respondent received \$1,343,000 of the family property at the time of the trial and currently owns over \$4.6 million in assets without including a value of his WRD 2015 or his other companies' businesses, he would be capable of earning income on his assets excluding the amount he received in the settlement agreement.
- [189] The issue of double dipping is discussed in *Boston v. Boston*, 2001 SCC 43 [Boston] at paras. 35 to 37. In *Boston*, the court was focused on the payee's effort to obtain support payments measured against income from the payor's pension that was previously divided at the trial.
- [190] Assuming the respondent's property includes in part the settlement of his portion of family assets, double dipping can be avoided by examining his after acquired assets as a potential source of funds available to pay support. The respondent testified to his interest and efforts at selling his real property and other assets. I can infer that this intention continues and he will likely have sale proceeds available within the foreseeable future.

- [191] There was evidence in the trial that the respondent could earn interest at the rate of 3% on investments and if he invested \$3.5 million at 3% per annum he could earn \$105,000 each year. Thus, for the purposes of assessing the respondent's ability to fund spousal support by taking out the value of assets he received in the settlement after trial (\$1,263,000), the risk of double dipping can be eliminated. Thus, the respondent will likely be able to earn more than \$100,000 per year without dipping into the property he received under the 2008 order and the settlement.
- [192] There was very little evidence concerning the intention of the parties at the time the settlement agreement was made. There were a few remarks by the trial judge that reflect the parties' expectations of the future. The court noted that the respondent was awaiting surgery which would likely have disabled him for some time. He was contending his ability to support the claimant at that time was going to be compromised; the judge rejected that assertion and concluded he would continue performing management duties.
- [193] The respondent set out to establish the extent of his income derived from unconventional sources or payment schemes that should be included in his income for support purposes. He received employment income from his roofing business, income from his Chilliwack property, income from WorkSafe BC by way of disability pension and reimbursement of lost wages.
- [194] In reviewing Mr. Williams' income from 2015 to the present, his counsel said that averaging his income over the three years results in income available for support purposes on average of \$74,044 per year which subject to tax gross ups results in average annual income at \$104,000 per year. He said that calculating Mr. Williams' income for each year separately provides a somewhat reduced amount of income available for support purposes.
- [195] On all of the evidence, I am satisfied that Mr. Williams' income is understated for the following reasons:
- a) In 2016, the company records reveal a \$25,000 wage payment to Mr. Williams which is recorded in the general ledger but not in his income for that year.
 - b) Amortization expenses for the Chilliwack Holdco were \$17,000 in 2017 and \$35,000 in 2018. Other amortization expenses were also claimed and I am satisfied that those amounts were income available for spousal support purposes.
- [196] I am satisfied that benefits Mr. Williams received from WorkSafe BC totalling \$19,803 in 2018 are income available for spousal support.
- [197] I am also satisfied that Mr. Williams' disability pension from WorkSafe BC totalling \$1,135 per month is also income available for spousal support purposes: see *Stanley v. Stanley*, 2013 BCSC 371 at para. 107.
- [198] Because WorkSafe BC benefits are not taxable, there would ordinarily be a tax gross up to reflect the actual value he receives and available for spousal support.

- [199] I accept the applicant's suggestion that deposits from unknown sources of \$12,750 in 2015; \$14,827 in 2016; \$33,354 in 2017 and \$5,249 to August 2018 could be included in his income for spousal support purposes.
- [200] I am satisfied that the expenses related to travel and entertainment in the company are not expenses that should be deemed personal benefits to Mr. Williams. They are modest sums and reflect the type of business promotion expenditures that are reasonable.
- [201] The travel and entertainment expenses also reflect what may be chargeable for work the company undertook outside of the Lower Mainland.
- [202] Mr. Williams' receives income of \$2,000 per month from Chilliwack Holdco; this sum is income for spousal support purposes because it represents a profit component in the years after 2018. This amount is commensurate with the amount he paid to his girlfriend in 2018 which he recorded as a salary expense. In future, that sum will be profit available to Mr. Williams.
- [203] The respondent's decision to allocate funds to repayment of shareholders loans does not affect the company profit nor the funds available to pay spousal support. Repaying shareholder's loans is a means to shift equity in a business to its shareholders; if the Chilliwack property is sold and the company pays its shareholder's loans to the respondent, the respondent's equity will be unchanged; the balance between the two assets will not change.
- [204] It is clear that the reference in the Chilliwack general ledger that \$25,000 was allocated to, but not received by Mr. Williams, as income for that year, indicates that this amount remains available for spousal support purposes. It may be that by not taking the \$25,000 from the company, Mr. Williams has added that sum to his shareholders' loan but this does not detract from the fact that \$25,000 is income to him that is available for his support obligations.
- [205] In calculating the companies' net incomes from 2015 to 2018 there were losses in some years and profits in others. I am satisfied that it is appropriate to average the incomes (net of losses) of all companies: see s. 16 CSG. The net profits for four years were \$77,719 or \$19,429 per year up to August 2018.
- [206] I have concluded the respondent has revenue of \$35,500 per year available from the amortization expense and another \$26,000 that will be available as income (after considering the one-time payment recorded as salaries and wages to his girlfriend for 2018) from the Chilliwack company. I also conclude that his income from the Chilliwack Holdco will continue to accrue at the same rate going forward.
- [207] I accept the claimant's assertions that the respondent received unexplained cash deposits to his accounts in 2015 of \$67,628; in 2016 \$18,534 and 2017 \$47,941. I am not able to conclude that these unaccounted for deposits constituted income over and above repayment of shareholders loans or other recorded sources. Conversely, I cannot conclude

that these unaccounted for deposits were not income from sources such as cash received directly by the respondent for work performed by his company and not recorded in the records. On this point, the respondent has failed to prove that Mr. Justice Cole's imputation of income was no longer applicable to his current and most recent income.

[208] In summary, I excluding unaccounted for deposits to his accounts the respondent's income at a minimum was follows:

Respondent's Income

Line 150 Income

Company Related Income

Other Amortization and benefits

Total Income for Year

2015

96,647

19,429

6,050

116,726

2016

77,212

19,429

32,046

128,687

2017

97,456

19,429

66,435

183,320

2018

Not filed

19,429

77,826

97,255

[209] I find that the respondent's income available to pay spousal support for 2018 and ongoing includes \$61,563 from Chilliwack Holdco in addition to his other sources of funds.

[210] The respondent's 2006 F8 financial statement indicated the respondent's line 150 income at \$89,906. Mr. Justice Cole noted that the defendant was claiming total income of \$70,000 including rent received on the industrial road property and \$32,500 as employee of Williams roofing. Nevertheless, the Court found there was an ability to generate substantially larger sums of money by doing work for cash or taking trades in return for work which he does not declare as income. He noted the defendant lived rent-free and the company covered all his taxes on the property he occupies above his business. In the result the Court said it was satisfied that Mr. Williams had "the capacity to earn a minimum of \$150,000 a year and I input this income accordingly": see para. 120. On that basis, spousal support was set at \$4500 per month. Following the appeal and the settlement, the claimant agreed to accept \$2700 per month in spousal support commencing February 2, 2010 increasing to \$4500 per month on the sale of the former matrimonial home. Thus, her spousal support did not increase to \$4500 until 2015; this was five years after the 2010 settlement agreement was made.

What is the Claimant's Income from July 2015 to December 2019?

The Claimant's Income

[211] Mr. Justice Cole imputed an income to the claimant at \$6000 per year. He said that she had taken some retraining but her marketable skills were few and her income going forward would be nominal. The respondent contends that the claimant's income should be imputed at \$16,800 per annum based on a gross rental income of \$18,000 per year and because of an inflated allocation of Hydro to her tenant.

[212] Not including spousal support, the claimant reported income of \$7,766.40 in her F8 financial statement. Her line 150 income was \$6,049 for 2015 and \$22,545 for 2016, including \$21,600 spousal support. The claimant filed an F8 financial statement sworn October 16, 2018. On her 2017 tax return she reported line 150 income at \$45,163 that was comprised of \$45,061 of spousal support paid by the respondent. She provided no receipts concerning rental income or rental expenses nor any income receipts. She said her rental income for 2018 was \$18,000 per year, from which she subtracted \$10,233 for expenses.

- [213] Although the claimant appears to charge mortgage expenses, taxes, telephone and cable as rental expenses, I am not satisfied that for the purposes of seeking spousal support that all those expenses are appropriate deductions from income. Absent tenants the respondent's expenses for taxes, insurance and services and levies would be paid. The actual expenses solely attributable her tenants would include some hydro, gas, house repairs and maintenance.
- [214] The claimant said that her current tenant was vacating the premises and she was not confident about finding a new tenant. There was no evidence suggesting the claimant would not find a new tenant nor what rental income she might receive. I am approaching the question of the claimant's income based on her historical experience in renting her suite.
- [215] She has declared assets of \$1,170,500, including \$1,129,000 for her residence. She has \$40,000 in savings and will likely earn some return on that money; I will assume she will earn \$1,400 per month which is higher than the \$6,000 per year imputed to her in 2008.
- [216] I am satisfied that the claimant's income will be \$16,800 per year and I impute income to her of that amount.

Has there been a Significant Change in Circumstances?

- [217] As set out above, the respondent has described multiple physical health issues he claims impaired or interfered with his ability to work between 2010 and early 2018.
- [218] The claimant rejects any suggestion by the respondent that his ability to work and generate income changed materially between 2010 and 2018. Nevertheless, the claimant concedes that after February 2018 the respondent's circumstances were materially altered and reconsideration of the spousal support amounts was appropriate. She recognizes that the claimant is now 62 years of age and is winding down his business and seeking to sell several of his properties. I am prepared to accept that concession from the claimant and will address the question of the amount of ongoing spousal support if any and consideration of a lump sum payment below.
- [219] The first challenge in this case is to determine whether the respondent has proved a significant material change in circumstances including a reduction in his income available to pay support after August 2015.
- [220] The parties provided no information concerning their negotiations in 2010 to assist in determining what was meant in the settlement agreement by "a significant material change in circumstances". It may be that the parties contemplated a reference to s. 164(5) of the FLA which addresses material changes in circumstances in agreements.

- [221] Recently, the phrase "significantly unfair" in the context of an FLA claim for unequal division of property was considered by the Court of Appeal; the Court confirmed that under the "significantly unfair" standard there must be a higher threshold of unfairness before judicial discretion to reapportion is engaged: see *Venables v. Venables*, 2019 BCCA 281 at para. 91.
- [222] In *Morey v. Morey*, 2017 BCCA 439, the Court concluded that assessments of changes in circumstance where consent orders are based on agreements are the same and once changes have been established, the court should vary the terms in to reflect the change and not conduct a de novo hearing of the support claims:
- [26] The fact that the judgment under appeal upends the order consented to by both parties is not in and of itself a basis for reversal. The chambers judge recognized that the assessment of change of circumstances is not different for consent orders that are based on agreement of the parties than for orders imposed on the parties. He cited *L.M.P. v. L.S.*, 2011 SCC 64 for this proposition:
- [46] The examination of the change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement as for one that does. A general statement that the agreement must be accorded "significant weight", even though its implications in a concrete case are unclear, in effect raises the threshold necessary to establish a "material change" under s. 17 when there is an agreement, and emphasizes legal certainty and finality at the expense of the statutory requirements of s. 17. Such a result is reminiscent of the "clean break" approach of the *Pelech* trilogy, rejected in *Moge* and *Miglin* because it was held to be inappropriate in the context of the current Divorce Act.
- [50] In short, once a material change in circumstances has been established, the variation order should "properly reflect [the objectives set out in s. 17(7),... [take] account of the material changes in circumstances, [and] consider] the existence of the separation agreement and its terms as a relevant factor" (*Hickey*, at para. 27). A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s.15.2 of the Divorce Act.
- [Emphasis added.]
- [223] The 2008 order is presumed to have been correct and will not be lightly interfered with on a variation application; thus the respondent was obliged to establish that his income for support purposes was at the levels described in his argument, and by implication the imputed income set in 2008 was incorrect.
- [224] Any changes to the support obligations must reflect the significant change in circumstances that have occurred since the 2008 order and 2010 settlement. The issue to be resolved is not a de novo inquiry into the respondent's spousal support obligations.

- [225] There is a substantial onus (a heavy duty) on the person asking for a reduction or a cancellation of arrears to show that there has been a significant and long lasting change in circumstances.

Conclusion: No Material Change 2015-2018

- [226] The respondent provided little evidence concerning changes in his business activities or performances from the 2008 order to 2018 other than financial statements concerning those businesses. He provided evidence concerning his earned income over that time and his corporate incomes but nothing in his testimony persuaded me that his business affairs had deteriorated over that time. The taxable incomes he reported were higher than those he testified to at the 2008 trial and by 2018 there was significant growth in his assets. He provided little evidence concerning the growth in value of his equities properties and other assets and whether they accrued due to market appreciation or other reasons. Thus, I infer that his improved financial circumstances from 2008 to 2015 and 2018 most likely resulted in part from surplus income he earned but did not disclose.
- [227] There is a heavy burden on a payor spouse seeking a reduction in spousal support obligations based on "significant changes of circumstances" and in the instant case the respondent failed to provide any adequate evidence concerning changes to demonstrate "significant material changes" in his overall financial circumstances: see Trang and Lessard.
- [228] He did not adequately address the basic questions posed in Trang and necessary to support a claim of significantly changed circumstances.
- [229] I am satisfied that, taking into account the respondent's line 150 incomes, the income available from his corporations, additions to income based on amortization expenses, and additions to income based on the respondent's personal benefit from corporate expenses that his circumstances have not been significantly reduced between 2015 and 2018. I also find he has accumulated his assets from which he could earn a significant return, which demonstrates significant improvements in his means and circumstances. Finally, the uncertainties concerning monies received by the respondent from 2015 to 2018 lead me to conclude he was more likely than not receiving unrecorded income and that his actual income was equal to or exceeded the income imputed to him in 2008.
- [230] The respondent did not contend the claimant's circumstances had improved significantly nor that she was no longer entitled to spousal support.
- [231] On the basis of all of this evidence I am not persuaded the respondent has demonstrated a significant change in circumstances from 2010 to 2018 and I dismiss his application to vary or change the amount of spousal support during that time.

[232] The claimant does not seek any variation or increase in spousal support based on significant changes to the respondent's actual income since 2015. Thus, in the final analysis I confirm the respondent's obligation to pay the claimant \$4500 per month up to and including February 2018. Thus, up to and including August 2018 the respondent's arrears of spousal support are based on the 2008 settlement agreement amounts of support payable.

Termination of Spousal Support

[233] On the question of terminating the claimant's entitlement to spousal support, I take into account the objectives described in s. 161 including the need to recognize economic disadvantages to her arising from the relationship and its breakdown, to apportion financial consequences arising from childcare, and to relieve economic hardship arising from the breakdown of the relationship.

The Parties' Circumstances

[234] I accept that the conclusions reached by Cole J. took into account the claimant's disadvantages arising from the abuse in their marriage and the subsequent breakdown of that relationship. She undoubtedly cared for the children during their infancy while making contributions to the respondent's business.

[235] In the circumstances, it is not appropriate for the court to conduct a de novo assessment of the claimant's ability to work. There is nothing in the trial reasons indicating the claimant was expected or able to seek employment. The history of her marriage to the respondent indicates she was victimized and dependent entirely on the respondent. Throughout the pre-separation years she maintained the home and raised their children and it is not surprising she has not been able to improve her economic circumstances except through renting a portion of her residence.

[236] Moreover, the respondent did not oppose the granting of a spousal support order. I am satisfied that, based on Cole J.'s reasons, there was a solid foundation that the claimant was entitled to compensatory and non-compensatory support. Before marriage the plaintiff had worked as a waitress and thereafter worked in the old WRD business. She was entirely dependent on the respondent for financial support while at the same time being the target of his violent and physically abusive behavior.

[237] The respondent provided little evidence concerning the claimant's role in the marriage or his businesses prior to separation. The claimant dropped out of school when her son was born at which time she testified they began living together. She eventually completed her high schooling but cared for the children while at the same time performing duties for the respondent's business. She would pick up materials and transport employees and the respondent to job sites. On occasion, she would attend job sites with the parties' children; she would drive the respondent to places where he was doing estimates. During the marriage the parties were breeding dogs, owned three houses and worked together.

[238] She did not receive income from the respondent's businesses; he "gave the plaintiff \$5 to \$20 periodically": see para. 8. Later, she was paid some wages from the company. Given his controlling behaviors it appears that she had little opportunity to advance or improve her access to work opportunities given the nature of their relationship and her intermittent involvement in the businesses.

[239] Mr. Justice Cole described the basis on which the claimant was entitled to support. At para. 63 he said:

I have taken into consideration the length of the marriage, the roles played by the parties in the marriage, and more particularly, that the plaintiff was responsible for the raising of the children, her lack of marketable skills and the fact that she was only to receive \$25,000 as her share of the family assets and limited spousal support

[240] Compensatory support orders are meant to provide the recipient a standard of living equivalent to the standard enjoyed during the relationship.

[241] In the absence of any other evidence, I am satisfied that the plaintiff's entitlement to support in 2008 was based on compensatory and non-compensatory grounds. When a large discrepancy between the incomes of a payor and payee spouse exist, compensatory support should not be eliminated while the parties' standards of living are dramatically different. This is so, particularly in light of a long marriage and significant disparate standards of living between the parties: see *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 59 -61; *Morigeau v. Moorey*, 2015 BCCA 160.

[242] The claimant's circumstances did not improve after 2008 and her physical condition is, much like the respondent, compromised. She has a long term need for methadone. She suffers from rheumatoid arthritis in her hips, hands and knees. She needs an ankle repair due to arthritis. Her legs differ in length and she walks with a limp. She is currently 62 years of age and it is most unlikely that she will ever be able to enter the workforce or become self-sufficient.

[243] I am persuaded that the disadvantages suffered by the claimant during the marriage coupled with her role as caregiver for the children warranted an award of spousal support. Her circumstances have not significantly changed or improved. There has been no practical opportunity for her to become more self-sufficient and she continues to suffer hardship from the breakdown of the marriage.

[244] The respondent argued that his retirement was an unforeseeable event at the time of the settlement agreement. He contends that without a variation in the support order, the claimant will be "double dipping" because the parties had divided the family assets and it would be unfair to require him to dissipate his capital in order to pay spousal support: see *Boston*. I have rejected this contention above.

- [245] He also contends that the claimant received \$1,100,000 in family assets and invested \$760,000 in her new family home. Thus he contends there is a shortfall of \$550,000; he argues the claimant should be required to generate income from that sum and should be available to assist in her self-sufficiency.
- [246] The claimant's evidence did not support the respondent's assertion that she received \$550,000 after sale of the matrimonial home. Although the order was made in 2008 and the settlement agreement signed in 2010, the home did not sell until 2015 and then she received only \$960,900. The total received by the claimant was reduced by way of an agreement with the respondent that part of the payment she was to receive go to their daughter; each party gave \$40,000 to their daughter to purchase a house.
- [247] The claimant used \$960,000 to purchase her house; the purchase price was \$1,129,000 and, after obtaining a \$170,000 mortgage, she spent the entire \$960,000 to acquire her home and did not retain any funds after her purchase.

The Respondent's Retirement

- [248] As indicated above, the respondent argues his anticipated retirement was unforeseen at the time of the settlement agreement and that more recent changes in his businesses and plans to retire support his contention that spousal support should be ended in December 2019.
- [249] Retirement of a payor under a maintenance order usually results in a significant reduction of income; that is so in this case. Courts are not guided by legislation to enquire into the circumstances of retirement. Courts have no power to compel people to work but should, in the interests of justice, refuse to consider a reduced income resulting from retirement if a payor spouse has intentionally put him or herself out of the money in order to frustrate a support claim. Any such deliberate self-induced impecuniosity constitutes cannot be sanctioned.
- [250] When voluntary retirement is advanced as a reason for seeking a reduction in maintenance, a court must consider the circumstances of the retirement carefully and ensure that the payor has not been prompted by deceit to avoid support orders.
- [251] Because I accept the claimant's concession concerning ongoing support I do not need to consider the implications and consequences of the respondent's plans to retire at this time: see *Fehr v. Fehr*, 2006 BCSC 1440.

Conclusion: There is a Continuing Entitlement

- [252] In view of the length of the parties' relationship (25 to 31 years), the claimant's age, her skills, abilities, the respondent's treatment of the claimant during the relationship and the objectives of the FLA, satisfactory compensation has not been received by her. Thus, I find the claimant is entitled to ongoing support on a compensatory basis and needs basis.

- [253] The respondent's assertion that he is winding down his business with the intention of retiring lacks the finality usually happening when a person retires. The respondent left the door open, as it were, when he said he might continue to do a few projects. Nonetheless, the claimant accepts that the respondent's financial productivity is lessening and she seeks a lesser sum than was ordered.
- [254] I find that the 2008 support order was intended to provide indeterminate subject to the agreement that the variation application now before the court. In light of my conclusions concerning the respondent's ongoing income expectations and his overall financial circumstances, I dismiss his application to terminate the claimant's spousal support; it will remain an indeterminate order.
- [255] The respondent argued that ongoing spousal support from 2018 should be calculated against his incomes of \$59,004 per annum or \$100,043. These calculations do not take into account his resources available from Chilliwack Holdco or resources from his other companies nor any economic return on his other assets.
- [256] The respondent's business WRD 2015 is currently for sale as are two of his other properties. If, for example, he was able to invest sale proceeds from those properties or lease the properties it is conceivable he could earn interest income of \$105,000 each year in addition to the other income he will earn from the Chilliwack Holdco (including amortization expenses) and his other sources well into the future.
- [257] The claimant submits that her continuing entitlement to support should be based on an income to the respondent at \$100,000 per year. I am satisfied he will easily earn \$100,000 per year and taking into account the claimant's imputed income of \$16,800 per year support at the low end (as was adopted by Cole J.), would be \$2,600 per month.

Lump-sum/Quantum of ongoing Spousal Support

- [258] The claimant is seeking a lump sum award based on the respondent's refusal to pay ongoing spousal support, her need for a clean break and to eliminate future court applications.
- [259] Although the respondent testified that he was winding down his business with a view to retirement without prospects of future earnings from his own work, WRD 2015 continued to earn revenue in 2018. From May 1, 2018 to October 9, 2018 the company earned revenues of \$520,064. Between January 2018 and March 2018 the company earned approximately \$220,000. I do not have a reliable estimate of the measure of the respondent's 2018 Line 150 income or the income from his corporations. This difficulty is accentuated because all financial statements for 2018 adopt a year end between February and August. Of particular significance is that Chilliwack Holdco year-end is February 28.

- [260] The claimant contends that the respondent's income for support purposes should be assessed at \$100,000 per year; in light of the evidence this is a generous concession on the claimant's part. She contends a lump-sum of \$650,000 ought to be awarded for spousal support.
- [261] The respondent suggested that his income for 2018 ought to be assessed at \$59,004 comprised of some employment income, rental income, his WorkSafe BC pension, adjustment for meals and entertainment and vehicle use. As set out above, I find that the respondent's income is and will continue to be at least \$100,000 per year. I was not invited to assess the claimant's entitlement to ongoing support based on income exceeding \$100,000.
- [262] I am satisfied that *Davis v. Crawford*, 2011 ONCA 294 [Davis] and *Rees v. Rees*, 21 B.C.L.R. 188, 1980 CanLII 573 (S.C.) are apposite to this case. Davis was approved by the Court in *Parton v. Parton*, 2018 BCCA 273 at paras. 46 to 48.
- [263] Madam Justice Fleming considered the issue of lump-sum support in *Zhang v Sun*, 2016 BCSC 1418. In that case, the court took into account that the respondent had adequate assets to fund a lump-sum award and the Court had little confidence that he would pay the spousal support on an ongoing basis. She based the lump-sum award on consideration of a median between low and mid-range spousal support suggested by the Guidelines.
- [264] In this case there is a real risk that periodic support would not be paid by the respondent; he has refused to pay support since 2018 and steadfastly insisted he wanted to pay a lump-sum to the claimant rather than continuing monthly payments. He has defied the order to pay ongoing support and his inability to honestly and clearly disclose the sources of his bank deposits are significant. I have no confidence that he will pay support on an ongoing monthly basis.
- [265] I find that such an award will not redistribute property in the guise of support and, given the respondent's failure to pay support for an extended period of time, and desire to pay lump sum, a lump-sum is warranted.
- [266] I accept the claimant's submission that the respondent's spousal support obligation be measured at \$2,600 per month commencing August 1, 2018 and that amount will be converted to a lump-sum payment of \$566,722 subject to further submissions on the issues raised by the respondent concerning appropriate tax deductions and discount rates.
- [267] The parties' further submissions regarding the quantum of the lump-sum payment should also address the parties' entitlements to Canada pension payments, old-age security payments and guaranteed income supplements might have in the future. The effects of these benefits may significantly affect the quantum of lump sum spousal support and argument is necessary.

Conclusion

- [268] The application for an order retroactively varying spousal support is denied; the respondent is to pay the claimant \$129,200 in spousal support arrears. Subject to further submissions on the issue of the amount of lump sum support ordered, the respondent will pay \$ 566,722 for her support.
- [269] The application for an order terminating ongoing spousal support is similarly denied; the respondent is to make a lump sum payment to the claimant. The parties will have liberty to address costs; absent further submissions within 30 days the claimant will have her costs.

"Armstrong J."

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