
CANADA / JUDGMENT

A.M.F.D. v. S.T.D.

2020 BCSC 529

COURT

Supreme Court of British Columbia

DECIDED

3 April 2020

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2020 BCSC 529 A.M.F.D. v. S.T.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.M.F.D. v. S.T.D.,

2020 BCSC 529

Date: 20200403

Docket: 18-3028

Registry: Victoria

Between:

A.M.F.D.

Claimant

And:

S.T.D.

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

J.A.C. Stewart

Counsel for the Respondent:

S.J. de Wit

Place and Date of Trial:

Victoria, B.C.

July 16-19 and 22-26, 2019;

September 12, 2019;

and October 29-30, 2019

Place and Date of Judgment:

Victoria, B.C.

April 3, 2020

Introduction

- [1] This family proceeding involves the issues of parenting, the relocation of the respondent and children, division of property and child and spousal support including retroactive support. The trial commenced on July 16, 2019 but initially addressed primarily the proposed move of the children as the outcome of the mobility ruling would relate to the remaining issues. The respondent sought an early determination so that the children's enrollment in the appropriate schools could be made. The proposed relocation of the children with the respondent from Victoria to Vancouver was denied on August 27, 2019 with reasons to follow.
- [2] The respondent then applied to re-open the trial to address his intention to return to live in Victoria and the resulting implications related to property, income and support issues. Leave was granted and two further days of evidence and submissions were heard. However, at the continuation of the trial, the respondent indicated he was only contemplating returning to Victoria, saying his return was contingent on the trial outcome, in particular his proposal to return to Victoria at a reduced income. His position and its implications will be addressed later in these reasons.

Background

- [3] The parties met in 2000, were engaged in February of 2003 and were married in Ontario on August 24, 2004. They had cohabited before their marriage, however the date of cohabitation is in dispute. They moved from Ottawa to Victoria in 2006 for the respondent's employment and have resided here since. They separated on March 5, 2017 but continued to reside together in the Family Residence with their two children until the end of August 2018 when the respondent unilaterally and without notice to the claimant vacated the home with the children and moved to Vancouver.
- [4] Their children are L.F.D., born August 28, 2007 and O.M.T.D., born December 11, 2009. L. is in Grade 7 and O., Grade 4.

- [5] The claimant is 42 years of age and has a two-year diploma in early childhood education. She is employed as an Early Childcare Educator in Victoria. The respondent is 45 years of age and works for a computer consulting firm initially in Victoria and since September 2018, in Burnaby, B.C. However, at the continuation of the trial in October 2019, the respondent testified he intended, depending on the trial outcome, to return to work in Victoria.
- [6] When the parties met, the respondent was the owner of a townhouse in Ottawa purchased in 1999 (the "Ottawa Townhouse"). He rented out a portion to a friend and in late 2000 the claimant also became a tenant. The parties eventually commenced a relationship and cohabited in the townhouse, although the date of their cohabitation is in dispute. They resided there after their marriage until they moved to B.C. as the respondent wished to live on the West Coast. The respondent worked as a computer consultant in Ottawa and continued with the same employer in Victoria until December 2008. He started employment with his current employer in January 2009.
- [7] In May of 2006 the Ottawa Townhouse was sold for \$395,000 from which the respondent received net sale proceeds of \$241,210.99. In June of 2006 the parties purchased the Family Residence on Longview Drive in Victoria. The respondent used \$10,000 of the Ottawa Townhouse sale proceeds for a down payment and \$181,456.45 to complete the purchase.
- [8] During the marriage, at least initially, it was agreed the claimant would remain at home with their children. In 2012 the respondent started working at the Vancouver office of his employer most weeks. The claimant says he would be gone from Tuesday to Thursday, leaving Tuesday morning and returning Thursday evening, every week. The respondent disputes both the length of those work trips and their frequency.
- [9] At some point the respondent became dissatisfied with the claimant remaining at home and encouraged her to become employed once their youngest son was in kindergarten, although the claimant states the respondent asked about her returning to work when their youngest child was in preschool.
- [10] The claimant did not return to work until January 2016 when their youngest son went to kindergarten. She worked in a daycare part-time until she was relicensed in B.C. in September 2016 as an Early Childhood Educator. She was initially paid \$17.00 per hour, 25-30 hours a week. She took the summers off in 2016, 2017, and 2018 to care for the children. She worked some days in the summer in 2019.
- [11] Until the end of the children's school year in 2018, they were enrolled in a private school in Victoria, St. Michael's University School, the cost of which was born by the respondent's parents from their family trust. The family trust was wound up in 2017 and the respondent's parents ceased funding the children's school fees.
- [12] On March 5, 2017, a physical altercation occurred in the Family Residence between the claimant and N.B., a friend and co-worker of the respondent. Ms. B. attended the residence so her son could have a playdate with L. The respondent was home but the claimant was not.

The claimant was uncomfortable with the friendship between the respondent and Ms. B., as she suspected they were having an affair. The respondent was aware of her concerns and had been for some time. When the claimant returned home and found Ms. B. present at the residence, tempers flared and the altercation ensued. It was unclear on the evidence who initiated the physical contact. The police investigated the incident, but no further action was taken. The marriage had been in difficulty for some time and the parties separated following this incident but remained living in the former Family Residence.

- [13] In 2018 the respondent became aware he was being considered by his employer for promotion to a position as Vice President, something he clearly wished to accept as part of his career plans. The position required however that he reside in the Lower Mainland. The respondent testified he informed the claimant on June 18, 2018 that he wished to move to Vancouver to take such employment. The claimant indicated she did not intend to move with him. It is unclear if the respondent said that he proposed to move with the children.
- [14] The claimant filed her Notice of Family Claim on July 10, 2018 seeking an order that the children continue to reside with her as the primary care giver in the Family Residence.
- [15] The respondent filed a Response to Family Claim and Counterclaim on August 10, 2018 seeking an order to relocate to Vancouver with the children and that he have primary parenting responsibilities alleging the claimant was mentally ill, unstable, and violent.
- [16] On August 24, 2018 the claimant filed an application for a short leave, without notice order respecting preservation of assets, child and spousal support, exclusive occupancy of the Family Residence and determination of the children's school for the 2018-2019 school year. Short leave was granted and orders made for service of the application. The respondent, through counsel, filed an Application Response on August 30, 2018 opposing the relief claimed and seeking an order the children move to Vancouver with him and that they be enrolled in the school system there.
- [17] Despite having counsel and the issue of relocation of the children being clearly engaged in the above application, the respondent unilaterally and without notice to the claimant altered the existing parenting arrangement by surreptitiously moving to Vancouver with the children.
- [18] In August 2018 the respondent informed the claimant he was taking the boys camping at China Beach on Vancouver Island. He and the children left with the parties' travel trailer on August 30, 2018 on the understanding the respondent would return with the children on September 4, 2018 for the start of school.
- [19] On the afternoon of September 3, 2018, a male, unknown to the claimant, returned the family trailer to the Family Residence. He informed the claimant, who was understandably concerned, that his wife had called him to pick up the travel trailer. This resulted in the claimant calling the police. At their suggestion she attempted to contact the respondent. When he eventually replied, he informed her the children were with his parents (who the

claimant thought were in Ontario) and refused to tell her where they were and informed her he and the children were not coming home.

- [20] Later the claimant discovered the respondent had, without informing the claimant, relocated with the children to Vancouver, initially to a hotel and then to a rental home in West Vancouver. He enrolled the children in elementary school in West Vancouver, again without consulting the claimant.
- [21] He testified he contacted his parents in that first week in Vancouver and asked that they come to Vancouver from Ontario to care for the children.
- [22] On September 11, 2018 the claimant, through new counsel, set the August 24, 2018 application for hearing on September 14, 2018 regarding the parenting and schooling issues only.
- [23] On September 14, 2018, Church J. ordered on an interim basis that:
- (1) The children will be returned to the Greater Victoria Area by the Respondent, no later than September 15, 2018 at 5 o'clock in the afternoon;
 - (2) The children will be enrolled in public school in the Greater Victoria Area as soon as possible thereafter, and the older child, [L.F.D.] will be enrolled in Gordon Head Middle School, and [O.M.T.D.] will be enrolled in Hillcrest Elementary School;
 - (3) The Claimant, [A.M.F.D.], is entitled to regular and generous parenting time pending either a further agreement between the parties or further order of the court;
- [24] The respondent returned to Victoria with the children in compliance with that order. However, despite the order for generous parenting time, the respondent refused to permit the children to be with the claimant overnight, instead allotting her parenting time from 4:00 p.m. - 7:00 p.m. on Tuesdays and Thursdays and 9:00 a.m. - 6:00 p.m. on Saturdays, supervised by him. Nor would the respondent permit the claimant to enroll the children in school, doing so himself because it was during "his" parenting time. His explanation for the supervised and limited parenting time was that it was "in the boys' best interests." Despite the order saying nothing about supervised parenting time, he explained it did not say unsupervised either, and that his then legal counsel instructed him on that interpretation. That counsel was not called to testify and privilege was not waived.
- [25] On October 11, 2018 the respondent filed an application seeking various orders, including an order permitting his relocation with the children to Vancouver. The claimant opposed the application.
- [26] On October 24, 2018 the matter came before Master Dick. She ordered, inter alia, shared interim parenting time on a one-week on/one-week off basis in Victoria, interim exclusive occupancy of the Family Residence by the claimant, interim spousal and child maintenance payable by the respondent and that Dr. Larry Waterman and Dr. Arthur Burrows be retained to complete a Family Law Act, S.B.C. 2011, c. 25 (FLA) s. 211, assessment as to what

parenting arrangements best meet the needs of the children, including whether relocation of the children to Vancouver would be in their best interests. The s. 211 report writers were requested by the respondent and agreed to by the claimant. By consent, the respondent agreed to pay the cost of the s. 211 assessment up front, with liberty to the parties to seek an order as to how payment of the report should be divided.

- [27] Since that order, the parties exercised week on/week off shared parenting until June 2019 in Victoria. While the respondent remained employed in Burnaby and living in West Vancouver, he rented accommodation in Oak Bay until June of 2019 to exercise his weekly parenting time.
- [28] The children have been primarily in the care of the claimant since the start of the school year in September 2019 as the respondent has continued to work in Vancouver. He has not been spending his parenting week with the children. He has continued to see the children on some weekends.
- [29] At the continuation of the trial on October 29 and 30, 2019, the respondent testified he planned to return to Victoria to a lower paid position than he previously had with his employer in Victoria, although he had not committed to that proposal as it was "contingent on the court process." During 2017, his last full year in Victoria, he had earned \$144,543.56. The position he proposes to take in Victoria pays approximately \$82,000 per annum. He then proposes to work a reduced work week of about 25 hours a week when he has the children, given the costs of child care, asserting the difference between child care costs and a full-time salary was "relatively close." That will result in pay of approximately 75% or \$61,500 per annum.
- [30] While his parents were considering a permanent move to Vancouver to assist with child care there, they do not intend to move to Victoria.
- [31] He testified that by staying with the same employer, he can once again advance his career faster than would be the case with a new employer. He has not sought or applied for other employment in Victoria.

Consented to Orders

- [32] At the commencement of the trial, the parties agreed to the following orders:
- i. By consent, the parties are seeking an order for joint custody and that they are both guardians of the parties' two children, [L.] and [O.], pursuant to section 16 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) (the "Divorce Act") and sections 39 and 40 of the Family Law Act;
 - ii. An order they will share all parenting responsibilities pursuant to section 41 of the Family Law Act:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
- (i) starting, defending, compromising or settling any proceeding relating to the child, and
- (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

Issues

[33] As noted, the parties have consented to an order for joint custody and that they are both guardians of the boys under the FLA. They have also agreed that equally shared parenting is in the best interests of the children and to dispute resolution of any parenting issues. The issues remaining include:

- a) The respondent's proposed relocation to Vancouver with the children;
- b) Excluded property and the date of cohabitation;
- c) Division of property, including:
 - i. The former Family Residence;

- ii. Financial assets;
- iii. Personal and household property including sentimental items.
- d) Occupational rent;
- e) The parties' respective incomes;
- f) Child and spousal support, including retroactive support;
- g) The costs of the s. 211 report and attendance of Dr. Waterman and Dr. Burrows at trial;
- h) Costs.

Position of the Claimant

- [34] The claimant seeks shared parenting time, property division and child and spousal support, both retroactive and prospective. She opposes the respondent's request to relocate with the children, the excluding of certain property from division, and the sharing of costs for the s. 211 report arising from the attendance of the report's authors for cross-examination.
- [35] The claimant submits the court must address the situation as it presently exists. That is, the respondent works and lives in Vancouver. He has yet to move back to Victoria and he appears to be hedging his bets to see if he can afford to do so depending on the trial outcome. The claimant argues that if, at some future date, the respondent returns to Victoria, it would be addressed at that time.

Position of the Respondent

- [36] The respondent seeks orders permitting the children to relocate with him to Vancouver, parenting provisions, the exclusion from the property division of certain assets, including the sale proceeds of the Ottawa Townhouse and a \$100,000 gift from his parents, post-separation, accounting for expenses of the Family Residence, occupational rent, division of s. 7 expenses under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"), imputing of income to the claimant and costs.
- [37] In submissions his counsel stated it is not a question of if the respondent will return to Victoria, but when.

Credibility

Credibility and Evidence of the Respondent

- [38] While I accept the respondent loves his children and they, him, he displayed a lack of candour before the court. I found his evidence was self-serving and he sought to place himself in the best light while not accepting responsibility for his actions and placing fault or blame on others. At other times, it was misleading.

- [39] For example, it was clear on the evidence that when he took the children camping on August 30, 2018, it was agreed he would return them to the claimant on September 3, 2018. In his direct evidence about how that plan changed, he gave an explanation of problems with his vehicle and the resulting risk of pulling the travel trailer as justification for another individual returning it to the Family Residence. He then testified he decided, while on the camping trip, to move to Vancouver with the children. The respondent did not explain what he said was a change in plans from August 30, 2018 when he told the claimant he would return the children on September 3, 2018 and instead moved to Vancouver with the children other than to say it was "on the advice of counsel." Solicitor-client privilege was claimed over that advice. Claimant's counsel did not seek to challenge that privilege.
- [40] The respondent did not explain why he was in contact with his counsel on the long weekend camping trip or who instituted the call. Nor did he explain what information he gave to his then counsel that would have somehow justified or explained such questionable advice if, indeed, the respondent's understanding of it is accurate. I pause to note that the respondent's present counsel quite rightly did not seek to justify nor condone such advice or the actions taken by her client.
- [41] Despite testifying the decision to take the children to Vancouver was made during the camping trip, not before, he had in fact accepted a new contract of employment with his employer in Vancouver as of August 28, 2018. That was followed by his Application Response of August 30, 2018 to the claimant's August 24, 2018 Notice of Application in which he sought an order permitting his move to Vancouver with the children. Also, on August 31, 2018 he signed a Financial Statement that showed his employment was located in Victoria and his then salary of \$140,478.04, not his new position salary of \$195,700, plus bonus. The Financial Statement also stated he anticipated no significant changes in the information set out in it. The latter was false. Again, he blamed his then counsel who he alleges stated it would be corrected later.
- [42] Under cross-examination he acknowledged that he knew in June 2018 he would get the promotion to Vancouver after a spring interview with his employer's president and was in discussions in June regarding salary which was the only remaining issue. He also did not promptly disclose the signed employment agreement.
- [43] Regarding taking the children to Vancouver, he was evasive when questioned about his intention to live there with them.
- [44] When the claimant reached him by phone on September 3, 2018, he did not tell her where he and the children were as he did not want to tell her their exact location and did not do so until the September hearing before Church J. Nor did he inform her he was enrolling them in school or where, again, according to him, on the advice of his then counsel. He only let the claimant speak to the children twice before they were returned to Victoria because he claimed it was upsetting for them to do so.

- [45] I am satisfied he knew full well when he left on the alleged camping trip he was planning to surreptitiously move the children from their mother in Victoria to Vancouver. His explanation of the camping trip and the sudden decision to move to Vancouver is simply neither believable nor consistent with the evidence. In addition, he displayed a complete lack of understanding of his conduct, commenting later that when the claimant obtained the interim order that the boys return to Victoria, it was "horrible" for the boys, implying her conduct in obtaining the order was the cause. His lack of insight into his conduct is concerning.
- [46] I find his evidence generally was consistent with the comments of Dr. Burrows based on psychological tests undertaken during the s. 211 process, and while such tests are not determinative, they are worth noting:
- a) [S.'s] responses resulted in a score for positive bias that is outside the normal range, suggesting that he may not have answered in a completely forthright manner
 - b) [S.'s] pattern of responses suggested that he tends to portray himself as being exceptionally free of common shortcomings to which most individuals will admit . tending to minimize the negative impact of his behaviors on others as well as on himself.
 - c) it is important to remember that he seems to be reluctant to admit dysfunction or problems across many areas.
- [47] Even on a simple matter, his lack of candour was apparent. On cross-examination he was asked about living in West Vancouver and working in Burnaby, some 20 kilometers away, given the travel time involved and the impact on his time at home with the children. He stated it took him only 15 minutes to get to the office. This was misleading. When challenged, he then said that was if there was no impeding traffic. When it was put to him it really takes 30 minutes, his response was, he had done it in 15 minutes plus, however that had only been perhaps 10 times in 11 months.
- [48] In addition, throughout his cross-examination, he repeatedly retreated to the answer that "he did not recall."
- [49] He was neither a credible nor reliable witness.

Credibility and Evidence of the Claimant

- [50] I found the claimant to be straightforward in her evidence, credible and reliable. She admitted what she did not know or was uncertain of. Cross-examination did not raise issues respecting her credibility or reliability. It was clear she is devoted to her children and that they have a close and loving relationship with her.
- [51] Where the evidence of the parties differs, I accept that of the claimant.

Witnesses of the Claimant

Dr. Govender

[52] Dr. Govender has been the family physician since 2010. In addition, his children attended St. Michael's University School as did the parties' two sons. He stated that about 90% of the time the claimant brought the children to his clinic. He has treated her for depression noting that since 2016 with her marriage crumbling, she faced situational crises. He testified it is controlled. He confirmed that he spoke to Dr. Burrows who accurately reflected his advice in the s. 211 report that "[h]e considered her to be medically stable, compliant with her prescription, and felt she was dealing effectively with her current stressors. He indicated that she had developed a clear understanding of what she can, and cannot, control regarding her situation."

H.H.

[53] Ms. H., a former social worker and now education assistant, is a friend of the claimant and has been for 12 years. They kept in contact daily at one time and now see each other in person at least once a week. She described the claimant as one of the most loving parents she has seen and would trust her implicitly with her own children. She noted the children's close attachment to their mother.

T.G.

[54] Ms. G. has known the claimant and the respondent since 2014 or 2015. She would see the claimant at church and at the children's karate dojo where she works. She commented on how the claimant interacts with her children while the respondent does not.

A.M.G.

[55] Ms. G. is a neighbour of the parties having met them in 2006 when they moved into their home. She became friends with the claimant but not the respondent. She spoke of the close relationship the children have with their mother and her ability to properly care for and discipline them. She was not impressed by the respondent's parenting or lack thereof.

C.D.E.

[56] Mr. E. is a neighbour of the claimant. He had little contact with the respondent when he was residing in the Family Residence. He rarely saw the respondent with the children. He testified the children were at ease with the claimant and that she was playful and they had fun with her. He had attended at the residence at the claimant's request in May of 2019 to video the removal of items by the respondent from the Family Residence.

Witnesses of the Respondent**M.G.**

[57] Mr. G. lives in Ontario and was a past roommate with the claimant and respondent in the Ottawa Townhouse. He confirmed the claimant moved in as their roommate in October or November 2000 and that the parties commenced dating in December 2000 or January 2001

and around that time shared the respondent's bedroom. Describing the respondent and claimant's relationship, he said they had disagreements once every four to five weeks, during which time she would move back to the basement room in which she originally lived, typically for a few days or a week. During those times of separation he did not see them dating others. He said they always reconciled. He moved out in July 2001 but remained friends with them.

D.S.

[58] Ms. S. is the respondent's aunt on his mother's side. She confirmed the close relationship between the respondent and his children. She described him as a calm, even-handed parent who participates in various activities with the children.

B.D.

[59] Ms. D. is the respondent's mother. She and her husband reside in Ontario. She could not provide a date when the parties became a couple except when their son told them they were going to get engaged in 2003. She confirmed that she and her husband came to B.C. in the fall of 2018 to support the respondent with the children.

[60] She testified her son had a close relationship with his children and they with him. She confirmed the claimant loved her children and they adored her and that she worked very hard at dealing with them, although at times she struggled a bit with her patience.

[61] She and her husband would pick up the children at school, prepare dinner for them and get them to their activities. While on a walk she heard L. tell his father he wanted "50/50" but she did not hear anything else. She noted it was a term the adults used but not when the children were around.

[62] She confirmed the bedroom side table, an item in dispute, was given to her by her grandmother but thought the bed, another item in dispute, was one her son had bought himself. It was sought now by her son for the Vancouver home to have a spare bed for friends of the children to use for sleepovers.

[63] She testified that she and her husband still planned to relocate to Vancouver even if the children did not live there with the respondent.

L.D., Sr.

[64] Mr. D. is the father of the respondent. He confirmed the respondent called them in September of 2018 because he needed their immediate assistance with the children and that he was moving to Vancouver. He confirmed as well their long-term plan was to move to Vancouver. He said that O. had said he wanted to move to Vancouver but L. was more guarded and said he wanted his mom to come too.

- [65] He confirmed gifting \$100,000 each to the respondent and to their daughter as birthday gifts. He said he did not discuss with the respondent or his daughter what the money should be used for. He and his wife thought the respondent should invest the funds and the respondent told them he had done so. He confirmed the respondent owes he and his wife \$48,000 for funds they have loaned to him since the parties separated for the children's summer camp, the Victoria house rental and other expenses. No repayment arrangements have been made. He confirmed that he and his wife cared for the children throughout the balance of 2018 and 2019 when their son had the children, except for one week.
- [66] He said that if the relocation of the children to Vancouver was not permitted, they would reconsider a move to Vancouver. They had no intention however of moving to Victoria.

M.B.

- [67] Mr. B. has known the respondent since they were teenagers. He was aware the claimant moved into the respondent's townhouse in the fall of 2000 but was not sure when they began sharing a bedroom. He did not see them dating anyone else after they began sharing the bedroom. From 2011 to 2015 Mr. B. lived in Victoria and saw the respondent and his children weekly. He has since moved to Calgary and has had no contact with the claimant or the children, though he still keeps in touch with the respondent over the phone and by text. He provided a parenting reference in the s. 211 report and confirmed in direct examination it accurately reflected his comments. He had described the respondent as patient and attentive with the children and he had no concerns about the respondent's ability to parent them cautioning the report writer that he had not been present for the last three years.

A.D.

- [68] Mr. D. is the B.C. Regional Vice President of the respondent's employer. He testified first in July 2019 and then once again in October 2019. He confirmed that had the respondent not chosen to seek the Vancouver position, he would still be employed in his old role in Victoria. The Vancouver position was effective May 1, 2018, however the respondent did not agree to the contract until later. He testified that if the respondent choses to move back to Victoria, he would expect him to move up the ranks again. He noted the Vancouver position required that the respondent reside there full time. He also stated it was a one or two-year process for the promotion of the respondent and that he had been identified for the Vancouver position four or five years ago. He stated the Vancouver position was a 40-hour work week but that some weeks required more and some less, given work performance is based on outcomes.

L.F.H.

- [69] Ms. H. is the respondent's sister and lives in Ontario. She first met the claimant in the spring of 2001 but did not find out her brother and the claimant were dating until October of 2001 when they came for a visit. The respondent told her in February of 2003 he planned to marry the claimant. She saw the parties and their children about twice a year, typically over the summer and over Christmas break. She described the claimant as impatient with the

children at times. She said her brother was a loving father and enjoyed time with his children. She confirmed the \$100,000 gift she received in 2011 from their parents given to her to improve her kitchen.

[70] She did not give a parenting reference to Dr. Burrows as she was not asked to.

The FLA Section 211 Report

[71] The parties agreed by consent in the October 24, 2018 order to retain Dr. Waterman and Dr. Burrows for the s. 211 report to address a parenting assessment and the relocation issue. Current counsel were apparently not aware until trial that this was the first s. 211 report prepared by Dr. Burrows. The parties agreed to the acceptance of the report as an expert report although the respondent reserved his right to challenge its findings as a matter of weight. Dr. Burrows prepared the report under the supervision of Dr. Waterman and I was satisfied Dr. Burrows had the background and training to do so notwithstanding it being his first s. 211 report.

[72] The report stated:

- Overall, the children would be safe with either parent and in many ways each complements the other in terms of their relative strengths and weaknesses as parents. Both parents present as engaged and concerned with their children's welfare. Both provide suitable nutrition, guidance, and engagement with the children. Expectations between both parents in regards to behavior, manners and routines appear to be largely aligned.
- The children seem equally at ease with both parents, there is no indication of parental alienation occurring. They appear to have adapted well to moving between both parents as it is currently structured.

...

RECOMMENDATIONS:

- The Family Law Act provides that in making an Order respecting guardianship, parenting arrangements or contact with a child, the parties and the courts must only consider the best interests of the child...

Based on the information gathered during the course of this assessment, the following recommendations would appear to be reasonable.

- It is recommended that [A.] and [S.] share joint guardianship of their two children.
- It is the opinion of this writer that relocation of the children to Vancouver is not in their best interest. The children have established relationships in Victoria. [A.'s] support network is in Victoria. [S.'s] parents, if they remain, would be able to locate in either Victoria or Vancouver. In order to facilitate the above shared parenting recommendation, it is best if the parents are both in the same city.

- It is recommended that the boys attend school in Victoria. This is where the children have an established set of friends and activities. Therefore, [S.] will have to maintain a household in Victoria and commute to his work, or find a way to maintain two households.
- It is recommended that a parenting coordinator help the couple to learn to co-parent and resolve any conflicts. The parenting coordinator may also wish to provide some coaching to [A.] regarding her responses to frustration and stress in order to strengthen her ability to correct the children's behavior and her ability to address whining and complaining on their part.
- It is recommended that [S.] and/or his parents pay to have the renovations on the family home completed and that the cost of doing so be repaid prior to dividing up the proceeds from the sale of the family home between [A.] and [S.].
- In regards to counselling for the children, it is recommended that a Registered Psychologist, ideally one with specialty in regards to children adjusting to divorce, be consulted within 1-2 months following implementation of the resulting guardianship/custody agreement. If deemed necessary, it is recommended that one or both boys receive counselling as recommended by that psychologist.

[73] The claimant did not dispute the s. 211 report and its conclusions.

[74] The respondent acknowledges the s. 211 report appropriately reviewed and determined the parties' respective capacities to parent and made a sound determination that shared parenting was recommended in the same city in that such is in the best interests of the children. However, the respondent challenges the report's approach and conclusion on the issue of relocation. As a result, the respondent required the attendance of both Dr. Burrows and Dr. Waterman for cross-examination.

Dr. Waterman

[75] Dr. Waterman explained that Dr. Burrows took over his practice noting he had extensive experience with children's interviews and parents and the skill necessary to prepare a s. 211 report, including the professional ability to reach conclusions. He taught him the process he had developed since he began such work in 1982. They discussed the options and types of recommendations that could be made. His involvement was to assist and teach Dr. Burrows the process, not to complete the actual report. He confirmed that Dr. Burrows did the assessment and he could not speak to it.

Dr. Burrows

[76] Dr. Burrows confirmed this was the first s. 211 report he had done and that he did the assessment, not Dr. Waterman. His first draft was reviewed by Dr. Waterman who assisted with the structure of the report.

- [77] He did not question the parents about their financial circumstances and resources nor the financial benefits of the move to Vancouver. He agreed that increased resources for a child could affect their well-being. He stated his testing of Ms. D. showed no difficulty in her making friends. He stated that he did not question the children about the relocation or where they wished to live because that is a decision for adults. He said the children's preferences were to live with both parents. He attended the claimant's residence in Victoria and the respondent's rental in Victoria but not his rental in Vancouver. His opinion was it was unnecessary to attend at the latter.
- [78] He confirmed he relied on the information from Dr. Govender respecting the claimant. Dr. Burrows' testing did not indicate she had major depressive disorder. Regarding parenting and the relocation issues, he confirmed he addressed parenting first. He stated that if the respondent were permitted to relocate with the children, he could not address a parenting schedule without having information respecting such factors as how close the parents' homes would be. He stated the best thing for the children is for both parents reside in the same location and share equal parenting time. Regarding the status quo, he stated it would have been a consideration if everything else was equal.
- [79] He stated that O.'s comment that his mother should get a better job is not typical of a nine-year-old.

Discussion of Section 211 Report

- [80] The respondent submits the conclusions and recommendations on the relocation issue are not grounded on the evidence and the procedure followed by Dr. Burrows was questionable. Specifically, that:
1. The report failed to adequately assess the Children's best interests when it came to the question of relocating to Vancouver;
 2. The report failed to provide recommendations for all the available scenarios that are available to the court when it comes to an initial application and relocation under section 46 of the Family Law Act; and
 3. The report was biased in favour of Ms. D.
- [81] The respondent's principal complaints are the failure of Dr. Burrows to question the children specifically about what they thought of Vancouver and Victoria, what they liked to do in Vancouver, their views of the home, school and community in West Vancouver and where they wanted to reside. He argues that, as a result such information was not considered and further, the failure of Dr. Burrows to visit the Vancouver home, suggests a focus solely on the status quo arrangement in Victoria.

- [82] As noted, Dr. Burrows confirmed that, given the ages of the children, it is not his practice to ask the children directly about the parenting time or where they wished to live. He explained that such a decision is for adults, not children of their age, and it was not appropriate to ask them.
- [83] In my view, in the circumstances of this case he is correct in not directly putting such questions to the children. I say this because of the personalities involved, in particular the strong personality of the respondent, and his influence over their children as well as his rather transparent attempts to make the home in West Vancouver more attractive to the children such as the installation of a video entertainment and gaming centre in the basement, including multiple screens and terminals and providing TV's in each of the children's rooms, something they had not had in Victoria. Additionally, to ask the children where they wished to live likely leaves them with the impression they have a say in the matter. Given their ages and the evidence of Dr. Burrows, they do not.
- [84] The respondent also argues Dr. Burrows' failure to consider the financial benefits of the Vancouver move and that increased resources could affect the children's well-being.
- [85] The respondent refers to alleged deficiencies in the report consisting of a lack of analysis as to how the claimant, having primary parenting, was more in the children's best interests than living primarily with the respondent in Vancouver, and a lack of analysis of how the best-case scenario of both parents residing in the same location with the children lead to his recommendation the children continue to reside in Victoria.
- [86] I note that Dr. Burrows did suggest that relocation should not occur because "[t]he children have established relationships in Victoria. [A.'s] support network is in Victoria. [S.'s] parents, if they remain, would be able to locate in either Victoria or Vancouver."
- [87] On the allegation of bias, the respondent raises several criticisms of the communications between Dr. Burrows' office and the claimant and the differences between what each party was told regarding the use of collaterals. He also criticizes the reliance on hearsay in the report and a failure to put negative comments from collaterals to the other side for their explanation. He also submits there was a lack of credibility assessment in the report.
- [88] While there is some merit to these latter complaints, I do not find they establish bias. I recognize this was Dr. Burrows' first report and while the parties accepted his findings respecting the parties' capacity to parent and the best interests of the children generally given his expertise as a psychologist, the criticisms are limited to the relocation issue. In any event, the issue of relocation is for the court to determine. I give little weight to the recommendation that the children remain in Victoria as set out in the report, although I have, based on the evidence at trial, come to that conclusion independent of the s. 211 report on that issue. I have been in a better position to consider the issue of mobility, given the considerable evidence at trial.

- [89] The claimant submits a s. 211 report is simply a tool to assist the court in determining the best interests of the children: *R.S.D. v. K.D.*, 2018 BCSC 2416 at para. 53. In *K.B. v. J.B.*, 2015 BCSC 704, Voith J. stated:
- [8] In terms of the preparation of and evidential concerns with such reports, Burnyeat J., in *Wu v. Sun*, 2006 BCSC 1891, at para. 3, said, "s. 15 reports are not governed completely by the evidentiary rules which would be in effect when dealing with reports requisitioned by one of the parties from an expert", and he described the authors of such reports as the "eyes and ears" of the court.
- [9] In *Wu*, at paras. 3-7, Burnyeat J. then engaged in a review of the case law that is relevant to the preparation of such reports. This review notes, among other things, that evidence for a s. 15 or s. 211 report is usually gathered over a series of interviews, that safeguards have been included in the process to protect the interests of the parties, that the report may be based on evidence that is not before the court, and that the court can then assess the weight of the opinions based on proof of the underlying facts and assumptions at trial.
- [10] This last point warrants some emphasis. Regardless of the information that goes to the report writer, the court ultimately has the discretion to review the background information presented in the report, carry out an independent assessment based on the evidence at trial, and come to a different conclusion as to the best interests of the child; *C. (T.) v. C. (S.)*, 2013 BCPC 217, at paras. 143-144; *Plant v. Kempton*, 2011 BCCA 171, at para. 11.
- [90] I conclude limited weight is to be given to the report on the issue of relocation but accept the report is of assistance regarding the characteristics of the children and the testing and interviewing of the parents, and their respective relationships with their children.

Relocation: Law and Discussion

- [91] The claimant's Notice of Family Claim pleads the FLA on the issue of relocation. The respondent filed for parenting and relocation under both the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), and the FLA. The parties agree that the FLA is the most appropriate legislation to proceed under subject to the qualification that the case law under the Divorce Act remains applicable to the mobility issue. The reasons for their agreement are the similarity in the best interest tests in the two statutes, that Ms. D. did not plead the Divorce Act and that interim orders have been made under the FLA. It is not in dispute that the doctrine of paramountcy "does not preclude consideration and application of the FLA in family law proceedings in which a divorce is granted": *B.D.M. v. A.E.M.* 2014 BCSC 453 at paras. 113-118.
- [92] In *K.W. v. L.H.*, 2018 BCCA 204, the court addressed the FLA and Divorce Act:
- [103] While this case arises under the FLA, much of the jurisprudence concerning mobility cases has arisen under the Divorce Act. Although there are some differences in the criteria that must be considered, both the FLA and the Divorce Act mandate that the decision must be made in the best interests of the child.

- [104] In cases under the Divorce Act, the court considers the criteria set out in *Gordon v. Goertz*, [1996] 2 S.C.R. 27. Those factors are similar to those found in s. 37(2) of the FLA. However the tests differ with respect to the weight to be given to the motive of a relocating parent. In *Gordon v. Goertz*, the Court held that the reasons for the custodial parent's move should only be considered in the exceptional case where it is relevant to that parent's ability to meet the needs of the child (at 61). Section 46(2) of the FLA however expressly requires the court to consider the reasons for the proposed move. As this Court explained in *Stav*, the reasons for the proposed move are legitimate considerations for the judge to weigh in determining whether the move is in the child's best interests:
- [88] ... often the parent seeking to relocate will submit that doing so will enable him or her to obtain financial and/or family support that is unavailable in his or her present situation, and which will both directly and indirectly benefit the children. The other parent will argue that whatever benefit there is to the relocating parent in those situations is more than offset by the detriment to the children of being removed from their community and, more importantly, from regular contact with the other parent. In my view, these are legitimate considerations which may assist a judge in determining to what extent the move will operate in the children's best interests. It is simply one more factor to weigh in the balance. The trial judge considered these factors in this case and, in my view, she was right to do so.
- [89] The question should not be whether the evidence of the reason for a proposed move is admissible, but how it relates to the children's best interests, if at all. Ulterior reasons for moving which are a thinly disguised attempt to thwart contact with the other parent are clearly relevant to whether a parent is acting in the children's best interests. Similarly, reasons for moving which benefit the person seeking to relocate can also be for the benefit of the children, but have to be weighed together with the other evidence to determine whether the move is in the children's best interests.
- [90] The fact that a move is in the best interests of the parent seeking to relocate does not necessarily mean that it will be in the children's best interests. It is more likely to be so if the person seeking to move is the custodial parent with a healthy relationship with the children, than if the person seeking to move is an access parent who has had limited contact or involvement with the children. These are but two scenarios along a broad spectrum.
- [93] The parties agree that s. 46 under Part 4, Division 2 of the FLA governs, not Division 6. The Court of Appeal addressed these divisions in *K.W.* and held:
- [92] Absent an existing agreement between the parties, when an initial application is brought for an order respecting parenting arrangements under s. 45 and a guardian indicates in his or her pleadings or by notice in writing of an intention to change the child's residence, s. 46 applies notwithstanding that an interim order is made in the course of the proceedings .
- [94] In this instance, no agreements or orders were in place at the time the respondent unilaterally relocated with the children, hence s. 46 applies. Section 46(2) states:

- (2) To determine the parenting arrangements that would be in the best interests of the child in the circumstances set out in subsection (1) of this section, the court
- (a) must consider, in addition to the factors set out in section 37(2) [best interests of child], the reasons for the change in the location of the child's residence, and
- (b) must not consider whether the guardian who is planning to move would do so without the child.
- [95] This is an initial custody application that includes a request to relocate. The court in *K.W.* addressed the approach to be taken:
- [108] In *Falvai*, this Court held that initial custody applications involving a mobility issue required a "blended" analysis that includes a consideration of the mobility issue as part of -- not separate from -- the determination of the custody issue. The Court rejected the proposition that mobility and custody be decided separately. Madam Justice Smith reasoned:
- [25] This analysis [in para. 28 of *Nunweiler*] does not create a "two-step" analysis as was undertaken by the trial judge. Nor does it change the conventional approach to determining custody on an initial application, which requires a balancing of all relevant factors, including a parent's proposed move with the child to a new community, in deciding what is in the child's best interests. Rather, in the context of an initial application, *Nunweiler* applied a "blended" analysis considering some of the factors identified in *Gordon*.
- [109] In *Falvai* the trial judge was found to be in error in conducting a two-step analysis in which he first decided the custody issue in favour of the mother, and thereafter determined the mobility issue.
- [110] In my opinion, a similar blended analysis is required under the FLA when an initial application to determine parenting arrangements is combined with a plan to relocate the child within the meaning [of] s. 46(1)(c). On such applications the court must balance in the round all relevant factors, including the proposed move to a new community, in deciding what parenting arrangements are in the child's best interests.
- [111] In this case the trial judge committed an error similar to that made in *Falvai*. Where in *Falvai* the trial judge decided the custody application in advance of the relocation application, in this case the trial judge did the opposite. He decided the relocation application in advance of determining the appropriate parenting arrangements. He was led into this error because of his decision to decide the mobility issues under Division 6 instead of Division 2. What was required in determining parenting arrangements in the child's best interests was a blended, in the round analysis that balanced all relevant factors, including the Mother's proposed move with the child to a new community: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 46; *Hellberg v. Netherclift*, 2017 BCCA 363 at para. 72 ...

- [96] As a result, a blended analysis is required (see also *Duggan v. White*, 2019 BCCA 200). In *Hellberg v. Netherclift*, 2018 BCCA 404, the court also noted:
- [67] Of course, the current status of a child's welfare is relevant on a relocation application. However, the test on an application to relocate does not require that a parent wanting to move must show that current living arrangements and circumstances are having an adverse impact on a child. A parent must only demonstrate that relocation is in a child's best interests. Those best interests can be shown even where a child is currently healthy and happy.
- [68] The best interests of the child is a positive right to the best present and future arrangements, which is something more than simply being free from harm. The oft-cited comments of L'Heureux-Dubé, J. in *Young v. Young*, [1993] 4 S.C.R. 3 at 84, while in a dissenting judgment, make the point:

The best interests of the child is not simply the right to be free of demonstrable harm. It is the positive right to the best possible arrangements in the circumstances of the parties. This could not be more clearly indicated than in the report on Family Law, *supra*, as the Law Reform Commission of Canada begins its recommendations on children and the dissolution of marriage with the following words at p. 63:

1. Children should have two fundamental rights when their parents' marriage ends:
 - (a) the right to social and psychological support by having the most suitable arrangements possible in the circumstances made for their custody, care and upbringing; and
 - (b) the right to economic support.

[Emphasis added.]

- [69] Furthermore, in a case like the present, where there is no prior agreement as to where the child will live and each parent wants to live in a place which is unfortunately far from the other parent's residence, the law does not require the party seeking to move to demonstrate that the current situation is unsatisfactory. Instead, it is a forward-looking test that asks what circumstances are best for the child. At paras. 20 and 50 of *Gordon v. Goertz*, the Court held that:
- [20] [The Best Interests Test] stands as an eloquent expression of Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake.
- [50] ... The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[Emphasis added.]

- [97] Section 37(2) of the FLA states:

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[98] I turn to consideration of each of these factors.

The child's health and emotional well-being

[99] The children are healthy, energetic, kind and inquisitive. They are doing well in school and are able to make and have friends. Despite the stresses between their parents, they appear to have adapted. They clearly wish to have both parents in their lives. They have a close and loving relationship with both their mother and their father.

The child's views, unless it would be inappropriate to consider them

[100] The children are 12 and 10-years-old and in Grades 7 and 4 respectively. While O. advised Dr. Burrows he wanted both of his parents to live in Vancouver "as his dad wouldn't have to go back and forth," it is not clear if his preference was Vancouver as a location or Vancouver because that is where his father lived and worked.

[101] The evidence does not establish a clear preference of the children to either Victoria or Vancouver and in any event, given their ages, it would not be appropriate to give their views weight as it has not been shown they are unusually mature. Dr. Burrows was clear that he did not and would not ask them directly where they wished to reside, given their ages.

The nature and strength of the relationships between the child and significant persons in the child's life

[102] It is not disputed the children have strong bonds with both of their parents. As for their grandparents, they have always had a long-distance relationship with frequent visits and it is expected that will continue.

The history of the child's care

[103] It is also not disputed the claimant was a stay-a- home mother until January 2016. She has also, since then, remained their primary caregiver. The respondent's employment necessarily limited the time he would spend with them.

The child's need for stability, given the child's age and stage of development

[104] The children's need for stability has been disrupted by the conduct of the respondent. His unilateral move with the children from Victoria to Vancouver was clearly disruptive for them. His initial refusal to permit unsupervised parenting by the claimant and his evidence that their return to Victoria as a result of the interim orders was "horrible" for them acknowledges that. His lack of insight into his conduct and the removal of them from their mother remains a concern. I am satisfied that the acknowledgement of the parties that it is best they share parenting provides stability to them.

The ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities

[105] The respondent refers to the claimant's history of anxiety and depression and that such may affect her and the children's well-being. The incident with Ms. B. on March 5, 2017 that led to the parties' separation is relied on as an example of such concerns. The evidence does not establish the claimant initiated the physical confrontation. The conduct of the respondent in having Ms. B. in their home, knowing his relationship with her was a concern for the claimant, was a significant error in judgment on his part and illustrative of a lack of insight. While the claimant has been diagnosed with a depressive disorder, her physician was clear it is controlled by medication and there are no concerns respecting her ability to parent. Indeed, the evidence of all other witnesses called by her shows the claimant to be a good mother, dedicated to, and adored by, her children.

[106] While the respondent's unilateral move to Vancouver with the children is worthy of criticism and demonstrative of a lack of insight, it does not cause me concern as to the respondent's overall ability to exercise his responsibilities as a parent to his children whom he clearly loves and cares for provided their mother shares parenting.

The impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member

[107] The respondent acknowledges there is no history of family violence, yet raises the incident with Ms. B. once again. He was not present in the room when the physical altercation commenced. The claimant testified Ms. B. initiated it. Ms. B. was not called as a witness. In any event, this was an isolated incident involving the presence in the claimant's home a woman whom the claimant suspected the respondent was having an affair. In the circumstances I do not accept the incident supports any concerns regarding the safety of the children, the ability of the claimant to parent or the close bond she and the children have.

Whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs

[108] This is not a factor.

The appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members

[109] Since October 24, 2018 the parties for the most part have been able to cooperate on parenting issues.

Any civil or criminal proceeding relevant to the child's safety, security or well-being

[110] There are no such proceedings.

Discussion of Relocation

[111] Prior to September 2018 I find the claimant was the primary parent. The evidence is she was the parent who took the children to school, was involved with the school, took them to most doctor and dentist appointments and curtailed her work hours in order to pick up the children from school and be with them after school. She cared for them during the respondent's absences for work-related travel and generally ran the household.

[112] The respondent's employment required substantial amounts of his time, including travel, hence his parental role was necessarily reduced. While the respondent sought to downplay the claimant's time with the children, her level of parenting is illustrated by the fact that upon relocating to Vancouver, the respondent immediately summoned his parents to come to Vancouver to provide child care.

- [113] The respondent's parents' focus, to some extent understandably, was supporting their son and grandchildren, however there was a lack of recognition of the importance of the claimant in the children's lives. When they were initially asked to come to Vancouver, they testified the absence of the claimant never arose. The claimant testified that she has had no direct contact with the respondent's parents since last summer, other than turning items over to the respondent's father.
- [114] The conduct of the respondent in making the unilateral move to Vancouver with the children reveals a profound lack of appreciation of the children's relationship with their mother and its significance and importance for them, and as a result, constitutes an action taken contrary to their best interests. It reveals a single-minded view rooted not in their best interests but rather in his desire to pursue his career, despite knowing the claimant was not agreeable to the proposed move.
- [115] I am satisfied the reason for the move was the desire of the respondent to pursue his ambitious career plans. While arguably his increased income would benefit the children, at the same time his position in Victoria was secure and earned him a reasonable income that was meeting the children's needs. While greater income is a factor to consider in a relocation application, it is only one factor and must be considered along with the other relevant matters.
- [116] The respondent has chosen, despite working in Burnaby, to live some 15 kilometers away in West Vancouver, a municipality known for its expensive housing. This choice would make the claimant's move financially difficult and certainly she would not be able to afford a home like the one the respondent rented. A significant concern is the lack of reliable evidence the claimant can secure employment in the Lower Mainland near enough to West Vancouver to permit her to effectively share parenting. The respondent has not shown the claimant would earn more than she presently does. There is also no evidence the claimant, given her limited earning capacity as supplemented by spousal support, can realistically find suitable accommodation in or near West Vancouver to facilitate shared parenting.
- [117] The respondent suggested that he would help the claimant find an apartment while he resides in a large home with a yard near the children's school. At the same time, in his pleadings and his submissions, he seeks to limit spousal support both in amount and duration. The evidence simply does not establish the claimant could reside and work near enough to the respondent's residence and the children's school so that shared parenting would occur, nor has the respondent provided a plan for such.
- [118] As the authorities indicate, if the reason for the move is to be given any weight, it must have a direct correlation to the best interests of the children. The respondent acknowledged that the primary reason for the change in location was economic. While his salary increased, it was not established the move would not come with a cost, that being the children's relationship with their mother. The evidence did not establish that even with spousal support, the claimant could work and reside close enough to the children to effectively

exercise shared parenting with them.

- [119] Dr. Burrows quite rightly noted that O.'s comments respecting wanting his mother to get a better job are not normal.
- [120] Parental happiness is also a relevant factor. The respondent has pursued claims the claimant has mental issues. To a certain extent it appears her tendency to experience depression is situational. Forcing her to leave her employment, her network of friends and sources of her support is not going to reduce the risk of that tendency that so concerns the respondent. He links her alleged mental issues to the well-being of the children, yet at the same time acknowledges a 50/50 arrangement is appropriate. He still views her as having mental health issues but testified he understood such were not significant enough to exclude her from parenting. He clearly reluctantly accepted that. He also testified that he was agreeing to 50/50 parenting because that appeared legally appropriate. Additional stress and a reduction in the claimant's sources of personal support is not going to be in the children's best interests. That said, I am satisfied the claimant's depression is controlled and does not interfere with her ability to parent.
- [121] The respondent's alleged reliance on the expertise of others, particularly his former counsel, to explain his actions runs contrary to his apparent intellectual ability, self-assured personality and desire to get his way. The respondent's actions in my view were about him, not his children. He shows a lack of insight regarding what is best for his children and the importance of their relationship with their mother.
- [122] I am not satisfied that, should the move to Vancouver be permitted and should the claimant move there, that the respondent would be supportive of shared parenting there. Given the significance of their mother in their lives, the risks to the children of such a move weighs against such a move.

Conclusion Regarding Relocation

- [123] In all of the circumstances, the best interests of the children can only be assured with shared parenting in Victoria. The increased salary of the respondent in Vancouver, the reason for the proposed move, and its benefits do not outweigh the other factors referred to. The cost of living in Vancouver and the logistics of housing and employment to facilitate shared parenting for these children outweigh the advantages that can come from greater family income. Indeed, it is doubtful that such an increased income would be sufficient in any event to alleviate those concerns.
- [124] The parties originally chose to move to Victoria and have raised their children there. The children are happy and secure. While the status quo is not to be preferred, I am satisfied that shared parenting can be more effectively carried out in Victoria than in Vancouver given housing costs, shorter travel times and closer employment.

[125] A move to Vancouver is unlikely to enhance the quality of life of the children and the claimant and indeed is likely to negatively affect it. The evidence does not show that the children are or will be deprived in any way, social, financial or educational, by remaining in Victoria. They have already faced the disruption arising from the breakdown of their parents' marriage and have come to terms with that. A move to Vancouver for their father's desire to facilitate his career does not justify the future of these children being placed at risk.

[126] The application of the respondent to relocate with the children is dismissed.

Parenting

[127] As of the trial dates, the respondent lived and was employed in Vancouver. It is not disputed that should he return to live in Victoria, the parties will share parenting time equally. However, he has yet to make the decision to return to Victoria. He seeks parenting time three weekends out of four while he lives and works in Vancouver. The claimant submits every second weekend is appropriate. I agree with the claimant. The children are entitled to time with each parent when the parent is not working.

[128] By consent, the parties agree to jointly retain the services of a mutually agreed upon Parenting Coordinator for a minimum term of two years, to assist them in parenting arrangements and decisions in the future.

Property Issues

[129] The parties seek an equal division of family property and debt subject to the respondent's claims for excluded property and an accounting for expenses incurred since separation.

Date of Cohabitation

[130] The parties disagree on when they began cohabiting. It is complicated by the fact the claimant initially moved into the respondent's Ottawa Townhouse as a friend and roommate.

[131] The claimant testified they commenced dating in October 2000 and shortly thereafter they became intimate. At that time, she was still paying rent and her share of the groceries. She testified she started doing the respondent's laundry starting sometime after they were dating. She stopped paying rent but did not recall when. The parties broke up early in their relationship more than once and on one occasion for five to six weeks. During separations they slept apart and had separate lives. They did not have joint or combined finances until after they married. She viewed them as cohabiting as of the fall of 2001.

- [132] The respondent's evidence was that they became a "dating" couple in the Spring of 2001 and the relationship did not become more serious until closer to the time when he decided to propose. Mr. G., as noted earlier, testified he moved out in July 2001. While he resided with them, the parties shared the respondent's bedroom. Ms. H., the respondent's sister, testified it was not until around October 2001 that she learned they were dating.
- [133] The test for cohabitation was addressed recently in *McDowell v. Andrews*, 2018 BCSC 2216:
- [22] In *Weber v. Leclerc*, 2015 BCCA 492, the Court of Appeal confirmed that the approach to this issue should be a holistic view of the evidence, taking all relevant matters into account and weighing the factors, rather than a checklist approach of factors considered in other cases. In reaching this conclusion, the Court of Appeal referred to *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.); *Takacs v. Gallo* (1998), 48 B.C.L.R. (3d) 265 (C.A.), leave to appeal ref'd [1998] S.C.C.A. No. 238; and *Austin v. Goerz*, 2007 BCCA 586, stating as follows:
- [17] ... First, while *Gostlin* had suggested that economic dependence is a key element of a marriage-like relationship, the majority in *Takacs* explicitly recognized that the intention to live in a marriage-like relationship need not include an intention to be financially interdependent. Second, *Takacs* holds that the intention that is critical is not the intention to be bound by a statutory regime of mutual support, but rather the intention to enter into a relationship similar to marriage. In the context of *Takacs*, the court saw the issue as one of whether the parties' intentions in cohabiting were similar to those that might be expected in a relationship of marriage. The key question was whether the couple saw their relationship as one of indeterminate, lengthy duration. While the majority of this Court accepted that the couple saw eventual marriage as a possibility, it was of the view that they considered their existing relations to be transitory.
- ...
- [22] *Austin* establishes that the question of whether a cohabiting couple are in a "marriage-like relationship" is a question of mixed fact and law that requires a broad approach ...
- [23] The parties' intentions -- particularly the expectation that the relationship will be of lengthy, indeterminate duration -- may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.
- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- ...
- [31] The weighing of these various factors was for the judge. She considered all of them, and was entitled to conclude, as she did, that the relationship was marriage-like.

- [23] Despite that a check-list approach is to be avoided, it is helpful to set out the factors that may be relevant in determining if two parties are spouses:
- a) the parties' intentions, particularly that the relationship will be of lengthy, indeterminate duration;
 - b) whether there is financial interdependence;
 - c) whether the parties resided together and if so, whether they did so in the nature of roommates or in the nature of a couple;
 - d) objective evidence of the parties' lifestyle and interactions; and
 - e) whether the parties engaged in sexual relations and were intimate in the sense of fidelity and sharing personal information.
- [24] This Court has referred with approval to a detailed list of indicia pertaining to shelter, sexual and personal behaviour, household services, social/societal behaviour, and economic support. These indicia are set out and discussed in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) at para. 16; *Gostlin* at paras. 11-12; *Takacs* at paras. 46 and 53; *Fowler v. Fowler* (1997), 68 A.C.W.S. (3d) 909 (B.C. S.C.) at para. 8; and *Kneller v. Greenwood*, 2015 BCSC 1410 at paras. 98-100.
- [25] These indicia may be present in varying degrees: *Austin* at para. 57, citing *M. v. H.*, [1999] 2 S.C.R. 3 at para. 59. For example, in some marriage-like relationships, there is a complete blending of finances and property while, in others, spouses keep their property and finances totally separate: *Austin* at para. 58. Although a party may subjectively believe that he or she is not in a marriage-like relationship, the reality may be otherwise: *Takacs* at para. 53.
- [26] In *Dey v. Blackett*, 2018 BCSC 244 at para. 235, Mr. Justice Schultes summarized the approach to rationalizing the subjective evidence of the parties' intentions with objective evidence:
- [235] ... While an intention to enter into a relationship similar to marriage -- of an indeterminate, lengthy duration -- is the essential requirement for finding a marriage-like relationship, a consideration of objective indicators are helpful as a means of testing the parties' professed intentions (or lack of intentions) in that regard, and may also form the basis of inferences as to what their intentions were. Put another way, while intention is the key, a partner who claims or disavows such an intention may not be believed if all of the surrounding circumstances strongly imply the contrary. All of that said, *Takacs* offers the reminder that relationships can fulfill many of the accepted indicators without the couple "intending or in fact entering the kind of psychological and emotional union that one associates with marriage."
- [134] The lack of information respecting cohabitation is problematic. There is a lack of some of the indicia of cohabitation and no clear evidence of their intentions other than the respondent's view he intended a long-term relationship around the time he proposed marriage. There is some evidence of travel together and introduction to the respondent's

family well prior to their engagement. The evidence of financial inter-dependence is it occurred only after they married. The evidence of what they did as a couple is limited. Neither party has a clear recollection of when cohabitation commenced given they had been sharing the townhouse for some time. It appears it was a gradual change in their relationship interspersed with break-ups rather than, for example, a decision to move into a residence together as a couple. The court is left with the claimant's evidence they commenced cohabitation sometime after in the fall of 2001 and the respondent's, that they commenced dating in the Spring of 2001 with cohabitation nearer to when he proposed marriage in February of 2003.

[135] I do not accept the respondent's submission the proposal date in February of 2003 was when cohabitation commenced. Logically, their relationship had evolved prior to his proposal of marriage. Given these evidentiary limitations, I fix the commencement of cohabitation as September 1, 2002.

Excluded Property claimed by respondent

[136] The respondent submits the following were owned by him before cohabitation and should be found to be excluded property:

- a) The value of the Ottawa Townhouse at the date of cohabitation;
- b) The value of his investments with SP Wealth at the date of cohabitation;
- c) A total of \$80,000 of a \$100,000 gift from his father in August 2011;
- d) A set of silver coins he says are in the children's bedrooms;
- e) The "Ottawa Painting" gifted to him by his former employer in Ottawa; and
- f) A bed and nightstand owned by him prior to the parties' cohabitation.

[137] The respondent argues he has shown the above are excluded property and can be traced into assets at the date of separation, particularly the Family Residence and the respondent's investments.

[138] The claimant submits there are evidentiary issues respecting the exclusions sought by the respondent such that he has not satisfied the onus on him to prove and trace them, particularly respecting the townhouse, his RRSP's and the \$100,000 from his father.

[139] Part 5 of the FLA governs property division. Section 81 provides:

- 81. Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],
 - (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[140] Excluded property is addressed in s. 85 of the FLA:

85.(1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
 - (b) inheritances to a spouse;
 - (b.1) gifts to a spouse from a third party;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[141] The respondent submits that the excluded property he owned before the parties began their relationship did not lose its character when the Ottawa Townhouse was sold in 2006 and its proceeds put into the Victoria property, registered jointly in the names of the parties. The claimant submits there is no evidence of the value of the townhouse when cohabitation commenced nor of the mortgage debt at that time and, as a result, the respondent's claim for exclusion fails.

[142] I turn first to the issue of tracing of excluded property pursuant to s. 85(1)(g) of the FLA.

[143] The respondent relies on *H.C.F. v. D.T.F.*, 2017 BCSC 1226, where Voith J. addressed the mechanism of tracing:

[79] In *F. (V.J.)* at para. 56, I've. to app. *dism'd.* [2016] S.C.C.A. No. 295, Newbury J.A. considered that "derived" is broader than "received" and equivalent to "arising or accruing" while "disposition" is a transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, and lease. In footnote one to *F. (V.J.)*, Justice Newbury wrote:

Although this point was not argued, I regard the use of "derived from" in the FLA as possibly opening the door to a more flexible approach than the arcane rules of tracing, such as the rule in *Clayton's Case*, might permit. I also note that at paras. 50 and 69, the trial judge described the funds as having been "co-mingled" with funds derived from family property to purchase the property on West 33rd; but I as I understand it, the judge did not intend to suggest that 'tracing' in a non-technical sense was impossible, and he did not decide the case on that basis. It is doubtful that the 'co-mingling' of funds would preclude a court from tracing them into property purchased with such funds: see *Foskett v. McKeown* (2000), [2001] A.C. 102 (U.K. H.L.) at 131 and *Tracy (Guardian ad litem of) v. Instalogs Financial Solution Centres (B.C.) Ltd.*, 2010 BCCA 357 (B.C. C.A.) at paras. 31 and 41-3; and see generally Lionel Smith, *The Law of Tracing* (1997) and Maddaugh and McCamus, *The Law of Restitution* (looseleaf at ch. 5-7); and it is more doubtful in my view that it would preclude a finding that property is 'derived from' such funds. [Emphasis

added.]

- [80] In *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 59, Harris J.A. agreed with Madam Justice Newbury's obiter remarks that the language of s. 85(1)(g) of the FLA suggests a more flexible approach than the formal rules of tracing.
- [144] In addition, he relies on *Shih v. Shih*, 2017 BCCA 37, where the issue of evidentiary certainty in claims for excluded property was addressed. *Shih* was succinctly summarized in *Pisarski v. Piesik*, 2019 BCCA 129, in the Court's discussion of family property and excluded property:
- [22] The definition of "family property" in s. 84 establishes a communal pot from which only excluded property, defined under s. 85, is removed. The definition of "family property" is very broad: *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 8. Section 85 provides that certain classes of property, including property acquired by a spouse before the relationship began, are excluded from the definition of family property. The categorization of property as family property or excluded property is significant as each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common.
- [23] Family property may only be divided unequally if equal division would be "significantly unfair" pursuant to factors listed in ss. 95(2) and (3). On the other hand, excluded property cannot be divided unless it would be significantly unfair not to divide it having regard to the duration of the parties' relationship and any direct contribution by a spouse to the preservation or maintenance of the property: s. 96(b); *V.J.F.* at para. 10.
- [24] The onus rested on the appellant to prove her contribution was excluded property pursuant to s. 85. The proper test for establishing a claim to excluded property is proof on a balance of probabilities: *Shih v. Shih*, 2017 BCCA 37 at para. 42. Precision or mathematical certainty is not required, but to discharge the burden, the party seeking to prove property is excluded property must do so with clear and cogent evidence: *Shih* at paras. 40, 43. If documentary evidence is not available, the party seeking to exclude property will need to testify as to their recollection of the disputed transactions and that evidence will be scrutinized for credibility: *Shih* at para. 43. In balancing the evidence as a whole, the judge is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties: *Shih* at para. 44.
- [145] The respondent sold the Ottawa Townhouse for \$395,000 and received net proceeds of \$241,210. The Family Residence in Victoria was purchased in 2006 for \$555,000 and registered in the parties' joint names. The respondent used \$10,000 of the townhouse sale proceeds for the deposit and \$181,456 for the purchase with the balance paid by way of a mortgage.

- [146] While a portion of the sale proceeds of the Ottawa Townhouse was initially excluded property the respondent contributed it to the purchase of the Family Residence which was registered in both parties' names as joint tenants. Therefore, each holds an undivided interest in it. The balance of the purchase price was secured by a mortgage.
- [147] The issue then arises, did the excluded property remain excluded after being used to purchase the Family Residence, or does the presumption of advancement between spouses apply such that the excluded property became family property?
- [148] This issue in B.C. was, until recently, unclear. As noted by Savage J.A. in *Namdarpour v. Vahman*, 2019 BCCA 153:
- [26] Prior to this Court's decision in *V.J.F. v. S.K.W.*, 2016 BCCA 186, leave to appeal ref'd, [2016] S.C.C.A. No. 295, discussed below, there were conflicting lines of authority in the lower court concerning whether the FLA is a complete code with respect to property division or whether common law and equitable principles such as the presumption of advancement continue to apply.
- ...
- [29] In *V.J.F.*, this Court addressed the two conflicting lines of authority and held that the FLA is not a complete code and that common law concepts such as gifts and evidentiary presumptions continue to operate under the statute. Madam Justice Newbury wrote:
- [74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses. ...
- [Emphasis in original.]
- [30] In general, the common law plays a role in the interpretation of legislation unless common law concepts are expressly abolished by the legislature. Statutory law and common law are necessarily intertwined: *Cabezas v. Maxim*, 2016 BCCA 82 at para. 36; *Poulin v. Serge Morency et Associés Inc.*, [1999] 3 S.C.R. 351 at para. 33. Absent clear legislative intent, a statute should not be interpreted as substantially changing the law: *R. v. D.L.W.*, 2016 SCC 22 at para. 21.
- [31] In *V.J.F.*, this Court reviewed the family legislation of other provinces and noted that other jurisdictions had expressly abolished the presumption of advancement to various degrees: see *Matrimonial Property Act*, R.S.A. 2000, c. M-8, s. 36; *The Family Property Act*, S.S. 1997, c. F-6.3, s. 50; *Family Law Act*, R.S.O. 1990, c. F.3, s. 14. In contrast, in British Columbia, the FLA does not abolish the presumption of advancement, but instead states in s. 104(2) that the rights arising under the division of property provisions "are in addition to and not in substitution for rights under equity or any other law."

- [32] Since V.J.F. was decided, some judges have remained reluctant to apply the presumption of advancement to issues of family property division. While some cases have cited V.J.F. with approval (see e.g. K.A.L. v. K.J.L., 2017 BCSC 651), other cases have distinguished or confined the case. One case, H.C.F. v. D.T.F., 2017 BCSC 1226, held that V.J.F. could be revisited and found the presumption of advancement has no ongoing application under the FLA.
- [33] Although the presumption of advancement continues to apply under the FLA, I would not overemphasize the role of evidentiary presumptions in the current property division scheme for a number of reasons, including the apparent context in which the presumption has its origins (the sometimes anachronistic notions of economic dependence), in contrast to contemporary circumstances.
- [40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.
- [149] The Court concluded at para. 46, "[I]n every case it is incumbent on the trial judge to ascertain the intention with which a transfer is made, using both the direct and circumstantial evidence available."
- [150] In Venables v. Venables, 2019 BCCA 281, Griffin J.A. for the Court, after reviewing matters leading to the new FLA and excluded property provisions, stated:
- [93] Two questions arise under the FLA when ownership of excluded property is transferred from one spouse's name to the other spouse's name, solely or jointly, and remains in that form of ownership at the time of separation:
- a) first, does the "excluded property" become "family property", or does s. 85(1)(g) apply with the result that it continues to be excluded property; and,
 - b) second, if it does become family property, on relationship breakdown, can the origins of the property that previously made it excluded property be considered as a factor that might make it "significantly unfair" to divide the family property equally, justifying judicial reapportionment of the family property under s. 95?
- [94] This Court has already spoken on this first question in V.J.F., which was followed in Pisarski v. Piesik, 2019 BCCA 129 and Namdarpour v. Vahman, 2019 BCCA 153.

- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: V.J.F. at paras. 74-79; Namdarpour at para. 46.
- [151] Based on these authorities, I must first look to the evidence to determine on a balance of probabilities the respondent's intention in using the excluded funds for the purchase of the Family Residence to determine whether those funds remain excluded property.
- [152] The respondent did not take any steps to keep his funds separate or document at the time that they were to be kept separate as they related to the house purchase. They both were covenantors on the mortgage. They both contributed to its repair and maintenance, either directly or indirectly. There is no evidence that the funds to purchase the home and its registration in their joint names was done other than for the shared financial benefit of their marriage. I find that I am unable to reach a conclusion about the respondent's actual intention on the evidence before the court, thus, per Namdarpour at para. 40, the presumption of advancement is engaged.
- [153] The Court in V.J.F. v. S.K.W., 2016 BCCA 186. described the presumption of advancement:
- [50] Where the evidence is insufficient or equivocal and the transfer was made by husband to wife, the law normally provides an evidentiary presumption that a gift was intended and the burden of persuasion shifts to the opposite party to rebut on the balance of probabilities: see Pecore v. Pecore 2007 SCC 17 at paras. 22 and 44. This, of course, is the presumption of advancement.
- [154] The respondent has the burden on the balance of probabilities to rebut the presumption. He has failed to do so. There is no evidence the respondent did not intend to gift the funds. Therefore, the proceeds of the sale of the Ottawa Townhouse used to purchase the Family Residence are not excluded property. I conclude the Family Residence is a family asset to be divided equally and note that no argument was raised that reappportionment be made.

\$100,000 Gift from Respondent's Father

- [155] The respondent's father testified that he gifted \$100,000 to the respondent and \$100,000 to their daughter. He described it as a gift for their birthdays. He did not discuss with either child what they should do with the money saying it was in their discretion, however he and his wife thought the funds should be invested. He recalled the respondent advising him he had done so.

- [156] The respondent testified his father wanted him to invest the \$100,000. He created a spousal RRSP and TFSA each for himself and the claimant. He placed \$15,000 of the \$100,000 into the claimant's RRSP and \$75,000 into his own. The remaining \$10,000 was divided equally into their respective TFSAs. He submits the \$75,000 from his RRSP and the \$5,000 from his TFSA should be excluded property given how he divided the funds.
- [157] The claimant submits such funds were an investment for the family and should be divided equally including the \$15,000 in her RRSP and the \$5,000 in her TFSA. She submits they were funds to benefit the family and its future.
- [158] The evidence is the respondent chose not to divide the funds equally but to the contrary allotted them as noted. I am satisfied that his intention was to treat them as excluded funds and not gift them to the claimant other than in the amounts transferred to her.
- [159] I conclude the \$75,000 being the balance of the gift, plus the \$5,000 of TFSA funds are excluded as they have not changed in character since being gifted to the respondent.
- [160] The \$15,000 deposited in the claimant's RRSP and the \$5,000 deposited into her TFSA were gifted to her by the respondent during the marriage. They do not fall under any category of excluded property; thus, they are family property subject to division. After their separation the claimant cashed in her TFSA, valued at approximately \$6,000 at the time of separation, and such is to be accounted for in the division of assets.
- [161] The children's RESPs shall be maintained by the parties for the sole use of the children. If either child does not attend post-secondary education, that child's net share will be paid out to the child after they turn 25 years old.

Pre-Acquired Investment

- [162] The respondent had investments with SP Wealth before the parties cohabited and submits those funds should be found to be excluded property. He provided documentation confirming the balance of the funds:

Date

Market Value

September 30, 2000

\$12,287.38

September 30, 2001

\$28,841.20

September 30, 2002

\$49,233.64

February 28, 2003

\$52,891.04

[163] He submits \$52,891.04 should be excluded based on a cohabitation date of February 2003 when they became engaged. The SP Wealth funds were later transferred to his TD Direct Investing Account which had a balance of \$200,575.76 as of June 17, 2019. The latter included the funds gifted from his father.

[164] Having concluded the date of cohabitation to be September 2002, I conclude the SP Wealth funds valued at \$49,233.64 in September 2002 are excluded as they were excluded property at the date of cohabitation.

[165] The remaining alleged excluded property will be addressed as part of the household goods division later in these reasons.

Debts at Separation

[166] The parties' debts at separation consisted of a Revenue Canada obligation of the respondent, a TD Loan account and TD Canada Trust Credit Card(s).

[167] The parties agree those debts as of the date of separation are to be equally divided.

Sale of Family Residence

[168] It is acknowledged by the claimant she will not be able to purchase the respondent's interest in the Family Residence. The position of both parties at the commencement of trial was that it be sold. There was a dispute over incomplete renovations and how they should be addressed in order to maximize the sale price. They have not reached an agreement on such renovations being completed nor who should do them. This despite the time that has passed since they separated. In any event, neither party has the funds to pay for the renovations up front and because of the breakdown between the parties, the respondent's earlier proposal that he complete the renovations is not tenable.

[169] Nor have the parties reached agreement on the valuation of the Family Residence or the means to value it and appraisals are not in evidence.

[170] The respondent proposed in July at trial that the home be sold "as is." However, at the trial continuation he sought an order that the home be appraised by two licensed appraisers with the market value to be determined by an average of the two with the respondent having an option to buy at that price.

[171] The Family Residence shall be listed for sale at a price recommended by the listing realtor. If the parties cannot agree on a realtor or listing price, they are at liberty to apply. Likewise, if the parties are unable to agree on any offer received, they are at liberty to apply for directions. In the event the respondent wishes to make an offer to purchase the home, he is also at liberty to do so, however, should that offer be made after the property is listed, he shall be solely responsible for the real estate agent commission that is payable.

Respondent's Claim for Occupational Rent

[172] The respondent seeks an order for occupational rent in the form of compensation for one-half of the rent he has had to pay for the rental property in West Vancouver after the claimant received her order for exclusive occupation of the Family Residence pursuant to the October 24, 2018 order of Master Dick until such time as he is able to access his share of equity in the Family Residence. He did not make a claim for occupational rent in his counterclaim but did note such a claim in his Trial Briefs. He submits, if the claimant advances a claim for retroactive spousal or child support from November 1, 2018, it should be set off against his claim for occupational rent.

[173] He argues the claimant has delayed the sale of the property to her sole benefit. He claims he has incurred \$4,000 a month for his rental property in West Vancouver, totalling \$56,000 and that the claimant owes him \$28,000 in occupational rent as of December 1, 2019, accounting for one-half of the rent expenses he has incurred. He submits that, had the home been sold and he had access to the funds, he would have had money to put towards the purchase of a home and avoided renting two residences.

[174] The claimant submits the respondent is not entitled to occupational rent, noting the respondent vacated the Family Residence, chose to move to Vancouver and rented a home in West Vancouver. She submits he seeks to impose responsibility on her for choices he made.

[175] The respondent acknowledges the claimant did not ouster him but did obtain an order for exclusive occupation. That however was after the respondent vacated the home and moved to Vancouver.

Occupational Rent: Law and Discussion

[176] In *L.W. v. F.W.*, 2018 BCSC 1924 Justice Walker stated with regards to occupational rent:

[167] It is not typically advanced as a stand-alone claim, but is usually considered in the reapportionment analysis: *Holland v. Holland*, 2017 BCCA 75 at para. 23; *Shen v. Tong*, 2013 BCCA 519 at para. 91. Reapportionment is appropriate when an equal division would be significantly unfair: *Shen* at para. 91. Where a stand-alone order for occupational rent is made, it is a discrete order made as a result of a determination that it is necessary to achieve equity between the parties: *Shen* at para. 94; *Hack* at para. 41.

[177] The factors relevant to a claim of occupational rent were addressed by Verhoeven J. in *Ross v. Ross*, 2013 BCSC 1716:

[47] I observe that in other Canadian jurisdictions, the law does not focus upon the question of ouster, or of claims for expenses by the spouse remaining in occupation. The principles applicable in Saskatchewan were recently summarized in *Casey v. Casey*, 2013 SKCA 58, at para. 48.

From the jurisprudence the following principles may be drawn regarding the awarding of occupational rent on a matrimonial home:

1. Occupational rent is a remedy which may be utilized to obtain justice and equity in appropriate circumstances.
2. The remedy is exceptional and should be used cautiously.
3. The following factors, where relevant, are appropriately considered:
 - The conduct of both spouses, including failure to pay support, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home (Peltier at paras. 16-17; Wilgosh at paras. 99 and 109; Good at para. 90).
 - Where the children are residing and who is supporting them (Good at para. 90; Peltier at paras. 16-17; Wilgosh at para. 108).
 - If and when a demand for occupational rent was made (Wilgosh at paras. 100 and 106, Good at para. 90, and Peltier at para. 16).
 - Financial difficulty experienced by the non-occupying spouse caused by being deprived of the equity in the home (Peltier at paras. 16-17; Wilgosh at para. 106).
 - Who is paying for the expenses associated with the home. This includes who is paying the mortgage and other upkeep expenses (maintenance, insurance, taxes, etc.). If there is no mortgage, occupational rent may be needed to equalize accommodation expenses (Good at para. 90; Peltier at paras. 16-17; Wilgosh at paras. 105-106 and 108).
 - Whether the occupying spouse has increased or decreased the selling value of the property (Peltier at paras. 16-17).
 - Any other competing claims in the litigation that may offset an award of occupational rent (Wilgosh at para. 108; Good at para. 92).
4. The remedy is a discretionary one requiring the balancing of the relevant factors to determine whether occupational rent is reasonable in the totality of the circumstances of the case.

...

- [50] On the approach used by other jurisdictions, as I interpret it, the overriding question is whether occupational rent, as a discretionary remedy to be used cautiously, should be utilized in order to achieve justice and equity in all of the circumstances of the case. This approach appropriately places little if any emphasis on the question of fault or blame for the decision of one spouse or the other to leave the matrimonial residence.
- [178] In *McManus v. McManus*, 2019 BCSC 123 at para. 76, Fleming J. summarized the various factors that may be relevant to assessing a claim for occupational rent:
- Aside from ouster, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home;
 - Whether children are residing with the occupying spouse;
 - Whether the occupying spouse has made a claim for contribution from the non-occupying spouse for the expenses related to the premises;
 - Whether support has been paid;
 - Whether the occupying spouse increased or decreased the value of the property;
 - The duration of the occupancy; and
 - Other competing claims in the litigation that may offset an award of occupation rent.
- [179] In *McFarlen v. McFarlen*, 2017 BCSC 1737, Jenkins J. stated:
- [20] ...My reasoning is reflective of the opinions expressed by Verhoeven J. and McEwan J. in *Ross, Piderman and S. (C.M.L.)* - that the proper way to approach a claim for occupational rent is as a discretionary tool to achieve fairness. Such a conclusion is consistent with family law legislation including the Divorce Act, (R.S.C., 1985, c. 3 (2nd Supp.)) and the FLA which are not premised upon "fault based" principles ...
- [180] The respondent chose to vacate the former Family Residence. It was his choice to leave and move to Vancouver. His submission that the claimant has delayed the sale of the former Family Residence has not been established. The parties have been unable to agree on the renovations and sale arrangements. No application was brought by the respondent for its sale. His assumption that had it been sold he could have accessed the net sale proceeds to acquire another residence and avoided renting, ignores the issue of excluded property raised by him, an issue requiring trial.
- [181] The claimant has been paying the mortgage of \$1,013.98 per month since November 1, 2018. She and the children continue to reside there. The respondent misled the claimant respecting his income, did not pay spousal or child support until ordered to, and did so on the basis of an income of \$140,478.04 shown in his August 31, 2018 Financial Statement when, as noted earlier, his actual income exceeded that amount.

[182] Taking into account these circumstances as well as the fact the claimant has not sought a contribution from the respondent for the residence expenses, the late demand for occupational rent and the duration of the occupancy, in my view occupational rent is not required to achieve justice and fairness. The respondent's claim for occupational rent is dismissed.

Division of Household Goods

Household Furnishings

[183] The respondent seeks an order that the household furnishings be appraised and then divided. The claimant opposes such given her lack of finances to buy replacement items. In any event, an appraisal of used furniture will not avoid disputes over possession or compensation for them. Given they cannot agree, the parties shall prepare a list of all furnishings in the home and the claimant shall have first choice of possession with the parties alternating thereafter their choices from the list. Those items exclude items specifically addressed in these reasons.

Silver Coins

[184] The respondent testified there were 7-10 silver dollar coins that his mother had received from her grandparents and had then gifted to L. He last saw them in L.'s room in the former Family Residence and seeks an order that they be placed in L.'s possession.

[185] The claimant testified she has been unable to locate them and has no recollection of ever seeing them. The parties do not dispute they are the property of L. As a result, I order that if located they are to be released to L.

Jewellery

[186] The respondent claimed jewellery he gifted to the claimant before and during their marriage was an investment and referred to a 2003 appraisal of the jewellery. The evidence does not establish they were anything but gifts. There is no evidence they were to be returned to the respondent or that he shared an interest in them. In any event, the appraisal is so old the current value of the jewellery is not established. The respondent's claim to the jewellery is dismissed.

The Ottawa Painting

[187] The respondent stated the painting was a gift from his employer in Ottawa. He seeks to retain it as excluded property. The claimant states it was gifted to them as a couple. It apparently has insignificant monetary value and is of sentimental value only. Given the lack of any further evidence, it is most probable it was given to the respondent when he left his employment in Ottawa. It is to be released to him.

Child's Bed and Nightstand

[188] The respondent states the nightstand was owned by him prior to their relationship as it had belonged to his mother. The bed is his old childhood bed he brought to Victoria for the spare room and then it was used by their son L. It is not clear if the nightstand and bed are still used by their son. As the respondent has purchased furniture for the children for his residence in West Vancouver, the nightstand and bed shall remain at the residence of the claimant for as long as they are used by their son when at the claimant's residence. If no longer being used by him they shall be released to the respondent.

Zodiac Boat, Motorcycle and related equipment and 2012 Keystone Travel Trailer

- [189] The parties agree these items will be sold and the proceeds divided. The respondent seeks an additional \$500 from the sale proceeds of the motorcycle because he spent \$500 on it for upgrades post-separation. However, he has not established the value was increased by those upgrades nor the extent of any such increase nor did he produce any invoices in support of the \$500 claimed.
- [190] The respondent also sought any necessary repairs arising from the claimant's possession of the travel trailer be done prior to sale, the costs of which to be deducted from her share of the proceeds of its sale. As there is no evidence the trailer has been damaged while in the possession of the claimant, I make no order addressing such.
- [191] The parties agree that the Zodiac Boat, Motorcycle and related equipment and the 2012 Keystone Travel Trailer are to be sold. The sale proceeds are to be equally divided.

Countertop and Trim

- [192] The respondent testified he attended at the Family Residence in October 2018 with the countertop and trim required to finish the upstairs bathroom. He seeks reimbursement for one-half of the cost of the countertop and trim, being \$1,842.86. There is no evidence of the now used value of those items nor what, if any value, they might add to the house value. I decline the requested reimbursement.

Vehicles

- [193] The parties agree that the claimant shall retain the Honda and the respondent, the Mercedes. They differ however on the values to be attributed to them. The respondent suggests the 2007 Honda Odyssey is worth \$10,000 and the claimant suggests \$9,000. The 2012 Mercedes Benz is said to be worth \$15,000 according to the respondent, and \$22,000 according to the claimant.
- [194] No appraisals respecting the vehicles are in evidence. The difference in alleged values shall be split such that the Honda shall be valued at \$9,500 and the Mercedes at \$18,500. The respondent shall pay \$4,500 to the claimant to equalize the vehicle values.

Sentimental Items

[195] The respondent seeks an order that "the parties divide all sentimental items, which include but are not limited to: the Japanese name paintings (2); the framed baby photos (2); the Children's hanging solar systems (2); and the shadow boxes with the Children's newborn clothing and birth certificates (2); evenly between them, with neither party to have the majority of those items."

[196] The claimant states that the shadow boxes and their contents are extremely sentimental to her as they are part of her story as well as the children's birth. It is unclear if those contents are capable of equal division.

[197] I order that the Japanese name paintings be divided equally. The claimant will have the baby photos reproduced, with the cost to be shared, with the claimant to retain the originals and the respondent to receive the reproductions. The children's hanging solar systems will remain with the children. The claimant will have the contents of the shadow boxes photographed and provided to the respondent and the claimant shall retain the shadow boxes and their contents.

Reimbursement for not having access to possessions in Family Residence.

[198] The respondent seeks \$3,655.50 as reimbursement for one-half share of the costs he incurred as a result of not having access to his possessions or household contents until May 25, 2019.

[199] The order of Master Dick dated October 24, 2018 and entered December 6, 2018 addressed the respondent's access to the Family Residence:

11. The Respondent is entitled to attend at the Family Home on two occasions for up to four hours at a time to remove personal items and things he needs. There should be some ability on the Parties to ensure that what the Children need at home is going to be available to them;

[200] The respondent submits the claimant failed to cooperate and turned down every date he proposed for his attendance at the residence, hence he had to replace some items before his eventual attendance on May 25, 2019. There is no evidence of what dates he proposed, and if turned down, why. The proposed attendance was being arranged through counsel. There apparently was an issue over a list of possessions sought. The evidence does not address the allegation of the respondent nor were such put to the claimant other than her agreeing he did not obtain his possessions until May 25, 2019.

[201] The items he seeks compensation for are:

Household items for new home

Amount

Leaf Blower

336.00

Bedding/Towels

91.52

Duvet

342.63

Kitchen Utensils

17.88

Steam Iron

55.54

Rug

358.00

Electrical Tester

22.97

Pillows

17.99

TOTAL

\$1,242.53

Other items for new home

Amount

Beds

920.31

Kitchen Table/Chairs

179.20

Shelf

97.37

Furniture

1,087.06

Furniture

441.17

Shelving

54.85

Couch

558.88

TOTAL

\$3,338.84

[202] In addition to the issue of the delay in access and who was responsible for it, the evidence does not establish that the above items were available to be taken from the former family home without leaving the claimant short of those very items or that they are items he would have received. For example, the respondent claims \$336 for the purchase of a leaf blower justifying it because the one in Victoria was not used frequently and he needed one more frequently in Vancouver. That is not a basis for reimbursement. In addition, he is seeking replacement cost for used items, the value of which are not before the court. The claim for reimbursement of the above is dismissed.

[203] The respondent also seeks reimbursement for \$263.36 spent by him on May 10, 2019 shortly before he gained access to the former Family Residence to retrieve his possessions. He advances this claim on the basis he had to purchase new pants as he could not access the home. However, the claimant notes by that time he had lost a lot of weight and the respondent, on direct, also stated he had lost "loads" of weight. I am not satisfied the pants were not required due to the weight loss. In any event the evidence has not established the reasons for the delay in accessing the former family home. This claim for reimbursement is dismissed.

[204] The respondent also advances a claim for children's clothing described as "regular clothing" including two ski outfits for a total of \$1,630.05. Again, the evidence does not establish the items purchased could have been taken from the home without leaving the claimant short of such. In addition, as the claimant noted, the children have grown and she too has had to purchase clothing for them. This claim for reimbursement is also dismissed.

Accounting Request of Respondent

[205] The respondent seeks an accounting with respect to expenses for the Family Residence, including renovations paid for post-separation of \$1,842.86 for countertop and trim purchase (previously dismissed), pre-paid property taxes of \$3,758.34 for the period July 2018 to June 2019 and pre-paid insurance of \$1,429 for August 12, 2018 to August 11, 2019.

[206] Regarding the property taxes and insurance, in my view these are best taken into account in fixing retroactive child and spousal support. I decline the order sought for an accounting.

Child and Spousal Support

[207] The respondent's position at the time of the trial continuation that he had not signed a new employment agreement for a position in Victoria as he wanted to know the new salary he proposed would be "acceptable" in this proceeding is problematic. He testified that he would return to Victoria if the court did not make his monthly salary "too high," apparently a reference to imputing of income to him.

[208] He has not committed to return to Victoria. Despite his counsel's submission, it is a matter of when, not if, he returns, that was not the respondent's evidence at trial. As counsel for the claimant described the situation, the respondent was "hedging his bets."

[209] In my view it is not appropriate for the court to rule on what it might order if the respondent chose to move back to Victoria at a substantially reduced salary. As a result, the issues of incomes, child and spousal support and retroactive support will be addressed based on the circumstances as they were at trial, that is, with the respondent living and working in Vancouver.

Incomes

Claimant's Imputed Income

[210] The respondent seeks to impute income to the claimant.

[211] Section 19 of the Guidelines permits the court to impute income to a party. It provides:

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;

[212] Also relevant is s. 26.1(2) of the Divorce Act:

(2) The guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.

[213] The claimant's income as reported on her tax returns for the past three years has been:

Year

Income

2016

\$11,762.24

2017

\$22,721.00

2018

\$29,920.45

[214] Her estimated income for 2019 is \$35,380.80 based on her employment from 8:30 a.m. to 2:45 p.m. with apparently most of the summer off.

[215] Her rate of pay is \$22.00 per hour. In the past she has worked less than 30 hours per week. The evidence does not establish she is qualified for a higher hourly wage in her profession. She is able to work during the summer months if she chooses to do so. It is not clear if work greater than 35 hours per week is available to her. Given the children's ages, the claimant can work 35 hours per week. She apparently has some flexibility enabling her to address child care during her parenting week. I therefore impute income to her of \$38,000 per annum commencing in 2020.

Respondent's Income

[216] The respondent's income for the past three years has been:

2016

Income

i. Employment Income

\$142,371.10

ii. Other Employment Income

\$4,447.77

iii. Taxable Capital Gains

\$4,057.00

TOTAL

\$150,875.87

2017

Income

i. Employment Income

\$144,543.56

iI. Other Employment Income

\$1,866.80

iii. Taxable Capital Gains

\$65,811.50

TOTAL

\$212,221.86

2018

Income

i. Employment Income

\$181,153.70

ii. Taxable Capital Gains

\$16,748.50

TOTAL

\$197,902.20

[217] The respondent also received a bonus of \$25,000 in January 2019 for his performance in 2018 which he proposes be divided net of taxes equally between the parties.

[218] As of the trial he remained employed in Vancouver. His salary for 2019 was \$195,700, plus any bonuses.

Child Support

[219] Based on the respondent's base salary of \$195,700 and the claimant's imputed income of \$38,000 with the children living with the claimant, child support payable by the respondent is \$2,698. The respondent shall pay to the claimant the sum of \$2,698 commencing with the 1st day of January 2020 and continuing on the first of each month thereafter for as long as they remain children of the marriage.

[220] Regarding s. 7 expenses, those shall include medical and dental expenses not covered by insurance or Medical Services Plan (MSP), including insurance premiums, along with child care expenses where either parent is not available to provide such care. Further expenses such as out-of-school camps, activities and related expenses are subject to the agreement of the parties. The parties shall also share ferry and parking expenses relating to shared parenting for so long as the respondent remains resident in Vancouver. All s. 7 expenses shall be shared proportionate to the parties' incomes.

Spousal Support

- [2221] It is not in issue that the claimant is entitled to spousal support on both a compensatory and non-compensatory basis given the parties' roles in their relationship and its length, as well as the claimant's financial circumstances. The respondent does not contest that the claimant is entitled to spousal support. At issue however is the quantum and duration of such support. The claimant seeks mid-range support. The respondent submits an amount at the low end of the Spousal Support Advisory Guidelines (SSAG) range is appropriate based on the parties' ages at separation, the goal of becoming self-supporting and the ability of the parties to work full time given the children's ages. He also submits that the SSAG propose a duration from seven to 14 years and that seven years is appropriate in this case, to include the interim support paid to date.
- [2222] The SSAG as calculated by DivorceMate on the basis of the respondent's income of \$195,700 and the claimant's imputed income of \$38,000 is a range of \$2,400 to \$2,971 to \$3,529.
- [2223] Taking into account the years of marriage and the parties' roles in the marriage and the compensatory and non-compensatory entitlement, I fix the spousal support at the mid-range of \$2,971 to commence on the 1st day of January 2020 and to continue on the first day of each month thereafter.
- [2224] With respect to duration, the respondent seeks an order that spousal support terminate on June 30, 2024. He submits that since the separation in March of 2017, he has supported the family and that consideration of the duration of support should commence then. He argues that, given the parties' comparatively young ages at separation and the 14-year duration of their marriage, a fixed duration of seven years is appropriate. He notes as well the promotion of economic self-sufficiency is a factor that supports such a duration. While he provided job listings in Victoria that he submits the claimant was qualified for with salaries of \$36,400 to \$50,000, the claimant disputes she is qualified for the higher paying positions. In any event, income of \$38,000 has been imputed to the claimant.
- [2225] Given the SSAG indicate spousal support payable for an indefinite period from seven to 14 years and along with the current uncertainty of the respondent's future plans and income prospects, I decline to order a termination date.
- [2226] Should the respondent move at some future date, counsel for the claimant has raised the issue of imputing income given such a move will significantly reduce the respondent's income. Counsel note he testified that if he does return to employment in Victoria with his current employer, he anticipates an income of \$82,000 per annum but proposes voluntarily only working 75% of the time to enable him to care for the children. However, I need not address this issue at this stage given the uncertainty of the respondent's plans.

Retroactive Support

- [227] The interim order of Master Dick required the respondent to pay child support of \$1,724 per month from November 1, 2018 based on his declared income of \$140,478 in his August 31, 2018 Financial Statement. The claimant's income relied on was \$19,409. Spousal support was also ordered based on that income in the amount of \$2,517 per month, also commencing November 1, 2018.
- [228] Given the respondent's income was actually \$181,153.70 and was known to be that by the respondent at the time of the interim order, the claimant seeks retroactive child and spousal support from September 1, 2018 when they ceased cohabiting.
- [229] The respondent submits he should only pay retroactive child and spousal support from July 1, 2019 as there was no prior request to review the child support despite the respondent making his 2018 tax return available to the claimant's counsel in the spring of 2019 and no adjustment was requested until trial.
- [230] He notes his high parenting costs consisting of \$45,000 to maintain a second property in Victoria for 10 months and the cost of travel between Vancouver and Victoria totalling \$9,136 which he bore himself until the summer of 2019 when the claimant began to assist with such expenses.
- [231] He also submits he was responsible for the majority of the Family Residence expenses before November 1, 2018, including the mortgage payments, property taxes, property insurance and some of the larger utility bills and it was only as of November 1, 2018 when the claimant gained exclusive occupancy that the claimant assumed responsibility for these expenses. He also pre-paid the property tax and insurance in 2018. He submits all of the above expenses should be set-off against any retroactive child and spousal support before July 1, 2019.
- [232] Using the respondent's 2018 income of \$181,154 and the claimant's income of \$29,920.45 during 2018 when parenting was shared, the child support payable by the respondent was \$2,527 and the claimant, \$483, for a net set off of \$2,044 monthly payable by the respondent. The spousal support, when based on his true 2018 income, is \$3,177.
- [233] I do not accept the respondent's argument that no adjustment was sought until trial as the issues of child and spousal support were before the court and the respondent knew the income relied upon for the interim order was not correct. Nor is the respondent prejudiced by the order being sought at trial rather than earlier. I reject as well his claim that the spousal support should be reduced because of his choice to maintain a second residence, given the Guidelines take into account the shared parenting arrangement.

- [234] Taking into account the Family Residence expenses paid by the respondent before November 1, 2018 and the property taxes and insurance pre-paid by the respondent and balancing such in the overall circumstances, I order retroactive child and spousal support commencing November 1, 2018 based on shared parenting from November 1, 2018 to August 31, 2019 and sole parenting with the claimant from September 1, 2019 to December 31, 2019. Based on the parties' 2018 and 2019 incomes, this results in:
- a) \$2,044 of child support and \$3,177 of spousal support per month payable by the respondent from November 1, 2018 to December 31, 2018.
 - b) \$2,091 of child support and \$3,243 of spousal support per month payable by the respondent from January 1, 2019 to August 31, 2019.
 - c) \$2,698 of child support and \$2,971 of spousal support per month payable by the respondent from September 1, 2019 to December 31, 2019.
- [235] The total amount payable will be set off by the pre-paid property taxes and insurance paid by the respondent for the period November 1, 2018 to December 31, 2019.
- [236] I accept the travel costs of \$9,136.00 incurred to maintain shared parenting before the claimant began to assist with such expenses in the summer of 2019 are to be shared proportionate to the parties' incomes.

Costs of Section 211 Report and Court Attendance of Dr. Burrows and Dr. Waterman

- [237] The respondent seeks reimbursement for one-half of the base cost of the s. 211 report plus "additional expenses related to the Claimant's numerous collaterals." He also seeks one-half of the costs incurred for the attendance of Dr. Burrows and Dr. Waterman to testify. While the respondent was to pay the upfront cost of the s. 211 report as ordered by Master Dick, the parties had liberty to seek an order dividing responsibility for it. The cost of the report was \$13,832.99. The cost of the attendance of Dr. Burrows and Dr. Waterman paid to date by the respondent is \$6,607.92.
- [238] The respondent seeks an order that the claimant pay 60% of the report costs and he pay 40% claiming the report cost more because of additional expenses relating to the claimant's "numerous" collaterals. He apparently had fewer collaterals allegedly because of what he was told by the report writer's staff although the evidence does not establish that was the case.
- [239] The claimant submits the respondent requested the report, not the claimant, and he chose to cross-examine Dr. Burrows and Dr. Waterman. She submits as well that Dr. Waterman's attendance was unnecessary as he did not author the report.
- [240] In *L.E.G. v. A.G.*, 2003 BCSC 412, Martinson J. addressed the issue of attendance of a report writer:

- [241] The general rule with respect to costs, which provides that costs of, and incidental to, a proceeding shall follow the event unless the court otherwise orders, (Rule 57(9)), applies to family law cases: *Gold v. Gold*, (1993), 82 B.C.L.R. (2d) 180. In custody cases, the Court does not view success in terms of winners or losers. Where the case needs an investigation into the best interests of children, and there is no conduct in the litigation worthy of rebuke, the Court will usually order each party to bear his or her own costs: *Morrison v. Morrison*, 2001 BCSC 909.
- [25] Similarly, where a case requires the assistance of a s. 15 investigator, and there is no conduct in the litigation worthy of rebuke, the parties should usually share the costs of the attendance of the investigator at the trial.
- [26] The wife had the right to require the attendance of the s. 15 psychologist. The request was not frivolous and certainly not worthy of rebuke. The attendance, in fact, assisted the court. The wife successfully challenged procedures followed in the preparation of the report. She asked appropriate questions relating to the reliability of the views of the children and the factual bases underlying the conclusions reached in the report. The costs of the attendance of the s. 15 psychologist should therefore be shared equally.
- [241] While the conduct of the respondent in unilaterally moving to Vancouver with the children is open to criticism, the request for a s. 211 report is not. Indeed, proceeding to determine parenting without such a report is, if possible, to be avoided. The claimant relies on the report.
- [242] There is no conduct in the litigation that is "worthy of rebuke."
- [243] With respect to the respondent requiring the attendance of Dr. Waterman and Dr. Burrows, they clarified their roles in the preparation of the report and were of assistance to the court.
- [244] Therefore, the claimant and respondent are responsible for the cost of the s. 211 report and the attendance of Dr. Burrows and Dr. Waterman in proportion to their respective incomes in 2019. See *J.R. v. N.R.*, 2017 BCSC 455 at para. 147, where Koenigsberg J. made a similar order.

Orders

[245] I make the following orders:

- a) By consent, the parties will have joint custody and guardianship of the parties' two children, L. and O. [the "Children"], pursuant to section 16 of the Divorce Act and sections 39 and 40 of the Family Law Act;
- b) By consent, the parties will have shared parenting responsibilities for the Children as detailed under section 41 of the Family Law Act;

- c) The Respondent's application to relocate to Vancouver with the Children is dismissed.
- d) The Respondent will have parenting time with the Children two weekends out of every month, from Friday evening at 4:00 p.m. to Sunday evening at 7:00 p.m.;
- e) If the Respondent moves back to Victoria, the parties will share parenting on a week on, week off schedule, with transitions to occur on Friday at 4:00 p.m.;
- f) The parties will follow the regular parenting schedule for any holidays and school breaks, unless otherwise agreed between them, with the exception of Christmas each year, whereby the parent that does not have the Children in their care will have parenting time with the Children for a period of four hours on December 25th, to commence prior to noon;
- g) The parties will have telephone and video contact with the Children whenever requested by the Children and shall facilitate such contact;
- h) The parties will be permitted to travel with the Children during their parenting time, subject to no less than 7 days' notice and consent of the other party if the travel will be outside of Canada, which consent will not be unreasonably withheld;
- i) During any travel with the Children, the Children will contact the non-travelling parent by telephone or video no less than once a week, unless cell phone or internet service is not available;
- j) The parties will jointly retain the services of a Parenting Coordinator for a minimum term of two years, to be mutually agreed upon, to assist them in parenting arrangements and decisions in future;
- k) The Claimant's imputed income will be set at \$38,000;
- l) The Respondent's current income will be set at \$195,700, plus bonus, his employment income earned in 2019;
- m) Commencing January 1, 2020, the Respondent shall pay child support of \$2,698.00 per month to the Claimant, being the offset table amount pursuant to the parties' respective 2019 incomes and the sum of \$2,971 per month spousal support.
- n) For so long as the Respondent remains residing in Vancouver, the parties shall share section 7 expenses on a basis proportional to their incomes;
- o) The following expenses that have been incurred by the Respondent since his move to Vancouver are declared section 7 expenses by the Court:
 - i. Medical and dental expenses not covered by insurance or MSP, including insurance premiums for the Children;
 - ii. Child care expenses where either parent is not available to provide such care;
 - iii. Activities and related expenses agreed upon between the parties;

- iv. The cost of travelling between Victoria and Vancouver, including ferry costs and parking fees.
- p) The Claimant will reimburse the Respondent for a proportional share of \$9,136.00 with respect to the travel expenses incurred by the Respondent between his move to Vancouver in September 2018 until the parties started to share transportation in June 2019;
- q) For so long as the children and/or the claimant are eligible to receive support, the parties will exchange:
- i. Copies of their respective income tax returns for the previous year, including all attachments, not later than May 31st of each year; and
- ii. Copies of any Notice of Assessment or Reassessment provided to them by Canada Revenue Agency, immediately upon receipt.
- r) The parties will review and adjust child and spousal support each year with any adjustment of such support to commence July 1st of that year;
- s) The Respondent shall pay retroactive child and spousal support commencing November 1, 2018 based on shared parenting from November 1, 2018 to August 31, 2019 and sole parenting with the Claimant from September 1, 2019 to December 31, 2019. Based on the Respondent's 2018 income of \$181,154 and 2019 income of \$195,700 and the Claimant's 2018 income of \$29,920.45 and 2019 income of \$38,000, the monthly sums payable by the Respondent are:
 - i. \$2,044 of child support and \$3,177 of spousal support from November 1, 2018 to December 31, 2018;
 - ii. \$2,091 of child support and \$3,243 of spousal support from January 1, 2019 to August 31, 2019; and
 - iii. \$2,698 of child support and \$2,971 of spousal support from September 1, 2019 to December 31, 2019.
- t) The total amount of retroactive support payable by the Respondent will be set off by the pre-paid property taxes and insurance paid for by the Respondent for the period November 1, 2018 to December 31, 2019;
- u) The Respondent's claim for occupational rent is dismissed.
- v) The parties' date of cohabitation is September 1, 2002;
- w) The Respondent's excluded property consists of:
 - i. The balance of the Respondent's investments and RRSPs as of the date of cohabitation of \$49,233.64;
 - ii. A monetary gift from the Respondent's parents in August 2011, a total of \$80,000 of which was put into investments in the Respondent's sole name; and

iii. Furniture owned by the Respondent prior to the parties' cohabitation consisting of a child's bed and a nightstand used previously by L. These items will remain at the Claimant's residence for as long as they are used by L. when at the Claimant's residence and will be returned to the Respondent when no longer in use.

x) Within one month of this order, the Family Residence will be listed for sale with the parties having joint conduct;

y) The parties are at liberty to apply if they are unable to agree on the listing agent or listing price or whether to accept an offer;

z) The Respondent will have the right to buy out the Claimant's interest in the Family Residence, at a price to be agreed or, as a first option, to purchase if an offer is received but any real estate agent commission payable will be the responsibility of the Respondent;

aa) Prior to determining whether he wishes to buy out the Claimant's interest in the Family Residence, the Respondent will be permitted to have a house inspection of the property completed at his sole cost;

bb) The parties' family property and debt will be divided equally between the parties, after accounting for the Respondent's excluded property and the TFSA cashed by the Claimant;

cc) The Respondent will pay the Claimant an equalizing payment of \$4,500 respecting the vehicle values, after which the Respondent shall retain the Mercedes Benz and the Claimant, the Honda Odyssey Van;

dd) Within 30 days of this order, the Zodiac Boat, Motorcycle (with its related equipment) and 2012 Keystone Travel Trailer will be listed for sale by the parties with the proceeds of sale to be divided equally;

ee) Within 30 days of this order, the parties will exchange a list of the household items to be incorporated into a single list with the Claimant having the right of first choice of possession from the list, and the Respondent, second choice and thereafter alternating through the list. This will not include any excluded property or property otherwise addressed in this order;

ff) Neither party will remove any household contents from the Family Residence until such time as the division is complete;

gg) Within 30 days of this order, the parties will divide all sentimental items as follows:

i. The Japanese name paintings will be divided equally between the parties;

ii. The Claimant will have the baby photos reproduced, with the cost to be shared, with the Claimant to retain the originals and the Respondent to receive the reproductions;

iii. The hanging solar systems will remain with the Children;

- iv. The Claimant shall retain the shadow boxes and their contents and will have the contents of the shadow boxes photographed and provide the photographs to the Respondent.
- hh) The Respondent will retain the Ottawa Painting;
- ii) The Claimant will retain the jewellery gifted to her by the Respondent before and during the marriage;
- jj) The Silver Coins will remain with the Children;
- kk) The Respondent's claim for the sum of \$3,655.50, as reimbursement for one-half share of the costs incurred by him not having access to his possessions is dismissed;
- ll) The parties will maintain the RESPs on behalf of the Children, and if either child does not attend post-secondary education, that child's net share will be paid out to the child after they turn 25 years old;
- mm) The Respondent will equalize the Profit Participation Bonus he received in early 2019 with the Claimant by paying to the Claimant 50% of the net amount (after taxes) of the Bonus;
- nn) The parties will share the costs of the section 211 report and attendance of Dr. Burrows and Dr. Waterman proportionate to their 2019 incomes.

Costs

- [246] The parties have requested leave to speak to costs of the interim applications and the trial. If they are unable to settle costs between them, they are at liberty to make the necessary arrangements through scheduling to address the costs issue.

"The Honourable Mr. Justice Punnett"

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