

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *T.L.T. v. R.E.S.*,
2022 BCSC 598

Date: 20220413
Docket: E192366
Registry: Vancouver

Between:

T.L.T.

Claimant

And

R.E.S.

Respondent

Before: Master Bilawich

Reasons for Judgment

Counsel for the Claimant, via
videoconference:

T. Hopman

Counsel for the Respondent, via
videoconference:

I. Hayward

Place and Date of Hearing:

Vancouver, B.C.
March 2 and 4, 2022

Place and Date of Judgment:

Vancouver, B.C.
April 13, 2022

Introduction

[1] By application filed December 23, 2021, the claimant applies for orders that:

- a) The respondent pay to the claimant interim child support for their two children, commencing January 1, 2019 and continuing on the first day of each and every month thereafter until further agreement of the parties or court order; and
- b) The respondent be responsible for 100% of the children's special and ordinary expenses.

[2] It is the claimant's position that the respondent should be imputed income sufficient to pay her the amount of child support that he paid voluntarily for a brief period after the parties separated; \$9,500 per month.

[3] By application filed February 14, 2022, the respondent applies for orders that:

- a) The claimant pay interim child support for their two children to the respondent, retroactive to January 1, 2019 [offset support based on shared parenting];
- b) The parties share equally, or in a proportion determined by the court, the children's special and extraordinary expenses, retroactive to January 1, 2019;
- c) The parties share equally the Canada Child Tax Benefit and BC Family Bonus, retroactive to January 1, 2019; and
- d) The sum of \$184,500 that the respondent paid to the claimant from June 2019 to March 2021 be offset against any interim retroactive and prospective child support that he is ordered to pay.

[4] The respondent's application also requested an order that Mr. Mynett be appointed the court's expert to prepare a report on the respondent's 2017-2021 *Guideline* income, but this was not pressed in argument. The respondent did put in evidence a report of Mr. Mynett regarding the respondent's 2017-2019 *Guideline*

income. The parties disagree about whether Mr. Mynett was retained as a joint expert.

[5] If the court does order the respondent to pay the claimant retroactive child support, the claimant does not take issue with the respondent receiving credit for amounts he paid her for the relevant period.

Background

[6] In this action, the claimant asks the court to set aside or vary the terms of a cohabitation agreement (the “Agreement”) which the parties entered into as of February 1, 2011. The claimant the parties actually signed the Agreement on August 9, 2011, at which time their first child was 6 months old. She alleges that the respondent required her to sign the Agreement or move out of the home they shared. The Agreement provides that, upon separation the claimant will not receive any spousal support, save for “compensation” for lost income during the period of their relationship and only a limited share of capital.

[7] The claimant says the parties began living together in a marriage-like relationship in 2009. The respondent says they were only dating at that time and they first began cohabiting on January 1, 2011. They have two children together:

- a) A.H.S., born [date redacted] (age 11); and
- b) A.T.S., born [date redacted] (age 8).

[8] They separated on January 17, 2019. On May 31, 2019, the claimant moved out of the family home.

[9] The respondent is a successful entrepreneur. He operates a 42-acre estate winery in Napa Valley, California and owns and operates several other wine-related businesses. When the parties met, the claimant was working in corporate public relations with a large public company.

Cohabitation Agreement

[10] Shortly after the parties learned the claimant was pregnant with their first child, the respondent asked the claimant to enter into a cohabitation agreement with him. Both parties were represented by legal counsel when the Agreement was negotiated and executed. In the recitals, it provides that:

- a) The parties had been dating and cohabiting since January 1, 2011 in anticipation of the birth of their first child;
- b) The respondent was 47 years old and never previously married. The claimant was 38 years old and had been previously married;
- c) Neither of them had any other children;
- d) The respondent's annual income was complicated, as it fluctuated significantly from year to year, but was generally in excess of \$600,000 from self employment;
- e) The claimant's gross annual income was about \$231,545 (including salary, bonus and stock options) from her employment; and
- f) The parties anticipated the claimant may quit or take a leave of absence from her employment to parent their child; however, they also understand she may continue working.

[11] It includes schedules which set out the separate property and liabilities of each. The respondent's is Schedule A and includes:

Description	Value
["Residence" address redacted], West Vancouver	> \$3,500,000
["Rental Property" address redacted], West Vancouver	> \$2,300,000
Condo in Kaanapali, Maui (1/6 interest)	> \$300,000
Ranch in Mendocino, California (1/2)	> \$300,000

Children's Trust (irrevocable, he owns 100%)	> \$20,000,000
Nevada Partnership in real estate	> \$5,000,000
Nevada real estate Divi Corp. - shares	> \$1,000,000
Vehicles (3)	\$123,000
RRSPs	\$36,000
"S." Estate (proprietorship)	\$4,000,000
"E". Wines LLC (67%)	\$1,000,000
"F" Wines LP (70%)	\$400,000
Arizona real estate partnership	\$300,000
Arizona real estate – farm (100%)	\$400,000
"E2" Wines Ltd. (100%)	\$100,000
House art and furnishings	\$500,000
Mortgage on Residence and Rental Property	(\$1,000,000)
Mortgage on Winery	<u>(\$800,000)</u>
Net Total	> \$33,974,000

[12] The claimant's is Schedule B. It includes a condo in Vancouver valued at \$411,000, a vehicle worth \$8,000, financial assets of \$130,300 and pensions / RRSPs worth \$131,700, stock options of about \$400,000, jewelry worth \$20,000 and mortgage debt of (\$283,000). Her net total was \$798,000.

Residence, Rental Property and Children's Trust

[13] The property at [Residence address] is the respondent's home. He has owned it since 2003. He also owns the neighbouring Rental Property, which is rented out. It appears the respondent did not provide the claimant detailed disclosure or explanation of the Children's Trust at the time the Agreement was created. He does offer an explanation in his affidavit #1 sworn February 14, 2022.

[14] There are two distinct trusts. "S." Children's Trust I ("Trust 1") and "S." Children's Trust II ("Trust 2") were both settled by the respondent's parents. The only assets that Trust 1 owns are shares in a company, R.E.S. Inc. ("RES"). The only assets that Trust 2 owns are shares a company, Walrus Inc. ("Walrus").

[15] RES and Walrus each own one-half of the land on which the respondent operates the estate winery. He describes Trust 1 as a “generation skipping trust”. He says he is only entitled to income generated by that trust and is not a beneficiary of the underlying assets. The beneficiaries of the underlying assets appear to be the respondent’s children. Trust 2 appears to be the same arrangement, but in respect of the respondent’s brother and his children.

[16] The respondent says the trusts’ only activities involve them leasing the winery lands to the respondent. He operates the winery and pays rent to both companies. The respondent receives the rent that RES receives back in the form of a management fee from RES equal to the rent it receives.

Post Agreement Relationship

[17] At the time the parties entered the Agreement, the respondent was working long hours to build up his businesses. He was generally away at least one or more weeks per month.

[18] After A.E.S. was born in 2011, the claimant switched to part-time work so she could care for their daughter. After A.T.S. was born, she stopped working outside the home and was a full-time caregiver.

[19] The claimant says that during the relationship, the respondent supported the family and provided them a very comfortable lifestyle. The parties lived in West Vancouver in a large home with a 180-degree view of English Bay and the City of Vancouver. They regularly visited the respondent’s other homes in Hawaii, San Francisco, Napa Valley and Mendocino County.

[20] The children have attended a private school in West Vancouver, they belong to Hollyburn Country Club and the respondent was a member at World President’s Organization, Capilano Golf Club and Olympic Club in San Francisco.

[21] The parties took frequent holidays, flew business class, stayed in the best hotels and enjoyed elaborate and expensive restaurant meals. They travelled

regularly, enjoyed biennial luxury cruises and chartered a yacht each summer to cruise the B.C. coast.

Wildfires Damage Winery

[22] The winery suffered extensive property damage as a result of two separate wildfires. The first, in October 2017, destroyed the residence and other infrastructure on the property, but did not damage the grape crop. The respondent says he had to terminate more than 50% of the employees. Substantial insurance proceeds were received and a construction loan of about \$13,000,000 was arranged and secured against the land to rebuild and expand operations. The respondent is a party to that loan in his personal capacity. Reconstruction plans include a new residence, hospitality centre, fermentation facility and cave for wine storage.

[23] The respondent suggests his wine businesses were struggling generally in the years before the fire.

[24] In 2019, in order to remain solvent and pay ongoing business and family expenses, the respondent says he started to sell his wine inventory in bulk to Costco at a reduced profit margin. He describes this as an act of desperation for a premium wine brand. Since March 2020, when the Covid-19 pandemic began, he has lost more than 50% of his sales. He typically sold to private clubs, restaurants and the hospitality industry, all of which suffered shut downs or slow downs during the pandemic.

[25] The second wildfire occurred in August 2020. Smoke damage destroyed that entire year's grape. As a result, he says he will have no 2020 vintage to sell. It is not clear the extent to which the 2021 crop was affected.

[26] The respondent says that in 2011, he relinquished his interest in the Arizona real estate referenced in the Agreement and he owns a minority interest (less than 10 percent) in the Nevada real estate.

[27] With respect to his financial assets, he says that following the 2017 wildfire, he had to sell his various shares to carry on business and pay for the family's expenses. As of swearing his affidavit #1, he had liquidated all of his share accounts; in excess of \$1 million. He does not particularize exactly how those funds were subsequently applied.

[28] The respondent says the family was living off of capital for many years and that it has now come to a point where this is no longer sustainable.

Post Separation Developments

[29] After separation, the respondent refused the claimant's request to review the Agreement or revise its terms. He refused her request to mediate with Diane Bell, Q.C. He initially refused to pay her the capital and compensation payments contemplated by the Agreement. The respondent says the terms of the Agreement provide that these latter two payments are only payable after the claimant signs an acknowledgment that the terms of the Agreement are binding on her and that she will not make any further claims against him, which she has refused to do.

[30] When the claimant moved out of the Residence, the respondent initially agreed to pay the claimant interim child support of \$6,000 per month and 100% of the children's special and extraordinary expenses, including fees and expenses for private school and Hollyburn Country Club.

[31] Subsequently, Ms. Daum of Daum Valuations and Financial Services was retained to prepare a Guideline Income Report regarding the respondent. She issued a draft report dated February 28, 2019. It is the respondent's position that Ms. Daum was retained as a joint expert. The claimant acknowledges that she spoke to Ms. Daum and provided some input, but says Ms. Daum was retained solely by the respondent. She also denies that the information the respondent provided to Ms. Daum was complete or accurate. The report was never finalized. The respondent paid Ms. Daum's invoice without any contribution from the claimant. In the draft report, Ms. Daum calculated the respondent's income as follows:

2015	2016	2017	2018	2019
\$76,000	(\$85,000)	\$334,000	(\$458,000)	N/A

[32] On August 29, 2019, the claimant filed a notice of family claim.

[33] In an email dated January 5, 2020, Ms. Daum stated there was a referencing error in the schedules to her draft report, such that her conclusion for 2018 income should instead be \$116,000. She requested additional documents from the respondent for 2018 so she could have a more complete conclusion for that year. With the change noted in her email, this above income summary becomes:

2015	2016	2017	2018	2019
\$76,000	(\$85,000)	\$334,000	\$116,000	N/A

[34] On November 8, 2019, a judicial case conference (“JCC”) was held before Justice Morellato. A consent order was pronounced, including the following terms:

- a) On a without prejudice basis, the respondent will pay to the claimant the sum of \$200,000, which the respondent characterizes as the claimant’s entitlement to property under paragraph 5(3)(a) of the [Agreement] ... and will deliver those funds by close of business on November 22, 2019;
- b) On a without prejudice basis, the respondent shall pay to the claimant pursuant to the spousal support provisions of the Agreement, the payments due to the claimant by the respondent for the years commencing February 1, 2015 to and including 2018, on or before November 22, 2019; and
- c) The trial was set for February 1, 2021 for 19 days.

[35] Pursuant to that order, the respondent paid the claimant \$200,000 as her share of capital under the Agreement and \$253,344 as compensation for her income loss during the relationship. Around the same time, the respondent unilaterally reduced his voluntary child support payment to the claimant from \$6,000 to \$2,000 per month.

[36] Following the JCC, the parties agreed to mediate outstanding issues through mutual friends. In January 2020, the respondent began making voluntary child support payments to the claimant of \$9,500 per month. He also continued to pay all special and extraordinary expenses.

[37] On August 20, 2020, at the respondent's request, the trial scheduled for February 2021 was adjourned generally.

[38] On December 4, 2020, Mr. Mynett of Blair Mackay Mynett Valuations Inc. was retained to prepare a new Guideline Income Report regarding the respondent. The claimant did not sign and return the joint retainer agreement. She says she did not have the financial means to contribute to the cost of the report.

[39] In April 2021, the respondent unilaterally terminated his child support payments to the claimant. He took the position that he was not earning a positive income and thus had no obligation to pay her child support. He continued to pay the children's special and extraordinary expenses.

[40] In August 2021, Mr. Mynett issued a draft Guideline Income Report, which concluded that the respondent's income was negative for each of 2017, 2018 and 2019.

[41] The claimant filed her application for interim child support on December 23, 2021.

[42] In February 2022, the respondent asked the claimant to join him in giving Mr. Mynett instructions to finalize his report and include an update setting out the respondent's 2020 *Guideline* income. The claimant declined and took the position that Mr. Mynett was not a joint expert.

[43] Counsel for the respondent noted there is a clause in Mr. Mynett's retainer agreement which permitted him to issue a final report in the absence of joint instructions in the event one of the parties failed to respond to a request for instructions within 14 days. He issued a final report on February 10, 2022. He was

not able to add the respondent's 2020 *Guideline* income in the absence of the claimant's cooperation.

[44] Mr. Mynett opines in his final report that the respondent's guideline income is as follows:

2015	2016	2017	2018	2019
N/A	N/A	(450,000)	(400,000)	(620,000)

[45] I note that Mr. Mynett's conclusions for 2017 and 2018 are substantially lower than those in Ms. Daum's draft. There is no expert evidence regarding the respondent's 2020 or subsequent guideline income.

Post Separation Parenting

[46] The claimant says the children had a difficult time adjusting to separation and the transition to shared parenting, as they had never been in the respondent's sole care for extended periods of time. The claimant arranged counselling to assist them and the respondent to build a trusting relationship. Over time, they built up to the respondent having the children 2 over-nights in week one and 4 over-nights in week two, except when the respondent is travelling.

[47] The claimant says she has continued to deal with most of the meetings at the children's school and with medical professionals, including arranging counselling for A.T.S., who has been diagnosed with generalized anxiety disorder and depression. The respondent disagrees and says he also takes part in the school meetings and other children's activities during his parenting time.

[48] Both children are active and participate in tennis, field hockey and volleyball. They ski regularly and participate in an annual Whistler ski camp.

Post Separation Income - Claimant

[49] After separation, the claimant says she sought employment, however, her skills and experience are outdated due to her eight-year absence from the

workforce. She is also now nearly 50 years of age and remains primarily responsible for the children.

[50] She secured a part time temporary corporate communications position and was earning about \$15,000 per annum, after expenses. That position came to an end in mid-December, 2021 and she has not yet been able to find new employment. She is receiving rental income from her Vancouver condo. She has been renting a home in West Vancouver so she can be close to the children's school and their friends.

Respondent's Post-Separation Lifestyle

[51] The claimant says the respondent's lifestyle has continued undiminished from pre-separation levels. He lives in the Residence, employs a cleaning lady and a gardener, he extensively renovated the home, including creating two adjacent bedrooms for the children, each with a large screen television and installed new hardwood flooring in the home. He purchased new furnishings and a Mercedes SUV GLS, a new electric bicycle and a mountain bike for himself as well as many items for the children.

[52] The respondent says he had to purchase new furnishings to replace ones the claimant removed when she moved out. The renovations were necessary to allow the children to have bedrooms next to each other. This helped make them more comfortable staying overnight. The floor needed to be replaced. He purchased a used vehicle to transport the children because the claimant took the only vehicle suitable for that with her when she moved out. He purchased the bicycles at a discount from a friend who owns a bicycle store, including one for the claimant.

[53] The claimant notes the respondent still owns the Rental Home next door to the Residence and maintains a rented apartment in San Francisco, a home in Hawaii, the ranch in Mendocino and he rents a condo in Whistler for six months each year. He still has memberships in the World Presidents Organization, Capilano Golf Club and Olympic Club. He continues to patronize high-end restaurants. He

recently announced he is expanding the California wine facility, hired new staff and is introducing new products.

[54] The respondent notes the Rental Home is generating rental income. He only owns one-sixth of the Hawaiian condo and one-half of the Mendocino ranch. His golf club memberships and restaurant visits involve organizations to whom he sells his wines and are a necessary part of his marketing. His membership in the World Presidents Organization is essential for establishing business contacts, and he says they have modified their normal financial requirements during the pandemic.

[55] The claimant argues that the respondent's international travel continues unabated. In the preceding three months alone, he has travelled to Mexico to take in a Formula 1 event and visit a friend's resort, to Florida for a boat show and to Maui, Paris, Verbier and London with friends. The respondent says he travelled to Mexico, Maui and London to meet at restaurant groups to sell his wines. He denies attending a Formula 1 event or a boat show. He was in Paris for a flight layover. He acknowledges having had a "short stopover" at Verbier (Switzerland) for a ski trip but does not elaborate.

[56] He goes on to counter that the claimant has told him verbally that she travelled to Verbier in February 2022 and that he has heard from mutual friends (who he does not identify) details of other vacations she has taken. As this is unattributed hearsay, it is not admissible.

[57] The claimant says she requires child support to allow the children to maintain a lifestyle with her similar to that which they enjoyed prior to separation, and which they continue to enjoy during parenting time when they are with the respondent. The claimant wishes to continue to live in West Vancouver, near the respondent's home, which is where the children have lived since birth, where they attend school and where their friends reside.

Financial Statements

[58] The claimant filed an F8 Financial Statement sworn December 2, 2021 which discloses he has a *Guideline* income of \$28,504 plus Canada Child Tax Benefits of \$5,360. She lists expenses totalling \$18,513 per month / \$222,156 per year. Some features include housing expenses of \$8,450 per month, including rent of \$5,650, mortgage on her Vancouver condo of \$1,400 and a rental in Whistler at \$2,450 x 6 months, or \$1,325 per month averaged over the full year, which I presume is for the ski season. There are vacation expenses on top of this of \$2,000 per month. Transportation expenses are \$1,113 per month. Personal expenses of \$1,830 per month and children's expenses of \$1,525 per month.

[59] The respondent's F8 Financial Statement was sworn January 27, 2022 and discloses a *Guideline* income of \$0 and expenses of \$24,788 per month / \$297,458 per year. Some features include housing costs of \$9,665 per month, including \$6,200 in rent or mortgage, \$500 for repairs and maintenance, \$420 for a gardener for the Residence, \$1,600 for contributions for the Hawaiian condo. Utilities are \$1,675 per month. Household expenses are \$2,100 per month. Transportation is \$1,010 per month. Personal expenses are \$4,198 per month, including \$450 for clothing, \$300 for life insurance on the life of "J.W.", \$1,000 in fees for the Olympic Club and Capilano Golf Club, \$350 for Hollyburn Country Club Membership dues, used by the children and the claimant, \$1,363 for gifts to Trust 1 and Trust 2 to fund life insurance policy premiums they are paying and \$500 for the respondent's own Hollyburn charges.

[60] The assets and debt listed by the respondent include

a) Residence	\$5,031,000
b) Rental Home	\$4,766,400
c) Hawaiian Condo	\$261,261
d) Mendocino Ranch	\$39,299
e) Vehicles (4 cars, 1 boat)	unknown
f) Financial Assets	\$50,863

- g) Business Interests 10 items, unknown values
- h) Secured debt (\$456,548)
- i) Unsecured debt (\$5,507,177) incl. construction loan

[61] Under “disposal of property”, the respondent lists \$1,023,154 in shares disposed from October 2017 to 2021.

[62] Special expenses claimed for the children include:

- a) For A.H.S., \$32,650 per year, including health related expenses in excess of insurance reimbursement of \$1,200 per year, private school expenses of \$27,850 and for extracurricular expenses at Hollyburn, summer camp, Whistler ski camp, ski activities and basketball, \$3,600.
- b) For A.T.S., \$30,100 per year, including health related expenses of \$1,200, private school expenses of \$25,300 and extra-curricular expenses of \$3,600.

Legal Basis

[63] The application for child support is made pursuant to part 7 of the Family Law Act, S.B.C. 2011 c. 25 (“*FLA*”) and the *Guidelines*. Section 147(1) of the *FLA* provides that each parent of a child has a duty to provide support for the child. Section 149 allows the court, on application, to make an order requiring a child’s parent or guardian to pay support to a designated person. Section 150 provides that that if the court makes an order respecting child support, it must be made in accordance with the *Guidelines*, except in certain circumstances.

[64] Section 19 of the *Federal Child Support Guidelines* (“*Guidelines*”) permits the court to impute income in certain circumstances:

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 ...;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[65] The court's discretion to impute income is broad and is not limited to the enumerated heads in s. 19. See *K.E.J. v. P.R.J.*, 2018 BCSC 1401 at para. 142.

[66] In *Lafrentz v. Palmer*, 2021 BCSC 1332 at paras. 94-96, Justice Kirchner summarized as follows:

94 The court has considerable discretion under the *Guidelines* to impute income on a parent's means of the supporting a child. In *Hathaway v. Hathaway*, 2015 BCSC 1485, Justice Abrioux (as he then was) described this authority at para. 59:

... the court is not limited to a consideration of income alone when determining child and spousal support. It may also consider financial means. The reference in section 1 of the [*Guidelines*] to the parents' "means" expands the calculation of income beyond income. The word "means" has been liberally interpreted to include all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person: *Leskun v. Leskun*, 2006 SCC 25 at para. 29; *Griffiths v. Griffiths*, 2006 BCSC 1077 at para. 25; *C.A.B. v. M.S.C.S.*, 2006 BCSC 1393 at para. 11; *S.M. v. V.V.*, 2014 BCSC 565 at para. 118;

...

... section 19 of the [*Guidelines*], particularly section 19(1)(a), empowers the court to impute income based on a parent's means. This includes a wide variety of factors, the following being germane in this case:

- * a payor's capital and assets, includes assets obtained through the division of property: *Bullock v. Bullock*, 2007 BCSC 318 at para. 25;

- * a parent's lifestyle, monthly living expenses, assets and investments, and the range of income earned during the marriage: *Motyka v. Motyka*, 2001 BCCA 18 at paras. 6, 16;
- * the age, education, experience, skills and health of the parent: *Watts v. Willie*, 2004 BCCA 600 at para. 16;
- * a parent's experience, business acumen, and business contacts: *Braich v. Braich*, [1997] B.C.J. No. 1764 at para. 68 (S.C.);
- * deferring or receiving a reduced income for future benefits: *Motyka v. Motyka* at para. 18; *Nielsen v. Nielsen*, 2007 BCSC 306 at paras. 29-31, varied 2007 BCCA 604;
- * business expertise and contacts: *Akkor v. Roulston*, 2009 BCSC 1584 at paras. 74, 79; and
- * historic earnings: *Nielsen v. Nielsen* (S.C.) at paras. 29-31; *Nielsen v. Nielsen* (C.A.) at para. 46; *Akkor v. Roulston* at paras. 74, 76;

...

... imputing income can and should be employed to prevent sophisticated payor spouses from reducing their support obligations by using deferred forms of compensation such as shares and stock options. *Motyka v. Motyka*; *Nielsen v. Nielsen* (S.C.) at para. 31;

95 In *Brown v. Brown*, 2014 BCCA 152, Justice Groberman, speaking for the court said:

[23] Sections 17-20 of the *Guidelines* allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the *Guidelines*. It is important, however, in interpreting and applying those sections, that courts recognize the need for consistent and predictable results. Courts should interpret ss. 17-20 of the *Guidelines* with a view to advancing the objectives set out in s. 1.

96 As noted above, the onus falls to the party seeking to impute income to establish the imputed income on a rational and evidentiary basis: *Windle* at para. 88.

Analysis

[67] The claimant asks that the respondent be imputed income sufficient to pay her the highest amount of child support he was previously paying her voluntarily, namely \$9,500 per month.

[68] The claimant and respondent have a shared parenting arrangement, with the respondent having them 6 nights out of 14 during a two-week cycle, except when the respondent is travelling. The figure proposed by the claimant appears to be net of any off-set support obligation she has based on her *Guideline* income. She also asks that the respondent continue to pay 100% of the children's special and extraordinary expenses.

[69] The respondent argues that his *Guideline* income is appropriately set at NIL due to the losses suffered at the winery due to a combination of the two wildfires and pandemic-related reductions in sales.

[70] The October 2017 fire loss in particular led to a new construction program which involves construction of a new residence, hospitality centre, fermentation facility and wine storage cave, with a budget of just under \$23 million. I presume this is expressed in US dollars. This is not simply a replacement of the structures destroyed; it involves an expansion and upgrade of the former facilities.

[71] The project is being funded through insurance proceeds, the construction loan, which is secured against the lands owned by RES and Walrus, a personal covenant of the respondent, security interest against the respondent's personal property and other collateral. The project is not yet complete. This undoubtedly represents a major disruption to the respondent's core winery business.

[72] The respondent's *Guideline* income figures set out in Ms. Daum's draft report suggest he was earning positive income in all but 2016, but still far less that would be required to cover his and the family's living expenses. Mr. Mynett's figures are negative for 2017-2019. Essentially, the respondent presents as having earned no income from 2016 to 2019. There is no expert evidence available for 2020 to present. The respondent does assert in his Financial Statement that he continues to have no income up to present date.

[73] During this same extended period, the respondent has clearly held considerable wealth. In the Agreement, he discloses that as of 2011 he was earning an average of about \$600,000 per year and had net assets in excess of \$34 million.

[74] Among those were the two B.C. properties. The Residence was stated as having a 2010 BC Assessment valuation of \$1,990,000 and a market value in excess of \$3,500,000. The Rental Home had a 2010 BC Assessment value of \$1,680,000 and a market value in excess of \$2,300,000. In his January 2022 Financial Statement, the respondent lists these as having 2022 BC Assessment values of (Residence) \$5,031,000 and (Rental Home) \$4,766,400. This is a combined increase of \$6,127,400, based on BC Assessment values.

[75] The respondent has not disclosed a current value for the majority of his other business interests, however, even if one assumes their values just remained stable (as opposed to increasing since 2011), the respondent has clearly had considerable capital wealth at his command, despite the lack of income.

[76] The claimant has also described the parties' lifestyle during the relationship and the respondent's lifestyle with the children since separation. The respondent self-reports that he has annual expenses of about \$300,000. This indicates that there has been a consistent pattern of spending throughout the post-separation period which appears consistent with lifestyle and spending as described during the relationship. Despite earning no or negative income since 2015 to present, the respondent has somehow managed to maintain a luxury lifestyle, involving spending at a \$300,000 per annum level. He has managed to maintain the children in private school, country clubs and numerous sporting and recreational activities. He has continued to maintain interests in numerous properties. The respondent says he has only managed to do so through expending capital in the form of his share portfolio, totalling just over \$1 million between October 2017 and 2021. Even with this level of capital expenditure, there remain unexplained gaps in terms of where the funds expended came from and how this continues to be achieved. The respondent notes that his shares were exhausted some time ago.

[77] The respondent denies having an ability to pay the claimant any amount towards the children's basic support, while at the same managing to pay monthly expenses which include a gardener, expenses for his Hawaii property, allegedly also a six month per year rental in Whistler, various life insurance premiums totalling about \$1,700 per month and fees for numerous club memberships. He has continued to travel extensively and take vacations. It is frankly perplexing that he would say he cannot afford basic expenses for the children while having managed to pay extensive special and extraordinary expenses, most of which are fairly characterized as luxuries.

[78] A case which has similarities to this one is *Motyka v. Motyka*, 2001 BCCA 18. There, the court of appeal dismissed an appeal from an order varying a father's obligation to pay child support where the chambers judge had imputed to him a *Guideline* income of \$60,000, based on his lifestyle, monthly living expenses and range of income that he earned during the marriage. The father claimed he relied on funds received as repayments of shareholders loans and advances from companies in which he had invested to maintain his lifestyle and that he was in the process of pursuing a real estate development project.

[79] The court of appeal concluded that although the father's activities effectively deferred his income until completion of that project, it was his choice to work for future rewards and pay his living expenses from capital. The children had present needs and expenses that the father was required to meet. The court upheld the chamber's judge's imputation of income of \$60,000 to the father. At reasons paras. 16-18:

16 In imputing to Mr. Motyka an income of \$60,000 per year, the learned chambers judge relied on "his present lifestyle, his monthly living expenses... and the range of income that he was earning during their marriage". According to his Property and Financial Statement his household expenses prior to 1999 totalled about \$73,000 per year. The judge reasoned that he must have had more income than he disclosed in order to meet those expenses.

17 Mr. Motyka contended on this appeal that his business ventures had not been successful in recent years, and that he has relied upon monies received as repayment of shareholder's loans and other monies advanced to him by companies in which he has invested. He gave affidavit evidence that his

current work involves a real estate project in the United States that is in the early stages of development, and which requires "considerable" financial support. Therefore, it cannot be expected to produce any returns without further substantial work. The first phase of this project was not scheduled for completion before late 2000.

18 These arguments, in my respectful view, do not relieve Mr. Motyka of his obligation to provide appropriate financial support for his children. By pursuing real estate development in the way described, Mr. Motyka is effectively deferring income until such time as the project is complete and producing revenue. It is his choice to work for future rewards, and to pay his present living expenses from capital and repayment of shareholder loans. His children, however, have present needs and expenses, and his obligation as a parent is to contribute to their support. As a person with professional qualifications and experience he has the ability to meet that obligation.

[80] In the present case, the respondent likewise appears to be delaying or deferring the opportunity to earn current income from his considerable capital assets while he focuses on rebuilding, improving and expanding the winery facilities. He has focused these past several years on future rewards expected from a new and significantly expanded winery operation, and has chosen to draw upon capital to pay living expenses. That does not excuse him from his obligation to contribute to the children's current needs and expenses. That includes their basic expenses, not just special and extraordinary ones.

[81] One could also suggest the respondent has not been reasonably utilizing his considerable capital wealth to generate current income – see s. 19(1)(e) of the *Guidelines*. For example, the respondent appears to have considerable equity in the Rental Home while generating a comparatively modest rental income from it. In *J.R. v. N.R.*, 2017 BCSC 455, the court found that a spouse was underutilizing a luxury property in Point Grey by renting it rather than selling it and investing his equity, and imputed to him a *Guideline* income that included a 3 percent rate of return on his equity in the property. Based on about \$2,900,000 in equity in that property, 3% return would come to \$86,000. That is just one example among numerous capital assets that the respondent owns or controls. Unfortunately, he has not disclosed current values for most of those, so this approach to the analysis is of limited utility in this instance.

[82] In *M.F.W. v. M.A.H.*, 2021 BCSC 1581, the court imputed income to a payor who had reduced his employment income and failed to give an explanation for his failure to utilize several million dollars in assets he owned to earn income. See paras. 35-37

35 Mr. H invested in VVI and expected to earn a substantial salary from that company. I am satisfied that he continues to own shares in this company. He has not provided an adequate explanation for what happened to his investment. For example, does it earn dividends? Has the value of his investment increased? If not, is he able to withdraw his investment and deploy these funds elsewhere? Mr. H's evidence on the details of his investment in VVI was vague and inadequate, particularly in light of his reliance on an expected salary from VVI about which he testified at trial.

36 Similarly, there is no adequate or detailed explanation of income earned from his ownership of the farm and Mariposa Contracting. These assets are worth several million dollars but seemingly generate little or no income.

37 There is a dramatic and significant disparity between Mr. H's reported annual income of \$67,521, and monthly expenses of approximately \$13,000, not including debt repayment and child and spousal support obligations. This level of expenditure is unsustainable. The wide disparity between Mr. H's reported income and net expenses suggests that he either has income that he is not reporting or is inexplicably exaggerating his monthly expenses.

[83] I am not suggesting the respondent has intentionally reduced his current income to avoid his child support obligations. I merely refer to the lack of adequate explanation of why a reasonable level of current income could not be derived from the capital assets that the respondent owns and controls had he chosen other priorities.

[84] In my view, the most compelling factor is the respondent's self-reported pattern of spending at the \$300,000 per annum since separation. The claimant argues that the expenses set out in the respondent's Financial Statement are incomplete and the actual figure is even higher. She does not offer specifics. For the purposes of this interim application, this figure suffices as a rough indication of the ongoing level of capital the respondent has chosen to draw upon to meet living expenses, while deferring current income in favour of future opportunities. The equivalent salary level the respondent would have to earn to generate net income of \$300,000 is roughly \$560,000, which is the level of income that I impute to him on an interim basis.

[85] The claimant was, until mid-December 2021, working in a part-time temporary position and was earning some rental income from her condo in Vancouver. I impute to her a *Guideline* income of \$28,505 for the purposes of determining basic child support.

Conclusion

[86] I impute income to the respondent of \$560,000 per annum and to the claimant of \$28,505 per annum.

[87] At these income levels, based on a shared parenting arrangement for two children, the respondent would be paying the claimant basic support of \$6,997 and the claimant be paying the respondent \$458, for an offset payment of \$6,539 per month from the respondent to the claimant.

[88] The respondent is ordered to pay the claimant interim basic child support of \$6,539 per month. This order is retroactive to April 1, 2021, which is the date that the respondent unilaterally stopped making any voluntary payment for child support to the claimant. Payments are due on the first day of each month, until further written agreement of the parties or order of the court.

[89] In view of the claimant's relatively modest imputed income, I do not consider that she has sufficient income to afford to contribute to several of the special and extraordinary expenses involved. This includes private school fees and related expenses and extraordinary extracurricular expenses for the children. The respondent will continue to be responsible for 100% of those.

[90] It is appropriate for the claimant to contribute to the children's health related expenses which exceed reimbursement by at least \$100 – Copeman Health and dental, which are estimated at \$1,200 per annum for each child. The parties will each be responsible for those in proportion to their respective incomes, namely 5% to the claimant and 95% to the respondent. This order takes effect April 1, 2022.

[91] Retroactive child support, including basic support for the period from January 17, 2019 to March 31, 2021 and special and extraordinary expenses from January 17, 2019 to March 31, 2022, are reserved to trial.

[92] I decline to order any change in the current distribution of the Canada Child Tax Benefit or BC Family Bonus at this time. These will remain with the claimant on an interim basis, pending further written agreement of the parties or order of the court.

[93] The balance of the relief sought in the respondent's application that was addressed before me is dismissed.

[94] The claimant is entitled to costs of these applications from the respondent in any event of the cause, but not payable forthwith.

"Master Bilawich"