
CANADA / JUDGMENT

Young v. Barnicott

2020 BCSC 1869

COURT

Supreme Court of British Columbia

DECIDED

3 December 2020

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2020 BCSC 1869 Young v. Barnicott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Young v. Barnicott,

2020 BCSC 1869

Date: 20201203

Docket: E161963

Registry: Vancouver

Between:

Lesley Ann Young

Claimant

And

Donald Leonard Barnicott

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for Claimant:

M. Campbell

Counsel for Respondent:

R. Huinink

Place and Date of Trial:

Vancouver, B.C.

August 4-7, 10-14, 17-20, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 3, 2020

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Introduction and Issues

- [1] The issues for determination in this family law trial are the division of family property and family debt, and the terms of spousal support.
- [2] The parties own two main assets. Both assets are family property under s. 84 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The first asset is a 4.5 acre property in Langley (the "Farm") registered in the name of the claimant. The Farm includes the former matrimonial home, a barn, a kennel, a horse riding ring and paddocks, and a gravel parking area. The claimant lives in a suite in the home and earns her income from various activities on the Farm. There is a mortgage on the Farm which is family debt pursuant to s. 86 of the FLA. The second asset is an incorporated business, Western Tree Services Corp. ("WTS"), the shares of which are wholly owned by the respondent. The respondent is a certified utility arborist and earns his income from WTS. WTS owes substantial debt.
- [3] The claimant seeks orders that she retain the Farm in her name, the respondent retain WTS in his name, and that she receive a lump sum spousal support award rather than periodic spousal support payments. She argues that the present value of a lump sum award is greater than the respondent's interest in the Farm, which she will set off against the award. There is no claim for retroactive spousal support.
- [4] The respondent seeks orders that the Farm be sold with the equity used to pay the family debts and debts of WTS, and the remaining equity to be divided equally between the parties. The respondent argues that WTS has a negative value. The respondent acknowledges the claimant's present entitlement to spousal support but opposes lump sum support and seeks an order for periodic support with a review provision in two years.
- [5] The values of both the Farm and WTS are in issue. The financial records of WTS, in the words of the jointly retained chartered business valuator, have "pervasive errors and irregularities". There are substantial debts owed by WTS to the Canada Revenue Agency ("CRA") and another creditor. The claimant alleges that since separation, the respondent has "run up" these debts, thereby decreasing the current value of WTS. The claimant argues the valuation date of WTS should be the date of separation. The respondent alleges these are debts that existed prior to the separation, and argues the valuation date should be the date of trial.

- [6] The incomes of the parties are in dispute. Neither party, nor WTS, has declared all of their incomes to the CRA in past years. The irregular accounting practices of WTS are bound up with this issue. Both parties also have significant health issues.
- [7] The specific factual issues for determination prior to addressing the ultimate issues are:
- a) What is the value of the Farm?
 - b) What income has the claimant earned in the past?
 - c) What income is the claimant likely to earn if she retains / does not retain the Farm?
 - d) What income has the respondent earned in the past?
 - e) What income is the respondent likely to earn if he continues / does not continue to operate WTS?
 - f) What is the value of WTS?
 - g) What are the family property and family debts?
- [8] I will review the evidence relating to each of the above issues and make findings of fact within those headings, before turning to the ultimate issues of spousal support and division of property and debts.

Overview of relationship

- [9] The claimant is 55 years old and the respondent is 51 years old. The parties met in late 1999 and began cohabitating in 2000. At the time, the claimant had three daughters, then aged 10, six, and five. The parties married in August 2001. Neither party had any significant assets or debts when they entered into their relationship. There is no claim for excluded property under s. 85 of the FLA, other than an RRSP owned by the claimant.
- [10] At the beginning of their relationship, the parties lived in rented homes. They purchased a condominium in North Vancouver which they rented to others. The respondent was working as an arborist and began WTS in 2005. The claimant was working part time as a medical office assistant ("MOA").
- [11] In 2007, the parties separated. They sold the condominium and the net proceeds of approximately \$100,000 was divided equally. After separation, the parties saw each other frequently. After about 18 months, the parties reconciled. Neither party brought their \$50,000 back into the family upon reconciliation, nor is there a claim with respect to it.
- [12] In 2009, the parties purchased a home on Lynn Valley Rd. in North Vancouver for \$600,000. They put the property in the claimant's name only because of the respondent's credit rating, and to differentiate between WTS and their home. The respondent stated they hired a mortgage broker and created a T4 for the claimant from WTS for \$100,000 to obtain financing. The claimant was not being paid \$100,000 per year from WTS. The deposit of \$18,000 and another \$100,500 came from WTS. There is no evidence these funds were repaid

to WTS or declared as income by the parties at that time. The balance of the purchase price was funded with a \$480,000 mortgage.

- [13] In 2011, the parties sold the Lynn Valley Rd. home for \$750,000 and purchased the Farm for \$890,000. The down payment for the Farm was \$45,000 and came from WTS. There is no evidence the down payment was repaid to WTS or declared as income by the parties at that time. The parties used the net proceeds from the sale of the Lynn Valley Rd. home and obtained a mortgage for \$704,000 to fund the remainder of the purchase price. The Farm was again put in the claimant's name only. After they purchased the Farm, the parties made various improvements to the property, which were paid for by WTS. Again, there is no evidence those amounts were repaid to WTS or declared as income by the parties at that time.
- [14] The claimant and her daughters were interested in horses and equestrian events. The claimant grew up with horses, and when she was a young adult, was a horse trainer. Starting in about 2008, the parties purchased their first horse and by 2009 owned three horses which they boarded at a stable in North Vancouver. One of the claimant's daughters is a talented rider and regularly attended equestrian competitions. When the parties moved to the Farm, they moved their horses there, and the claimant began boarding other horses on the Farm for income. The claimant stopped working as an MOA and began managing the Farm, and the respondent continued to operate WTS.
- [15] In June 2016, the parties separated, the respondent moved to a different location, and the claimant remained living on the Farm.
- [16] Starting in 2017, the respondent has caused WTS to pay the claimant \$1,000 bi-weekly. There have been times when the cheques did not clear. Because these payments were not made pursuant to a written settlement agreement or a court order, the claimant did not declare this as income. It appears WTS expensed these payments as "rent".

What is the value of the Farm?

- [17] The parties agree the appropriate date of valuation for the Farm is the date of trial: s. 87 of the FLA. The current outstanding balance on the mortgage on the Farm is approximately \$567,500. The mortgage payment is \$1,435 bi-weekly and the mortgage is in good standing. Since separation, the claimant has paid approximately \$12,000 in outstanding property taxes on the Farm, and there is currently another approximately \$4,500 in property taxes owing.
- [18] Mr. Paul Ellis, a certified residential appraiser, was jointly retained by the parties. In his opinion, the fair market value of the Farm as of July 20, 2020 is \$1,490,000. The respondent believes the fair market value is higher, approximately \$1,750,000, but there was no admissible evidence of this.

- [19] I find the fair market value of the Farm as of the date of trial is approximately \$1,490,000, the mortgage is about \$567,500, outstanding property taxes are about \$4,500, and the resulting net equity is approximately \$918,000.

What income has the claimant earned in the past?

- [20] The claimant has four sources of income from the Farm: horse boarding; rental of the gravel area for recreational vehicle ("RV") parking; rental of the home's upper suite; and dog breeding.

Horse Boarding

- [21] While the parties cohabitated, the claimant collected revenue from the boarding of horses on the Farm. Full board for a horse was \$450 to \$500 per month. The claimant boarded up to 10 to 12 horses, less the three horses they owned. At the time of separation, the claimant was boarding four or five horses. The claimant's tax returns going back to 2011 show that she did not declare any of this income prior to 2016. After separation, the claimant began recording and declaring her income from horse boarding. There are currently 10 horses on the Farm. Full board for a horse is now \$590 per month.
- [22] Two of the claimant's daughters have horses on the Farm. One daughter rents a suite in the home on the Farm and has two horses. This daughter takes care of her own horses and contributes toward the cost of food. The other daughter has one horse and contributes to the cost of food but does not pay board for the horse.

Rental of gravel area for RV parking

- [23] The claimant rents out the gravel parking area on the Farm for RV and truck storage. Prior to separation, this area was used by WTS to store some of its equipment, and although previously WTS claimed a rent expense, corresponding income was not declared by the claimant. The claimant now has between four and five vehicles parked there at an average revenue of \$80 per month each. She has not declared this income on her tax returns.

Rental of the home's upper suite

- [24] The claimant receives income from renting the upstairs suite in the home on the Farm. About a year after purchasing the Farm, the parties created a suite in the lower floor of the home. After separation, the claimant used insurance money from a flood caused by an open tap, to renovate the lower suite and moved into it. Commencing January 2017, she rented the upper suite for \$1,900 per month. When those tenants left, she tried to rent the upper suite without much success. In November 2018, one of her daughters began renting the suite for \$1,450 per month. The claimant's ex-husband from her first marriage, Mr. Patrick Young, now also lives in that suite with their daughter. Previously, Mr. Young rented a trailer on the Farm for at least a year at \$400 per month. The claimant has not declared any of this income on her tax returns.

Dog breeding

[25] Finally, the claimant has bred dogs and attends dog shows. She is not a certified dog breeder, but states she has earned respect from breeders because she has done everything correctly. She states this is a hobby and overall it has not been a money making business as the expenses were more than the revenue in previous years. However, she has a website and last year she declared income from dog breeding on her tax return. She does not know if she will continue this because of the uncertainty of whether she will be able to keep the Farm.

Conclusions

[26] I find the claimant's income has been as follows:

2013

2014

2015

2016

2017

2018

2019

Horse boarding

11,000

11,000

11,000

11,018

11,528

11,633

22,640 (incl. dog breeding)

Parking rental

4,320

4,320

4,320

4,320

4,320

4,320

4,320

House rental

$1,900 \times 12 = 22,800$

$1,900 \times 6$ (est.) plus $1,450 \times 2 = 14,300$

$1,450 \times 12 = 17,400$

Trailer rental

$400 \times 2 = 800$

$400 \times 10 = 4,000$

Dog breeding

Incl. in above

Total

15,320

15,320

15,320

15,338

39,448

34,253

44,360

[27] I have estimated the undeclared horse boarding income from 2013 to 2015 based on the average declared income from horse boarding from 2016 to 2019. I have estimated the undeclared income from the rental of the parking area to WTS for 2013 to 2015 based on the estimated income received from 2016 to 2019. However, I note that the amount claimed by WTS for rent expense and allegedly paid to the claimant during the former years was much larger than these amounts (e.g. nearly \$34,000 in 2015). The amount above market rent has been added back to WTS income (see below). I have not included any income for dog-breeding for 2016 to 2018 because the claimant said expenses exceeded revenue, although there were no clear records of this. The rental revenue of the home does not include any expenses associated with that rental. I have not grossed-up amounts to take into account that taxes were not paid on certain income (see discussion below under respondent's income).

- [28] Prior to separation both parties also received the benefit of personal expenses paid by WTS, which were not at the time declared as income by the parties, but instead recorded as an amount owed by the respondent to WTS. I will address this under the respondent's income.

What income is the claimant likely to earn if she retains / does not retain the Farm?

- [29] The claimant testified she was diagnosed with rheumatoid arthritis at age 30 and since then has been under the care of a rheumatologist. The arthritis causes swelling and inflammation of her joints, deformity to her toes, and pain particularly in her wrists on a daily basis. The severity of the symptoms varies from day to day. Some days it is "okay" and other days it is "extremely painful" and it is difficult for her to get going in the morning. If there is a flare-up in her wrists, she cannot do any heavy lifting. The claimant also testified she has severe pain down one leg, the cause of which is currently under investigation, and is possibly a disc problem in her spine.
- [30] Dr. Wendy Lovelace has been the claimant's family physician since 2002. She testified as a fact witness. She described the claimant's conditions as inflammatory arthritis and psoriatic arthritis. She has observed the claimant's symptoms have become worse over time. On physical examination, the claimant has swelling of the fingers at some of the joints, the wrists, the bases of the thumb, knees, and all joints of the toes. She has observed the claimant has difficulty sitting down and standing, walks with a limp, and does not stand up straight.
- [31] In the mid 1990's the claimant took the first half of a course to become an MOA. She worked at a medical clinic until sometime between 2008 and 2010. For the first few years she worked three to four shifts per week, six hours per shift. She said that over time she reduced her employment from three to two, and then to one shift per week because she was having a lot of pain. She had to handle heavy binders and this bothered her wrists.
- [32] While acknowledging the claimant always has had pain and complained of pain in her wrists from lifting binders at work, the respondent noted that the decline in the claimant's work as an MOA coincided with her increase in work at a stable where they were then boarding their horses. The respondent stated that at the time they purchased their first horse in about 2008, the claimant was working between two and four shifts per week as an MOA. The parties were still living on Lynn Valley Rd. and the horse had to be boarded at a stable. The claimant and her daughters would work at the stable on Friday nights to reduce the cost of board. They fed and watered the horses and cleaned the stalls. The claimant did not complain about doing the work. When they owned three horses, the claimant worked more at the stable to offset the cost.

- [33] Once the parties bought the Farm and started boarding horses there, the claimant did the work required, and would get help from her daughters and a Farm hand. The respondent's work frequently took him away from home. The claimant primarily managed the Farm, although the respondent did chores on the Farm when he was available. The respondent acknowledged the claimant always had some degree of pain, and when she had a flare up the pain was worse, but chores had to be done.
- [34] There are daily tasks that must be done on the Farm. The horses must be fed four times per day, watered and put out and taken in from the fields, and their stalls cleaned. Bi-weekly or weekly, the riding ring must be harrowed using a tractor, and the tractor must be used to take away the horse dung. The claimant stated she is able to clean stalls and feed the horses but she gets help when needed from her daughter and brother-in-law when she has a flare-up. She does not harrow the riding ring because she can't lift the harrow onto the back of the tractor. When her wrist pain flares, she is not able to fill the wheelbarrow with manure or pull anything heavy. The claimant adopted evidence at her examination for discovery where she described her work day which starts at 7:30 a.m. with feeding and turning out the horses, and ends at 10:00 p.m. with feeding at night, but she has breaks in between.
- [35] The claimant has not considered any other employment or training since separation. She does not think she is fit to work at this time. She is waiting for an imaging test to determine the source of her leg pain and does not know what the treatment will be. She agrees she has a well developed skill set for horses. Many years ago she was a horse trainer, but says that is a young person's job. When it was put to her that nothing prevents her from working several days a week at another stable, she said she did not know. The claimant testified that the physical requirements and hours of a job will limit her ability to go back to a full time job outside the Farm. She does not walk well, and is sore. In addition, she has difficulty getting up and moving and this would limit her if the work started in the morning, and may prevent her from doing longer hours. She does have good days, but is concerned about committing to a job she may not be able to do consistently. Now, if she has a flare-up, she has family close by to help her with the Farm.
- [36] Mr. Craig Hennigar testified. He is married to the claimant's sister and they have four daughters. His wife and the claimant are close and his family is also involved in horse riding. They owned the other half of the horse purchased in 2009. They currently board one horse at the Farm and pay full board. Mr. Hennigar described the claimant as doing a terrific job of providing care for the horses. He and his family help out periodically on the Farm.
- [37] Mr. Hennigar was present on two occasions when the claimant renewed the mortgage on the Farm, and he does not think she had any trouble in doing so. He and his wife are happy to help the claimant financially, but he did not provide any details of how much funds they could provide the claimant. He has not had a discussion with the claimant of financing a buy out of the respondent's interest in the Farm. He and his wife do not have the ability to finance half the equity in the Farm.

- [38] The claimant argues she is capable of earning an income from the Farm of between \$30,000 and \$40,000 per year, which is more than she could earn full time at a minimum wage job. She argues that if the Farm is sold, at most she could earn about \$12,000 per year which is minimum wage for four days a week for four hours each day. The respondent argues the claimant could work at another stable or as an MOA (after re-training), and is capable of earning an income outside the Farm of \$30,000 in the next year, and \$40,000 thereafter.
- [39] I find the claimant suffers from a form of arthritis that causes her pain in her joints, mostly her wrists and feet. She also has an un-diagnosed problem causing pain down one leg. I accept the claimant has daily pain and that sometimes mornings are difficult for her and she has flare-ups. Based on the claimant's evidence, I find the claimant presently has the ability to work on the Farm and manage it with some assistance, despite the pain which limits some tasks she can do. I also find that she prefers to work with horses. This was her chosen occupational field prior to becoming an MOA, and one she chose to return to when the parties bought the Farm. I find that her daughters' and her own interest in horses, was a factor in the purchase of the Farm. She has worked on the Farm and managed it since the parties purchased it in 2011. It provides her with an income and a lifestyle she and her daughters enjoy.
- [40] To the extent that the claimant's condition may become worse over time, I find this will decrease her ability to do the heavier chores on the Farm. It is also a factor in considering whether lump sum spousal support should be ordered. The claimant seeks a lump sum so she can keep the Farm. If she cannot work on the Farm, then it is an expensive investment that would not provide her with adequate income if she had to hire someone to do the work she is presently doing.
- [41] I find that if the claimant retains the Farm and is able to continue to work on it without more assistance than she is presently receiving, she has the present ability to earn \$40,000 per year. Assuming that income will be appropriately declared in the future, I find that this is her current income pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The calculation of Guidelines income is the starting point for the Spousal Support Advisory Guidelines [SSAG] which are used as an aid in determining appropriate spousal support. Pursuant to s. 17 of the Guidelines, the court may consider the pattern and fluctuation of income over the past three years to arrive at the fairest determination of the spouse's income.
- [42] There was no expert medical or vocational opinion evidence regarding the claimant's ability to work outside the Farm. No evidence was given of whether jobs are available at other stables and if so the wage rate, or the wage rate of an MOA. Based on the claimant's description of what she is and is not able to do on the Farm, I find the claimant is not completely disabled from being employed outside the Farm. I do not accept that she could not work part time in a more sedentary job. She works on a regular basis from 7:30 a.m. to 10:00 p.m., albeit with breaks, and doing tasks that require walking and some of which are more physically demanding.

- [43] I expect that if the claimant were to work as an MOA again, she would have to re-train. She is now 55 years old and has health conditions that make her less competitively employable. Considering minimum wage and what I find is an ability to work half time, I find the claimant's earning ability outside the Farm is presently approximately \$15,000 per year. If the Farm is sold, that will be her current Guidelines income for the purpose of spousal support, after a period of adjustment.
- [44] Finally, I find that on the claimant's current income, even with periodic spousal support, she cannot afford to live on the Farm. She has been able to do so by not declaring certain income and because she has received \$1,000 tax free every two weeks (although not consistently) from the respondent through WTS. The mortgage payments, property taxes, and insurance total \$40,800 per year. The claimant's F8 financial statement indicates nearly \$80,000 in living expenses at the Farm. Evidence from her examination for discovery was adopted by her:

Q; Can you really afford to live there?

A: Can I really afford to live there?

Q: Yeah

A: Not in the current situation I'm in, no.

Q: Just can't find the money?

A: Not realistically. Not forever, no.

What income has the respondent earned in the past?

- [45] The respondent is a certified utility arborist ("CUA"), a certified BC faller, and a BC wildlife/hazardous trees assessor. The respondent started in the arborist business in 1997, working for private companies. From 2002 to 2005, he worked for the District of North Vancouver. He obtained the CUA designation on his own in 2004 while working for the District. He was let go from his job at the District shortly after he started WTS in 2005. He has operated WTS since that time.
- [46] WTS has earned revenue from two main sources. The first source is BC Hydro contracts to remove trees and foliage near power lines. Up until recently, when these contracts were tendered for bidding, they were for a specific project. The contracts would last from months, to on and off for a couple of years. In addition, WTS is an approved contractor for BC Hydro emergency work, which is primarily call outs for a few hours or up to two days, such as after storms. BC Hydro contracts require a CUA. The second source of revenue is residential work which may or may not require a CUA.
- [47] In 2018, BC Hydro changed its tendering process. Contracts were no longer tendered for specific projects, but for all work within a large area for three years, with a two year extension at the option of BC Hydro. For these projects, the contractor had to represent it

had a certain number of employees able to do the work. The respondent said WTS could not make that representation because it was not of that size. He has considered sub-contracting, but the work is less profitable. The result of this new tendering process is that the BC Hydro work for WTS has stopped other than for emergency calls. The respondent stated that the next time there will be tenders for which WTS will be able to bid, is in 2023.

- [48] Since WTS has not been able to do the BC Hydro work, the respondent has attempted to market WTS to realtors, construction companies, strata management companies, government ministries, and municipalities to get more business. He has been partially successful. WTS continues to do residential work.
- [49] WTS has heavy equipment. This includes two bucket trucks to lift a pruner to a height in a tree; and a chipper truck. For some jobs, it is impossible to use a bucket truck and manual climbing of the trees is necessary. The respondent described how he climbs a tree, with a harness and belt and a lanyard that goes around the tree. He wears boots with straps and spikes. He carries up a chain saw and rope. He said most tree climbers stop in their 50's although he has a friend who is 61 years old and still climbs but is very limited. The respondent has not thought of a plan for himself for the future but was hoping to move into management. Currently a good CUA will earn \$35 per hour, or about \$75,000 per year.

Accounting issues

- [50] The starting point in determining Guidelines income for the purpose of spousal support, is the line 150 income in the spouse's personal tax return. From there, the Guidelines permit or require various adjustments to be made. This case involves several of those adjustments, summarized below.
- [51] When a spouse is a shareholder, director or officer of a corporation, and the personal income of the spouse does not fairly reflect all the money available to the spouse for support, the court may include all or part of the pre-tax income of the corporation in the spouse's income: s. 18(1)(a). Income that is kept within the corporation for legitimate business needs is not included: *Hausmann v. Klukas*, 2009 BCCA 32, at paras. 30-32, citing *Kowalewich v. Kowalewich*, 2001 BCCA 450.
- [52] In determining the pre-tax income of the corporation, payments or benefits to or on behalf of persons who do not deal at arms-length with the corporation, must be added to the corporation's pre-tax income unless the spouse establishes the payments were reasonable: s. 18(2).
- [53] When income has been diverted, such as cash revenue, the court may impute income to the spouse: s. 19(1)(d).

- [54] When a spouse has failed to provide financial information when under a legal obligation to do so, the court may impute income to the spouse: s. 19(1)(f). Sections 22 and 23 also permit the court to draw an adverse inference if financial information is not provided, and to impute income. "The onus is on the party seeking to impute income to show on a balance of probabilities, on a rational and evidentiary basis, that income should be imputed.": *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at paras. 139-140.
- [55] The accounting practices of WTS have not been consistent. From 2011 to 2016, the financial statements were completed by two different accountants and management. From 2017 to 2019, a different accounting firm completed the financial statements. The 2019 financial statements are marked as a draft for discussion purposes only, and none have been audited. In addition, financial information is missing. There have been three court orders requiring the respondent to produce financial records of WTS. Important records were produced in the months or weeks before trial, or even at trial. Some financial records for past years were not completed until one or two months before trial, and even then, were subsequently restated. Although the tax returns of WTS were produced, there were no notices of assessment from 2016 to date in evidence, so it is not clear that they have actually been submitted and assessed by the CRA.
- [56] Ms. Patti Daum was jointly retained to opine on the fair market value of WTS. Ms. Daum is a chartered professional accountant, chartered accountant and chartered business valuator. She noted some of the difficulties with WTS's accounting practices. As stated previously, she described the financial information as having "pervasive errors and irregularities". The result is some measure of unreliability of the financial records. Ms. Daum was not retained to do a full audit or forensic investigation. I found Ms. Daum's report and testimony very helpful in explaining the accounting issues and valuation, and in being able to determine the personal benefits the parties received that were not declared as income at the time they were received.
- [57] The claimant denied any knowledge of the financial workings of WTS. The respondent appeared to have no detailed knowledge of general ledger entries or how expenses or withdrawals were recorded.
- [58] The claimant argues the respondent's current Guidelines income is between \$110,000 and \$175,000 per annum. The respondent argues it is between \$100,000 and \$110,000 per annum.
- [59] The evidence regarding WTS accounting practices can be divided into four main areas: pre-tax corporate income; personal expenditures deducted as business expenses; unrecorded cash revenue; and money withdrawn from WTS and not declared as personal income or a dividend.

Pre-tax corporate income of WTS

- [60] I find that all of WTS' pre-tax corporate income should be added to the respondent's income for the purpose of calculating Guidelines income. There was no evidence given by the respondent that this income was needed to be kept within WTS for legitimate business purposes other than about \$20,000 in capitalization required to covers ebbs in cash flow.

Personal expenditures deducted as business expenses

- [61] I have relied upon and accept the information in Schedule 6 of Ms. Daum's report and exhibit 4, where she has summarized the personal expenses that were charged to WTS. Ms. Daum cautions that she has made material assumptions and has not done a forensic investigation. I find the calculations are reasonable and the best information available. Ms. Daum also notes an income imputation (gross-up) would likely be required since no tax was paid on these amounts. She was not retained to calculate Guidelines income.
- [62] The respondent testified why he thought some of these were legitimate business expenses. I do not find his explanations persuasive, and even if some of what he suggested was a legitimate business expense, it was very small compared to the total of these expenditures. Examples of inappropriate expensing are the entirety of his current personal rent and all of the utilities; and large payments to the claimant (from \$12,000 to \$38,000 per year) categorized as "rent" both before and after separation. The only "rent" would be prior to separation for the gravel parking area on the farm (which now rents for approximately \$360 per month) and perhaps a small portion of the house if WTS had a home office.

Unrecorded cash revenue

- [63] The claimant testified that the respondent would often get cash for residential work and keep it at their home. The respondent typically gave her cash to pay the mortgage. The claimant stated that in 2016 after separation, the respondent had a lot of cash in his pockets which he gave her to buy items he needed.
- [64] The respondent testified that there were "sporadic times" and the "rare occasion" that WTS would receive cash from residential customers. He agreed that during the parties' marriage he would keep between \$1,000 and \$3,000 in cash at their home. WTS would sometimes bounce cheques to employees and when it did, he would use the cash to reimburse the employees.
- [65] Mr. Patrick Young testified. He is the claimant's ex-husband from her first marriage, and is friendly with the claimant. His relationship with the respondent has soured because he states the respondent has failed to pay a debt he personally incurred for WTS and this ruined his own credit rating. I therefore approach his evidence with some caution, but generally found him to be a credible witness. He testified that he worked on and off for WTS between about 2013 and 2016. He frequently collected payments for WTS for residential jobs. Sometimes it was cash because that would save the customer the GST. He gave the cash

or cheque to the bookkeeper with the job estimate. Sometimes he did not give the cash to the bookkeeper, but instead gave it to the crew as directed by the respondent, or to the respondent. He has seen the respondent receive cash and give cash to employees. WTS had a tendency to bounce cheques and the respondent would pay cash to make up the amount, or sometimes gave the employees cash if they needed money. He does not know how other employees were paid and if this was an advance or a loan. Sometimes Mr. Young was paid cash.

[66] Mr. Brian Barnicott testified. He is a brother of the respondent and rents a suite in the home where the respondent and the respondent's new partner and her two children reside. He has worked for WTS since March 2017. He stated he works regularly from Monday to Friday full time. He is paid \$20 per hour which at 40 hours per week is approximately \$38,000 per year. He described a typical day at work which involved himself, the respondent, and two or three other employees. He was shown his 2019 T4 which states he made \$9,454 from WTS. When it was suggested he could not be covering his living expenses, he said \$700 rent for the suite comes off his last pay cheque, and he gets money from his son. He agreed he is being given extra funds by the respondent. He said this is by e-transfer not cash. I note that the T4's for Brian Barnicott in other years were approximately \$19,000, or approximately the equivalent of half of full time work.

[67] Ms. Lori Gillingham testified. She is WTS' office manager, and posted WTS' bookkeeping entries to a general ledger for many years up to 2016. She produced the bank deposit book for the period from January 2016 to January 2020, and said it was the only book in existence for that time period. In that four year period, there was only one deposit that included cash. Ms. Gillingham described that she would contact customers from estimate sheets to get payment by cheque or credit card.

[68] The respondent's F8 financial statement shows \$114,000 in yearly living expenses, including the bi-weekly payments to the claimant. The claimant argues this is understated as the items listed do not include various costs paid by WTS, and expenditures for sports equipment and a cell phone for his new partner's children.

[69] The claimant points to the revenue generated by WTS over the years, and the decline in its revenue since the separation. The following table showing revenue, is rounded and is in hundred thousand dollars:

2011

2012

2013

2014

2015

2016

2017

2018

2019

1,102

1,245

1,502

578

973

662

676

583

280

[70] The respondent testified that 2013, the highest year for revenue, was when WTS had a profitable, cost-plus contract which lasted on and off for two to three years. For the contract, he had six crews of three men plus two or three other men.

[71] Ms. Daum had the general ledgers from 2014 to 2018. She noted that in 2014, WTS received work from a variety of sources and there were many one-off clients. In 2015, there were again many one-off clients, but more BC Hydro work. In 2016 and 2017, the majority of the work was from BC Hydro. The deposits from BC Hydro end in 2018, but there are then many deposits from a construction company. A summary of the financial records produced by the respondent shows that in 2017, the BC Hydro revenue was 74% of recorded revenue, and in 2018 it was 54% of recorded revenue, most of that in the first half of the year.

[72] Claimant's counsel refers to the respondent's evidence at his examination for discovery in February 2018 where he estimated that in the past year, 50% of income came from residential jobs, which compared to the above figures suggests there is unrecorded cash. However, the respondent said he would have to check the figures and he appeared to have little knowledge of financial matters. Claimant's counsel also refers to her cross-examination of the respondent on the record of a job done in 2018 where there is no record of payment to an employee of WTS. Claimant's counsel suggests that perhaps 10-20% of annual income is unrecorded cash.

[73] How much cash revenue was being received by WTS and not recorded? Cash is nearly untraceable. The respondent did not produce the estimate sheets that are created when a residential customer calls for work, but not all jobs may be recorded in them. The

respondent did produce some of his day books, but the books record hours worked for payroll, not necessarily where the work was taking place, or the amount charged. The electronic calendar which Ms. Gillingham used to record jobs was not produced, but not all jobs are necessarily recorded in it.

- [74] The evidence of the claimant, Mr. Young, and Mr. Brian Barnicott, establishes that WTS was receiving cash more than sporadically or rarely. I accept the claimant's evidence that mortgage payments were typically paid by cash received from the respondent. The mortgage payments were about \$1,450 bi-weekly or \$3,100 per month. That accords with the respondent's evidence that he kept between \$1,000 and \$3,000 at home. The disparity between Mr. Brian Barnicott's T4 income and what he said he worked, implies much more cash jobs. However, I find he was not working as much as he thought. An excerpt from the respondent's day book for a two month period in 2018, shows Mr. Brian Barnicott worked only 23 days, roughly half time. Almost none of the cash received was being recorded because the bank deposit book shows only one cash deposit in four years.
- [75] The respondent gave evidence of the typical day rate and wages for crew members, and based on that evidence I conclude that a day-long residential job would net (after wages only) between \$1,000 and \$1,200, assuming that any cash received was also used to pay cash wages to the employees. That combined with the claimant's evidence regarding cash paid for the mortgage indicates there was between two and three cash jobs per month. However, the claimant was also receiving undeclared income from the boarders at the Farm prior to separation which she may have used to pay the mortgage.
- [76] Considering all of the above, and given the failure of the respondent to produce all relevant financial records, I impute cash income to the respondent of an average of \$2,000 per month that was not being recorded by WTS. This is the profit from one day-long job approximately every two weeks, and is approximately 10% of WTS' current revenue, and a higher proportion of its net income. This amount would have varied over the years, depending on how busy WTS was with BC Hydro work, and is an average over all years.

Money withdrawn from WTS and not recorded as income or a dividend

- [77] I find the respondent withdrew funds from WTS to pay for the parties' personal expenses that were recorded as a negative value shareholder's loan, and not repaid to WTS or declared as income at the time. Ms. Daum notes that the financial statements show an amount due from the shareholder in every fiscal year from 2011 to 2017. Ms. Daum explained that loans to shareholders outstanding for more than one year are generally required to be included in personal income.
- [78] Examples of this are shown in a form of ledger and reconciliation of bank accounts for 2009, the year the parties purchased the Lynn Valley Rd home. It shows that in addition to the approximately \$118,500 taken out to purchase the home, there was \$50,000 paid for a new vehicle and thousands of dollars spent on house renovations and property taxes, along with

large withdrawals payable to the parties personally. In comparison, the respondent's personal tax return for that year showed \$15,000 in income. The WTS financial statements for 2009 show a "loans receivable" of \$251,168. I note here that during testimony, the respondent referred to amounts owing by him to WTS as a "shareholder's loan". This is a misnomer. A shareholder's loan is usually an amount owing to a shareholder from a company and not the other way round.

- [79] There are two line items related to this issue which require further comment. First, the financial records show that the amount due from shareholder was \$129,070 in 2011, went up to \$201,416 in 2013, was reduced in 2014 and 2015 with the payment of two dividends to the respondent, and then increased again to a high of \$209,877 in 2018. However, a month before this trial, WTS restated its 2018 financial statements (which had just been completed a month before that), and retroactively declared a dividend in 2018 and in 2019. A draft of the 2019 financial statements was also completed at this time. The effect of this was to eliminate the "shareholder's loan". The "repayment" of the "shareholder's loan" through dividends reflects withdrawal of money that should have been recognized and declared in prior years. Further, the respondent will incur a tax liability related to those dividends, some of which relates to funds withdrawn by the parties in the pre-separation period. I will return to these dividends when discussing the value of WTS and family debt.
- [80] In addition to the above, Ms. Daum notes that there was a \$112,500 restatement of the opening retained earnings balance at the beginning of 2018. She assumes that the adjustment relates to the declaration and payment of dividends in years prior to 2018, but this must be for years other than the two known dividends in 2014 and 2015, since those are accounted for in the financial statements. There was no indication of any other dividends declared. This restatement was unexplained by the respondent.
- [81] Second, there is another line item called "loans receivable" of approximately \$168,000. This has been existence since at least 2010. Neither party gave evidence of what this was, and who owed the money to WTS. It has remained unpaid for 10 years, but the amount has varied slightly over the years. In preparing her report, Ms. Daum tried to get answers from the respondent to her questions regarding this loan, for example, who was the debtor. The answers she received were not responsive. Ms. Daum noted it would be unusual for a company to maintain this loan receivable and be unable to provide further information as to its nature or collectability. Given that it has never been written off or paid in 10 years, one possibility is that it is another entry that reflects money the parties took from WTS, however there was no evidence of that. I will return to this loan when discussing the value of WTS.

Conclusions

- [82] I find that the respondent's income has been as follows:

2013

2014

2015

2016

2017

2018

2019

WTS pre-tax inc.

(44,784)

(222,582)

201,429

(64,426)

(10,311)

47,064

20,696

Pers. exp. chgd. to WTS

53,416

64,515

65,213

76,687

91,852

68,242

30,943

Resp. line 150

27,600

65,000 incl. 59,000 tax. div.

85,300 incl. 64,900 tax. div.

18,900

25,200

18,000

119,275 incl. 113,275 tax div.

Cash

24,000

24,000

24,000

24,000

24,000

24,000

24,000

Div. retro.

112,125 tax. div.

Total

60,232

(69,067)

375,942

55,161

130,741

269,431 (157,306 w/o div.)

194,914(81,639 w/o div.)

[83] I have not included in income the \$112,500 restatement of retained earnings or the \$168,000 in unidentified loan receivable. If they reflect benefits received by the parties, they both appear to relate to years prior to 2011. The taxable dividend declared by WTS in 2018 was retroactively declared after the respondent completed his 2018 personal tax return so I have indicated that on a separate row as it was not included in his 2018 personal tax return. There is no documentary evidence the 2018 tax return has been filed or assessed as there is no notice of assessment in evidence. The dividends shown are already grossed-up 15% to reflect the different tax rate for dividends. For the calculation of past incomes of both the claimant and the respondent, I have not included any tax gross-up to reflect that certain income was not being declared, or to reflect that personal expenses were being paid with corporate pre-tax dollars. I have not done so because there is no claim for retroactive support.

[84] The average income of the last seven years is approximately \$145,000. The average income of the last three years without the inclusion of the dividends is approximately \$123,000.

What is the income the respondent is likely to earn if he continues / does not continue to operate WTS?

[85] The respondent has two significant health issues. First, he has struggled with addiction. He realized in his 20's that he has a problem with alcohol. The drinking led to the use of cocaine. After meeting the claimant and her children, he started attending AA. He took AA seriously and completed the program. Except for a couple of relapses which I describe below, the respondent has remained sober.

[86] In 2007, the respondent had a relapse of his addiction and this led to the parties' 18 month separation. Ultimately, the respondent "realized I had enough and I needed help" and he went to a treatment centre. He became sober, attended AA again, and the parties reconciled. He stayed sober from 2007 to 2016 when he had a relapse. He said he was still managing WTS in 2016, but he was not as effective. The respondent was again able to become sober. In December 2016, he went to a detox facility for seven days. He said that usually this treatment would be followed by attending a rehabilitation facility, but he did not go there. He stated he has stopped using alcohol and drugs since, with only one relapse for one day in March 2017, which he immediately realized was a mistake.

[87] The claimant points to a number of small purchases at liquor stores in the WTS general ledger in 2018 as evidence that the respondent potentially is not sober. The respondent said those may have been purchases for his crew at the end of a week. The respondent's new partner is also a recovering alcoholic.

[88] The second health issue is that the respondent has problems with his knees that cause pain, and limit his ability to bend, walk and work. He had surgery on one knee in 2002 or 2003 for what he understood was a ligament problem. He had pain in both his knees from arthritis. By 2013 or 2014 his doctor prescribed OxyContin for the pain. He had knee pain when he first woke up, dull pain during the day, and sharp pain after work. At that time, he had bouts when he could not climb trees. Between 2015 and 2017 he had difficulty walking. If he drove from North Vancouver to Langley, he would need to stand two to three minutes to get moving. He could not walk after climbing trees. He would need someone take off the spurs for him. When he could not climb, he still did work out of the bucket truck where it was possible.

[89] Since the separation, he has had arthroscopic surgery on his left knee. As a result of that surgery, he was referred for and had knee replacement surgery in April 2019. The pain in that knee is now gone but he can only bend the knee 90 degrees. In the spring of 2020, he partially tore a ligament in that knee. He had a further manipulation of that knee under anaesthetic to break up scar tissue. This further surgery was not entirely successful and the knee may require further treatment. He is also on the waiting list to have a replacement of the other knee, and expects that surgery to take place later this year or early next year. He

walks with a limp.

- [90] The respondent testified that after the surgery in April 2019, it took six weeks before he could walk. He still ran WTS. One of his employees did the estimates and the respondent answered the phone. He employed tree climbers. It took six months before he got back into a bucket for pruning. Certain jobs WTS could not take on because he was not there and the job required a CUA. During this time, WTS was less efficient and there was also less work because he was not estimating.
- [91] The respondent would like to move into management, but he currently has only one to two crews. He likes to train employees to do the work, but in the last few years he has had difficulty retaining them. He has trained six or seven employees in the first year of the CUA apprenticeship. He pays wages for a CUA that are more than a unionized position, but he does not offer benefits.
- [92] The claimant agrees that the respondent has "always had bad knees or complained of sore knees". She agrees the respondent now walks with a limp.
- [93] I find the respondent suffers from knee problems that so far have resulted in three surgeries including a knee replacement, and a manipulation under anaesthesia of one knee. There is the possibility of further treatment for that knee. The respondent is on the wait list for knee replacement surgery for his other knee. The respondent is a recovering alcoholic and has had difficulty in the past with cocaine use when he drinks. Although the respondent has done well in his addiction recovery, there is a risk of relapse. The major source of revenue to WTS, the BC Hydro tendered contracts, has been lost for at least the near future. However, the respondent is working to replace that source of income and has been partially successful in doing so.
- [94] There was no expert medical or vocational opinion evidence regarding the respondent's ability to work. Based on the respondent's evidence, I find the respondent is presently able to operate WTS, but that the pain in his knees limits some of the tasks he can do, in particular climbing trees. To the extent that the respondent's condition may become worse over time, I find that this will further limit his ability to do the heavier demands of work for WTS, and that WTS will become less profitable. This is also a factor in considering whether lump sum spousal support should be ordered. If the respondent is not able to work as much in the future, then a lump sum based on his past and present ability to work cannot be effectively adjusted.
- [95] I find that the respondent will currently continue to operate WTS as it is his highest source of income. Considering the respondent's past income, his health issues including the relapse in 2016 and the knee replacement surgery in 2019 which resulted in a decrease in WTS income, the loss of the BC Hydro tendered contracts and the respondent's attempts to find work elsewhere, and the pattern and fluctuation of his income in the last three years (s. 17 of the Guidelines), I find that the respondent has the current ability to earn an income of approximately \$125,000 per year. In coming to this conclusion, I have factored in that he will

have some time off work for further knee surgery, but will continue to operate WTS.

- [96] Assuming the \$125,000 income were appropriately declared in the future, this would be the respondent's current Guidelines income for the purpose of spousal support. However, appropriate accounting has not been the pattern in the past. The respondent points to WTS' last fiscal year where he has cleared up the "shareholder's loan" and there is a decrease in personal expenses charged to WTS. The respondent stated, at least for personal rent and utilities, they would no longer be charged to WTS above what is appropriate. The claimant argues that even in 2019, the respondent was still claiming personal expenses as business expenses, and Ms. Daum also gives this opinion. However, there is a marked decline in inappropriate expensing from 2017 to 2019. I have decided to assume the respondent and WTS will appropriately claim business expenses in the future and to make an order that the respondent produce detailed financial statements on a yearly basis so that if there is significant non-taxed income, the claimant will be able to make an application for variation. I have also considered the cash income, and since that is much harder to trace, I have concluded there should be a gross-up to reflect this. I therefore gross-up the respondent's Guidelines income to \$135,000 to take into account the approximate effect of undeclared cash income. There was no specific evidence of the gross-up amount, but \$10,000 on \$24,000 cash is a reasonable estimate given marginal tax rates.
- [97] As will be discussed below, WTS is in a very poor financial condition. If WTS is forced into liquidation by its creditors, the respondent will lose the equipment required to run his business and the respondent's earning ability will be much less than what he can earn through WTS. The respondent is in his 50's with health conditions, and he will not be as competitively employable as younger persons without those conditions. If, despite his health problems, the respondent can find work as a CUA or in management for another employer, I find he could potentially make up to \$75,000 per year.

What is the value of WTS?

- [98] There are three main sub-issues: the valuation method; the valuation date; and adjustments I find are necessary to Ms. Daum's opinion as a result of findings I have made and information that was not available to Ms. Daum.
- [99] In summary, Ms. Daum opined that the liquidation methodology was appropriate, and using that methodology, the fair market value ("FMV") of WTS was:
- a) as of April 30, 2016: \$106,000 to \$198,000; and
 - b) as of December 31, 2019: (\$90,000).
- [100] Claimant's counsel requested Ms. Daum to value WTS using a "going concern" or "value to owner" methodology. Ms. Daum disagreed this was an appropriate methodology to use in this case, but opined that the FMV of WTS was:
- a) as of April 30, 2016: \$130,000 and \$222,000; and

b) as of December 31, 2019: (\$65,000).

[101] Claimant's counsel also asked Ms. Daum to comment on how unrecorded cash would affect the FMV. Ms. Daum opined that it would be unlikely to affect her liquidation methodology valuation, but it depended on the amount of cash that was diverted. She was not asked to determine if there was unrecorded cash. As I have found that unrecorded cash is about 10% of income and the liquidation method is the appropriate starting point for valuation, I conclude that the unrecorded cash income would not have a material affect on FMV.

Valuation method

[102] Ms. Daum selected the liquidation methodology of valuation because WTS has: poor return on assets; highly variable cash flows and profitability; risks associated with the irregular accounting practices and potential tax liability; and declining revenue. WTS does not have any commercially transferrable goodwill and is not sellable as a going concern. A purchaser may be interested in the assets (in this case the equipment) but would not risk inheriting the potential liabilities of WTS.

[103] The claimant argues the court should accept the higher going concern methodology because of the irregularities in accounting practices, and the assumptions which Ms. Daum had to make. The respondent accepts Ms. Daum's valuation using the liquidation methodology for the 2019 valuation date.

[104] For all the reasons given by Ms. Daum, I accept that the liquidation method is appropriate and is the starting point for the determination of the FMV of WTS.

Valuation date

[105] The FLA provides for a presumptive equal division of family property and family debt upon separation: s. 81. Family debt includes all financial obligations incurred by a spouse during the relationship, and after separation if incurred for the purpose of maintaining family property: s. 86. Unless an agreement or order provides otherwise, the value of family property (other than Part 6 pensions) and family debt, must be based on their fair market value at the time of an agreement dividing it, or the date of trial: s. 87. A court may order an unequal division of family property and family debt if it finds it would be significantly unfair to divide them equally: s. 95.

[106] A court may depart from the trial date as the date of valuation if it finds significant unfairness under s. 95: *Blair v. Johnson*, 2015 BCSC 761 at paras. 69. This is because a "departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA": *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76. To justify a reapportionment of family property or family debt, requires something "objectively unjust, unreasonable, or unfair in some important or substantial sense": *Singh v. Singh*, 2020 BCCA 21, at paras. 129-134.

- [107] The claimant points to the decline in the value of the WTS from 2016 to 2019 and argues that the valuation date of WTS should be the date of separation because the respondent has run up debts within WTS since separation, and instead paid himself, thus depressing the value of WTS. Claimant's counsel argues that she is not relying on s. 95; she is arguing the acquisition of that debt was under the sole control of the respondent and it should not be considered family debt. The evidence focused on the two main debts of WTS, being to the CRA and a creditor, Transport Financial Services Ltd. ("TFS").
- [108] The respondent argues the valuation date should be the date of trial, and that the above debts were owed at the date of separation by WTS. The respondent also argues that the CRA and TFS debts are now also owed, or potentially owed, by the respondent and have become family debts. While accepting Ms. Daum's valuation (which takes into account those debts), the respondent then argues that the respondent should be responsible for bringing the value of WTS to nil. After that, the above debts of WTS should be paid equally by both parties subject to a \$40,000 deduction which respondent's counsel argues reflects the respondent's decreased work and funds taken from WTS in 2016 as a result of the relapse.
- [109] For the reasons sets out below, I find that the valuation date should be the date of trial. I do not agree with either of the parties' positions regarding the treatment of the WTS debt. The CRA and TFS debts are WTS debt. In my view, the issue is whether the respondent has in bad faith decreased the value of WTS after separation, a factor the court can consider under s. 95. Significant unfairness must be shown before a valuation date other than the date of trial may be used.
- [110] Ms. Daum states in her report that the negative value in WTS for the December 31, 2019 valuation date was created through the "payment" of dividends to the respondent. As discussed previously, the "payment" eliminated the "shareholder's loan" owing by the respondent. There was no repayment of actual cash to WTS by the respondent to replace the negative value "shareholder's loan". It was an accounting entry and a declaration of dividends that recognized money taken out of WTS that should have been recognized years earlier (as income or dividend to the respondent). As a result, the value of WTS had to decrease by the amount of those dividends. Some of the "shareholder's loan" was incurred prior to separation. The "shareholder's loan" increased after separation and in that respect the claimant is correct that the respondent has taken funds from WTS that it did not have. However, with the declaration of the retroactive dividends for 2018 and 2019, all of these funds have now been included in the respondent's income for those years.
- [111] While the CRA debt may have increased since separation, I find that the debt has not increased to the extent that it is significantly unfair. Ms. Daum's calculation of the FMV includes a CRA debt of \$237,589 as of December 31, 2019. There is no document establishing the CRA debt at the time of separation. At the end of 2017, the CRA debt was \$156,190, and it increased \$81,399 from then until the end of 2019. There are documents which show the CRA debt was substantial before separation. The first documents are the Requirements to Pay (a garnishment document) issued in 2012 by the CRA, in which the total amount

claimed was \$161,647. The second documents are the financial statements of WTS which show large accounts payable up to 2015. The accounts payable reduce significantly in 2016, and again in 2017. Due to the inconsistent recording of line items, the CRA debts are not shown as a separate line item until 2017. The third documents are the summary statements from the CRA obtained in August 2020, showing amounts outstanding for each year, but unfortunately not when payments were made on those accounts. The respondent gave evidence of a payment plan he negotiated with the CRA, and produced a summary of payments to the CRA since late 2016, of about \$100,000. That record does not show to which years those amounts were applied. The summary statements also show that the amount outstanding of GST alone (and not including payroll taxes and corporate taxes) as of the date of separation, was about \$90,000.

- [112] With respect to the debt owing to TFS, I find that the debt has not increased, but is substantially the same FMV as it was at the date of separation. The respondent testified that in 2013, WTS needed financing. It entered into an agreement with TFS to have a line of credit. TFS continued to advance sums to WTS into 2017. The interest rate was over 26% per annum. By June 2016, the date of separation, TFS alleged it was owed about \$136,000. TFS subsequently seized WTS equipment under a security agreement and litigation followed to have the equipment released. At one point, TFS alleged it was owed over \$300,000. Ultimately, in April 2020, TFS and WTS and the respondent entered into an agreement settling all issues between them. WTS and the respondent agreed to pay TFS the sum of \$135,000 on a payment schedule of \$1,000 per month. The agreement is secured by the respondent and a general security agreement over WTS, and an assignment of any proceeds received by the respondent from the sale of the Farm.
- [113] I pause here to address the respondent's position that even though he accepts Ms. Daum's valuation of negative \$90,000, he also seeks an order that the CRA and TFS debts be paid equally by the parties out of the proceeds of sale of the Farm. I do not agree with this. These debts are already accounted for in Ms. Daum's valuation. This is sufficient to dispose of the respondent's position. I do not need to discuss his further arguments that the CRA and TFS debts (which are debts of WTS) have now also become family debts (s. 86 of the FLA), something which the claimant contests.
- [114] In summary, the main reason the FMV of WTS declined from 2016 to 2019 was because of the declaration of dividends which cleared the "shareholder's loan", and which in part recognized money the respondent had taken from WTS prior to separation, and which both parties enjoyed. To the extent the 2015 financial statements indicate an asset in the form of a negative value shareholder's loan (which on the other side of the "ledger" is a family debt), unless the respondent was actually going to repay that loan with cash (which I find the parties did not have), the 2015 and earlier financial statements over-state the value of WTS. The WTS financial records indicate that the "shareholder's loan" increased after separation, however that increase has been included in the respondent's income through the dividends. To some extent the respondent has paid himself rather than creditors of WTS, however, this

has been a long-standing pattern, and one from which the claimant also benefitted prior to separation.

Valuation adjustments

- [115] Ms. Daum's valuation of negative \$90,000 is as of December 31, 2019. This was based on the most current financial information produced. As there is no evidence of a significant change in WTS since then, I find that is the starting point for the FMV at the date of trial.
- [116] I find there must be adjustments to Ms. Daum's valuation. First, I have found that the respondent will continue to operate WTS. Therefore, the liquidation costs of \$31,000 (schedule 3, lines 24-26 of Ms. Daum's report) should be added back to Ms. Daum's valuation of negative \$90,000. Second, Ms. Daum's valuation assumes the TFS debt is \$113,200 based on the 2019 financial statements. It was subsequently settled at \$135,000. Ms. Daum's valuation therefore must be reduced by \$21,800. The total is negative \$81,000 rounded.
- [117] Ms. Daum includes in her valuation the loan receivable of approximately \$168,000 from the unknown person or entity. I have considered whether this should be included as an asset in the valuation WTS. It is odd that an amount would be outstanding this long given the dire financial situation of WTS. I have concluded that it should be included for the following reasons. The respondent accepted Ms. Daum's valuation of negative \$90,000 which includes an assumption that this amount is collectible. The loan has varied slightly over the years, suggesting there is some activity with respect to it. Finally, the respondent is the person who could provide information that this loan was not collectible and he did not do so.
- [118] Finally, I make a non-accountant common sense check of FMV having found that the respondent will continue to operate WTS. Currently, the only significant assets of WTS are its equipment which the respondent valued at \$194,000 and the \$168,000 loan receivable. The two main debts owing to the CRA and TFS, total approximately \$372,000 plus there is another approximately \$53,000 in accounts payable. This results in a net figure of negative \$63,000, close to Ms. Daum's adjusted valuation.
- [119] I accept Ms. Daum's calculations after the adjustments for liquidation costs and the TFS debt. I find that the FMV of WTS at the date of trial is negative \$81,000. The CRA and TFS debts are already taken into account in this figure.
- [120] Finally, I note that even if I had found April 30, 2016 to be the appropriate valuation date, I would have made similar adjustments that would have resulted in a much smaller valuation of WTS than that provided by Ms. Daum. First, the April 30, 2016 valuations have a range of \$92,000. This is the amount of the "shareholder's loan" as of December 31, 2015. The lower value assumes this would not be paid. Similar to the discussion regarding the dividends that have now been declared, the respondent was never going to "pay" the loan with cash. Therefore, the lower figure is the appropriate figure to use. Second, it appears from schedule three of Ms. Daum's report that she did not include the TFS debt in her April 30, 2016 valuations. This is likely because the TFS debt was not recorded in the 2015 financial

statements (this was not explained). I am satisfied the TFS debt existed in the approximate amount of \$135,000 as of April 30, 2016. As a result, I find that if this had been taken into account by Ms. Daum, her valuations would have decreased by that amount, and the \$106,000 valuation would have turned into a negative number before adjustment for liquidation costs.

Family property and family debt

- [121] The parties have household furnishings, some recreational vehicles and other farm chattels. Neither party led any detailed evidence on these. Both counsel advised that the value of the assets was not sufficient to involve counsel or court time and advised they will settle any remaining division of chattels.
- [122] The claimant has an RRSP account number ending in 410, in the approximate value of \$16,000 acquired prior to the beginning of the parties cohabitating, and only the increase in the value since that time, estimated to be approximately \$12,000, is family property. The claimant also has an RRSP, account number ending in 796, in the approximate value of \$23,500 acquired during the marriage and it is family property.
- [123] The respondent will have a personal tax liability as a result of WTS retroactively declaring dividends in 2018 and 2019. This is on the assumption that the respondent will file an amended personal income tax return declaring the dividend retroactively declared for 2018 in 2019. As part of the dividends reflects funds taken from WTS pre-separation that should have been declared at that time, I find that the tax liability for that portion of the dividend is a family debt as it was "incurred" prior to separation: s. 86(a) of the FLA and *Neely v. Neely*, 2019 BCSC 610 at paras. 58-64. Both parties benefitted from funds taken from WTS in this manner as no tax was paid on the funds at the time. Based on the WTS financial records, the amount of "shareholder's loan" at the end of 2015 was \$91,846 and decreased to \$56,047 at the end of 2016. As the parties' separation was in June 2016, and assuming the decrease in the "shareholder's loan" was evenly made during the year, I have taken half of the decrease and concluded the "shareholder's loan" at separation was \$74,000. I find the tax liability arising from a dividend in this amount is a family debt.
- [124] The mortgage is a family debt and is now approximately \$567,500. I find the mortgage should be valued at the date of trial. I do not credit the claimant with the post-separation payments she has made on the mortgage, for property taxes incurred post-separation, or for property insurance, as I find it would be significantly unfair to do so. The claimant has had the benefit of living at the Farm, plus earned an income from that significant investment, while the respondent has had to incur rent elsewhere. It appears from the claimant's financial statements that she has claimed insurance as a business expense. In addition to the horse boarding and dog breeding, the claimant received rent from the suite in the house of \$1900 per month, and later \$1450 per month, plus rent from RV parking, which was not shared with the respondent. Further, she has received \$1000 bi-weekly tax free from the respondent (albeit with some NSF cheques), part of which would have paid

the \$1435 bi-weekly mortgage. However, to the extent there were arrears of property taxes outstanding as of the date of separation, and those have been paid by the claimant (the evidence of this amount was not clear) this is a family debt that should be divided equally between the parties.

[125] In summary, I find the family property and family debts are: the Farm; the mortgage; the outstanding property taxes as of the date of separation; WTS; the increase in the value of the RRSP ending in 410; the RRSP ending in 796; and the tax liability arising out of the declaration of \$74,000 in dividends.

Spousal Support

Entitlement

[126] Section 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 [DA], sets out the objectives for a spousal support order:

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

[127] Section 15.2(4) sets out factors for the court to consider. These are the "condition, means, needs and other circumstances" of each spouse, including, the length of cohabitation, the functions performed by each spouse during cohabitation, and any order, agreement, or arrangement relating to support.

[128] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow], the Court discussed the three conceptual grounds upon which spousal support is based: compensatory (economic disadvantage/advantage), non-compensatory (needs based), and contractual: *Bracklow* at para. 15. In this case, there is no contractual basis for support. The starting point is consideration of the objectives in s. 15.2(6). No objective is paramount and all must be considered: *Bracklow* at para. 35-37; *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge] at paras. 850-852.

- [129] Compensatory support is intended to provide for an equitable sharing of the economic consequences of the marriage or its breakdown. Both economic advantage and disadvantage are considered. The longer the relationship, the greater will be presumptive claim to an equal standard of living upon its breakdown: *Chutter v. Chutter*, 2008 BCCA 507 [Chutter] at paras. 50-52; *Bracklow* at paras. 34 and 39; *Moge* at 861-863, 870.
- [130] Non-compensatory support is intended to provide needs based support even when compensatory principles do not apply. Its goal is to narrow the gap between the needs and means of spouses upon marital breakdown. Need is a relative concept and informed by the circumstances of the parties, including the length of the marriage and the standards of living of during and after the marriage: *Chutter* at paras. 54-59; *Bracklow* at paras. 36 and 41.
- [131] The claimant argues she is entitled to spousal support on both a compensatory and non-compensatory basis for the following reasons. This was a long marriage. The parties had a traditional family structure where the claimant fulfilled the role of homemaker looking after the children while the respondent built his career and WTS. Since separation, the respondent has had a more affluent lifestyle, spending between \$110,000 and \$150,000 per year. The claimant is in her 50's and has significant health issues, and it is unrealistic to expect her to obtain the same level of self-sufficiency as the respondent is able to achieve. The claimant has slowly built up various personal income streams at the Farm in significant efforts towards self-sufficiency. The law does not require self-sufficiency, but seeks to promote self-sufficiency "in so far as practicable" in all the circumstances: *Tedham v. Tedham*, 2005 BCCA 502 at para. 33.
- [132] The respondent does not contest entitlement to spousal support on a non-compensatory basis, but challenges the compensatory basis and the quantum and duration of support. The respondent argues that to the extent the claimant may not have worked because of her children, these were obligations she had incurred prior to their marriage as these are not the respondent's children. The claimant did not assume greater household and child-rearing responsibilities to allow the respondent to pursue his career. All the impacts of her career path flowing from the care of the children had already occurred from her marriage to and divorce from Mr. Young. Respondent's counsel refers to *Larochelle v. Larochelle*, 2018 BCSC 1347, where there was no evidence the claimant had sacrificed educational or employment opportunities as a result of being primary caregiver to the parties' children. The court found entitlement to support had not been established.
- [133] I find that the claimant has established entitlement to spousal support on both a compensatory and non-compensatory basis for the following reasons. At the time the claimant entered into the relationship she was working part time as an MOA, but her children were young. Eventually the parties decided to purchase the Farm and this provided the claimant with a source of income in her chosen area. I find that she managed the home and the Farm, thus freeing the respondent to pursue his career and develop WTS, and also providing more income to the family. The respondent has an income that is

significantly more than the claimant and his potential standard of living is therefore higher than that of the claimant. Upon the marital breakdown the claimant lost the income of the respondent, and if she is not able to retain the Farm, will lose the career and sources of income she has developed over the past nine years as a result of the decisions the parties made during their marriage. The marriage was a relatively long one. Both the claimant and the respondent are in their 50's and have significant health issues, and if they worsen, both may suffer a decrease in income. However, as the claimant's income is much lower than that of the respondent's, the effect on her may be more significant. In my view, the claimant has taken reasonable and active steps to become self-sufficient through the Farm. While the claimant's daughters were not the respondent's biological children, the evidence was that the respondent enjoyed and had the benefit of a good relationship with the daughters. There was no evidence to establish that they were not children of the marriage as that term is defined in s. 1(2) of the DA.

Quantum, Duration, Lump Sum or Periodic

- [134] Before discussing whether lump sum or periodic support should be ordered, I provide the SSAG range of spousal support based on the findings I have made.
- [135] Claimant's counsel argues the parties had a 16-year relationship. Respondent's counsel used 15.5 years in his SSAG calculations. The Revised Users Guide to the SSAG, suggests that if there is a period of separation followed by a reconciliation, then the cumulative total of the periods of cohabitation will often be the appropriate way of calculating the length of the relationship. See also *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 213, where the period of separation was deducted.
- [136] The parties began a marriage-like relationship in 2000 and finally separated in mid-2016, but had an 18 month separation in between. This is a net of 14.5 years. During this time, the respondent said he saw the claimant and the children almost daily. As there was no argument from respondent's counsel that the calculation should be 14.5 years, I have taken 15.5 years to account for the initial period of separation before the parties began seeing each other frequently. Under either scenario, the claimant meets the "rule of 65" in the SSAG which suggests indefinite (no fixed termination date) support. Using \$135,000 as the respondent's Guidelines income and \$15,000 for the claimant's future Guidelines income (assuming the Farm is sold), the range of monthly spousal support is a low of \$2,325, and a high of \$3,100, with a mid value of \$2,712. Using \$135,000 and \$40,000 figures (assuming the Farm is not sold), the range of monthly spousal support is a low of \$1,841, and a high of \$2,454, with a mid value of \$2,147.

- [137] Both parties are nearing retirement, and when they retire their earned incomes will stop. There is no evidence that either have a private pension plan. At retirement, they will be living on whatever assets they have saved to that time, plus federal pension benefits. The basis for entitlement and quantum of spousal support will likely change. Both parties have significant health conditions that may impair their earning ability in the future, and which may lead to an early retirement.
- [138] For the purpose of illustration only, at a discount rate of 1.5%, the multiplier for the present value of a stream of income until the respondent is 65 years old, is 12.5434. Using this multiplier, the present value of the mid-range of monthly spousal support assuming the claimant would keep the Farm is \$323,168. Assuming on a best case scenario that this were approximately equivalent to the respondent's equity in the Farm, I again find that the claimant cannot realistically afford the Farm. She would still have the mortgage, but no periodic monthly payments.
- [139] Finally, I make one further finding that is relevant to spousal support. I find that during the parties' marriage, the parties were living beyond their incomes. They were able to afford the Farm by WTS and themselves personally not declaring income, by irregular accounting practices within WTS, and by WTS not paying creditors.
- [140] In *Parton v. Parton*, 2018 BCCA 273 at para. 47, the court summarized the approach the court should take when considering a lump sum or periodic award of spousal support. The court is to weigh the advantages and disadvantages of each. The court must distinguish between the purpose of a lump sum award and the effect of such an award, because even though a lump sum award is in effect a transfer of property, this is not the purpose of spousal support. A lump sum award should not be made for the purpose of redistributing assets, unless it is made to relieve against financial hardship that cannot be otherwise be accomplished through division of property. The court must consider the ability of the payor to make a lump sum payment without compromising the payor's future self-sufficiency.
- [141] The claimant argues that the following factors favour a lump sum award: the respondent's lack of financial disclosure and failure to abide court orders, making this litigation more lengthy and expensive; the claimant's need for capital to enable her to keep the Farm, where she will earn greater income than elsewhere; the ability of the respondent to make a lump sum payment through his equity; and the risk of non-payment of periodic payments given the respondent's history of financial management, NSF cheques, and the risk of relapse.
- [142] The respondent argues the following factors favour periodic spousal support: his willingness to pay support; WTS' perilous financial condition and his need for his equity in the Farm to pay WTS' debts and preserve his ability to earn an income; his uncertain health and that a lump sum will effectively deprive him of the ability to apply for variation; he is not a malingerer and willing to work through adversity; the claimant is seeking a lump sum award in the guise of support for the purpose of redistributing assets; and the parties would

be left in starkly different financial positions.

- [143] I find that a lump sum award should not be made for the following reasons. The Farm was likely never affordable to the parties. The Farm is not affordable to the claimant now with bi-weekly payments, and will not be affordable with a lump sum award. Given both parties have significant health issues, any assumptions made now regarding the parties' abilities to work in the future may become inaccurate. If the respondent's health deteriorates, a lump sum award once made, effectively cannot be adjusted. If the claimant's health deteriorates, her ability to continue to work at the Farm is in question. If she has to hire someone to do her work on the Farm, then any income will be eliminated. The respondent needs to access the equity in the Farm to pay the crushing debts of WTS. If he is not able to do so, WTS is at risk of liquidation by its creditors, and the respondent will lose his source of income needed to pay the claimant spousal support. If the claimant keeps the Farm, she will have disproportionately more property than the respondent. The claimant will have the Farm worth approximately \$1.5 million, and a mortgage she cannot afford, and the respondent will be left with an insolvent company at risk of liquidation. A lump sum spousal support would also deprive the respondent of the tax benefits of periodic spousal support. I acknowledge some cheques to the claimant have been NSF, but the respondent has made up about half of these. I find the NSF cheques are a reflection of the poor financial state in which WTS is operating, not a desire by the respondent to avoid paying support. The respondent has given the claimant blank signed checks to complete bi-weekly. While there is a risk the respondent will have a relapse of his addiction, he has been successful in the past in having long periods of sobriety.
- [144] The disadvantages to a lump sum award outweigh any advantages, and spousal support should be paid on a periodic basis, subject as always, to a variation upon either party showing a material change in the condition, means, needs or other circumstances of either former spouse: s. 17 of the DA.
- [145] The respondent requests a review provision in two years because of future uncertainties. In *Leskun v. Leskun*, 2006 SCC 25, the Supreme Court of Canada at paras. 37-39 discussed that review provisions may be made in cases of "genuine and material uncertainty at the time of the original trial". However, courts should as far as possible, "resolve the controversies before them and make an order which is permanent subject only to change under s. 17 [of the DA] on proof of a change of circumstances".
- [146] While I agree there is some uncertainty with respect to the parties' health, I am not persuaded that it is appropriate to make the review order sought by the respondent. I have considered the respondent's failure to have WTS keep proper accounting records, his failure to abide court orders, and the delays and costs his lack of disclosure have caused in this proceeding. While his impecuniosity may be part of the reason for these, there is a risk the parties will again be mired in a review, with the respondent not producing proper financial information. The claimant should not have to bear this risk. While the parties' circumstances may change, if the respondent seeks to vary the order for spousal support,

he will have to first make proper financial disclosure and provide information showing a material change in circumstances. I therefore do not order a review in two years.

[147] Chapter 9 of the SSAG discusses factors to consider in deciding where in the suggested range, spousal support should be ordered. Considering the claimant's current strong compensatory and non-compensatory entitlement, the parties' age and health, the marital standard of living which was not what the parties could afford, the income disparity between the parties and the respondent's ability to pay once WTS is on stronger financial footing, the claimant's past efforts at self-sufficiency, and the fact that if the Farm is sold the claimant will be left with a fund of money to invest as opposed to the respondent who will have a much smaller fund after the payment of WTS debts, I conclude the order for spousal support should be indefinite near the mid-range level. At incomes of \$135,000 and \$15,000, I find this should be \$2750 per month.

Division of property and debt

[148] It follows from above that I find that the Farm must be sold. I acknowledge this will be a disappointment to the claimant. However, the Farm is not affordable to the parties, and the financial decisions the parties both made in the past now have to be accounted for.

[149] In accordance with s. 81 of the FLA, the orders below will accomplish an equal division of family property and debts.

Orders

[150] I make the following orders, with explanations where necessary:

1. Within 30 days, if this has not been done already, the respondent will cause WTS to finalize and file its 2016 to 2019 financial statements and corporate income tax returns, as well as his 2016 to 2019 personal tax returns and any amendments required to those returns as a result of the restatement of the WTS financial statements. Copies of those finalized statements and filed returns shall immediately be produced to the claimant, as well as the notices of assessment immediately upon receipt;
2. Within 30 days, the claimant will list the Farm for sale. The respondent will have joint conduct of sale with the claimant, with the parties to agree on the listing agent, listing price and eventual sale. If the parties cannot agree, the parties have liberty to apply to court;
3. From the sale proceeds of the Farm, the following will be paid:
 - a) the mortgage, property taxes currently owing, real estate commissions and fees, and legal transaction costs and fees.
4. The net sale proceeds from above will be paid into the trust account of claimant's counsel to be paid as follows:

- b) any taxes that may be owing by the claimant as a result of the disposition of the Farm. There was no evidence there will be any taxes but as the property is a working Farm, I have allowed for that possibility;
- c) the personal taxes owing by the respondent arising only from the \$74,000 of dividends declared in 2019 by WTS;
- d) after payment of the above amounts, the balance to be divided equally, with the following adjustments:
 - i. from the respondent's portion, and paid to the claimant, one half of the property taxes owing on the Farm as of the date of separation and which were paid by the claimant;
 - ii. from the respondent's portion, and paid to the claimant, the amount owing to the claimant as a result of the cost of the Farm appraisals and Ms. Daum's report and court testimony. These costs should at this time be shared equally between the parties, subject to any submissions to be made with respect to costs of the litigation;
 - iii. from the claimant's portion, and paid to the respondent, \$40,500 for the negative value of 50% of the WTS shares; and
 - iv. from the respondent's portion, the amount required to satisfy the CRA and TFS debts of WTS. To the extent the respondent is able to negotiate any discount of the amount owing by WTS to the CRA as of December 31, 2019, and owing to TFS on the settlement of \$135,000, one half of the amount of the discount shall be paid to the claimant. This is because the full amount of these debts have been included in Ms. Daum's valuation of WTS. I have involved the claimant in the process of payment of these debts in order to ensure that these debts are paid and WTS is put on a stronger financial footing. This will help ensure the respondent is able to continue to earn an income from WTS, which is required to continue spousal support payments to the claimant.
- 5. The respondent's Guidelines income is \$135,000;
- 6. The claimant's current Guidelines income is \$40,000. Once the Farm is sold, and after allowing for a six month period for the claimant to find other employment, the claimant's Guidelines income will be \$15,000. During that six month period, the claimant's Guidelines income will be zero;
- 7. Pursuant to the DA, until the Farm is sold, on the first day of each month, the respondent will pay to the claimant monthly spousal support of \$2450. Once the Farm is sold, for six months, being the period of adjustment, on the first day of each month, the respondent will pay to the claimant monthly spousal support of \$3050. Thereafter, the respondent will pay to the claimant on the first day of each month, spousal support of \$2,750 until further order of the court or agreement of the parties;

8. Within the 60 days, the parties shall execute the documents necessary to divide equally by spousal rollover, the increase in the value (from the time of first cohabitation to the present) of the claimant's RRSP account number ending in 410, and to divide equally by spousal rollover, the claimant's RRSP account number ending in 796;
7. The respondent will remain the sole shareholder of WTS and any claims of the claimant to an interest in the shares of that company is dismissed; and
8. By June 15 of each year, and until further order of the court or agreement of the parties, the parties will exchange their filed personal tax returns and corporate or business financial statements and tax returns, and immediately provide to each other any notices of assessment upon receipt. In addition, the respondent will by June 15 of each year, provide to the claimant the WTS general ledger for WTS.

Costs

[151] Counsel wished to defer the issue of costs until this decision. If the parties cannot agree on costs, counsel may make arrangements through trial scheduling within the next 30 days to speak to the issue.

"Norell J."

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Prepared on 25 October 2026 · Esheria