
CANADA / JUDGMENT

Zilic v. Zilic

2021 BCCA 107

COURT

British Columbia Court of Appeal

DECIDED

9 March 2021

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2021 BCCA 107 Zilic v. Zilic

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Zilic v. Zilic,

2021 BCCA 107

Date: 20210309

Docket: CA46403

Between:

Eva Helen Zilic

Respondent

(Claimant)

And

Roman Mario Zilic

Appellant

(Respondent)

Before:

The Honourable Madam Justice Fisher

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated September 4, 2019 (Zilic v. Zilic, 2019 BCSC 1482, Vancouver Docket E160726).

Counsel for the Appellant:

J.P. Sullivan

Counsel for the Respondent:

S.L. Specht

Place and Date of Hearing:

Vancouver, British Columbia

October 26, 27, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 9, 2021

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Voith

Summary:

The appellant raises several grounds of appeal from the order of the trial judge dividing family property and awarding spousal support and special expenses relating to the parties' children. Held: Appeal allowed on one ground, other grounds dismissed. The judge made one error in respect of the division of property and reapportionment of family property to the respondent. The evidence did not support the judge's finding that the appellant wasted one investment. The remedy on appeal is to adjust the reapportionment of property, resulting in a reduction of total reapportionment by \$50,000 in the appellant's favour. The judge did not otherwise err in her approach to the division of property. The judge did not err in imputing income to the spouses or in awarding lump-sum spousal support at the mid-range of the SSAG. The judge did not err in her division of special expenses.

Table of Contents

Paragraph Range

Introduction

[1] - [11]

Legal Principles

[12] - [28]

Property Division

[12] - [14]

Imputing Income for Child and Spousal Support

[15] - [20]

Spousal Support

[21] - [25]

Special Expenses

[26] - [28]

Standard of Review

[29] - [36]

Overview of Findings by Trial Judge

[37] - [54]

Background Facts

[37] - [45]

Issues at Trial

[46] - [54]

Grounds of Appeal

[55] - [84]

Property Division

[56] - [84]

Support

[56] - [84]

Analysis

[56] - [217]

Alleged Error #1: Homer Street Investment Certificates

[56] - [84]

Alleged Error #2: Whistler Property

[85] - [104]

Alleged Error #3: Mainland Property

[105] - [121]

Alleged Error #4: Spot

[122] - [147]

Alleged Error #5: Rent

[148] - [152]

Alleged Error #6: Imputation of Mr. Zilic's Income for Child and Spousal Support

[153] - [165]

Alleged Error #7: Imputation of Ms. Zilic's Income for Child and Spousal Support

[166] - [190]

Alleged Error #8: Mid-range and Lump-sum Spousal Support

[191] - [210]

Alleged Error #9: Special Expenses

[211] - [217]

Conclusion and Remedy

[218] - [219]

Reasons for Judgment of the Honourable Justice Griffin:

Introduction

- [1] Roman Zilic appeals from orders made after a trial at which the judge divided family property and ordered that he pay lump-sum spousal support to Eva Zilic. The trial judgment is indexed at 2019 BCSC 1482.
- [2] The parties were married in 1999 and have three children. Ms. Zilic was a stay-at-home mother and homemaker during the marriage. The parties separated in October 2012, but this family proceeding was not commenced until 2016.
- [3] The issues at trial had to do with property division and child and spousal support.

- [4] As a general overview, the total family property to be divided, net of family debt, had a value of \$1,979,981, based on the judge's findings (taking into account the value of the family company, Spot Contractors Ltd., ("Spot"), at zero as at the time of trial). The largest asset was the proceeds from the sale of the family home, which at time of trial was net \$1,167,935.
- [5] The judge's order had the effect of dividing the family property equally, with two exceptions.
- [6] One exception to equal division was the judge's order that Mr. Zilic account to Ms. Zilic for \$50,000 in relation to an asset that the judge concluded had been wasted by Mr. Zilic, namely, an investment described below as the Homer Street Investment Certificates ("Homer Street ICs"). The other exception was the judge's order that Mr. Zilic account to Ms. Zilic for \$85,000 in relation to Spot, the value of which the judge also found had been wasted by Mr. Zilic. The total amount of this reapportionment in Ms. Zilic's favour was \$135,000.
- [7] The overall theme of Mr. Zilic's appeal with respect to property division is that the judge made several errors in her findings. He says the judge should not have ordered any reapportionment in favour of Ms. Zilic, either for the Homer Street ICs or for Spot. Further, Mr. Zilic says the judge undervalued one asset that was to remain in Ms. Zilic's hands, the Whistler Property, by \$28,394, if his interest in the Whistler Property was valued the way he says it should be. He says the judge overvalued one asset that remained in Mr. Zilic's hands, the Mainland Property, by \$25,706, by failing to treat a mortgage registered against the Mainland Property as family debt. He also takes issue with the judge's refusal to take into account rent paid by Mr. Zilic for his residence post-separation.
- [8] The judge also made findings as to the parties' respective incomes for the purpose of calculating child and spousal support. After imputing income to both parties, the judge ordered that Mr. Zilic pay lump-sum spousal support to Ms. Zilic in the amount of \$113,500, less amounts already advanced, amounting to a net amount of \$101,000. Mr. Zilic appeals from these findings as well.
- [9] Mr. Zilic also challenges the judge's treatment of the parties' respective responsibilities for the children's special expenses.
- [10] For the reasons that follow, I have concluded that for the most part Mr. Zilic's grounds of appeal cannot meet the standard required for appellate intervention. However, Mr. Zilic has persuaded me there is one error relating to the Homer Street ICs, that does justify appellate intervention.
- [11] I will address matters in the following order:
- a) the applicable legal principles;
 - b) the standard of review on appeal;
 - c) an overview of the findings by the trial judge;
 - d) the grounds of appeal;

- e) analysis of each of the grounds of appeal; and
- f) the conclusion and remedy on appeal.

Legal Principles

Property Division

[12] Property division is governed by the Family Law Act, S.B.C. 2011, c. 25 [FLA].

[13] The general principles relevant to this appeal are:

- a) As a starting position, spouses are entitled to equal division of family property and are equally responsible for family debt as at the time of separation, regardless of their relative contributions to the acquisition of the property: FLA, s. 81; *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 38.
- b) Family property includes all real and personal property owned by at least one spouse on the date of separation: FLA, s. 84(1). It also includes property acquired by a spouse that is derived from family property and the value by which "excluded property" increased during the relationship: FLA, ss. 84(1)(b)(i), (2)(g).
- c) Some property held by a spouse is excluded from family property. Excluded property is property acquired before the relationship, inheritances, property derived from excluded property, and some additional categories of property: FLA, s. 85. The onus of proof is on the spouse claiming that property is excluded property: FLA, s. 85(2).
- d) Family debt includes all financial obligations "incurred by a spouse" during the period of the relationship before separation and debt incurred after separation if incurred for the purpose of maintaining family property: FLA, s. 86.
- e) The presumptive date for determining the value of family property and family debt is as of the date of the hearing before the court respecting division: FLA, s. 87(b)(ii). There must be compelling evidence to depart from that valuation date: *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 35; *Namdarpour v. Vahman*, 2019 BCCA 153 at paras. 59-60. Departing from the presumptive valuation date is akin to reapportionment of property, and it thus requires consideration of the factors that would support unequal division pursuant to s. 95 and a finding that the presumptive valuation date would be significantly unfair: *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76; *Namdarpour* at para. 59.
- f) The value of family property must be based on its fair market value: FLA, s. 87(a).

- g) The court may order an unequal division of family property, family debt, or both if it would be "significantly unfair" to equally divide it: FLA, s. 95(1)(a). The words "significantly unfair" impose a higher threshold for the exercise of judicial discretion than under predecessor legislation: Jaszczewska at para. 41. Significant unfairness requires something objectively unjust, unreasonable or unfair in some important or substantial sense: Jaszczewska at para. 42; Singh v. Singh, 2020 BCCA 21 at para. 134.
 - h) Numerous factors can be considered when determining whether equal division would be significantly unfair. One factor that may justify unequal division of family property, which is particularly relevant in this case, is where a spouse after separation caused a significant decrease in the value of family property beyond market trends: FLA, s. 95(2)(f). This factor does not require a finding of a lack of good faith. A similar factor requiring a lack of good faith is "that a spouse, other than a spouse acting in good faith, substantially reduced the value of family property, or disposed of, transferred or converted property that is or would have been family property causing the other spouse's interest in the family property to be defeated or adversely affected": FLA, s. 95(2)(g).
 - i) The court is given wide powers to effect a division of family property or family debt, including making orders as to who owns an asset, transferring title, or requiring a spouse to pay compensation to the other: FLA, s. 97.
- [14] The court may also consider the spousal support needs of a spouse in making a reapportionment order, if those needs are not otherwise met: FLA, s.95(3). In this regard, the court may consider the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and circumstances of the relationship.

Imputing Income for Child and Spousal Support

- [15] The trial judge was required to determine the parties' incomes for both child support and spousal support purposes.
- [16] The calculation of child support, pursuant to the Divorce Act, R.S.C. 1985, c. 3, (2nd Supp.), s. 15.1(3), is determined by the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"). Section 19 of the Guidelines deals with imputing income. The following parts of s. 19 are relevant to the facts on this appeal:

Imputing income

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

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

- (g) the spouse unreasonably deducts expenses from income;

Reasonableness of expenses

- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[17] Sections 19(1)(g) and 19(2) are typically relied upon by trial judges to look beyond the income reported for tax purposes by a self-employed parent.

[18] Also relevant is s. 17 of the Guidelines:

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[19] The imputation of income is discretionary. The burden is on the party seeking to establish that income should be imputed. The broad governing test is reasonableness, having regard to the parties' actual capacity to earn income in light of all of their relevant circumstances, including age, education, health (physical and mental), work history, and work availability (which also takes into account child care responsibilities).

[20] As explained in *Marquez v. Zapiola*, 2013 BCCA 433:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has

been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).

Spousal Support

- [21] The applicable principles concerning spousal support under the Divorce Act, s. 15.2 and the FLA, ss. 160-162, are largely overlapping. Ms. Zilic pleaded both statutes and neither party seeks to draw any distinction between them. The conceptual basis under both statutes is the same: see *Marquez* at paras. 32-35; *Parton v. Parton*, 2018 BCCA 273 at para. 38-45; *Namdarpour* at para. 136.
- [22] The Spousal Support Advisory Guidelines (SSAG) provide guidance to the courts in the determination of quantum, duration, and form of spousal support (lump-sum or periodic payments).
- [23] The judge found that Ms. Zilic was entitled to an award of spousal support on both compensatory and non-compensatory grounds. It is useful to be reminded of the foundations for a spousal support award. As summarized by Justice Dickson in *Parton*:
- [38] The conceptual bases for entitlement to spousal support are well known: compensatory support, non-compensatory support (needs based) and contractual support. In this case, the judge found entitlement based on both compensatory and non-compensatory principles, grounding a spousal support award that is "single and indivisible": *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 39. He also found that Ms. Parton was entitled to indefinite spousal support, citing the SSAG and *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC refused, [2009] S.C.C.A. No. 41.
- [39] In *Chutter*, Justice Rowles described the underlying goals of compensatory and non-compensatory spousal support, namely, equitable sharing of the economic consequences of a marriage or its breakdown (compensatory support) and narrowing the gap between the needs and means of the spouses (non-compensatory support). In doing so, she explained that compensatory support provides redress for economic disadvantage arising from the marriage (such as diminished earning capacity and sacrificed career opportunities to take on child care responsibilities) or the conferral of an economic advantage upon the other spouse (such as contributions to enhanced career development). Citing *Yemchuk v. Yemchuk*, 2005 BCCA 406 and *Tedham v. Tedham*, 2005 BCCA 502, she also explained that, for purposes of non-compensatory support, at least for long marriages, "need" is generally measured against the marital standard of living: paras. 50-61. As this Court held in *Yemchuk*, while equalization of the parties' standards of living is not a stated objective of spousal support, in long-term marriages equality of standard of living may well be the just result: para. 50.

- [24] In Parton, this Court also touched on the factors that may be considered by a judge in exercising discretion as to whether to award spousal support as a lump sum or periodic payments. This Court accepted the analysis of the Ontario Court of Appeal in *Davis v. Crawford*, 2011 ONCA 294, regarding the advantages and disadvantages of a lump-sum award of spousal support that must be weighed by the trial judge:
- [67] The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example, short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.
- [68] Similarly, the disadvantages of such an award can include the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
- [25] In Parton, this Court noted also that a lump-sum spousal support award may be appropriate where the payor spouse has capital assets to fund the award, but a history of insufficient or variable income that could interfere with ongoing payments: at para. 48.

Special Expenses

- [26] In relation to child support, pursuant to s. 7 of the Guidelines, the court may provide for an amount to cover certain expenses that are beyond the ordinary expenses expected to be covered by child support. These have become known as "special expenses". As set out in s. 7(2), the guiding principle in determining each parent's obligation is that the expense is to be shared by the parents in proportion to their respective incomes.
- [27] The Guidelines deal with the determination of income in ss. 16-20. This includes income reported to Canada Revenue Agency for tax purposes on line 150 of the T1 tax return, as well as that imputed by the Court pursuant to s. 19. As well, s. 3.1 of Schedule III of the Guidelines deals with the calculation of income for purposes of s. 7 expenses.
- [28] The combined effect of these provisions is that spousal support is deducted from the payor's income and added to the recipient's income for purposes of calculating income in relation to payment of s. 7 expenses.

Standard of Review

- [29] An appeal is not an opportunity to re-argue all of the issues at trial and to have this Court substitute its opinion for that of the trial judge. This Court's role is quite limited.
- [30] As explained by Justice Butler in *Jean Louis v. Jean Louis*, 2020 BCCA 220:
- [24] The standard of review in family law matters is highly deferential. This Court should not intervene unless it finds a material error, a serious misapprehension of evidence or an error of law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Hsieh v. Lui*, 2017 BCCA 51 at para. 38. This deferential standard of review applies to all family law matters, including issues of property division: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 14; *Hallgren v. Fry*, 2013 BCCA 15 at para. 8. A high level of deference is necessary in family law cases to promote finality and to recognize the importance of the appreciation of the facts by the trial judge, who has had the benefit of hearing the parties directly: *Hickey* at para. 12; *Venables v. Venables*, 2019 BCCA 281 at para. 72.
- [25] It is worthwhile noting that the two principle errors alleged by the appellant challenge the judge's exercise of discretion: her decision to use the date of trial to value the family residence; and her decision to divide the family property equally. Such discretionary decisions are central to the task a judge must perform in resolving family property disputes and are always afforded considerable deference. To the extent that the appellant challenges the findings of fact, this Court can intervene only where there is a palpable and overriding error affecting the judge's assessment of the facts: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.
- [31] As discussed in *Housen*, the fact that the trial judge had the opportunity to see witnesses testify is not the only reason to accord deference to the judge's findings of fact. The trial judge also has the advantages of greater expertise in the weighing and assessing of evidence and of greater familiarity with the vast quantity of evidence at trial.
- [32] Although *Jean Louis* dealt with property division, Justice Butler correctly noted that the deferential standard of review also applies to decisions dealing with support: see also *Parton* at para. 33
- [33] While the standard of review applicable to family law proceedings is not different than in other civil proceedings, there are some special factors at play in family law judgments that provide additional context for the deference shown by appellate courts in reviewing trial judgments.
- [34] A family law proceeding often engages many issues, including division of multiple assets, parenting arrangements, child support, and spousal support. Issues having to do with the children are governed by the overarching principle of the best interests of the children. The other issues engage a number of legal principles, but ultimately all of the legal tests assist the judge in determining what outcome will be reasonable and fair to both parties on the particular facts of the case at hand. When thinking through and coming to conclusions on

each issue, the judge ought not to compartmentalize each issue or the evidence in a mechanical fashion. The judge should assess all of the evidence together, and the conclusions reached will be intertwined. Judges attempt to balance the need to explain their decisions with a desire to avoid escalating ongoing conflict between the parties. The multitude of issues that are raised by the parties and the focus at trial may result in some parts of the analysis in the reasons for judgment being rather succinct, and other parts more expansive.

- [35] It is therefore important on appeal not to lose sight of the fact that the trial judge may have been dealing with many more issues than are the subject of appeal.
- [36] These are additional contextual reasons for the deferential standard of review applicable to findings of fact, mixed fact and law, and the exercise of discretion in family law cases. For all of these reasons, this Court is cautious not to "tinker" by wading into the minutiae of the evidence and taking small bits of it to make adjustments to the findings here and there. Such an approach risks overlooking other aspects of the evidence of which the trial judge was aware and upsetting the trial judge's careful balancing of all of the related issues the judge was required to determine.

Overview of Findings by Trial Judge

Background Facts

- [37] The parties married in June 1999 and separated in October 2012, when Mr. Zilic left the family home. The couple had three children who were elementary school age at the time of separation and teenagers at the time of trial. Ms. Zilic had always been a full-time stay-at-home mother during the marriage, taking on the majority of the work within the home and organizing the children's school and extracurricular activities. Mr. Zilic was a building contractor who operated the family business, Spot, a renovation and construction business.
- [38] The family was comfortably upper middle class, with leased cars paid through Spot, private schooling and tutoring for the children, and Whistler vacations.
- [39] Mr. Zilic controlled all of the family finances. Spot was the main source of family income. Many expenses were run through the company as well, including for vehicles and fuel. Mr. Zilic controlled a joint line of credit, bank accounts and credit cards as well as the assets of Spot.
- [40] After separation, the parties continued intermingling their finances. Initially both simply used the joint bank accounts and credit cards, but in March 2013 Mr. Zilic cut off the family credit cards. Ms. Zilic was initially paid \$3,000 per month by Mr. Zilic; then briefly \$4,000 per month; then \$3,000 per month again; and eventually \$2,500 per month in 2015 and early 2016. Mr. Zilic paid for some family expenses--including the children's tuition, extracurricular activities, orthodontics and other special expenses--through joint accounts.

- [41] There was a disagreement between the parties in 2016 about the joint line of credit, which was secured against the family home. Mr. Zilic had been using the line of credit to pay his expenses, and it had increased by approximately \$256,000. Ms. Zilic sought to prevent further withdrawals. Ms. Zilic commenced her family claim around this time. When Mr. Zilic would not agree to terms that would prevent further withdrawals from the line of credit, she withdrew the balance of \$282,000. She offered to return it if Mr. Zilic would agree, on a without prejudice basis, to pay support of \$3,000 per month (he had decreased it to \$2,500) and to limit withdrawals on the line of credit. Mr. Zilic did not agree, and instead ceased paying all support and did not renew Ms. Zilic's vehicle lease through Spot when its term expired at the end of 2016.
- [42] Ms. Zilic thus supported herself and the children on the line of credit until September 2018, when the family home was sold and both parties received an advance from the sale.
- [43] A trial initially commenced in 2017 but was adjourned due to a last minute allegation by Mr. Zilic that Ms. Zilic was a beneficiary of a family trust created by her parents. As it turned out, Mr. Zilic did not advance this as part of his pleadings until he sought an amendment mid-trial in 2019, which was denied. No appeal is taken from this decision.
- [44] By the time of the trial in 2019, the parties had reached a mediated settlement on parenting issues.
- [45] On November 2, 2018, Mr. Zilic was ordered to pay interim child support of \$2,300 per month and interim spousal support of \$2,000 per month, without prejudice to any final rulings on support. He made those payments for three months (November, December and January) but ceased paying as of February 2019. The trial judge who heard the case at the end of February and beginning of March 2019 ordered at the conclusion of the hearing that Mr. Zilic pay arrears and continue to make the interim payments until and unless varied by the final trial reasons.

Issues at Trial

- [46] The responsibility for the increase in debt, and corresponding decrease in equity of the family home, was the primary issue between the parties at trial. Mr. Zilic sought an unequal division of family assets in his favour based on his assertion that Ms. Zilic had spent too much money before and after separation, including withdrawing funds from the line of credit. Mr. Zilic, through his counsel, embarked on a detailed examination of Ms. Zilic's spending by adducing a large number of documents and cross-examining Ms. Zilic at length during the trial.
- [47] The judge rejected Mr. Zilic's position with respect to Ms. Zilic's spending and the line of credit.

- [48] Mr. Zilic also sought an order that an investment he held in a property, described as the Mainland Property, be treated as excluded property on the basis that he had invested in it before the marriage.
- [49] The judge found that only \$2,000 of the value of the Mainland Property should be treated as his excluded property.
- [50] For her part, Ms. Zilic made an excluded property claim in relation to the proceeds of sale of the family home, on the basis that part of it related to a \$110,000 gift from her parents that should be treated as excluded property.
- [51] The judge rejected Ms. Zilic's position that the gift from her parents should be treated as excluded property that could be traced into the proceeds of sale of the family home.
- [52] The judge's findings on the above primary issues at trial are not the subject of appeal.
- [53] Rather, on appeal Mr. Zilic raises a number of other issues regarding the judge's valuation of family property and determination of family debt, as well as the judge's imputation of income and treatment of spousal support and special expenses relating to child support.
- [54] I will address the judge's findings on the issues in dispute on an issue-by-issue basis as I analyze the grounds of appeal.

Grounds of Appeal

- [55] Mr. Zilic argues that the judge made the following errors, which I have reorganized to follow the order in which the judge's reasons dealt with each issue:

Property Division

1. ordering a reapportionment of \$50,000 from Mr. Zilic to Ms. Zilic for the Homer Street ICs.
2. valuing the Whistler Property at \$213,000 and awarding Mr. Zilic's quarter interest to Ms. Zilic at \$36,522 based on that valuation;
3. failing to find that the first mortgage on the Mainland Property was a family debt and thereby over-valuing Mr. Zilic's interest in retaining that asset by \$25,706;
4. reapportioning \$85,000 of family property from Mr. Zilic to Ms. Zilic for her half interest in Spot;
5. refusing to consider the rent paid by Mr. Zilic as part of the reapportionment analysis;

Support

6. imputing income to Mr. Zilic equal to the higher of \$150,000 or his actual income;
7. in relation to Ms. Zilic's income: failing to impute income to Ms. Zilic for the years 2013-2018 and imputing \$25,000 or her actual income to Ms. Zilic for 2019 and subsequent years, subject to an order that may arise from a material change in circumstances after 2020;

8. ordering that Mr. Zilic pay spousal support to Ms. Zilic at the mid-range of the SSAG and on a lump-sum basis; and
9. ordering Mr. Zilic to pay 70% of the children's special expenses.

Analysis

Alleged Error #1: Homer Street Investment Certificates

- [56] In 2005, the parties purchased the Homer Street ICs. The first, a \$25,000 investment certificate in a residential development on Homer Street, was purchased in April 2005. The second, a \$100,000 investment certificate in the same development, was purchased in September 2005.
- [57] At trial, Ms. Zilic argued that her parents had gifted her \$110,000 and that money had been invested in the family home. The judge rejected Ms. Zilic's argument because Ms. Zilic did not establish that the \$110,000 was likely invested in the family home and she found that at the time the funds were not needed for that purpose: at paras. 85, 87. No appeal is taken from this conclusion.
- [58] The judge found that instead, \$100,000 of the funds were invested in the \$100,000 Homer Street IC: at para. 86.
- [59] There was no argument advanced by Ms. Zilic that the Homer Street IC was excluded property. However, it was a relevant family asset, the value of which was at issue.
- [60] The judge found that the maturity date of the Homer Street ICs was in 2009, but at some point they were converted to investment certificates in the amounts of \$35,000 and \$140,000 plus interest respectively, with an expiry date in June 2015. The Homer Street ICs were guaranteed by the principal of the developer, Mr. James Schouw.
- [61] The parties had been successful in another investment with Mr. Schouw in 2005. In April 2004, the parties used investment certificates, cash, and a loan from Mr. Toplak to purchase a property on Drake Street. In August 2005, the parties sold the property for approximately \$1,000,000 in profit.
- [62] However, the Homer Street development ran into trouble. Mr. Zilic gave evidence that, post-separation, Mr. Schouw indicated to him that he could apply the converted value of the Homer Street ICs to another real estate development. Mr. Zilic declined because he did not have the funds to complete the purchase of the unit in question.
- [63] There was also evidence that Ms. Zilic's brother-in-law, Mr. Siklic, had invested in the project as well, and in or about 2009 or 2010 he managed to recover all but \$10,000 of his investment.

- [64] The judge found that the Homer Street ICs had no value at the time of trial. However, she found that the \$175,000 face value of the Homer Street ICs could have been applied to an alternative real estate development sometime after separation but prior to 2015.
- [65] The judge found that:
- [98] Mr. Zilic made a unilateral decision not to realize on that investment, \$140,000 of which was derived from funds that were gifted to Ms. Zilic by her parents in 2005. While it is not possible to assess what value may have been achieved had Ms. Zilic had the opportunity to convert these investment certificates into the purchase of a residential unit, I find that Mr. Zilic disposed of this asset in such a way as to defeat Ms. Zilic's interest in it. I also find that Mr. Zilic's unilateral decision to do so without informing Ms. Zilic of this opportunity was not in good faith. I consider that Mr. Zilic's waste of the value of these certificates was significantly unfair and warrants reapportionment of the family's assets pursuant to the FLA.
- [99] It is impossible to know whether Ms. Zilic would have taken advantage of the opportunity to convert these certificates into a purchase of real estate had Mr. Zilic afforded her the opportunity to do so. While she did not have the funds herself, her father had loaned money to Mr. Zilic and herself in the past for precisely this purpose, and the parties were able to make a substantial and almost immediate profit from doing so. I therefore consider that such an investment was a distinct possibility. The value of such an investment is difficult to know, and it may have resulted in great profit, but there is also a possibility that the investment would fail.
- [100] Given the uncertainties of valuing this opportunity, and my finding that it is Mr. Zilic who is responsible for this uncertainty, I reapportion \$50,000 of the total family property to Ms. Zilic to address Mr. Zilic's abandonment of her interest in these certificates without consulting her.
- [66] On appeal, Mr. Zilic takes issue with the judge's findings and disposition in relation to the Homer Street ICs. He does not dispute that the assets were worthless at the time of trial. He says that the judge made other factual errors.
- [67] First, Mr. Zilic has a strong argument that the judge made an error in finding that the source of \$100,000 of the funds for the Homer Street ICs was derived from a gift from Ms. Zilic's parents. It is equally likely the funds were derived from the sale of the property on Drake Street, which was purchased in part with similar investment certificates, as those funds were received on August 30, 2005, two days before Ms. Zilic received the \$110,000 gift and about two weeks before the purchase of the \$100,000 Homer Street IC. The judge did not conclude that the Homer Street ICs were excluded property because of the source of the funds. The judge treated these investments as family property. Nevertheless, it could be said she was influenced somewhat in her analysis of the perceived unfairness of Mr. Zilic "wasting" this asset by her conclusion that the funds were a gift from Ms. Zilic's parents.

- [68] Second, Mr. Zilic says that the judge erred in finding that the Homer Street ICs had some residual value after the parties' separation in 2012, and that Mr. Zilic wasted that value in bad faith. I am persuaded by Mr. Zilic that this was an error.
- [69] The judge's finding that equal division of family property would be significantly unfair without some reapportionment due to this failed investment appears to be based on s. 95(2)(g) of the FLA. The judge found that Mr. Zilic was not acting in good faith in making a unilateral decision to dispose of the assets in such a way as to defeat Ms. Zilic's interest in it: at para. 98. She also referred to Mr. Zilic's "waste" of the value of these family assets, which may also have been a reference to s. 95(2)(f).
- [70] However, the original ICs expired in 2009. The ICs state on their face that they have no residual cash value and are redeemable only upon completion of a purchase of a Homer Street strata lot. The judge accepted the evidence that the project was never built and that Mr. Schouw was known to be experiencing financial difficulty in 2009 when the original certificates came due: at para. 90.
- [71] It is true that Mr. Siklic managed to get some money out of his similar investment in the project in 2009 and 2010. In her evidence, Ms. Zilic's criticism of Mr. Zilic was that he knew the development was going sideways and he never made efforts to retrieve his money and so it was lost. I note that if the money was lost because Mr. Zilic did not make the same efforts as Mr. Siklic, it appears to have been pre-separation and not some post-separation attempt to deplete assets out of spite.
- [72] Ms. Zilic was suspicious that her husband would just walk away from this investment, and so wondered if he had struck up a deal on the side with Mr. Schouw. The judge did not find any such side deal.
- [73] In my view, it cannot be said that Mr. Zilic's decision to accept new Homer Street ICs for a higher value than the original ICs was in bad faith, given that the parties had profited so much in the past from a similar investment. Mr. Zilic's evidence was that he was still hopeful at that point. It is unclear when he was offered the new certificates. As for Ms. Zilic, she was content to leave financial decisions to her husband during the marriage.
- [74] Mr. Zilic said he later asked Mr. Schouw about getting his money back and Mr. Schouw's response was to ask him if he would like to invest in a unit of a building on Hornby Street, as they would accept the converted Homer Street ICs as going toward that investment. Mr. Zilic recalled this conversation being after separation. He said he did not have the funds to put towards another unit and agreed that he never told Ms. Zilic about this conversation.
- [75] It is clear that the judge was of the view that Mr. Zilic ought to have told Ms. Zilic of his conversation with Mr. Schouw. I cannot see that the judge erred in this regard, as the investment was family property and Ms. Zilic was entitled to be informed about it.

- [76] But there are several problems with the judge's finding that the opportunity mentioned by Mr. Schouw was of any value and in concluding that Mr. Zilic's actions wasted that value.
- [77] Given that Mr. Schouw was attempting to mollify a creditor, it cannot be said that the hearsay evidence of what he told Mr. Zilic in response to pressure to pay the debt is reliable or credible evidence of an opportunity of any real value. Ms. Zilic called no admissible evidence in this regard. There was no evidence that a development built on Hornby Street accepted Homer Street ICs as a form of partial payment towards investment in a unit. There is no evidence that the Homer Street ICs had any market value post-separation.
- [78] No doubt it would have been preferable for Mr. Zilic to inform Ms. Zilic of his conversation with Mr. Schouw about the Homer Street ICs. But this does not necessarily mean it was "significantly unfair", within the meaning of the FLA, that he did not, as is necessary to justify reapportionment of other assets.
- [79] There was no evidence that, had she been told she had an opportunity to invest in another real estate development using the Homer Street ICs in part, Ms. Zilic would have raised the funds (in whatever unknown amount was required) and made the investment. Ms. Zilic could have addressed this in her evidence at trial but did not. She knew before trial of Mr. Zilic's conversation with Mr. Schouw, from Mr. Zilic's evidence given on examination for discovery.
- [80] But presuming, even in the absence of evidence, that it could be inferred that there was a possibility Ms. Zilic would have pursued such an investment, borrowing money from somewhere else to complete the purchase of a unit, where would that lead us? Before this possible investment opportunity can be meaningful, it would also have to be presumed, again in the absence of evidence, that there was a possibility that this would have been a profitable investment, even after taking into account the cost of borrowing.
- [81] The problem is that, in the absence of evidence from Ms. Zilic on either point, there was at least an equal possibility that if told of the conversation with Mr. Schouw, Ms. Zilic would have decided it was too risky to invest more money based on Mr. Schouw's promises, or, if she did invest, she would not have made any money on her investment.
- [82] The judge's finding that the amount of the Homer Street ICs "could have been applied to an alternative real estate development" after separation and before the expiry of the ICs, suggesting there was some value in the investment, is in my view too speculative and is not an inference that could be drawn from the evidence.
- [83] Despite the deferential standard of review, this Court may intervene where the award is "clearly wrong" in the sense that it cannot reasonably be supported by the evidence: *Marquez* at para. 26. There was no evidentiary foundation for the judge's conclusions that Mr. Zilic disposed of this asset "in such a way as to defeat Ms. Zilic's interest in it" and that the interest was of any value. As such, the judge's reapportionment of property based on these findings was clearly wrong.

[84] I would therefore allow the appeal on this ground, and set aside the judge's reapportionment of \$50,000 of family property to Ms. Zilic.

Alleged Error #2: Whistler Property

[85] One of the family assets was a one-half interest in a condominium unit located in Whistler, BC (the "Whistler Property"). The asset was in Mr. Zilic's name; the other half-owner of the unit was Ms. Zilic's father, Mr. Toplak.

[86] Prior to trial, Mr. Zilic advanced the claim that the Whistler Property was his excluded property, but he abandoned this claim at trial. At trial his position was that the property should be sold and the proceeds divided between the parties and Mr. Toplak. He did not name Mr. Toplak as a party to the proceeding, so this was not a realistic remedy.

[87] The judge dealt with the Whistler Property by ordering that Mr. Zilic transfer title of the one-half interest to Ms. Zilic, in return for Ms. Zilic accounting for one-quarter of the value, payable to him.

[88] The issue at trial that remains a live issue on appeal is the valuation of the Whistler Property.

[89] Rule 13-3(2) of the Supreme Court Family Rules requires that expert opinion evidence on a financial issue must be presented by a jointly appointed expert, unless the court otherwise orders or the parties otherwise agree. Where a joint expert has been appointed, no other expert may give opinion evidence on the issue, absent court order: R. 13-4(5).

[90] The parties had jointly retained an appraiser who produced an appraisal report in 2016. The parties had not asked the appraiser to update the appraisal as of 2019, a relatively simple process under the Supreme Court Family Rules. Mr. Zilic did not bring an application for leave to call opinion evidence from another expert on the value of the Whistler Property.

[91] However, the parties put into evidence the BC Assessment Authority's 2019 property tax assessment of the property, which was higher than the 2016 appraisal.

[92] The trial judge valued the one-half interest of the Whistler Property based on the average between the 2016 appraised value and the 2019 assessed value of the property, which was consistent with Ms. Zilic's position at trial: at para. 113.

[93] The trial judge rejected Mr. Zilic's argument that the judge should give weight to evidence he called from a realtor friend of his, Mr. Kuramoto, as to recent sales in the building. The recently sold units obtained a higher sale price on a square-foot basis than both the 2016 appraisal and the 2019 BC property tax assessment of the Whistler Property. The judge did not find this evidence useful: at para. 110.

[94] Mr. Zilic appeals from the judge's determination of the value of the Whistler Property, arguing that the judge should have given considerable weight to the realtor's evidence and chosen a higher value for that property.

- [95] Mr. Zilic points to two errors made by the judge in her reasons: first, she stated that Mr. Kuramoto was called to "express an opinion"; and second, she stated he was provided with sales data by Mr. Zilic: at para. 110. In fact, Mr. Zilic says he took the position at trial that Mr. Kuramoto's evidence was not opinion evidence and so none of the rules pertaining to expert evidence had to be met. Further, while Mr. Zilic provided him with information about the strata, it was Mr. Kuramoto who obtained the sales data.
- [96] In my view these two purported errors were immaterial.
- [97] The judge properly understood that Mr. Kuramoto was being called to give evidence as to sales data on other units in the same building for the purpose of supporting inferences about the value of the Whistler Property. Mr. Zilic's position was that the sales data must be reliable because it was accessible to realtors such as Mr. Kuramoto, so to that extent he was relying on Mr. Kuramoto's expertise.
- [98] The data Mr. Kuramoto relied on as to the recent sales was hearsay evidence that was not produced before trial. The judge was not wrong in noting that Mr. Kuramoto had no direct or personal knowledge of any of these sales or of the Whistler Property itself, and could not speak to comparative or distinguishing qualities. Mr. Kuramoto was not even a realtor working in the Whistler market. Mr. Kuramoto was a friend of Mr. Zilic and not independent.
- [99] The judge was understandably critical of Mr. Zilic for not complying with the rules for notice of expert opinion evidence. Indeed, Mr. Zilic did not even comply with the rules for giving notice of this witness in his trial brief.
- [100] Had Mr. Zilic wanted to call evidence of recent comparable sales, there was no reason he could not have sought to have the joint appraisal updated.
- [101] Mr. Zilic's approach created the unfairness of taking the opposing party by surprise, as he only gave notice that he would be calling Mr. Kuramoto on the eve of calling the witness. Because of the lack of notice, the opposing party had little opportunity to challenge the hearsay evidence relied on by Mr. Kuramoto about the sales of other units in the building, and no opportunity to investigate distinguishing or comparable factors of the other units.
- [102] The judge was not required to conclude that all units in the building were comparable in the absence of first-hand evidence regarding the other units that had recently sold or expert opinion evidence. There may have been many distinguishing factors between the Whistler Property and the recently sold units, such as quality, condition, renovations, views, exposure to sunlight, exposure to noise, food smells, and the like.

[103] It was entirely in the judge's purview to determine what weight to give Mr. Kuramoto's evidence when determining the value of the Whistler Property. The fact she considered his evidence but in the end gave it no weight does not constitute an error. It is not this Court's role to reconsider the same evidence considered by the judge and assign to it a different weight.

[104] This ground of appeal is therefore not established.

Alleged Error #3: Mainland Property

[105] Mr. Zilic purchased a one-half interest in a commercial property located on Mainland Street in the Yaletown area of Vancouver (the "Mainland Property") in 1997, approximately two years before the marriage. The other owner is a friend of Mr. Zilic, Dieter Saxer. Mr. Saxer operates an eyewear business out of the property.

[106] Although Mr. Zilic is shown as a shareholder of the company that owns the eyewear business, it was his evidence, confirmed by Mr. Saxer, that the share register is a mistake and he has no interest in the business. The judge received no evidence as to the value of Mr. Zilic's ostensible shares in any event.

[107] On the basis that the pre-marriage value of Mr. Zilic's interest in the Mainland Property would be considered his excluded property, the judge found the excluded property value to be \$2,000. No appeal is taken from that decision.

[108] Mr. Zilic wished to keep the Mainland Property and it made sense to order a compensation order be made by which he would compensate Ms. Zilic for her interest in this family asset. The question was the amount of the compensation order. This required looking at the value of the asset and whether there was any debt associated with the asset.

[109] The Mainland Property was appraised at \$1,478,000 as of January 7, 2019, by way of a joint valuation. The judge accepted one-half of this amount as the value of the parties' property interest.

[110] Although there was a 2019 BC property assessment valuing the property approximately \$200,000 higher as at July 1, 2018, Mr. Zilic submitted this should be ignored and the judge agreed as the appraisal was more recent.

[111] The issue between the parties at trial and on appeal has to do with whether mortgages registered on the Mainland Property should be considered family debt. While Mr. Zilic in argument frames the issue on appeal as one affecting the value of the asset, that is not correct. The market value of the asset is not at issue. What is at issue is whether or not one of two mortgages on the property should be considered family debt.

- [112] Mr. Zilic appeals from the finding that one mortgage on the Mainland Property is not family debt. He says that the judge ought to have found one half of the \$102,826 first mortgage to be family debt--that is, the amount of \$51,413. Mr. Zilic submits that this requires an adjustment of the division of assets.
- [113] Mr. Zilic agrees that a second mortgage on the Mainland Property is not family debt and need not be taken into account.
- [114] The judge found that the two mortgages on the Mainland Property were not family debt:
- [136] With respect to the mortgages on the Mainland Property, the evidence establishes that Mr. Zilic has not been responsible for paying them for more than 15 years. In return, he and Ms. Zilic have foregone substantial rent on the Mainland Property for almost 20 years, and in return Mr. Zilic has allowed Mr. Saxer to leverage the Mainland Property through refinancing and additional mortgages for the purposes of financing Mr. Saxer's own projects. I find that Mr. Zilic is not expected to pay the principle or interest on the mortgages on the Mainland Property and that they are not family debt.
- [115] I can see no error in the judge's finding of facts at para. 136 of her reasons, which were supported by the evidence. Mr. Zilic had not been responsible for any payments on the mortgages. Both he and Mr. Saxer testified that Mr. Saxer was solely responsible for paying all costs in relation to the Mainland Property, including any mortgage payments. There was no distinction in the treatment of the two mortgages in this regard.
- [116] Mr. Zilic called no evidence to prove that any amount presently owing on a mortgage in relation to the Mainland Property was incurred by him and was family debt within the meaning of the FLA. Mr. Zilic testified he "believed" that both he and Mr. Saxer took some money out when the mortgage was obtained in 2006, but that belief was highly unreliable. Mr. Saxer did not confirm that evidence. Mr. Zilic could not point to any need by him to obtain a loan at the time, as he had substantial cash on hand from the sale of another property. It was more likely that any loan secured by a mortgage related to Mr. Saxer's business.
- [117] In any event, Mr. Zilic's evidence that he believed he obtained some money from the mortgage was not only unreliable, it was also irrelevant in light of the evidence that Mr. Saxer covers all of the mortgage payments, and in return, Mr. Saxer's business does not pay rent. This is the same deal that Mr. Saxer and Mr. Zilic have with respect to the other mortgage on the property.
- [118] On appeal, Mr. Zilic argues that Ms. Zilic conceded in her opening submission that the one mortgage was family debt. It is true that in her opening she indicated that one mortgage was family debt, based on her understanding of the evidence. It was not a formal admission, and there was no complaint in closing submissions when her position changed based on the evidence that came out at trial. Ms. Zilic's understanding was totally dependant on information provided by Mr. Zilic. In the end, the evidence at trial did not

support this understanding.

- [119] Given that Mr. Zilic could not account for the funds, I should also note that if the judge had determined that the first mortgage was family debt, she nevertheless could have also determined that it was not incurred in the normal course of the relationship between the spouses and therefore ought not to be equally divided: FLA, s. 95(2)(d); Jean Louis at para. 72.
- [120] As was the case with many assets under the control of Mr. Zilic, the evidence as to the Mainland Property and associated mortgages was fragmentary, and Mr. Zilic's own memory was unreliable. The judge was asked by Mr. Zilic to accept his and Mr. Saxer's oral evidence even where it was at odds with the documents, including: Mr. Saxer's evidence that Mr. Zilic had no interest in the business despite being shown on the share register as a shareholder and that Mr. Zilic received no rent despite there being a lease in existence showing rent payable of \$36,000 per year. The judge was balanced in her approach to accepting this evidence: at paras. 128-130. She cannot be said to be wrong in accepting Mr. Saxer's evidence regarding the fact he was responsible for the mortgage debt.
- [121] I see no basis for interfering with the judge's findings regarding the Mainland Property.

Alleged Error #4: Spot

- [122] Mr. Zilic was given the family business, Spot, by Ms. Zilic's father, Mr. Toplak. There was no dispute that it made sense that this was a family asset he alone should retain given that he operated the business. The dispute was how Ms. Zilic's one-half share of this family asset should be valued.
- [123] There was no formal valuation of Spot produced at trial. This was despite the fact that the income generated from this family company had sustained the parties' comfortable lifestyle for years.
- [124] The judge was left to discern the value of the company from the company's financial statements, which included the company's income and expenses over the years.
- [125] Both parties at trial argued that the value of the company could be discerned by considering the value of retained earnings and shareholder loans.
- [126] The judge noted that the shareholder loan account did identify amounts owed to Mr. Zilic: at para. 147. Further, the judge noted that authority from this Court supported the view that in some circumstances, such as a non-capital intensive family company, retained earnings may be a family asset to be divided, citing Namdarpour at para. 129. Nevertheless, the judge was concerned by the absence of any expert evidence as to the value of Spot.
- [127] The judge noted several factors that indicated Spot had value but that the value had diminished just before trial:

[149] With the evidence I have available, I make the following findings as to Spot's value:

- a) At the time of separation, Spot had access to free warehouse space and was equipped with vehicles and tools that, though depreciated, allowed Mr. Zilic to carry on a largely profitable business. It also had clients and construction contacts that contributed to its value;
- b) At the time of separation, Spot had \$128,843 in retained earnings and \$48,000 in shareholder loans;
- c) Spot's revenues were dependent on the work Mr. Zilic booked and performed through the company. Between separation and trial, Spot had four years where its revenues exceeded \$800,000, however in the year immediately before trial it recorded revenues of less than \$150,000;
- d) Between separation and trial, Spot continued to pay for vehicles for Mr. Zilic, including a truck, Volkswagen Touareg (and later a Golf), and a Triumph motorcycle, and all gas and related vehicle costs;
- e) Between separation and the end of 2016, Spot also paid for the lease of an SUV for Ms. Zilic and her gas;
- f) Spot paid cell phone and other bills for members of the family;
- g) Spot also paid for many of Mr. Zilic's expenses, including restaurant meals and travel throughout the separation period;
- h) In 2017, Spot's retained earnings were \$40,307; and
- i) At the time of trial in early 2019 Spot had retained earnings of negative \$12,331 and the shareholder loan had decreased to \$240.

[150] In terms of liabilities, the most significant was in 2013, when Spot Contracting accumulated approximately \$150,000 of "bad debt." This was explained by Mr. Zilic as arising from work done in 2012. He also explained that he chose not to register a builder's lien for that work to assist his client, but ultimately that client went out of business and the debt was determined to be unrecoverable in 2013.

[128] The judge found that Spot's value was not limited to its assets: at para. 153.

[129] The judge held that Mr. Zilic had total control over Spot and had distributed virtually all of the income and assets of the company to himself, depleting it between the time of separation and trial, and this justified reapportionment:

[155] I also find that Mr. Zilic had total control over the company between separation and trial. Between separation and 2016 he distributed the income and assets of the company to family expenses as well as to himself. After 2016 he distributed the income and assets of the company almost entirely to himself, and after 2017 he made little effort to book new work or to maintain the value of the company.

- [156] I find that Mr. Zilic is responsible for the almost complete depletion of the assets of the family company between separation and trial, and that he obtained substantial benefits from Spot beyond use of its retained earnings and shareholder loans during separation. I find that awarding Spot Contracting to Mr. Zilic on the basis of its retained earnings and shareholder loan account at the time of trial would be significantly unfair to Ms. Zilic and that a reapportionment of family property is warranted to address this.
- [130] The judge found that the retained earnings and shareholder loans at the time of separation were worth approximately \$175,000 but this had been depleted by the time of trial: at paras. 151, 154. The judge determined that Mr. Zilic should keep the shares of Spot but that a reapportionment of \$85,000 of the family property to Ms. Zilic was warranted: at paras. 156-57.
- [131] Mr. Zilic appeals from this conclusion. He asserts that the judge made two errors in her treatment of Spot:
- a) she chose the date of separation as the valuation date, contrary to s. 87 of the FLA; and
 - b) she valued Spot in a manner inconsistent with fair market value.
- [132] Mr. Zilic maintains that Spot should have been treated as having no value, resulting in no reapportionment to Ms. Zilic.
- [133] I disagree with Mr. Zilic that the judge chose the date of separation as the valuation date. She did not value Spot as worth \$175,000 and divide it on that basis; rather, she reapportioned family property to Ms. Zilic in the amount of \$85,000. The judge was very aware of the difference between valuation of a family asset and reapportionment.
- [134] The judge made no error in her understanding of the legal framework of the FLA. Her reasoning makes it quite clear that she understood the presumptive valuation date was the date of trial, as she noted at paras. 44 and 50, and she attempted to determine that value. She considered the value of Spot at the time of trial and noted the lack of evidence in that regard: at para. 142. She dealt with the argument of Mr. Zilic that the company was worth nothing at the time of trial because its retained earnings were negative and the shareholder loan had decreased to \$240 and observed that if it was divided on that basis there would be nothing to divide: para. 152. The judge was of the view that accepting Mr. Zilic's position that the company was worth nothing would be significantly unfair given the company's much higher value at the time of separation, justifying reapportionment. The judge's approach was entirely consistent with s. 95(2)(g)(ii) of the FLA and the authorities cited by the appellant, such as Kumagai, a case cited by the judge.
- [135] I would therefore not accede to the appellant's argument as to the first alleged error made by the judge in dealing with Spot.

- [136] As for the second alleged error, the appellant submits that the judge valued Spot in a manner inconsistent with fair market value. He argues that a more formal approach to determining fair market value should have been undertaken by the judge, relying on *Maguire v. Maguire*, 2016 BCCA 431, at paras. 28-30 and principles from business valuation text books.
- [137] Ms. Zilic points out that Mr. Zilic did not rely on *Maguire* at trial nor did he retain an expert to prepare a valuation of Spot. She suggests Mr. Zilic conceded before the trial judge that retained earnings and shareholder loan accounts could be a source of information as to the value of the company, although he claimed these were worth nothing. Before this Court, Mr. Zilic agreed that retained earnings and shareholder loans could be considered in determining the value of the business.
- [138] The largest problem with this second aspect of the appellant's argument dealing with Spot is that it is premised on his success on the first argument. It is premised on the notion that the judge valued Spot as worth \$175,000. I have already stated my view that the judge did not do this. The judge noted that \$175,000 worth of assets had been depleted from Spot by Mr. Zilic post-separation, bringing the value of retained earnings and the shareholder's loan effectively to zero. She reapportioned other family property because of this depletion.
- [139] Despite this, there is an aspect of this part of the appellant's argument that requires further consideration.
- [140] Mr. Zilic submits that in giving weight to the retained earnings and shareholder loan account in Spot in 2013, which were subsequently reduced to nothing by the time of trial, the judge erred in overlooking the evidence that these values were impacted by the writing-off of approximately \$150,000 worth of receivables that were subsequently determined to be bad debt. He suggests that any depletion of the retained earnings and shareholders loan account was solely attributable to this bad debt.
- [141] The problem with this aspect of the appellant's argument is that he does not show a link between that bad debt and the reduction of the shareholder loan account in Spot. Likewise, the appellant does not show a link between the reduced retained earnings and the bad debt after 2013. While the evidence does suggest a link between the bad debt and reduction of retained earnings in 2013, that is a single year only.
- [142] It is to be remembered that over the years Spot made significant revenue: \$471,630 (in 2012, the year in which the accounts receivable reflected the subsequently declared bad debt); \$532,925 (in 2013, the year in which the bad debt was taken into account); \$891,881 (2014); \$920,612 (2015); \$851,452 (2016); and \$811,612 (2017). While of course there were also expenses, many of these were of personal benefit and some were paid to Mr. Zilic's girlfriend's company. The judge understandably had difficulty accepting that the business was of no value given the significant revenues it could generate.

- [143] The judge did acknowledge Mr. Zilic's argument that there were accounts receivable at the time of separation in 2012 that were never collected by Spot. But at the same time, the judge noted that Spot had other valuable resources and assets not reflected in the financial statements: free warehouse space; vehicles and tools that were depreciated but still of use; and clients and construction contracts.
- [144] Further, it is important to take into account the fact that by 2016 the retained earnings had accumulated again and were in the amount of \$73,781. The judge found that Ms. Zilic received no support from Mr. Zilic after March 2016 and Mr. Zilic was drawing substantially on the family assets to pay for his own spending: at paras. 20-21. There is no logical basis for inferring that the reduction of the retained earnings after March 2016, under the direction of Mr. Zilic, to a negative position at the time of trial, was due to the bad debt or was spent on joint expenses.
- [145] Further, the shareholder loan account of close to \$50,000 diminished and eventually disappeared after 2013. The depletion of the shareholder loan account cannot be attributed to the bad debt.
- [146] Mr. Zilic did not account at trial for the depletion of the shareholder loan account of close to \$47,933 or the depletion of retained earnings of \$73,781. Incorporated in the judge's analysis is the finding that Mr. Zilic took the benefit of these amounts personally. These figures total approximately \$121,714. Once the judge's findings regarding the other aspects of Spot's value are added to the mix, that is, intangible and tangible assets, there is evidentiary support for the judge's conclusion that Ms. Zilic should be compensated in the amount of \$85,000 for her half interest in Spot.
- [147] In my view there is no basis for interfering with the judge's findings of fact that by the time of trial Mr. Zilic had taken the benefit of the retained earnings and shareholder loan account, which were aspects of the value of Spot, leaving nothing to distribute to Ms. Zilic; that Spot had inherent value despite the financial statements; and that it would be significantly unfair not to reapportion \$85,000 of other family property in Ms. Zilic's favour to account for the depletion of the value of Spot. The finding of a trial judge that equal division of property would be significantly unfair is entitled to a highly deferential standard of review: Singh at paras. 125, 142. I would not accede to this ground of appeal.

Alleged Error #5: Rent

- [148] At trial, Mr. Zilic argued that there should be a reapportionment of assets in his favour to compensate him for the fact that Ms. Zilic had lived in the family home since separation while he rented an apartment. Mr. Zilic raised this in closing submissions and it was not part of his pleadings. Neither party was cross-examined on the issue.
- [149] The judge rejected this argument and made no such adjustment: at paras. 173-75. Mr. Zilic appeals from this conclusion.

[150] It should be kept in mind that Mr. Zilic used the equity in the family home by using the line of credit secured against it to pay for things he would ordinarily be required to spend his own income on, including amounts he paid Ms. Zilic in lieu of support, his rent, and his personal expenses. The line of credit paid for his rent until March 2016. The line of credit was a liability that reduced the net value of the family home. In this way, family property was already adjusted to take into account the rent he paid.

[151] Likewise, Ms. Zilic did not live in the family home for free. Any costs of maintaining the home were shared equally: at para. 175.

[152] I see no error in the judge's conclusion that there should be no additional adjustment for Mr. Zilic's rent.

Alleged Error #6: Imputation of Mr. Zilic's Income for Child and Spousal Support

[153] The judge was required to determine the income of the parties as the foundation for orders for child and spousal support.

[154] The judge cited the applicable legal authorities that provide a judge with discretion to impute income to a parent: at paras. 183-87.

[155] The judge found that Mr. Zilic's income, for the purposes of the Guidelines in the years 2014-2017 was: \$151,000; \$165,350; \$210,650; and \$110,500, respectively. This was higher than Mr. Zilic's reported income and took into account some of his personal spending that was paid for by Spot. Mr. Zilic does not challenge these findings as to his annual income for Guideline purposes during those years.

[156] After averaging this income over the years, and subtracting \$9,375 in recognition of a shared parenting arrangement that might require Mr. Zilic to cut into his work hours, the judge imputed to Mr. Zilic an income of \$150,000 for support purposes for 2019 and going forward, subject to any actual increase beyond that amount in 2020: at para. 228. Any increases would only be relevant to child support, given that the judge based a lump-sum spousal support award on Mr. Zilic's income being fixed at \$150,000.

[157] Mr. Zilic submits on appeal that the judge erred in using an average of past years' income and not taking into account either his declining income in 2017 or actual lower income in 2018, and ought to have found that his ability to earn income was declining. He says his decline in income was due to what he submits was a "well-known" and "catastrophic" decline in the real estate market caused by new legislation affecting foreign buyers of local residential real estate. He asks the court to take judicial notice of this.

[158] The first point in answer to his argument is that it is within a trial judge's discretion to average income rather than using a more recent income figure. It is particularly appropriate to do so where the person is self-employed and the judge has a well-founded suspicion that the family litigation has affected the spouse's efforts, as was the case here.

- [159] The problem with Mr. Zilic's arguments as to why his income declined is that these arguments were made at trial, were considered, and were rejected. The judge was not persuaded that Mr. Zilic suffered a drop in his ability to earn income. She found that his Guideline income was "better determined by averaging his historical income in years when his lack of motivation to work and his preoccupation with this trial were not factors": at para. 210. The judge could have chosen to average the three years 2015-2017, but included 2014 because it was more favourable to Mr. Zilic.
- [160] The judge also noted that Mr. Zilic admitted his 2018 income was an anomaly and he expected to return to his full earning capacity in 2019. Mr. Zilic was 47 at the time of trial. I do not see any error that justifies interfering with the judge's rejection of Mr. Zilic's arguments that he was less capable of earning an income than he used to be in years past.
- [161] Mr. Zilic called no evidence to prove that new legislation affecting foreign buyers of residential property caused a decline in Mr. Zilic's construction business in 2017 and 2018 and that this would continue going forward. Mr. Zilic's position on appeal seems to be that the trial judge ought to have taken judicial notice of this effect.
- [162] I see no merit to this position. It cannot be said to be common knowledge that there was new legislation that negatively and broadly impacted the market for renovations and construction, let alone in a way that impacted Mr. Zilic's contracting business.
- [163] As a second challenge to the income imputed to him by the judge, Mr. Zilic submits that the judge ought to have recognized that part of his past income included rental income from the Whistler Property. This rental income would not be available to him going forward because of the post-trial distribution of this asset to Ms. Zilic. He submits that taking this into account would result in reducing his income by \$6,254.
- [164] However, Ms. Zilic argues that the fact Mr. Zilic is no longer receiving income from the Whistler Property is more than offset by the fact that he has the ability to earn rental income from the Mainland Property and chooses not to do so. The evidence was that the annual market rent for the Mainland Property would be approximately \$47,067. Ms. Zilic argued at trial that additional income should be imputed to Mr. Zilic because of this income-earning potential. In Mr. Zilic's favour, the judge rejected that argument.
- [165] The judge had a large body of evidence to take into account, and she was balanced in her approach to imputing income to Mr. Zilic for support purposes. Mr. Zilic did not make the judge's task easy due to his vague approach to evidence about his business income, his lack of record keeping and his apparently poor memory. I find Mr. Zilic's approach on appeal to be focused on only one strand of the evidence without consideration of the many other intertwined pieces of evidence taken into account by the judge. I am not persuaded that it would be appropriate to interfere with her conclusions in this regard.

Alleged Error #7: Imputation of Ms. Zilic's Income for Child and Spousal Support

- [166] When the parties married, they planned that Ms. Zilic would be a stay-at-home wife and mother, and this is what happened. This was the traditional family model in which Ms. Zilic was raised. She had very limited work experience.
- [167] Ms. Zilic was 37 at the time of separation and the children were approximately 7, 9 and 10. She was a fulltime homemaker and the primary caregiver of the parties' three children during the relationship and continued to be the primary caregiver for several years afterwards, for a total of approximately 16 years. She had very limited work experience. The parties only began a shared parenting arrangement in October 2018, a few months before trial.
- [168] After separation, Ms. Zilic made some efforts to find employment but did not achieve full-time employment. She found work of a clerical nature (receptionist and office work) in 2013 and a similar position in 2016. Her income in the years post-separation and leading up to trial was: \$1,155 (2013); \$6,985 (2014); \$8,595 (2015); \$12,087 (2016); \$19,218 (2017). Originally making \$20/hour in her clerical employment, by the time of trial she was making \$25/hour.
- [169] Ms. Zilic agreed that she would be looking to work more now that there was going to be a shared parenting arrangement and the result at trial would allow her to consider whether to return to school to upgrade her skills.
- [170] The judge found that, up to the time of trial, Ms. Zilic had been making efforts towards her own self-sufficiency. The judge also found that her hours of work would increase in the future because of the shared parenting arrangement and decreased dependency of the children on her for transportation.
- [171] The judge considered Ms. Zilic's past efforts at earning income to be reasonable and imputed to her an income of \$25,000 in 2019 and going forward for spousal support purposes (due to a lump-sum award for spousal support), but subject to any actual increase in her income after 2020 for child support purposes: at para. 201.
- [172] Mr. Zilic argues on appeal, as he did at trial, that Ms. Zilic was and is "intentionally and unreasonably underemployed." He submits that the judge erred in not imputing a higher income to Ms. Zilic for past years and for the future.
- [173] Dealing first with past income, I agree that, viewed from a distance, it is difficult to understand why a woman of Ms. Zilic's age could not have achieved more employment income in the several years since separation. But the question is not what some hypothetical woman could have attained, but what someone in Ms. Zilic's circumstances--with her abilities, health, education, childcare responsibilities, and work experience--could reasonably attain.

- [174] The judge instructed herself on the correct legal principles when considering the imputation of income.
- [175] Mr. Zilic has not shown that the judge misapprehended or overlooked evidence of Ms. Zilic's circumstances.
- [176] The judge considered a large body of evidence, including: Ms. Zilic's education, namely, a degree in family studies obtained almost 21 years ago, which was not highly relevant to the work force; lack of marketable work experience; and the fact that at separation the children attended three different schools in another municipality, requiring Ms. Zilic to drive them to and from school and to also drive them to after-school activities. Ms. Zilic tried to find employment that would give her hours that were flexible to deal with the demands on her as the parent primarily caring for the three children, with the need to transport the children to their schools and to be available on school professional development days. Self-employment might have given her the necessary flexibility. Initially she sought to be trained to be a realtor, then a personal trainer, but these vocations did not work out. Eventually, she found an employer who was able to give her office work with flexible hours that could accommodate her children's demands on her time. However, it was part-time work.
- [177] Mr. Zilic argues on appeal that Ms. Zilic should have been working 40 hours per week at \$20/hour, and did not do so intentionally, as a matter of mere personal choice. The appellant fails to take into account that the judge did not make any finding that Ms. Zilic was intentionally choosing to work less and for less money than she could have worked.
- [178] The judge noted that Ms. Zilic was left anxious and depressed by the marriage breakdown: at para. 193. This characterization is supported by the record and might be considered an understatement. Her distress was contributed to by Mr. Zilic's lack of any commitment to provide financial support.
- [179] Mr. Zilic's position on appeal requires this Court to ignore the judge's findings as to Ms. Zilic's intentions, circumstances and abilities and to substitute our own findings. I accept that it is possible that someone else in Ms. Zilic's situation may not have made all of the same choices as she did and may have been more successful in finding more lucrative employment, with more hours but also with sufficient flexibility to allow her to meet her childcare responsibilities, but all of this is speculative. The reasonableness of Ms. Zilic's choices are to be assessed by her subjective circumstances.
- [180] It is important to appreciate that there is no evidence that Ms. Zilic's choices were to intentionally be underemployed. Rather, the record suggests she was clearly motivated to obtain financial independence, as she had no commitment of any support from Mr. Zilic. Unfortunately, as a matter of historical fact, she struggled to find lucrative employment that allowed her the flexibility to manage her childcare responsibilities for three children.

- [181] The appellant has not identified any evidence that was overlooked or misapprehended by the judge, and has not identified that the judge made any error in principle. There is no basis for interfering in the judge's finding of fact that Ms. Zilic made reasonable efforts towards her own self-sufficiency in the years prior to trial.
- [182] As for estimating Ms. Zilic's future income, the judge held:
- [199] Mr. Zilic says that Ms. Zilic could find a job that would allow her to do the same job she has right now working 40 hours a week, 50 weeks a year.
- [200] I agree that Ms. Zilic's hours of work should increase with the new parenting arrangement and as the children are less dependent for transportation. However, I also find that in order to work longer hours, she would need to find a new job and I have not been provided with any evidence that she would be able to command \$25/hour in an available full time position.
- [201] Overall, Ms. Zilic's annual salary has shown a steady increase since 2013, and she anticipates another near 20% increase in her salary in 2019. I consider this reasonable, and would impute an income of \$25,000 to her in 2019. This income shall be imputed to Ms. Zilic going forward, subject to any actual increase in her income after 2020.
- [183] On appeal, Mr. Zilic repeats the same argument he made at trial: that the judge should have imputed more income to Ms. Zilic in the future. Although Mr. Zilic seeks to have a higher income imputed to Ms. Zilic based on \$25/hour working full-time, there was no evidence that she would be able to increase her hours to full-time at the small firm where she had been promoted to being paid \$25/hour for part-time work.
- [184] Ms. Zilic submits that she faces uncertainty with respect to increasing her hours. It is far from clear what the job market would look like for her if she was to change positions to a new firm. It is not clear what her hourly rate would be nor how many hours would be considered full-time. Her counsel argues that if Ms. Zilic obtained full-time work based on her experience she might only be paid minimum wage and her total annual salary could still be in a range roughly equivalent to the \$25,000 imputed to her. Further, she may suffer some loss of income if she chooses to upgrade her skills through education, which should be a choice open to her.
- [185] Counsel for Ms. Zilic submits that the total award of just over \$100,000 in spousal support is reasonable and not excessive, given the years of the marriage and Ms. Zilic's position of having to start anew compared to Mr. Zilic's established career. She submits that the judge could have come to the same conclusion if Mr. Zilic's income was imputed to be \$200,000 and Ms. Zilic's was imputed to be \$50,000. The point is that the judge was equally quite conservative in imputing income to Mr. Zilic, and all of these matters are assessed in a global, interconnected manner, considering all of the evidence.

- [186] I note that accepting the judge's imputation of future income of \$25,000 already means incorporating an assumption that Ms. Zilic will be able to earn more in the future than she had in the past, despite the finding that she made reasonable efforts in the past. This is still an optimistic view of Ms. Zilic's future, considering that, based on the judge's findings, the past experience reflects all of Ms. Zilic's abilities, working with the intention of becoming self-sufficient. It allows for the possibility that Ms. Zilic would choose to upgrade her skills, would not be able to increase her hours to full-time at her current employer, or would have to accept a lower wage if working full-time elsewhere.
- [187] In setting a lump-sum amount for spousal support (which will be addressed in more detail below), the judge essentially froze both spouses' future incomes at currently imputed rates. This promoted certainty for both parties. While Mr. Zilic argues that one must presume that Ms. Zilic could have increased her income in the future, so too might this be presumed with respect to Mr. Zilic, once this family litigation is behind him. Other scenarios are also possible: Ms. Zilic could suffer a drop in income and Mr. Zilic an increase in income.
- [188] From my perspective, the problem with Mr. Zilic's argument on appeal is that once again it bumps up against the standard of review. The judge's assessment of Ms. Zilic's abilities, and what she can reasonably earn in the future, based on consideration of a number of connected factors, is entitled to considerable deference.
- [189] I am of the view that substituting a higher number for Ms. Zilic's income would be substituting this court's judgment for that of the trial judge, considering only one strand of a complex and interconnected set of assessments. Doing so would ignore the limitations on this court's role and would promote uncertainty and appeals in family litigation generally. As set out in the authorities reviewed above in relation to the standard of review, a trial judge is better placed to make these assessments because the trial judge will have a better grasp of all of the evidence and will have seen the witnesses testify.
- [190] I therefore would not disturb the judge's findings with respect to the imputation of income, past or future, for either Mr. or Ms. Zilic.

Alleged Error #8: Mid-range and Lump-sum Spousal Support

- [191] The judge found that Ms. Zilic was entitled to spousal support on a compensatory and non-compensatory basis. Ms. Zilic's long-term efforts as a full-time homemaker with parenting responsibilities allowed Mr. Zilic to devote his time and energy to the family business. It also meant that at separation Ms. Zilic had limited work experience. At trial, she was also not yet at the stage of being self-sufficient.

- [192] The judge was correct in concluding that Ms. Zilic was entitled to spousal support on both a compensatory and non-compensatory basis. By her efforts, Mr. Zilic is left in a much better position in respect of his earning capacity in the future than is Ms. Zilic. Upon the marriage breaking down, she is starting her career after a long absence from the workforce; his career is well-established.
- [193] The judge awarded \$113,500 lump-sum support to Ms. Zilic, after taking into account the tax implications to both parties. This amount represented a duration of support of 7 years at the mid-range of the SSAG. After deducting an advance from the proceeds of sale, the award amounted to \$101,000.
- [194] Mr. Zilic submits that the judge erred in ordering him to pay spousal support to Ms. Zilic at the mid-range and in ordering that it be payable on a lump-sum basis.
- [195] Starting with the choice of range, Mr. Zilic argues that the mid-range will result in the recipient having the benefit of 54.5% of the net disposable income (NDI), and the payor only 45.5%. He further argues that the better approach would have been to choose the low end of the range, which he says would have been close to equalizing the NDI to be received by both spouses. He submits that this sensible approach is consistent with the SSAG 2016 Revised User's Guide ("SSAG (2016)"), which says that where the spouses have not re-partnered and do not have new children, the starting point should be an amount of spousal support that leaves each household with equal NDI: Justice Canada, *Spousal Support Advisory Guidelines: The Revised User's Guide*, by C. Rogerson & R. Thompson (Ottawa: Justice Canada, 2016) at 34.
- [196] It should be noted that SSAG (2016) also points out that the equal NDI point is sometimes in the mid-range, and sometimes at the lower or higher range: at 34. However, I will assume for argument purposes that Mr. Zilic's submission is correct, and, had support been payable on a monthly basis, the low range would have achieved equal NDI, not the mid-range.
- [197] Mr. Zilic relies on Parton at para. 46 for the proposition that while the SSAG are advisory, they are generally consistent with the law of BC.
- [198] The problem with Mr. Zilic's argument is that he is selecting one factor and ignoring competing factors that are relevant to the judge's exercise of discretion in selecting the location of support within the SSAG ranges, and he fails again to appreciate the standard of review on appeal.
- [199] There are many different considerations in choosing a value within the range of spousal support, discussed in Chapter 9 of the SSAG (2016). As stated at p. 47: "[t]here are many moving parts to a good SSAG analysis, and it is an error to focus on just one part." These other factors include the strength of any compensatory claim.

- [200] There is also an inter-relationship between amount and duration of spousal support. Here, the range of duration suggested by the SSAG was between 6.5 years and 13 years. The mid-point between these two ranges of duration is 9.75 years.
- [201] In considering duration, the judge considered the passage of time since separation, Mr. Zilic's payment of an allowance between separation and 2012, and Ms. Zilic's use of a line of credit after 2016: at para. 240. The judge also took into account that Mr. Zilic had been ordered to pay interim support. The judge ended up choosing a duration of 7 years going forward. As stated in the SSAG (2016) at p. 47: "[t]he formula ranges for both amount and duration are quite broad, providing lots of room for the exercise of judgment and discretion to respond to the facts of individual cases."
- [202] Furthermore, the determination of quantum of spousal support is linked to the reapportionment and division of family property in considering an equitable distribution of the advantages and disadvantages arising from the marriage and its breakdown: Marquez at para. 39, citing Moge; Bodine-Shah v. Shah, 2014 BCCA 191 at paras. 70-71. When the judge awarded the quantum of spousal support, she would have taken into account her findings regarding the division of property. Now that the reapportionment of property to Ms. Zilic has been reduced on appeal, any reduction in the quantum of spousal support has far greater negative implications for Ms. Zilic and risks undermining the overall balancing considered by the judge.
- [203] Turning to the award of a lump-sum amount, the judge was influenced by the fact that Mr. Zilic avoided paying support for almost three years and then failed again to pay support after being ordered to do so. The judge held:
- [237] This Court has held in several cases that lump sum spousal support is appropriate where there has been previous disregard of a support order, where there is a concern that the payor will not pay periodic support or where there is animosity between the parties; see e.g. Foster v. Foster, 2007 BCCA 83; Zhang v. Sun, 2016 BCSC 1418. All of these factors apply in this case.
- [238] Mr. Zilic avoided paying support of any kind for almost three years, costing both himself and his family considerable additional interest charges and court costs. He then failed to pay that support even after he was ordered to pay it earlier this year. Furthermore, the parties are not at a point where they can regularly interact without significant friction.
- [239] Mr. Zilic does not oppose a lump sum award in principle. He also testified that cash flow is an issue for him.
- [204] The factors the judge considered are appropriate factors.
- [205] The proceeds available from the sale of the family home were a source of payment of the lump-sum amount, without requiring Mr. Zilic to liquidate any other asset.

- [206] On appeal, Mr. Zilic argues that a lump-sum award deprives him of the ability to seek a variation in the future, which is a significant disadvantage in the circumstances of this case, where it can be expected that Ms. Zilic's income will rise in the future. He relies on *N.K. v. M.H.*, 2020 BCCA 121. However, as that case illustrates, loss of ability to seek a variation is not the only factor to consider.
- [207] A number of factors were relevant in this case: the need for the recipient spouse to become self-sufficient and the ability of a lump sum to better assist in that regard; the ability of the payor spouse to use capital to pay the award; a high-conflict relationship; and the real risk of non-payment in the future should monthly support be ordered, given the track record of the payor spouse.
- [208] Dealing with the latter two points, it cannot be forgotten that litigating the question of Mr. Zilic's actual income for support purposes was very difficult given his use of Spot to pay personal expenses, his poor record keeping, his apparently poor memory, and his lack of motivation to earn a living as the matter approached trial. He had shown himself highly resentful and resistant to paying ongoing support. The litigation between these parties has been unusually prolonged and hence costly, both financially and emotionally. A lump-sum award assists each party in making a clean break from the other.
- [209] The judge cannot be said to be clearly wrong in considering it more reasonable to order a lump-sum spousal support award, based on a limited duration, rather than to leave open the likelihood of future ongoing litigation about support payments. This is especially so where the lump-sum amount, while significant to the parties, could easily be exceeded by legal fees if there was ongoing litigation. The historical power dynamics between the two parties, where Mr. Zilic had the benefit of more income to fund legal fees and more incentive to be difficult in revealing the details of his actual self-employment income, also made a lump-sum award appropriate.
- [210] The appellant has not established that the judge made an error in principle or any other error in the determination of spousal support. There was evidence to support the judge's exercise of her discretion and it cannot be said that the award is clearly wrong. I see no basis for interfering with the judge's exercise of discretion in respect of the quantum or the form of spousal support.

Alleged Error #9: Special Expenses

- [211] Mr. Zilic says the judge erred in ordering him to pay 70% of the children's special expenses. He says this is unfair given that the judge's spousal support award can be taken as adjusting the income disparity between the parties.

- [212] Mr. Zilic's argument raises the question of how to treat spousal support payments when considering the parties' respective incomes for the purposes of s. 7 expenses. As set out above in the review of legal principles, spousal support is deducted from the payor's income and added to the recipient's income when determining their respective incomes for purposes of calculating their proportionate share of s. 7 expenses: see also SSAG (2016) at 32.
- [213] I am not persuaded that the judge failed to take into account the fact that Mr. Zilic would pay and Ms. Zilic would receive spousal support.
- [214] The judge found the parties incomes to be approximately \$150,000 for Mr. Zilic and \$25,000 for Ms. Zilic for Guidelines purposes. If the judge had ignored the fact that Ms. Zilic would receive spousal support, the proportionate split in the parties' obligations with respect to special expenses would have been 86/14.
- [215] Taking into account Mr. Zilic's payment of spousal support as though the lump-sum amount of \$113,500 was amortized over seven years would mean reducing his income by \$16,214 and increasing Ms. Zilic's income by the same amount. This would make his income \$133,786 and hers \$41,214, a ratio of 76.5/23.5. The judge's split of 70/30 was even more in Mr. Zilic's favour.
- [216] It is a reasonable interpretation of the Guidelines and Schedule III to consider the lump-sum payment of spousal support as though it was amortized over the years it was meant to address when determining the parties' incomes for purposes of calculating their proportionate share of s. 7 expenses.
- [217] Mr. Zilic has not established any principled basis for interfering with the exercise of the judge's discretion in respect of the payment of the children's special expenses.

Conclusion and Remedy

- [218] I would dismiss Mr. Zilic's appeal in relation to: the Whistler Property; the Mainland Property; Spot; his payment of rent; the imputation of income to Mr. Zilic; the imputation of income to Ms. Zilic; the award of lump-sum spousal support; and special expenses.
- [219] I would, to a limited extent, allow Mr. Zilic's appeal in respect of the judge's reapportionment of family property due to the wasting of the Homer Street ICs. I would set aside term 17(d) of the judge's order, which required Mr. Zilic to account to Ms. Zilic for the sum of \$50,000 in relation to the Homer Street ICs.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Voith"

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