
CANADA / JUDGMENT

A.M. v. G.M.

2018 BCSC 942

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 942 A.M. v. G.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.M. v. G.M.,

2018 BCSC 942

Date: 20180608

Docket: E152497

Registry: Vancouver

Between:

A.M.

Claimant

And:

G.M.

Respondent

Before: The Honourable Justice Morellato

Reasons for Judgment

Counsel for the Claimant:

M. Guy

Counsel for the Respondent:

R. Shoker

Place and Date of Trial:

Vancouver, B.C.

March 13-17, 2017

May 8-10, 2017

June 6-7, 2017

August 4, 2017

Written Submissions:

October 12, 2017

Place and Date of Judgment:

Vancouver, B.C.

June 8, 2018

I. introduction

- [1] The parties in this family law matter seek a divorce and the determination of parenting, property and debt issues arising from the dissolution of their marriage. The mother, G.M. ("Mother"), is 39 years old and the father, A.M. ("Father"), is 41 years old. The property and debt issues, while important, were not the main focus of the trial. The parties clearly are most concerned about addressing the parenting arrangements in relation to their six-year-old son, W.M.
- [2] The parties were married on October 22, 2011 and separated on June 21, 2015. Much of the dispute regarding parenting arrangements arises from the Father's past alcohol and prescription drug abuse. The evidence before me supports the conclusion that the Father has been in recovery since June 2016, after receiving residential treatment. Nonetheless, the Mother remains concerned that the Father is not ready to assume equal parenting responsibility.
- [3] While the events surrounding the parties' separation have been challenging for all concerned, it is clear that, at this juncture, both the Mother and the Father are loving, engaged and dedicated parents. W.M. also benefits from a loving maternal and paternal extended family who have been, and wish to continue to be, an active part of his life.
- [4] During the course of the trial, and to their credit, the parties agreed on a number of consent orders, which I set out later in my Reasons. There are, however, a number of outstanding issues that may be summarized as follows:
- (a) Should the Mother have final decision-making authority pursuant to section 41 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]?

- (b) Should the Father and the Mother share equal parenting time on a seven day rotating basis with the exchange to occur on Monday mornings? If not, what other arrangement would be in W.M.'s best interest? Further, should the court order that W.M.'s bedtime be set at 8:30 pm, save and accept for special occasions as agreed by the parties?
 - (c) Should the Mother be permitted to travel with W.M. without the written consent of the Father?
 - (d) Should the Father be required to pay retroactive section 7 expenses?
 - (e) While the parties agree on paying their proportionate share of section 7 expenses moving forward, should such expenses be consented to in advance and in writing prior to being incurred?
 - (f) Is the 2010 Volkswagen Jetta Sedan ("Volkswagen Jetta") excluded property?
 - (g) Is the \$40,831.62 debt owed to the Mother's parents a family debt? If so, what proportion of the debt should be apportioned to the Father?
 - (h) How should the parties' respective interests in the 2012 Mercedes Benz GLK ("Mercedes") be apportioned?
 - (i) How should the parties' respective interests in the Bay Lake Towers timeshare and the Kidani Village timeshare be apportioned?
 - (j) How should various chattels that remain in the former family home be divided?
 - (k) Should the family dog follow W.M., while W.M. moves from parenting time at his Mother's residence to parenting time at his Father's residence?
- [5] Each of these issues are addressed, in their respective order, following a summary of the evidentiary matrix in this case.

II. background facts and Evidence

- [6] Both parties are nurses by profession. The Father commenced full-time employment as a registered nurse in 2005 and the Mother commenced full-time employment as a registered nurse in 2008. During the parties' relationship, before their separation, the parties' respective work schedules comprised four, 12-hour shifts (two days and two nights) followed by four or five days off.
- [7] The parties began dating in September 2010 and, as noted above, were married on October 22, 2011. W.M. was born on January 29, 2012. At the time of his birth, and for approximately three months afterwards, the parties lived in a one-bedroom apartment. In May 2012, to assist with child care for W.M., the parties moved into the Mother's parent's home located in east Vancouver ("Grandparents' Home"). The parties and their son lived on the main two floors while the Mother's parents lived in the basement suite.

- [8] Following the Mother's maternity leave, her parents provided childcare for W.M. and continue to do so to this day. The maternal grandmother, M.M., testified that she retired in order to look after W.M. The maternal grandfather, J.M., is also retired and also assists with W.M.'s care.
- [9] In February 2015, the Father saw his family physician after experiencing a recent onset of depression. The Father advised his physician that he had experienced intermittent episodes of depression for the preceding eight years. He was prescribed an antidepressant, Cipralex, which he continues to take to this day.
- [10] During the marriage and around this time, the Father was also taking a number of prescription drugs, which he acknowledged he mixed with alcohol. The Father found living with the Mother's parents very stressful; he testified that the Mother's father was highly critical of him and that his relationship with the maternal grandparents eroded over time. The Father testified how the strain of his living situation was such that he become increasingly depressed. He attempted to cope with this depression by drinking alcohol, and he took prescription drugs to assist with his insomnia and back pain.
- [11] In the last few months before the parties separated, the Father's alcohol and prescription drug use increased. He developed a serious alcohol addiction, while also abusing prescription drugs. On the evening of June 20, 2015, the Father admits he consumed half a bottle of vodka and took three Zopiclone. The Mother testified that after he consumed the alcohol and this prescription medication, the Father fell asleep and woke up around 9:45 p.m.; when he woke up, he said he was hungry and was slurring his words. He pushed the Mother out of the way, against the TV dresser door, and proceeded downstairs. He was walking unsteadily.
- [12] The Mother recalls that she followed him downstairs as she was afraid he might fall down the stairs. The Father put some food into the microwave. When he tried to take the food out of the microwave, it dropped on to the floor. As he tried to pick it up, he fell face down on the floor. The Mother was very worried. She did not understand what was happening. She called 911. The Father was taken to Vancouver General Hospital by ambulance. The Mother testified that the Father was tested while at the hospital and it was determined he was intoxicated.
- [13] The following morning, on Sunday June 21, 2015, the Father was discharged from Vancouver General Hospital into the care of the Mother. The parties returned to the Grandparents' Home. The Mother testified that she woke the Father around noon. She told him he needed to leave the Grandparents' Home, that she wanted to separate and that he needed "to get help". The Mother testified that the Father responded by saying "What's the problem?" and that he became very agitated. She testified that he asked whether J.M. (her father) was telling her that he had to leave. He was yelling and said that if J.M. "jerks my chain again" he would "knock him out" or "punch him out" or something to that effect. No threats were actually uttered directly to J.M.

- [14] The Mother contacted the Father's sister, V.M. ("Sister"), and his father, D.M., by text message that day advising of their separation, underscoring the Father's need for medical care and counselling, and suggesting that the Father live with them. The Sister and D.M. came over to the Grandparents' Home that afternoon to pick-up the Father and bring him to his Sister's home. The Mother testified that when the Sister and D.M. arrived, she left the group and went downstairs to make sure W.M. was alright. At that point, she heard yelling upstairs. The Father did not want to leave the Grandparents' Home. The Mother testified that she called the police when she heard yelling and banging. She was afraid the situation was escalating and she was also concerned the Father would try driving away in his car.
- [15] The police attended the Grandparents' Home and took the Father to St. Paul's Hospital. The Father testified that he was very upset about the marriage breaking down and tried to soothe himself by drinking vodka and taking an extra dose of prescription medication. The police report indicates that: the police officers found the Father in the upstairs bedroom; there was a "strong odour of liquor wafting off him"; he had glassy eyes and slurred speech; he was emotional and admitted feeling depressed; he acknowledged he needed help and began to cry; and he stated he had had a drinking problem since December 2014. The police report also states that the Father was cooperative and that he was "apprehended under section 28 of the Mental Health Act without incident". The police report expressly notes that the house was orderly and there were no signs of an altercation. M.M. testified she heard yelling and a door slamming but stated that the commotion did not wake up W.M. who was sleeping at the time.
- [16] After being released from St. Paul's Hospital, the Father moved into his Sister's residence in Surrey, where he continues to reside today. His Sister and his father have continued to be a strong source of support for the Father, as was his mother before she passed away on April 2, 2017; they have been very dedicated to W.M. and have also been actively involved in his life.
- [17] In the months that followed the separation, the Father's drinking problem continued. The Father made attempts to hide this fact. At the request of the paternal grandparents and the Sister, as well as the Father over the months that followed, the Mother took steps to arrange parenting time between W.M. and his Father and she also attempted to accommodate the relationship with the Sister and his paternal grandparents. The Mother understandably took precautions in order to ensure that W.M. was safe and properly cared for while in his Father's care and she insisted that the Father not drive W.M. to or from such visits.
- [18] Unfortunately, neither the Father nor the Sister were transparent or truthful in their interactions with the Mother during the initial period following the couple's separation. This also, understandably, had the effect of undermining the Mother's trust in both the Father and the Sister. After the couple separated, the Mother continued to make arrangements for the Father and his extended family to see W.M. on the conditions that the Father was to be sober and not drive any vehicle while W.M. was with him. For example, the Mother agreed that W.M.'s paternal grandparents and the Sister could take W.M. for a few days from June 29

to July 3, 2015. The Mother testified that they "were entrusted with W.M.'s care". That trust was breached. Under cross-examination, the Father acknowledged that he and his Sister pretended his Sister was transporting W.M. during the visit when it was actually the Father who was driving.

[19] The Mother's concerns about the Father driving while intoxicated with W.M. in the car were well-founded. On cross-examination, the Father candidly admitted that, before he became sober and entered sustained recovery following his residential treatment program in the spring of 2016, he drove with W.M. approximately 15 times while intoxicated. The first time the Mother became aware of this fact was at trial.

[20] The Father, in the first instance, testified that he could not remember that the Mother had been very clear with him that she did not want him to be alone with W.M. during this period. On cross-examination, when directed to a text message from his Sister which stated: "and if she [Mother] won't relent, tell her she can't be alone with [W.M.]". Upon being questioned again on the issue of whether the Mother told him that she did not want him to be alone with W.M., the Father testified that: "According to the text that conversation did happen, but I cannot -- I don't have any memory of that conversation -- part of that conversation, unfortunately."

[21] On cross-examination, the Father made the following further admissions:

Q After July 3rd [2015], [Mother] asked you whether you had driven W.M alone or whether you and [Sister] had driven W.M. home alone, and you told her that you and [Sister] had driven home; correct? Sorry, you and [Sister] had driven W.M home together; correct?

A I believe so.

Q You continued to lie to [Mother] and lead her to believe that W.M was safe with you and [Sister]; is that correct?

A Correct.

[22] The Father also admitted in cross-examination that despite the fact that he had lied to the Mother about the July 3, 2015 visit with W.M., the Mother was not trying to stop him from seeing W.M. and that her intention was not to take W.M. away from him.

[23] On the understanding that W.M. would be cared for by both the Father and his Sister, the Mother arranged for W.M. to stay with them for a five-day period from July 10 to July 15, 2015. In cross-examination, the Father admitted that he did not tell the Mother that his Sister was going to be away at a conference for three days during this visit. He further admitted in cross-examination that he was alone with W.M. during this time.

- [24] On July 14, 2015, while W.M. and the Father were alone at the Sister's residence, and while she was still away, the Father consumed what an agreed Notice to Admit describes as "a large amount of vodka"; he also took Zopiclone before going to bed. In cross-examination, when asked how much he drank on the evening of July 14, 2015, the Father admitted that he drank one-third of a litre of vodka that evening and took two Zopiclone while W.M. was in his care.
- [25] The following morning, prior to going to work, the Father consumed more vodka. W.M. continued to be in the sole care of his Father that morning until D.M. arrived to take care of W.M. so the Father could go to work. The Father admitted in cross-examination that after his father arrived to baby-sit, he got into his car to drive to work and blacked out soon after leaving the house. The Father admitted in cross-examination that he was pulled over by the Delta police for driving on the wrong side of the road. The Father was then transported to Surrey Memorial Hospital and was committed under the Mental Health Act, R.S.B.C. 1996, c. 288. The Father admitted that he did not tell the Mother about this event.
- [26] The Mother testified that the Father's family was not forthcoming about what happened on July 15, 2015. When questioned about whether the paternal grandfather or the Sister advised her what happened on that day, the Mother testified "no". She explained she found out from, L., a third party; later, the Ministry of Children and Family Development ("Ministry") contacted her about the incident.
- [27] The Mother explained that, based on her discussion with the Ministry, she advised the Father that from that point onward there would be no unsupervised visits and that she was not going to let W.M. out of her sight. Accordingly, the Mother insisted that she would need to be present at all future parenting times with W.M., including any visits with the extended paternal family. The Father acknowledged that, despite the incidents of June 20, 21 and July 15, 2015, the Mother continued to facilitate visits between the Father and his family, provided she was in attendance.
- [28] A letter was sent to the Father from the Ministry on July 15, 2015 which stated in part that: "It was also reported that you admitted to drinking daily and driving while impaired." The Ministry urged the Father to get help for his addiction.
- [29] The Father testified that after the July 15, 2015 incident, he had arranged to be off work for five weeks, after which he attempted a gradual return to work. He testified that he went back to work but was unable to sustain the pace and left work again in September 2015. The Father admitted that during this time he made two unsuccessful attempts to return to work, acknowledging that his two attempts to return to work failed due to his alcoholism.
- [30] The evidence establishes that during the fall of 2015, the Father's alcoholism continued untreated and unabated. Furthermore, his attempts to deny and hide his drinking problem also continued.

- [31] The Father commenced court proceedings by filing a Notice of Family Claim on September 2, 2015. He sought equal parenting time. The Mother's position continued to be that she should be in attendance during the Father's parenting time because of her continuing concerns about his drinking. The Father made an application for unsupervised parenting time and swore an affidavit in support of his application which he admitted on cross-examination was untruthful.
- [32] The Father's affidavit, sworn September 24, 2015, was put to him in cross-examination. In that affidavit, the Father deposed that he never consumed alcohol while having W.M. in his care. He further deposed:

With the support of my sister and physician, I am now sober and committed to maintaining my sobriety and utilizing other healthier tools to cope with stress in my life.

- [33] In cross-examination, the Father admitted that this statement in his affidavit was not true and that he lied to the court. He also admitted that this evidence was put before Madam Justice Maisonville before she made an order on December 2, 2015 entitling the Father to unsupervised parenting time.
- [34] The Father admitted that in October and November 2015, he was drinking alcohol two to three times a week and would drink a 750 ml bottle each time. The Father further admitted in cross-examination that he obtained letters from medical professionals in support of his position that he did not need to attend residential rehabilitation by providing untruthful information to them. Specifically, on November 27, 2015, the Father's counsel sent the Mother's counsel a letter which enclosed letters from Dr. Maria Undurraga and Dr. Ian L. Mitchell. Both letters addressed the issue of whether the Father needed to attend residential treatment. In cross-examination, the Father confirmed that Maisonville J. wanted him to look into whether he should attend a rehabilitation facility. He testified that he instructed his counsel to submit the doctors' letters to the Court, all the while knowing that they contained untruthful information that he had provided these doctors to the effect that he was no longer drinking, had developed successful coping strategies and that the support he was receiving from his attendance at AA meetings was such that a residential rehabilitation program was unnecessary.
- [35] On cross-examination, the Father admitted he lied when he told these doctors that he was sober and attending AA meetings. The Father also admitted, that in December 2015, he was drinking alcohol two to three times a week and would drink a 750 ml bottle each time.
- [36] On December 2, 2015, Maisonville J. issued an order, unaware that the Father had sworn false affidavit evidence and had lied about his abstinence to Dr. Undurraga and Dr. Mitchell. The order allowed the Father unsupervised parenting time with W.M, provided he was not driving W.M. to and from his visits. It stated:

1. Commencing Wednesday, December 2, 2015, and every Wednesday thereafter until further order of the court. The [Father] shall have parenting time with the child, [W.M.] from pick up, by [paternal grandfather] at 3:30 pm until drop off at 8:15 pm;
2. Commencing Saturday, December 5, 2015, and every Saturday thereafter until further order of the court, the [Father] shall have parenting time with the child, [W.M.] from pick up, by [Sister] at 9:30 am until drop off at 2:30 pm;
3. The [Father], shall have parenting time with the child, [W.M.] on Christmas Day, December 25, 2015, from 1:30 pm until 5:30 pm;
4. Madam Justice Maisonville is seized of this matter.

[37] From January through April 2016, the Father continued to drink excessively. The Consolidated Notice to Admit filed by the parties provides the following additional admissions:

In January 2016, the Father was drinking alcohol four times a week and would drink a 750 ml bottle each time: paragraph 54.

In February 2016, the Father was drinking alcohol four times a week and would drink a 750 ml bottle each time: paragraph 55.

In March 2016, the Father was drinking alcohol five times a week and would drink a 750 ml bottle each time: paragraph 56.

In April 2016, the Father was drinking alcohol five times a week and would drink a 750 ml bottle each time: paragraph 57.

[38] The Father acknowledged at trial that the Mother continued to express concern that he was still abusing alcohol after Maisonville J. made her December 2015 order. He also admitted that he lied to the Mother at that juncture by telling her he was not drinking alcohol. Indeed, the Father testified that it was only at his Examination for Discovery on December 14, 2016, after his residential treatment, that he admitted the true extent of his alcoholism.

[39] The Father further admitted in cross-examination that before his residential treatment, it was possible that when W.M. would come into his care, he may have been drunk given the amount of alcohol he was consuming. He also stated there were "probably a few times I was hungover." The Sister testified that during the period from January 2016 until he went into residential treatment on April 30, 2016, there were times the Father was drinking and times that he was not.

[40] During cross-examination, the Sister acknowledged she had sworn an affidavit dated November 3, 2015 that: "the [Father] and I have committed to a dry lifestyle and we no longer keep any alcohol at the Surrey Residence". It was put to the Sister that this statement was untruthful given that the Father was still drinking at this time. The Sister maintained that the paragraph was true at the time that the affidavit was sworn because at that specific

time the Father had stopped drinking. However, the admissions of the Father at trial and through the Notice to Admit reveal that the Father was in fact still drinking at this time.

- [41] In February 2016, the Father's employer, Vancouver Coastal Health, requested that Dr. Paul Sobey prepare a comprehensive occupational addiction medical evaluation. At that time, Dr. Sobey recommended that the Father complete a minimum 30 consecutive days of treatment in a recognized abstinence based residential treatment setting. The Father was required to attend this residential alcohol treatment facility in order to return to work as a nurse. The Father attended the residential alcohol and drug treatment facility for a one month period commencing April 30, 2016.
- [42] As part of his rehabilitation plan, the Father was required by Vancouver Coastal Health to sign a 36 month Relapse Prevention Agreement with Alliance Medical Monitoring before he could return to work. Part of the relapse prevention program involved regular and random alcohol and drug screenings. At the time of trial, the Father had cleared all his drug screening tests which were administered after he completed his residential treatment in the summer of 2016.
- [43] From April 29 to May 27, 2016, the Mother and D.M. tried to arrange visits with W.M. and the Father's family while the Father was in residential treatment. Efforts were made to arrange visits but the Mother continued to insist that she be present during these visits. This insistence created a significant degree of conflict and no visits actually occurred during this time frame. D.M. and the Sister testified that they felt "shut out" of W.M.'s life.
- [44] On August 30, 2016, the Mother sent an email to the Father advising of the following:
- (a) W.M. will continue to attend the Strong Start program at Alexander Mackenzie school located on East 39th Avenue in Vancouver, BC from 9:00 am to 11:30 am;
 - (b) W.M. will continue to attend preschool and activities at Kensington Community Centre;
 - (c) Preschool is scheduled from 9:00 am to 11:30 am; and
 - (d) W.M.'s current activities are a continuation of his last year's activities.
- [45] On August 30, 2016, the Father sought information about speech therapy for W.M. in an email. The Mother replied that W.M.'s speech therapy details would be discussed in court.
- [46] The Father had hoped to return to work in September 2016. However, he was not well enough to do so as he felt his "head wasn't right". The Father spoke to his employer's "workability advisor" and a decision was made to revisit the Father's employment status in the spring of 2017.
- [47] On each of September 20, October 4, and October 19, 2016, the Father again tested negative on his drug screening tests.

[48] The parties appeared before Maisonville J. again on November 7, 2016. The Father did not take the opportunity at that time to rectify his misrepresentation to the Court a year earlier. He did not disclose to Maisonville J. that he had been abusing alcohol at the time he brought the first application before her in 2015 for unsupervised parenting time. This application in November 2016 was an opportunity to do so and to apologize for his prior behaviour and egregious errors in lying to the court. In any event, based on the evidence of his residential treatment and progress, Maisonville J. increased the Father's parenting time and allowed him to transport W.M. in his vehicle. The order stated, in part, as follows:

- (18) The [Father] will have interim parenting time every Wednesday from 5:00 pm to return to Strong Start at 9:00 am on Thursday and every other weekend from Friday at 5:00 pm to Monday return to pre-school at 9:00 am, with the [Mother] to have parenting time with the Child at all other times.
- (19) Taking into consideration that Christmas falls on the [Father's] weekend parenting time, the [Mother] will have parenting time with the Child for Christmas from 11:00 am on Sunday, December 25 onwards until the [Father's] regular parenting time commences again on Wednesday, December 28, 2016 at 5:00 pm.
- (20) The [Father] may transport the Child during his parenting time. The November 7, 2016 Order also provided for protection measures to be taken during parenting time in W.M's best interest as well as for the preparation of a section 211 report by Dr. Elterman:

BY CONSENT, the Father will abstain from consuming alcohol twelve hours prior to and during parenting time with the Child.

BY CONSENT, the Father shall only consume those prescription drugs in the quantity as prescribed by the Father's physician twelve hours prior to and during parenting time with the Child.

A Report pursuant to section 211 of the Family Law Act, will be prepared with respect to the Child, including recommendations for parenting time of the Child; with the costs of said Report to be shared equally between the Father and the Mother, with liberty to the parties to apply at trial for reallocation of cost.

[49] On each of October 19, November 14, and December 13, 2016, and January 3, 2017, the Father again tested negative on his drug screening tests.

[50] On January 10, 2017, Maisonville J. issued a further order which provided, in part, for the disclosure of certain information as follows:

- release of the Father's PharmaNet Prescription Profile from June 1, 2016 to date;

- Dr. Sobey to produce to Dr. Elterman within 7 days "Referral Service Agreement", "Discharge Summary" completed by Dr. Stephen Clarke, "Admission Note" completed by Dr. Heather Badalato dated April 27, 2016, "Consultation Note" completed by Dr. David Murray dated May 18, 2016 and "Consultation Note" completed by Dr. David Murray dated May 27, 2016;
- above disclosure not to be provided to counsel for the Father and counsel for the Mother unless ordered by the court;
- Alliance Medical Monitoring to provide to counsel for the Mother the Father's test results from June 1, 2016 onwards and ongoing test results .

- [51] On each of January 17, January 30, February 9, and February 23, 2017, the Father again tested negative on his drug screening tests.
- [52] On March 2, 2017, Dr. Michael Elterman produced his section 211 report ("Elterman Report"). I will address the Elterman Report in more detail later in these reasons.
- [53] On April 26, 2017, the Mother called the police because she had tried repeatedly and unsuccessfully during the course of that evening to speak to W.M. during his parenting time with the Father. The Mother explained that she had difficulties reaching W.M. by telephone on other previous occasions when he was with his Father overnight; she stated this had been an ongoing issue since Maisonville J. issued her order on November 7, 2016. The Father stated that the Mother overreacted that evening and that there was absolutely no reason to call the police.
- [54] Other instances of discord and disagreement between the parties were raised by both parties at trial regarding the appropriateness of their respective conduct and care of W.M. For example, these included concerns about nutrition, bedtime, appropriate discipline, and attentiveness to W.M.'s medical care. There was also an incident that resulted in the Father being required to pick-up and drop-off W.M. at the front gate rather than the front door of the Grandparents' Home. While I have not expressly documented each instance of concern raised by both parties, I have carefully considered each. I am satisfied that in each case the issues are rooted in the deterioration of the marriage relationship, the resulting lack of trust between the parties and, in a number of cases, the Father's alcoholism. Since the Father successfully completed his residential treatment program in June 2016, until the completion of this trial in the fall of 2017, the evidence does not support the conclusion that the Father has been drinking, abusing prescription medications or acting violently. Further, the evidence establishes that, since his sobriety, the Father has competently cared for and parented W.M. Nor does the evidence support the conclusion, asserted by the Father, that the Mother has attempted to disrupt the Father's relationship with W.M. or alienate him from their son.
- [55] The Mother has at all times been very dedicated and attentive to W.M. and ensured, to the best of her ability, that W.M. was safe and well cared for; she has been a reliable and constant parent throughout W.M.'s life and is an essential source of stability, security and

nurturance. This was especially the case while the Father was lost in his addiction. The Mother's lack of trust and nervousness concerning the Father's care of their son is entirely understandable given the Father's history of alcoholism and prescription abuse, particularly when coupled with the inter-related incidents of his dishonesty.

A. The Father's Rehabilitation Plan

[56] As noted above, following the incidents of June and July 2015, the Father was off work for a considerable period of time. An April 8, 2016 letter to the Father from Great-West Life confirms he was receiving \$4,622.24 in monthly Long Term Disability ("LTD") benefits. The letter also sets out further details about the anticipated rehabilitation plan and the "return to work" process, referred to above.

[57] According to a further letter dated October 3, 2016, the main components of the Father's rehabilitation plan included:

- Continue active participation in a monitoring program, including creation of a Relapse Prevention Agreement (RPA). VCH will fund this.
- Private addictions counselling session 2-4 times per month, it is expected you continue to see your current counselor. VCH will consider funding this.
- Assessment and possible treatment by Kinesiologist and/or physiotherapist for your spinal condition. VCH will fund this. You will setup a time and date for initial appointment to occur by October 15.
- Regular communication with VCH, BCNU, CRNBC, and any other insurers involved. Return phone calls and emails within 48 hours, and respond to mailed requests within one week.
- Participation in return to work planning as required. Once the return to work plan is completed, three years of continued monitoring is expected to be required by CRNBC.

[58] The monitoring component of the above program included random alcohol and drug testing which would continue for a three year period, after the Father returned to work. As noted above, this testing commenced before the Father's return to work, in June 2016, after he completed his residential treatment. The results of the random alcohol and drug testing have been shared with the Mother pursuant to the November 2016 order of Maisonville J.

[59] The October 3, 2016 letter also stated:

Your approved rehab Plan will be reviewed by you and your workability advisor by April 28, 2017 to ensure that continued communications occurs with the Workability Advisor and your treatment provider(s).

Target Return to Work Date: by end of April 2017

Target Job: alternate job for at least 6 months

- [60] Following a period of further rehabilitation in the months that followed, the Father signed a "Return to Work Agreement" on February 1, 2017, which provided in part:
11. The term of this Return to Work Agreement is three years from the date of return to work as recommended by Dr. Sobey. If the Employee is absent from work for longer than one month during this time the period of absence will be added to this Agreement.
 12. Any breach of this Agreement, which includes any change in regular attendance satisfactory job performance, appropriate behaviour and safe work practices, will result in the WorkAbility Advisor contacting the Employee's Manager and HR Advisor. After consultation with the manager and HR Advisor, a new RTW Agreement may be required.
- [61] The rehabilitation plan with the Father's employer requires that he complete three consecutive years of documented compliance regarding abstinence from alcohol and mind-altering substances beginning from the date of his return to work.
- [62] The Father testified that in 2017 he was prepared to return to work on a graduated basis. He did not return to work in the spring of 2017 as originally contemplated; he explained that the graduated return to work involved finding the right position and that it did not involve the same type of shift work on a ward that he had previously done. Accordingly, there was some delay and difficulty finding the right position. Before the conclusion of the trial, the Father had commenced working part-time. He acknowledged on cross-examination that the position was a temporary three-month position and not a permanent one. He stated that the work plan involved starting on a part-time basis and gradually increasing to full-time work. The Father hopes to find a permanent full-time position, like the Mother's, which involves regular office hours during weekdays, rather than working on a ward doing shift work (including evenings and weekends).

B. Dr. Elterman's Report

- [63] The Elterman Report was thorough and of considerable assistance to the Court, particularly when examined along with the totality of the evidence led at trial. Dr. Elterman interviewed the parties, W.M., W.M.'s maternal and paternal grandparents and the Sister.
- [64] The Elterman Report noted that the Mother has no reservations with W.M. spending the weekends with his Father providing the Father remains sober. When asked by Dr. Elterman whether he saw his Father too much, too little or just right, W.M. responded that he would like to see his father more. The Father confirmed his sobriety when interviewed by Dr. Elterman in December 2016 and January 2017. He confirmed he was making plans to return to work. At the time of his interviews, when asked what he thought the best arrangement to see W.M. was, the Father responded: "I am still trying to figure this out." The Father acknowledged his life was in transition.

[65] In his report, Dr. Elterman notes that the Father proposed "he would have weekends as a default position" while the Mother had weekdays. The Elterman Report also noted that the Father had applied to court to "get close to 50-50 time." This characterization is consistent with the Father's evidence at trial where he stated he was seeking an equal parenting arrangement and was not opposed to a graduated arrangement where the parenting time would be increased incrementally.

[66] Dr. Elterman's opinion, with regard to providing increased parenting time to the Father, expressed the following concern:

My concern about [the Father] is that while he has not gone back to work, he has not endured the stresses of childcare, work and other financial pressures that would normally push someone to the point where they might begin using alcohol or relapse. While he has been given the benefit of the doubt in relation to getting overnight visits at his sister's home with [W.M.], he has not really been tested in terms of how he would cope with stress, organizational politics, and other life events. With the elements of low self-confidence, is the appraisal of what one might be capable of and his threshold for stress may actually remain quite low.

[67] Dr. Elterman recommended that the parents continue their joint guardianship of W.M. and that the primary parenting responsibility should be with the Mother because:

[the Mother] and her parents were primarily responsible for the day-to-day care of [W.M.] and in terms of disruption and continuity, this seems to be the best arrangement. It would therefore be up to her to register W.M. in school close to where she and her parents reside in Vancouver.

[68] Dr. Elterman concluded that:

there is still a period where the Father needs to prove that he can remain sober without relapsing before increasing he parenting time in the way he proposes.

[69] Further, Dr. Elterman recommended either an update at the end of last summer (2017) or an arrangement where:

[W.M.] spends two full weekends a month with [the Father] and that the alternating weekends alternate between a Saturday from 10 am until 5 pm and a Sunday from 10 am until 5 pm. The weekends [where W.M. was with the Father] would start on Saturday morning at 10am and continue until Sunday evening at 6 pm. This would largely allow [the Father] who, by then, should have returned to work, parenting time every weekend as he has requested.

[70] The Mother accepts Dr. Elterman's parenting time recommendations. The Father does not. He does not like the fact that W.M. would be moving everyday on the weekends. The Mother acknowledges this may not be ideal but states "there are other factors to consider". The Father prefers the current parenting arrangement to that proposed by Dr. Elterman. He agreed that increasing his parenting time ought to occur gradually and incrementally but did not provide a specific submission in this regard.

- [71] Providing the Father remained sober, Dr. Elterman did not see a problem with W.M. spending a week with the Father at Christmas. He did not have any concerns in regard to parental alienation with regard to either parent. He conducted a Child Abuse Potential Inventory as well as an Aggression Questionnaire and also discussed related issues with both the Mother and the Father. He concluded that his results were within normal limits for both parents. He did not express concerns in these regards. In my view, the evidence at trial was consistent with Dr. Elterman's conclusions in these respects.
- [72] Dr. Elterman testified that generally he advises his parenting time recommendations be in effect for a period of two years. He also stated that, in his experience, the chances of a relapse for a sober parent will decrease as one proceeds along the trajectory from one to five years.

C. Child Support Income

- [73] The Father did not pay child support between the date of separation on June 21, 2015 until December 1, 2016. He started paying \$500 per month pursuant to the order of Maisonville J. dated November 7, 2016.
- [74] As note above, the Father is not agreeable to contributing to W.M.'s activity expenses on a retroactive basis. On cross-examination, he recognized that these activities "are good" for W.M.
- [75] The Father's child support income, as set out in his Financial Statement sworn March 8, 2017, is set out as \$45,727.80. He acknowledged that this amount does not reflect his gross income of \$4,622.24 per month which he received as LTD payments. In addition, the Father stated in his Financial Statement, filed March 9, 2017, that his income in 2015 was \$69,932.19, less union dues of \$1,655.50.
- [76] On March 3, 2017, the Mother filed a Financial Statement, sworn February 23, 2017, which provides that her income for child support purposes was \$81,030.07.

D. Assets, Loans and Debts

- [77] The Father purchased the Volkswagen Jetta before the marriage, in February 2010, for \$35,592.00. He borrowed \$35,592.00 from his father to purchase the car. He also borrowed \$5,239.62 from his father for miscellaneous expenses prior to the parties' marriage.
- [78] Following their marriage, the parties purchased the Mercedes in January 2012. The Mother testified that prior to the marriage she owned a 2010 Honda Civic Coup ("Honda"). She received a trade in value for the Honda of \$11,878, to assist in purchasing the Mercedes.

- [79] On July 17, 2012, the Mother's parents issued a bank draft to the Father in the amount \$40,831.62 so that he could pay off the debt owed to his father in full. The Father testified that the sum of \$40,831.62 represented the \$35,592.00 he borrowed from his father to purchase the Volkswagen Jetta, coupled with the \$5,239.62 he borrowed to pay for miscellaneous expenses incurred prior to the marriage.
- [80] The copy of the bank draft in the amount of \$40,831.62 payable to the Father from the Mother's parents contained a hand-written notation which stated: "For 2010 Volkswagen Jetta and loan." The Mother testified this was to confirm that the bank draft was a loan to the Father so he could eliminate the debt he owed to his own father. It is undisputed that the debt of \$40,831.62 was incurred by the Father prior to the marriage.
- [81] On July 17, 2012, the same date as the bank draft, the Mother's parents signed a document entitled Sales Agreement ("July 2012 Sales Agreement") with the Father. The document was prepared by the Mother and states:

Sales Agreement

Seller: [Father] of Surrey, British Columbia

Buyers: [Mother's father and Mother's mother] of Vancouver, British Columbia

Price: \$25,000

This is a contract made for the sale of the seller's 2010 Volkswagen, Jetta.

Sellers Note: I am the sole owner of this vehicle, I brought this vehicle as new and this vehicle has never been in any major accidents.

Security: family relationship - son-in-law

Date: July 17, 2012

Seller: [signed by the Father]

Buyer: [signed by the Mother's father]

Buyer: [signed by the Mother's mother]

Witness: [signed by the Mother]

- [82] The Father testified that the Mother's parents bought the Volkswagen Jetta from him and that the \$25,000 purchase price was to be applied to the \$40,831.62 he owed them. He explained that the Mother's father sold his 2010 Ford truck just prior to signing the July 2012 Sales Agreement, as there were too many vehicles in the family. He testified that the Mother's father drove the Volkswagen Jetta after this agreement was signed. The Mother's mother also testified that the parents' truck was sold around the time this agreement was signed. Both of the Mother's parents also testified that they mostly used the Mercedes, rather than the Volkswagen Jetta. The title to the Volkswagen Jetta remained in the Father's name.

The Mother confirmed that the title to the Mercedes was in her name only.

- [83] The Mother testified that the July 2012 Sales Agreement was actually not a sales agreement at all but, rather, reflected the understanding between her parents and the Father that the Volkswagen Jetta was to be used as collateral in the event that the Father was unable to repay the money her parents had loaned him. When asked why she entitled the document "Sales Agreement", the Mother explained that she did not have much experience with drafting agreements; she found the template for the document on the internet and thought it would be sufficient.
- [84] Both of the Mother's parents testified that it was not their intention to actually buy the Volkswagen Jetta and that the Father has not paid back the money they loaned him. English is not their first language and they testified that the July 2012 Sales Agreement was not explained to them in any detail. The Mother's father testified that he wanted to help his son-in-law pay back the money he owed his own father; he did not charge interest on the loan to his son-in-law and stated he was flexible as to when the loan needed to be repaid. He also testified that had he known about his son-in-law's significant debt (owed to D.M.) he would "never" have agreed to loan the parties the money in January 2012 to purchase the Mercedes. The Mother's mother explained that she and her husband did not buy the Volkswagen Jetta but were loaning the money to the Father "just like the bank".
- [85] The Father testified that he currently owed no debt of any kind to the Mother's parents, notwithstanding his evidence regarding the difference between the price of the Volkswagen Jetta and the total amount of the loan from the Mother's parents. He asserts that while the Mother and her parents attempted at trial to re-characterize the July 2012 Sales Agreement as a "collateral agreement", the evidence does not support their interpretation. He asserts that his testimony in this regard is supported by a loan agreement dated September 1, 2012 which he and the Mother signed ("September 2012 Loan Agreement") and which includes a "Lenders Note" that states "To our knowledge, the loan amount totalling \$50,000 is the only amount owing to us by [Father] and [Mother]". The September 2012 Loan Agreement was also drafted by the Mother and provides as follows:

Loan Agreement

Lender: [Mother's father] of Vancouver, British Columbia

Borrower: [Father] and [Mother]

Principal: \$50, 000.00

Principal Specifics: \$37,000 for Mercedes Benz model year 2010

\$10,000 for remainder owing for Disney Vacation Club

\$3,000 for line of credit of [Father]

Lenders Note: To our knowledge, the loan amount totalling \$50,000.00 is the only amount owing to us by [Father] and [Mother].

Currency: CAD

Term: to be paid back on a monthly schedule for \$1000 increments of more (borrowers choice)

Interest: none

Additional Clauses: none

Security: none; family relationship - son-in-law and daughter

Date: September 1, 2012

Lender: [unsigned]

Lender: [unsigned]

Borrower: [Signed by the Father]

Borrower: [Signed by the Mother]

[Handwritten Notation] "Paid 06 June 2015"

[86] There is a handwritten notation on the September 2012 Loan Agreement that states "Paid 06 June 15", apparently initialled by the Mother's father. Attached to this loan agreement is a handwritten sheet with three columns and three rows: the first column sets out various dates, including the amount paid on the loan on those various specific dates; the second column is entitled "Amount Left" which sets out the amount left to be paid on the loan at the time of the various specified dates listed; and the third column is entitled "Initials". Each row on this handwritten sheet contains a specific date and the amount paid on the \$50,000 loan on that date, along with the amount left to be paid on the loan on that date, as well as the Mother's initials confirming payment of an amount on the specific date enumerated. The payment dates in the first column begin in September 2012 with a payment of \$1,000 and continue to June 2015 with a final \$10,000 payment. In June 2015, under the column designating the "amount left" to be paid on the loan is the numeral "0". This entry was also initialed by the Mother.

[87] The Mother's father testified that he lent these monies to the parties to assist in paying for the Mercedes, the parties' timeshare properties, and the Father's credit card debt. He also confirmed that the parties repaid the entire \$50,000 debt. He did not dispute the contents of the 2012 Loan Agreement and the multiple payments set out on the attached handwritten sheet.

- [88] The Mother testified that the September 2012 Loan Agreement was separate from, and did not relate to, the outstanding debt owed by the Father to her parents. She testified that the September 2012 Loan Agreement only related to the parties' joint debts; accordingly, no reference to the Volkswagen Jetta or the money owed by the Father to her parents was made in this document and the document was not intended to absolve the Father from paying back the debt he owed to her parents.
- [89] The Father testified that the title to the Volkswagen Jetta was not transferred out of his name because "no one wanted to pay the taxes" that would arise out of the sale. When the parties separated, the Father kept the Volkswagen Jetta and the Mother kept the Mercedes. The Father testified that the Mother's parents gave him the Jetta in 2015 when the parties separated; he still drives this car.

E. Disney Timeshares

- [90] The parties purchased two Disney timeshares between 2011 and 2014. The first, the Kidani Village timeshare, was purchased in October 2011. The second, the Bay Lake Towers timeshare, was purchased in June 2014. The timeshares are each in the names of both parties.
- [91] The purchase price of the Bay Lake Towers timeshare was \$20,596. The record shows that the parties paid the deposit for the Bay Lake Towers Timeshare via a wire transfer in the amount of \$1,945 US Dollars. The Mother testified that the monies to pay for this timeshare were withdrawn directly from the parties' joint account. She confirmed that in August 2014, an additional payment of \$18,668.92 came out of the parties' joint account through a wire transfer to satisfy the rest of the amount owing for this purchase. Following their separation, the parties continued to pay the dues owing on the timeshares from their joint accounts.
- [92] The worth of the timeshares was not clearly established on the evidence at trial. However, the parties seemed to be in agreement that the Bay Lake Towers timeshare was worth more than the Kidani Village timeshare. Specifically, the Bay Lake Towers timeshare was valued at approximately \$100 per point; the parties owned 200 points. The Kidani Village timeshare was valued at approximately \$75-\$80 per point; they owned 220 points. The Father was of the view that the Kidani Village timeshare was worth \$80 per point.

F. Consent Orders

- [93] As noted above, the parties agreed to a number of consent orders during the course of the trial. These are set out below:
- (a) An order that the parties be divorced.
 - (b) An order that the parties have joint custody of W.M.
 - (c) An order that W.M. be registered and attend kindergarten at Sir Alexander MacKenzie Elementary School.

- (d) An order that the Father abstain from consuming alcohol twelve hours prior to and during parenting time with W.M.
- (e) An order that the parties both attend counselling.
- (f) An order that Alliance Medical Monitoring will provide the Mother with the Father's ongoing drug test results.
- (g) An order that the Father will keep the Mother updated with respect to any changes to his work schedule and will advise of any change within 48 hours of receiving notice from his employer.
- (h) An order that the parties will have telephone contact with W.M. when he is in the care of the other party as follows:
 - (i) telephone contact will occur between 7:00 pm and 7:45 pm, with the party who has W.M. in their care initiating the call; and
 - (ii) in the event the party who does not have W.M. in their care has not received or has missed the phone call, that party may call W.M. anytime before 8:00 pm.
- (i) An order that neither party will make any derogatory comments or disparaging remarks about the other party to or in the presence of W.M., and the parties will not discuss the issues regarding this litigation to or in the presence of W.M.
- (j) An order that the Father will pay to the Mother \$9,538 in retroactive child support for W.M. for the period June 21, 2015 up to and including June 30, 2017.
- (k) An order that, commencing July 1, 2017, and on the first day of each and every month thereafter, the Father pay child support to the Mother for W.M. based on the Federal Child Support Guidelines, S.O.R. 197-175 [Guidelines], in the amount of \$512.00 pursuant to the Father's annual income of \$55,466.88, subject to any material changes in parenting arrangements.
- (l) An order that the parties will exchange income tax returns each year commencing June 1, 2018 and on June 1 of each and every year thereafter and exchange their respective Notices of Assessment within 15 days of receipt of same, for so long as the Father has an obligation to pay child support.
- (m) An order that the parties shall make adjustments to child support and their proportionate share of section 7 expenses in accordance with the Guidelines each year on July 1, commencing July 1, 2018, and the parties will make an adjustment retroactive to January 1, 2017 taking into consideration the Father's return to work in 2017.

[94] Notably, the parties each confirmed on the witness stand that they wish to improve communications with each other and to co-parent more effectively in the future. They also acknowledged that diminishing the level of conflict and acrimony between them would be in W.M.'s best interest. In the past, the couple have attended joint counselling; I would encourage the parties to consider doing so again to enhance their co-parenting relationship.

[95] I also note that in her order of November 7, 2016, Maisonville J. made an order as follows:

BY CONSENT, pursuant to section 224 of the Family Law Act, the Child [W.M.] will attend counseling sessions.

[96] The Mother testified that following this order she resisted providing counselling to W.M. and he has not received any counselling. I would encourage the parties to reconsider whether counselling would benefit W.M. at this time.

III. Discussion

Issue 1: Should the Mother have final decision-making authority pursuant to section 41 of the FLA?

[97] The parents have joint custody of W.M. pursuant to section 16 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and are both guardians of W.M. pursuant to section 39(1) of the FLA. The Mother is seeking final decision-making authority over parental responsibilities pursuant to section 40(2) of the FLA.

[98] Section 40(2) of the FLA provides as follows:

40 (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.

[99] Parental responsibilities are delineated in section 41 of the FLA as follows:

41. For the purposes of this Part, parental responsibilities with respect to a child are as follows:

- (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.

[100] In advancing her argument, the Mother also relies on section 16 of the Divorce Act. Specifically, section 16(8) provides:

16 (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

[101] Counsel for the Mother also highlights section 16(9) of the Divorce Act, asserting that in making an order for custody or access, the court will not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of the child. She argues that in these proceedings, the Father's conduct with respect to his drinking is directly relevant to his ability to care for W.M. She underscores that the Father's excessive drinking during the relationship led to his hospitalization on June 20, 2015 and again the next day. Further, the Father admitted to drinking and driving with W.M. approximately 15 times. Counsel further notes that the Father continued to drink after separation when W.M. was in his care.

[102] Counsel further submits that the Father lied to the Mother, professionals and the court with respect to his abstinence from drinking, which could have endangered W.M. She also underscores that the extent of the Father's drinking was only revealed at his Examination for Discovery conducted in December 2016 after two court orders had already been made with respect to parenting time. Counsel submits that such deception underlines that the Father cannot be trusted to advise either the Mother or the court if he relapses.

[103] Subsection 37(1) of the FLA requires the court to consider the best interests of the child only. Clearly, the focus is in on the best interests of the child, rather than the interests and rights of the parents: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 49.

[104] Section 37(2) of the FLA also provides guidance in assessing the best interests of the child:

37 (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.

[105] In addition, section 37(3) of the FLA provides that an order will not be in the best interests of the child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

[106] The court may make orders under the Divorce Act supplemented by orders related to guardianship and parenting arrangements under the FLA that are not operationally incompatible. As it is well established that both the Divorce Act and the FLA are directed to the same purpose, namely, the best interests of the child, counsel urged reliance on both statutory regimes: see *B.D.M. v. A.E.M.*, 2014 BCSC 453; *Rana v. Rana*, 2014 BCSC 530; *N.U. v. G.S.B.*, 2015 BCSC 105. In *B.D.M.* at para. 114, Mr. Justice Sewell reasoned that "[a]n overlap in legislation does not, without more, trigger paramountcy. Paramountcy only arises if a provincial law would frustrate the purpose of a federal law." He concluded that the FLA did not frustrate the purpose of the Divorce Act.

- [107] In *Noda v. Booth*, 2016 BCSC 1330, Mr. Justice Skolrood analyzed the factors set out in section 37 of the FLA in determining that one parent should have final decision making authority concerning important decisions affecting the child. Having applied this statutory framework in the instant case, along with the other provisions of the FLA and the Divorce Act outlined above, I am of the view that the Mother should be granted final decision making authority concerning important decisions affecting W.M. if, and only if, having attempted to reach agreement with the Father, agreement could not be reached.
- [108] Considering the best interests of W.M., parental responsibilities ought to be shared between the Mother and the Father in collaboration with each other as much as possible. While I understand the Mother's serious concerns about the Father's past history of alcohol and prescription abuse, including her worry about the risk of relapse, the Father has been in recovery now since June 2016 and there is no evidence before me of any further incidents of alcohol or prescription abuse since that time. In addition, both the Mother and Father testified at trial that they are committed to building a stronger and more collaborative co-parenting relationship. Each also agreed to attend counselling, affirming their desire to reduce the level of conflict between them and to work together more productively and positively in raising W.M. Further, both parents expressed a keen awareness during their testimonies that doing so would be in W.M.'s best interest. Indeed, during the course of the trial, the Mother and the Father were in fact able to reach consensus on a number of consent orders, including where W.M. was to go to school.
- [109] Accordingly, the parties will share their parental responsibilities for W.M. as contemplated under section 41 of the FLA. In the event the parties cannot agree on a significant decision, the Mother will be entitled to make that decision. The Father will have the right to apply for directions on any decision he considers contrary to the best interests of W.M, pursuant to section 49 of the FLA. This order may be reviewed in two years and, providing the Father has continued on his road to recovery at that time and the parties' ability to co-parent collaboratively has strengthened, a court may very well determine, or the parties may agree, that this particular order, qualified in this manner, is no longer necessary.

Issue 2: Should the Father and the Mother share equal parenting time on a seven day rotating basis with the exchange to occur on Monday mornings? If not, what other arrangement would be in W.M.'s best interest? Further, should the court order that W.M.'s bedtime be set at 8:30 pm, save and accept for special occasions as agreed by the parties?

- [110] As noted above, the Mother submits that it is in the best interest of W.M. that Dr. Elterman's recommendations, set out in his section 211 report as outlined above, be implemented. The Father seeks equal parenting time but is open to a graduated parenting scheduling which would build up to an equal parenting time arrangement.
- [111] Section 16(10) of the Divorce Act requires the court to give effect to the maximum contact principle:

16 (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[112] The court will give effect to the maximum contact principle to the extent that it is consistent with the best interests of the child: *Young v. Young*, [1993] 4 S.C.R. 3 at 118-119. The Mother argues that Dr. Elterman has made a recommendation with respect to the parenting schedule that is in W.M.'s best interest and submits that his recommendation should be followed as it minimizes risk for W.M.

[113] The Father asserts that while there is no presumption in favour of shared parenting, maximizing contact between the child and each parent is desirable and, further, maximum contact ought to be restricted only when it conflicts with the best interests of the child: see *Botticelli v. Botticelli*, 2009 ABQB 556 at para. 26, citing *Young* at para. 204.

[114] The Father argues, further, that the high standard of cooperation required between parents to order a joint custody, joint guardianship, or shared parenting agreement has been relaxed: *S.E. v. O.C.M.*, 2011 BCPC 198 at para. 84. He submits that courts are increasingly willing to grant joint custody if found to be in the best interests of the child: *Tomlin v. Tomlin* (1992), 69 B.C.L.R. (2d) 363 (S.C.); *Fontaine v. Fontaine* (1980), 18 R.F.L. (2d) 235 (Man. C.A.).

[115] While the Father acknowledges that the distance between his home in Surrey and the Mother's home in Vancouver might be a problem in an equal parenting arrangement, he testified that he would be willing to move to Vancouver to be closer to the Mother's home. In addition, the Father also points out that he has gradually begun his return to work and expects that his part-time hours will be increased to full-time hours. He expects full-time employment will include a manageable job such as research and data entry at the Vancouver General Hospital.

[116] The Mother asserts that the Father is still in a period of transition and highlights Dr. Elterman's observation that his ability to cope with work and an equal parenting arrangement is not clear at this juncture. Dr. Elterman noted in his report that the Father has not yet endured the stresses of childcare, full-time work and other financial pressures that "would normally push someone to the point where they might begin using alcohol and relapse." The Mother submits that while the Father has been given the benefit of the doubt in relation to having overnight visits at his Sister's home with W.M., he has not really been tested in terms of how he would cope with full-time employment and a "one week on/one week off" parenting schedule. The Mother asserts that, on the other hand, she is in a stable position with the support of her parents and is able to continue providing a secure environment for W.M. as she always has. She works "a Monday to Friday job" and has the support of her parents to care for W.M. while she is at work.

- [117] I have considered the evidence led at trial, including the Elterman Report, as well as the evidence of the Mother, Father, grandparents and Sister, in light of what parenting arrangements would be in W.M.'s best interests. I am of the view that Dr. Elterman's recommendation should be endorsed with a minor modification which would permit W.M. to spend both Friday night and Saturday night with his Father on alternating weekends, rather than just Saturday nights ("Modified Elterman Schedule"). In adapting Dr. Elterman's recommended schedule, I have considered both the Father and W.M.'s input that they wish to spend more time with each other, as well as the Father's valid concern that Dr. Elterman's recommendations would have W.M. moving from home to home on each weekend day.
- [118] While the Father is to be acknowledged for overcoming his alcoholism to date, until he is further down the path of his recovery and has worked for some time in a stable job, while also successfully managing the Modified Elterman Schedule, an equal parenting time arrangement would be premature. I have given considerable thought as to when a review of the Modified Elterman Schedule ought to occur. The Father signed a 36 month Relapse Prevention Agreement which requires that he be monitored for three years after his return to work. Dr. Elterman testified that, in his experience, the chances of a relapse for a sober parent will decrease as one proceeds along a trajectory from one to five years. The Father candidly admitted on the stand that he is unsure where his "next drink will take him". In this light, I am of the view that a review, in two years from the date of this judgment, is warranted. This will afford the Father a longer period of recovery and rehabilitation time, and will also permit him to transition into a more permanent and stable work routine while also parenting W.M. This period of adjustment and the passage of a longer period of sobriety would, in my view, be in W.M.'s best interest. After the passage of two years from the date of these reasons, an equal parenting arrangement may be in W.M.'s best interests providing the Father continues along his path of abstinence and recovery.
- [119] In coming to my conclusions regarding parenting time, I have carefully considered the Father's dishonesty in dealing with the Mother and in making false representations to the court. These are matters of great concern, particularly as the Father put his own interests before that of his own child by continuing to be under the influence of alcohol while he cared for W.M. Had it not been for the Father's successful treatment in 2016, his continuing monitoring and testing, and his profound candor during the trial, including his clear remorse and accountability for his past actions, I would not have been inclined to allow any unsupervised access. However, I am satisfied on the totality of the evidence before me that the Father has, in fact, been clean and sober since June 2016. Should this change, and should the Father relapse, then clearly it would not be in W.M.'s best interest to allow the Father unsupervised parenting time.
- [120] While I am mindful that the Father's past alcohol and abuse has been a very serious and distressing matter that has understandably informed the Mother's view on the appropriate parenting arrangements for W.M., the evidence before me established that the Father is now on the road to recovery. Accordingly, it is in W.M.'s best interest that the Father and the

Mother support each other in strengthening the integrity of their son's relationship with each other. Indeed, it is W.M.'s best interest that the entire extended family, who have been very involved in his care thus far, also support each other and the parents' relationship with their son. All family members who care so deeply for W.M. now have an opportunity to rebuild strong and positive relations with each other for his sake.

- [121] As regards the Mother's request for an order that W.M.'s bedtime be set at 8:30 pm, while I am in agreement with the Mother that a regular bedtime is in W.M.'s best interest, the Father did not testify that he was not in agreement with a set bedtime routine or that he would not institute an 8:30 pm bedtime. Indeed, the parties agreed to a consent order to the effect that each would have telephone contact with W.M. when he is in the care of the other party and the time of such calls was to occur prior to W.M.'s bedtime. Accordingly, I encourage the parents to also agree to their child's bedtime, without the necessity of a court order. I am not persuaded, at least at this juncture, that such an order is necessary.

Issue 3: Should the Mother be permitted to travel with W.M. without the written consent of the Father?

- [122] The Mother wishes to travel with W.M. without the written consent of the Father and seeks an order that the Father provide a blanket travel authorization allowing W.M. to travel with her. The Father wishes to do day trips to the United States with W.M. and to take him to Disneyland. He hopes to use his Bay Lake Towers timeshare in Disneyland for this purpose. He testified that day trips to the United States and regular trips to Disneyland were part of his family's traditions. He also testified that his entire family is committed to a life style of sobriety and it is in W.M.'s best interest to be able to travel with him to the United States.

- [123] I should note at this juncture that there was testimony from the Mother and her parents regarding heavy drinking by the Father's family, particularly during prior holidays. In fact, the Sister acknowledged on cross-examination that she also had a history of alcohol abuse. However, the evidence before me established that both she and the Father are now abstaining from alcohol consumption. Furthermore, D.M. testified that, in an effort to unconditionally support his son, his entire family agreed to support him by no longer drinking any alcohol, including removing all alcohol from their premises.

- [124] I am satisfied on the evidence before me that both the Mother and the Father should have the opportunity to vacation with W.M. outside the country. I am also of the view that each parent should provide reasonable notice to the other of no less than two weeks before they travel outside the country with W.M. They are each obliged to obtain the written consent of the other parent and such consent can not be withheld unreasonably. The non-travelling parent will sign any required documentation to facilitate the other party's proposed travel plans and will provide W.M.'s passport to the travelling parent if it is in his or her possession. Whether a parent is travelling with W.M. within Canada or abroad, that parent will provide the non-travelling parent with the travel itinerary. During such travel, the parties will continue their arrangement of providing the other with the opportunity to

speak to W.M. daily as they recently agreed, although they are free to alter this arrangement should they wish to accommodate specific travel and holiday plans, providing they do so in writing.

Issue 4: Should the Father be required to pay retroactive section 7 expenses?

[125] While the Father has agreed to pay retroactive child support, he opposes paying any retroactive section 7 expenses. He relies on a number of authorities in support of his position such as: (1) *Boski v. Boski*, 2014 BCSC 1599 at para. 122, where this Court determined that the respondent mother was not required to contribute to the costs of any extracurricular activities for the children which were incurred without her consent; (2) *K.T. v. D.C.P.*, 2015 BCSC 1179 at para. 61, where the Court ordered that the costs of extracurricular activities would not be shared as extraordinary expenses without both parents' written consent; (3) s. 7(1.1) of the Guidelines, which provides that not all extracurricular activity expenses fall within the definition of "extraordinary expenses"; and (4) *Clarke v. Clarke*, 2014 BCSC 824 at para. 54, where Mr. Justice Baird listed various activities such as dance lessons, community sports leagues, and ski trips as ordinary, rather than extraordinary, extracurricular activities.

[126] The Father also submits that extraordinary expenses should be necessary for the child's best interests and be reasonable given the parents' financial situation. He asserts that when parents have poor communication with respect to extracurricular activities, they should nonetheless keep each other fully informed, as responsible planners acting in their children's best interests. He also relies on cases in other Canadian jurisdictions, where the courts have exempted parents from contributing to extracurricular activities where the other parent has registered the child without the other parent's consent: *Currie v. Currie*, 2016 NSSC 175. In addition, the Father relies on the decision in *Reeves v. Brand*, 2017 ONSC 2306, at para. 74, rev'd on other grounds, 2018 ONCA 263, where an Ontario court decided that neither parent should be required to contribute to the child's section 7 expenses, which includes extracurricular activities, without the other's prior consent, as long as the consent is not withheld unreasonably.

[127] The Mother argues that the Father should pay his proportionate share of section 7 expenses retroactively. She also relies on section 7(1) of the Guidelines which provides:

Special or extraordinary expenses

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

[128] Section 7(1.1) of the Guidelines provides as follows:

Definition of "extraordinary expenses"

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

- [129] The Mother has paid \$374.80 for W.M.'s swimming and indoor soccer lessons. She has also paid \$775 for W.M.'s attendance at preschool in 2016. The Father has not contributed to the cost of W.M.'s attendance at preschool. The Father has paid \$29 towards W.M.'s soccer costs. As well, he paid for the cost of touch rugby and an introduction to fishing class for W.M., although the record does not establish the amount he paid for these activities. The Father did not consult the Mother before registering W.M. in touch rugby or the fishing class.
- [130] The Mother testified that W.M. was first enrolled in swimming and soccer classes, as well as in preschool, in the late summer of 2015, shortly after the Father's hospitalization and when he was still drinking heavily. She also stated that the parties had discussed W.M.'s enrollment in such activities prior to their separation and that they were then both in agreement he should be enrolled. In August 2016, however, the Father took issue with W.M.'s enrollment and with paying for such activities. His counsel wrote the Mother's counsel taking issue with the Mother's lack of consultation with regard to W.M.'s enrollment in swimming, soccer and speech therapy that fall. The Mother's counsel responded by letter dated September 1, 2016, advising that the activities W.M. was resuming in the fall of 2016 were the same activities he was registered for in 2015. This letter also confirmed that the Mother had emailed the Father this information on August 30, 2016, which included reference to W.M.'s swimming, soccer and speech therapy. At trial, the Father, acknowledged the Mother first enrolled W.M. in these activities when the Father was still drinking heavily in 2015.
- [131] The Mother submits that pursuant to section 7(1) of the Guidelines, the Father ought to pay his proportionate share of the expenses associated with pre-school, swimming and soccer. I am satisfied that the Mother wished to enhance W.M.'s educational and social development when she enrolled him in the activities she did in 2015 and 2016. However, before assessing whether I ought to make a retroactive order with regard to the Father's obligation to pay his proportionate share of such expenses, I agree with his counsel's submission that I must first determine whether these expenses properly fall within the definition of section 7 expenses.
- [132] The law, as it currently stands, provides that the first step with respect to extraordinary expenses is to determine whether the expenses are extraordinary or not. In *Bodine-Shah v. Shah*, 2014 BCCA 191, the Court considered the character of "extraordinary expenses" and reasoned as follows:
- [66] Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities.
- [133] I have considered the cases relied on by the Father as well as the Guidelines. I have concluded that the \$775 the Mother paid for W.M.'s pre-school clearly constitutes a proper section 7 expense. I am also satisfied that the Mother acted reasonably when she registered W.M. for preschool and incurred this expense, particularly in light of the parties' incomes

and their prior discussions about registering W.M. for pre-school and other activities. Further, there can be little doubt that attending pre-school was in W.M.'s best interest. The Father also effectively acknowledged this in his testimony.

- [134] The cases upon which the Father relies where the consent of the other parent is required before section 7 expenses obligations may be enforced are distinguishable given the unique facts of this case. In the instant case, the Mother made considerable efforts to care for her son and act in his best interest by organizing activities which contributed to his physical and educational well-being, particularly in the summer and fall of 2015 when the family was in distress and the Father was still actively abusing alcohol.
- [135] Nonetheless, I am not persuaded that the soccer and swimming lessons constitute extraordinary section 7 expenses in light of the reasoning of the Court in *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 (C.A.), which was more recently cited by the Court of Appeal in *Bodine-Shah*. In *McLaughlin*, the Court considered the meaning of the phrase extraordinary expenses for "extracurricular activities" in s. 7(1)(f) of the Guidelines. In that case, the mother had claimed a proportionate contribution from the father for the children's extracurricular activities, including soccer, softball, field hockey, outdoor school, swimming and hockey. The chambers judge ordered that the father pay his proportionate share of these expenses after taking into account the respective incomes of the parties. In discussing what extracurricular activities properly fall within s. 7(1)(f), the Court of Appeal acknowledged that courts had struggled to determine what expenses could properly be classified as "extraordinary":
- [30] It is apparent from my perusal of many of the dozens of cases decided under s. 7(1)(f) across the country that judges in British Columbia and elsewhere have been struggling to find some principled basis for deciding what expenses can properly be added to the base table amounts as "extraordinary expenses" within the meaning of s. 7(1)(f). The inability of judges to ascertain what Parliament intended to be included as ordinary expenses for extracurricular activities under the tables has resulted in a variety of approaches to the interpretation of s. 7(1)(f) with an accompanying inconsistency in results.
- [136] After canvassing the various approaches that had been taken by courts on this issue, the Court of Appeal sets out the preferred approach to s. 7(1)(f) as follows:
- [64] There is no dispute in the case law as to the meaning of the word "extraordinary". All of the decisions utilize dictionary definitions, including such synonyms as "unusual", "out of the ordinary" and "exceptional". Nor is there any dispute amongst judges that the use of the word "extraordinary" in s. 7(1)(f) to describe the type of expenses which can be added on to the basic table amounts, implies that "ordinary" expenses are included within the table amounts. The problem has been the difficulty of ascertaining the nature and extent of the extracurricular activities (in the case of s. 7(1)(f)), which are "ordinary" and, thus, included in the basic table amounts. If this could be determined, one could simply define extraordinary expenses as being those which are not ordinary; that is, those which are not

included in the basic table.

- [81] In the result, I conclude that, in deciding whether an expense, or the totality of expenses claimed on behalf of children under s. 7(1)(f) are extraordinary, the court should take into consideration the combined income of the parties, as well as the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the children, and the overall cost of the activities. This list is not intended to be exhaustive, as considerations may arise in other cases which may also be relevant. I note that in the only other decision of this Court dealing with s. 7(1)(f), *Cochrane v. Zarins* (1998), 36 R.F.L. (4th) 434 (B.C. C.A.), the Court concluded that a particular child's talents are a relevant factor in determining whether an expense for an extracurricular activity is extraordinary.
- [82] As earlier stated, once an expense or expenses are found to be extraordinary it is necessary for the court to proceed to determine whether the expenses are necessary in relation to the children's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation. There appears to be a consensus in the authorities dealing with s. 7(1)(f) that those questions do not need to be addressed until the expense or expenses in question have been found to be extraordinary. That would also be true of "extraordinary" educational expenses under s. 7(1)(d). With respect to the other expenses included under s. 7(1), which fit under the rubric of "special" expenses as that word is used in the heading of the section, the expenses need not be extraordinary, but they must meet the tests of necessity and reasonableness.
- [137] The Court of Appeal in *McLaughlin* applied this analytical approach and determined that common, extra-curricular activities are not "extraordinary expenses" under section 7(1)(f):
- [102] none of these expenses, individually, can be viewed as extraordinary expenses. The activities are common extracurricular activities for children of these ages and there are not, as there are in some cases, additional fees for such things as camps, trips, or expensive equipment. Nor is the total monthly amount associated with these expenses high, either in absolute terms, or in relation to the joint incomes of the parties (\$120,000). In my view, Mr. McLaughlin's proportionate share of these expenses (\$70 per month) must be treated as being included within the amount of maintenance he is paying under the basic table.
- [138] In this light, I am of the view that W.M.'s soccer and swimming lessons cannot be classified as extraordinary expenses.
- [139] Having decided that the pre-school expense is a proper section 7 expense, I must also consider the Supreme Court of Canada's reasons in *D.B.S. v. S.R.G.*, 2006 SCC 37. In *D.B.S.*, the Court sets out the analytical framework for assessing the entitlement and quantum of retroactive awards. In *Leachman v. Leachman*, 2007 BCSC 1166 at para. 27, this Court held that the *D.B.S.* factors apply in the context of making an award for retroactive section 7 expenses. At paras. 99-116 of *D.B.S.*, the Court outlines four factors which inform the question of whether a retroactive order should be made:

1. the reasons for the recipient's delay in asking for child support;
2. the conduct of the payor (e.g., non-disclosure of income or pressuring the recipient to not ask for more support);
3. the circumstances of the child; and
4. any hardship the payor might suffer if required to pay retroactive child support.

[140] The Court in D.B.S. also provides guidance on the date to which a retroactive child support order should begin:

[5] Where ordered, an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of his/her intention to seek an increase in support payments; this date represents a fair balance between certainty and flexibility.

More specifically the Court in D.B.S. reasons at para. 121:

[121] By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the status quo is fair, and his/her interest in certainty becomes less compelling.

Further, the Court reasons that while the matter is discretionary and fact dependant, an award of retroactive child support should not generally exceed three years before formal notice has been given:

[125] The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[Emphasis added.]

[141] In this case, the three year ceiling has not expired; the Mother requested assistance with the payment of the pre-school expenses in the late summer of 2015. Further, the four factors outlined by the Court favour a retroactive award of section 7 expenses. The Mother requested contributory payments in a timely way and both parents agree the pre-school activities benefitted W.M. Again, given the family was in transition and working through a

period of crisis, I have little doubt that these circumstances justified the pre-school expenses incurred. Further, I am also satisfied that this section 7 expense will not work a hardship on the Father, particularly as both parents will share the cost proportionately.

- [142] Accordingly, the Father will be required to pay his proportionate share of the pre-school expense of \$775 as required under in the Guidelines. It is not clear on the evidence before me whether the cost of speech therapy for W.M was covered by the parent's extended medical service plan. I would simply note that, to the extent the cost of speech therapy is not covered by medical insurance, such an expense would ordinarily constitute a section 7 expense that would be shared proportionately by the parents.

Issue 5: While the parties agree on paying their proportionate share of section 7 expenses moving forward, should such expenses be consented to in advance and in writing prior to being incurred?

- [143] The parties must share section 7 expenses proportionate to their Guidelines incomes. The Father's request for consultation and consensus-building regarding W.M.'s on going section 7 expenses is a reasonable one. The parties will consult with each other and seek each other's consent prior to incurring any section 7 expense but consent can not be unreasonably withheld. The parties will exchange an itemized list of all section 7 expenses, with receipts attached, on a quarterly basis. The parties are to determine their proportionate share of expenses pursuant to consent order (m), as set out at para. 93 of these Reasons.

Issue 6: Is the Volkswagen Jetta excluded property?

- [144] Section 85(1)(a) of the FLA provides that property acquired by a spouse before the relationship began is excluded from family property. Pursuant to section 85(2), the Father bears the responsibility for demonstrating that the Volkswagen Jetta is excluded property.
- [145] The Father argues that since he bought the Volkswagen Jetta before he was married, it is excluded property. He submits further that the Mercedes was family property and that it was the Mercedes that was used for family purposes; the parties are in agreement that the Mercedes was a family asset.
- [146] The Father further submits that the July 2012 Sales Agreement between himself and the Mother's parents in regard to the Volkswagen Jetta is predicated on the understanding that this vehicle belonged to him exclusively and was not a family asset. The Father testified that while he sold this car to the Mother's parents in 2012 for \$25,000, they gave him the car back when the parties separated in 2015 and he has had possession of it ever since. As noted above, the Mother's parents deny purchasing the vehicle or giving it to the Father in 2015.
- [147] I am satisfied on the evidence before me that the Volkswagen Jetta is excluded property. I am not persuaded, on the balance of probabilities, that the July 2012 Sales Agreement was a "collateral agreement", as alleged by the Mother and her parents, whereby the vehicle was intended to be collateral for the \$40,831.62 loan to the Father by the Mother's parents. On a

plain reading, this agreement indicates it is a simple purchase and sale agreement. Yet, the evidence before me does not persuade me, on a balance of probabilities, that the parents gave or gifted the Volkswagen Jetta back to the Father in 2015, as the Father alleges. The question of who owns this vehicle now comprises a legal dispute between the Father and the Mother's parents. Since it is an excluded asset and the Mother's parents are not parties to this action, the question of proper title to, and current ownership of, the Volkswagen Jetta is therefore beyond the purview of this Court to decide.

Issue 7: Is the \$40,831.62 debt owed to the Mother's parents a family debt? If so, what proportion of the debt should be apportioned to the Father?

[148] The Mother asserts that the Father borrowed \$40,831.62 from her parents and that this debt is not a family debt but is owed solely by the Father. She argues that as the largest part of this debt represents money that the Father borrowed to buy the Volkswagen Jetta, he should simply pay back the entirety of this debt and retain the Jetta for his own use. I note, however, that the Volkswagen Jetta was purchased before the parties were married. Accordingly, the Mother argues, in the alternative, that if this debt is a family debt and the parties are equally responsible for it, the Volkswagen Jetta should be sold and the proceeds applied to the debt with the balance to be shared equally between the parties.

[149] Section 86 of the FLA states that in circumstances such as those before me, family debt includes all financial obligations incurred by a spouse "during the period beginning when the relationship between the spouses begins and ends when the spouses separate." The evidence before me clearly establishes that the Father borrowed money from the Mother's parents in the amount of \$40,831.62 and that this debt was incurred during the parties' marriage and before they separated. A bank draft was issued to the Father on July 17, 2012 from the Mother's parents.

[150] The Father does not dispute the existence of the Debt; instead, he asserts that he has paid back the amount owing to the Mother's parents. He relies on the September 2012 Loan Agreement and attached documents indicating that the monies loaned under that agreement were paid by the parties. The difficulty with this argument is that the September 2012 Loan Agreement does not relate to the \$40,831.62 loan by the Mother's parents to the Father but, rather, to a subsequent loan made to both the Mother and Father relating to money they borrowed from the Mother's parents to assist in paying for the couples' Mercedes and timeshares, as well as the Father's then line of credit. Accordingly, the evidence establishes that the September 2012 Loan of \$50,000 to the parties was paid in full but goes not further.

[151] The Father argues that the "Lenders Note" in the 2012 Loan Agreement (that states "To our knowledge, the loan amount totalling \$50,000.00 is the only amount owing to us by [Father] and [Mother]") confirms neither he nor the Mother owes any debt to the Mother's parents. At best, in this regard, there is some ambiguity regarding the effect and intention of this provision. It is not clear that this note also relates to the previous loan to the Father by the

Mother's parents. Accordingly, it is appropriate that I consider evidence of the parties subjective intentions or their understanding of the meaning of the express words of the contract in order to resolve this ambiguity: *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 53. Having done so, I accept the evidence of the Mother and her parents to the effect that the "Lenders Note" dealt only with the additional debt of \$50,000 entered into and executed by both the parties and that it did not relate to the \$40,831.62 which the Father borrowed from the Mother's parents.

[152] The FLA embodies a presumption of an equal division of family property and debt independent of contribution or use. However, section 95 provides for judicial discretion to depart from an equal division of debt if it would be significantly unfair to do so. Section 95(2) of the FLA sets out a number of factors the court may consider in ordering an unequal division of family property or debt. I have considered the factors which guide the court's analysis on the specific issue of the \$40,831.62 debt. I have concluded, given the unique circumstances before me, that it would be significantly unfair to attribute any of the \$40,831.62 debt to the Mother. It is clear on the evidence before me that this debt arose from the Father's previous debt owed to his own father which, in turn, related to expenditures incurred by the Father prior to the marriage. Simply put, this family debt was not incurred in the normal course of the relationship between the spouses: see subsection 95(1)(d) of the FLA. In these circumstances, it would be significantly unfair, in my view, to require the Mother to carry an equal share of this debt. Further, as in *Appleby v. Marsham*, 2018 BCSC 212 at paras. 96-97, where Mr. Justice Cullen held that the respondent should be responsible for 100% of the family debt, I find that such a result is also appropriate in the instant case. Accordingly, the \$40,831.62 debt will be borne by the Father alone.

Issue 8: How should the parties' respective interests in the Mercedes be apportioned?

[153] While the parties acknowledge that the Mercedes is a family asset, they disagree on how their respective interests ought to be addressed. The Father submits that the Mother may retain the vehicle but must pay him \$20,000 which he asserts represents his half of its value at the time of separation. The Mother wishes to retain the vehicle but asserts the value should be agreed upon and that she should receive credit for \$11,878 representing the trade in allowance for her Honda which she asserts was excluded property. Just as the Father claimed the Volkswagen Jetta was excluded property, the Mother similarly claims that the car she purchased prior to the marriage, the Honda, is also excluded property. I agree that the Honda is excluded property. I also agree that the sum of \$11,878 ought to be subtracted from the price of the Mercedes. Accordingly, the Mother may retain the Mercedes providing she pays the Father half its current fair market value and receives credit for the sum of \$11,878. If the parties cannot agree on how much the Mother must pay the Father for the Mercedes within the next 60 days, the vehicle will be sold and the proceeds will be divided between the parties with the Mother receiving a credit for the sum of \$11,878. The parties are, of course, free to make whatever alternate arrangements they can agree on in this regard. Given their representations to the court of their commitment to collaborate and

improve their relationship, agreeing on a price to be paid for the Father's interest in the Mercedes should be a relatively straightforward matter.

Issue 9: How should the parties' respective interests in the Bay Lake Towers timeshare and the Kidani Village timeshare be apportioned?

[154] The parties acknowledge that Bay Lake Towers timeshare and the Kidani Village timeshare constitute family property but disagree on how to divide these assets. The Father proposes that they each retain one of the timeshares; that is, that he retain the Bay Lake Towers timeshare and that the Mother retain the Kidani Village timeshare.

[155] The Mother asserts that the timeshares are not of equal value and wishes to sever any financial ties to them. She asserts that the properties simply be listed for sale and the proceeds be divided equally between the parties. Alternatively, she asserts that the Father purchase her share of both timeshares at fair market value.

[156] As the parties are equally entitled to the timeshares, like the situation with the Mercedes, unless they can reach an agreement, the timeshare must be sold. Accordingly, I order that the Kidani Village timeshare be jointly listed for sale and that the proceeds be divided equally between the parties, unless the parties otherwise agree in writing. The Father may retain the Bay Lake Towers timeshare with a value to be agreed upon by the parties and shall pay half the value of this timeshare to the Mother. If the parties cannot agree on the current fair market value of the Bay Lake Towers timeshare within 60 days, this timeshare will be jointly listed for sale and the proceeds shall be divided equally between the parties. Again, the parties are free to make whatever arrangements they wish to resolve this issue, including working towards reaching a consensus on the fair market value of the Bay Lake timeshare.

Issue 10: How should various chattels that remain in the former family home be divided?

[157] The parties acknowledge that the Father has left various chattels in the former family residence, that is, the Grandparents' Home. The parties have attempted repeatedly, since September 2015, to agree to divide the contents of the household they previously shared and to develop a final list but the Father is concerned he cannot recall all of what he left behind. The Father has requested the opportunity to enter his former family residence to take an inventory of the items of what is there, as he does not trust his own memory to make a complete list. However, the Mother has refused to allow him to enter the home and proposes that he simply agree to the specified list set out in Schedule "A" of her Closing Submissions ("Schedule A").

[158] Pursuant to the Order of Maisonville J., made November 7, 2016, the parties were to finalize a list of the Father's personal items to be retrieved from the former family residence and to arrange for professional movers to move the items from inside the residence. The parties have attempted to do so, and some progress had been made, but the stumbling block is that the Mother does not wish to permit the Father to enter his former family residence to see

what he might have left behind. She says all household items have been accounted for and this step is unnecessary. The Mother asserts that the Father arrange for professional movers to retrieve and remove items from inside the residence within 30 days of the date of this order.

- [159] The Father proposes that the parties "engage in a traditional he pick/she pick rotating basis" selection process for the chattels they cannot agree belong to one or the other of the parties. In addition, he proposes that he and the Mother each choose a neutral third party to enter the former family residence with them to take a final inventory. He submits the parties should engage in this exercise in order to practice cooperation and validate the Father's frustration in not being allowed to return to his former home for this purpose. He also submits that the Mother's parents not be present when the parties attend at their former family residence along with the neutral third parties.
- [160] I am of the view that this matter can quickly be brought to a final resolution based on a two step process. First, the parties are to review Schedule "A" to settle which specific items belongs to the other, with the exclusion of M., the dog, as that issue is addressed specifically below.
- [161] Second, the Father and his counsel have made a reasonable suggestion that he be permitted to meet with the Mother at their former home and that both he and the Mother each choose a neutral third party to attend to facilitate a peaceful review of the premises; this would assure the Father that he has left nothing behind of value. Accordingly, I encourage the parties to make this arrangement as soon as possible. However, I do not intend to make an order enforcing this arrangement. It is also up to the Mother and the Mother's parents whether they wish to be present at such a meeting, although I do see how this meeting may be more easily managed with fewer persons present.
- [162] I note that the parties testified they wish to be more collaborative with each other and I commend them for this. They will be co-parenting for years to come and have the opportunity now to model cooperative and respectful problem-solving between each other for W.M.'s benefit at least.
- [163] Schedule "A" may be supplemented by the Father once the Father has had an opportunity to visit the former family home to review its contents. If the Father and Mother do not agree on a home visit, the Father may supplement Schedule "A" by asking the Mother to search for an item that he believes is still in the former family residence. Once located, the item may be added to Schedule "A". To the extent the parties cannot agree on how to divide items on Schedule "A", they will each take turns picking from the list of items identified.

Issue 11: Should the family dog follow W.M., while W.M. moves from parenting time at his Mother's residence to parenting time at his Father's residence?

- [164] The Father seeks an order that the family dog, M., follow W.M. as he moves from his Mother's residence to his Father's residence. The Mother referred to other dogs that were residing with the Father and the Sister, but the Father submits that the number of dogs that are residing with him is irrelevant as he himself only has one dog, G., who he brought into the marriage and later to his Sister's residence. M. was obtained during the marriage.
- [165] The parties are agreed that there is an emotional attachment between W.M and M. The Father also noted a bond between the two dogs, M. and G., and asserts that "the [Mother] unilaterally kept all the family assets, including M., without consideration of fairness or what [the Father] wanted". The Father further submits that the attachment between W.M. and M. should be accommodated by allowing M. to follow W.M. to the Father's home "where [W.M.] can enjoy M. and where M. can have a good quality of life because she will once again be reunited with G".
- [166] The Mother testified that appropriate care is being provided to M. in the home she shares with W.M., that M. is [W.M.'s] dog, and that she does not feel it is right to remove M. from her current home, noting that there are five or six dogs at the Sister's home where the Father is residing.
- [167] Having carefully considered the matter, particularly W.M.'s best interest and the fact that there are already several dogs at the Father's residence, including G. who lived with the parties and W.M. during their time together as a family, I decline to make an order that M. follow W.M. to his Father's residence during his parenting time. W.M. has the benefit of having M.'s company while with the Mother, along with the benefit of the company of other dogs, including G., while staying with his Father.

IV. DiSPoSiTiON

- [168] I am satisfied on the evidence and record before me that a divorce order should be granted pursuant to section 8(1) of the Divorce Act. I have reviewed the record and I find that the requisite criteria for granting a divorce have been satisfied. Subject to section 12(1) of the Divorce Act, the divorce will take effect 31 days from the date of these Reasons.
- [169] The parties have agreed to a number of Consent Orders. These are set out at paragraph 93 and need not be repeated here. The Consent Orders may be modified by the agreement of the parties in writing.
- [170] The parties will share their parental responsibilities for W.M. as contemplated under section 41 of the FLA. In the event the parties cannot agree on a significant decision, the Mother will be entitled to make that decision; however, the Father will have the right to apply for directions on any decision he considers contrary to the best interests of W.M, pursuant to section 49 of the FLA. This order may be reviewed in two years. At that time, providing the Father has continued on his road to recovery and the parties' ability to co-parent collaboratively has strengthened, a court may very well determine or the parties may agree that neither party has final decision making authority over the other.

[171] The Father will have the following parenting time with W.M. on a rotating basis:

Week 1: Saturday from 10:00 am until 7:00 pm;

Week 2: Friday at 5:00 pm until Sunday at 7:00 pm;

Week 3: Sunday from 10:00 am until 7:00 pm;

Week 4: Friday at 5:00 pm until Sunday at 7:00 pm.

[172] The above parenting schedule may be reviewed on June 7, 2020. W.M. will be in the care of the Mother at all other times, unless otherwise agreed in writing by the parties, or as otherwise set out herein. The Father's parenting time as set out above is contingent upon his ability to remain sober and abstain from alcohol and drug abuse.

[173] The parties may agree to modify this parenting schedule; such agreements must be arranged in advance and confirmed by email or other form of written communication.

[174] Providing the Father continues to remain sober and abstains from alcohol and drug abuse, the parties will share parenting time with W.M. equally during the Christmas and Easter holidays, as well as during spring school breaks.

[175] More specifically, the parties will share parenting time with W.M. during Christmas holidays, with W.M. spending the first half of the Christmas holidays with the Father during even numbered years and the first half of Christmas holidays with the Mother in odd numbered years, with the exchange to take place on Christmas day at 2:00 pm or at another time as agreed to by the parties.

[176] The parties will share equally in the responsibilities and costs of transporting W.M. to and from their respective homes.

[177] Regardless of the parenting schedule as set out herein, the Father will have W.M. on Father's Day from 10:00 am until 7:00 pm.

[178] Regardless of the parenting schedule as set out herein, the Mother will have W.M. on Mother's Day from 10:00 am until 7:00 pm.

[179] Either parent is free to travel within or outside Canada during that parent's normal parenting time with W.M. with the written consent of the other parent; the other parent shall not unreasonably withhold his or her consent. The non-travelling parent shall sign any required documentation to facilitate the travelling parent's proposed travel plans within seven days of departure and shall also provide W.M.'s passport to the travelling parent if it is in his or her possession.

- [180] The travelling parent shall provide the non-travelling parent not less than two weeks' notice of the planned trip and shall provide the non-travelling parent with a written travel itinerary, including a telephone contact number at the travel destination. During travel, the party who does not have W.M. in their care will have contact with W.M. in the same manner as agreed to in the consent order at paragraph 93(h) above, or as otherwise agreed by the parties in writing.
- [181] The parties will share section 7 expenses proportionate to their Guidelines incomes to be reviewed annually. Based on the evidence of the parties' respective Guidelines incomes for the year 2017, the Mother's share will be 60% of section 7 expenses and the Father will be responsible for 40% of these expenses. This proportionate share will be reviewed again this year as agreed by consent order. The parties will consult with each other and seek each other's consent prior to incurring any section 7 expenses and consent will not be unreasonably withheld. The parties will exchange an itemized list of all section 7 expenses, with receipts attached, on a quarterly basis.
- [182] The Father will pay his proportionate share of the pre-school section 7 expense of \$775.00, as required under in the Guidelines.
- [183] The Volkswagen Jetta is an excluded asset.
- [184] The debt of \$40,831.62 is a family debt and is re-apportioned exclusively to the Father. Accordingly, the \$40,831.62 debt will be borne by the Father alone.
- [185] The Mercedes is a family asset to be divided equally between the parties. The Mother may retain the Mercedes but must pay the Father for his share of its current fair market value, after receiving credit for the trade-in value of the Honda of \$11,878. If the parties cannot agree on the current fair market value of the Mercedes within 60 days, the vehicle will be sold and the proceeds will be divided between the parties, with the Mother receiving a credit for its trade in value. The parties may also agree to an alternative arrangement in writing.
- [186] The Kidani Village timeshare will be jointly listed for sale and the proceeds will be divided equally between the parties. The parties may agree otherwise in writing.
- [187] The Father may retain the Bay Lake Towers timeshare providing he pays half the current fair market value of this timeshare to the Mother. If the parties cannot agree on what half the current market value of the Bay Lake Towers timeshare is within 60 days, this timeshare will be jointly listed for sale and the proceeds shall be divided equally between the parties. The parties may agree otherwise in writing.
- [188] The parties will review Schedule "A", which may be supplemented as a result of: (a) the Father having visited the former family home; or (b) the Mother locating and retrieving additional items in the home at the Father's request. Having reviewed the Schedule "A" list (which may be supplemented if additional items are identified and located), the parties will settle which specific items belong to the other party. To the extent the parties cannot agree

on how to divide various items listed, they will each take turns picking from the list of items identified. The items will then be retrieved up by professional movers within 60 days of the date of this order and the cost will be shared equally by the parties. The parties may make other arrangements in this regard by agreement in writing.

[189] Counsel for the Father has requested an opportunity to make submissions on costs. I would encourage the parties to reach an agreement on costs without the need for this Court's intervention. However, if the parties cannot agree on costs, they must exchange their written submissions and file them with the Court by no later than July 3, 2018.

"MORELLATO J."

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