

CANADA / JUDGMENT

Bucholtz v. Smith

2001 BCSC 1176

COURT

Supreme Court of British Columbia

DECIDED

9 August 2001

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Source record

2001BCSC1176

Citation:

Bucholtz v. Smith

Date:20010809

2001 BCSC 1176

Docket:

E009017

Registry: New Westminster

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STUART MATTHEW BUCHOLTZ
PLAINTIFF

AND:

LINDA LOUISE SMITH
DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE WEDGE

Counsel for the plaintiff:

G.B. Kaine

Counsel for the defendant;

T.L. Jackson

Dates and Place of Trial:

May 7, 8, 9, 10,

11, 14, 15, 16, 17,

28, 29, 30, 31, and

June 1, 13, 14, 2001

New Westminster, BC

- [1] Stuart Bucholtz and Linda Smith met in December 1986. They began a relationship that, although fraught with conflict and marked by frequent separations, lasted about twelve years. They did not marry, and maintained separate homes for many years, but eventually began living together as spouses at Mr. Bucholtz's farm. Their son, Frazer, was born in 1996.
- [2] Mr. Bucholtz, a shrewd and energetic man who is careful with his money, had accumulated a number of properties and other investments before he and Ms. Smith began living together. He wished to keep for himself the assets he had inherited or acquired by his own industry. At his insistence, Ms. Smith signed an agreement that, among other things, ensured his assets remained his in the event the relationship ended.
- [3] Conflict in the relationship increased after Frazer's birth. Ms. Smith left the farm for the last time in March 1999, taking Frazer with her. Since the separation, Ms. Smith has been Frazer's primary caregiver and Mr. Bucholtz has had access. Both are dedicated parents but animosity between them has made shared access difficult at times.
- [4] Mr. Bucholtz commenced this action seeking joint custody of Frazer. He also seeks enforcement of the cohabitation agreement. Ms. Smith, in response, seeks sole custody of Frazer and maintenance for him. She says Mr. Bucholtz's income is much greater than he reports and asks that he be imputed with a higher income for purposes of determining maintenance for Frazer. In addition, she says she should not be held to the terms of the cohabitation agreement because it is unconscionable. She says Mr. Bucholtz was unjustly enriched by the relationship and seeks restitution.

ISSUES

- [5] This court must decide the following issues:
- (a) Should the cohabitation agreement be set aside as unconscionable?
 - (b) If the cohabitation agreement is not valid, was Mr. Bucholtz unjustly enriched by the relationship such that Ms. Smith is entitled to restitution?
 2. Is joint custody of Frazer appropriate, or does the apparent lack of cooperation between Frazer's parents justify sole custody to one parent?
 3. What are the appropriate child support arrangements for Frazer?

DECISION

- (a) IS THE COHABITATION AGREEMENT VALID OR IS IT AN UNCONSCIONABLE BARGAIN?
- [6] A number of issues turn on the validity of the cohabitation agreement. If it is valid, it governs the financial obligations between the parties and, in particular,

- (a) Ms. Smith has no claim against the property or other assets of Mr. Bucholtz on the basis of unjust enrichment;
 - (b) Mr. Bucholtz is entitled to repayment of a substantial part of a loan he made to Ms. Smith; and
 - (c) Ms. Smith is entitled to a specified amount of money for each year she lived with Mr. Bucholtz from the date of the cohabitation agreement.
- [7] Ms. Smith argues that the cohabitation agreement must be set aside because it is an unconscionable bargain. While she has also raised the doctrine of duress, she does not strenuously argue that ground.

The legal context

- [8] At common law, there is no presumption of an equal sharing of assets upon the breakdown of a spousal relationship. Because Ms. Smith and Mr. Bucholtz were not married, Part 5 of the Family Relations Act, R.S.B.C. 1996, c.128, (the "Act") which governs the division of family assets, does not apply. Nor does Part 6, which governs pensions. Spouses in a common law relationship must look to common law remedies when inequities arise from the contribution of one spouse to property owned by the other spouse.
- [9] Section 120.1 of the Act deals with property agreements between common law spouses. It provides that where spouses who are not married to each other enter into a property agreement, the provisions of Parts 5 and 6 of the Act apply. The effect of s. 120.1 is to permit the court to determine the fairness of the agreement in light of the presumptions concerning the division of family assets described in Parts 5 and 6 of the Act. Section 120.1, when triggered, brings into play another section of the Act, s. 65, which permits the court to determine whether a spousal agreement is unfair based on specific factors described in the section.
- [10] In this case, Ms. Smith appears to concede that s. 120.1 does not apply. That is an appropriate concession to make. The section came into effect February 4, 1998, but the cohabitation agreement in this case was signed December 9, 1997. This court has found s. 120.1 does not have retrospective effect: see *Weist v. Middlekamp* (2001), 86 B.C.L.R. (3d) 155 (B.C.S.C.); and *Johnstone v. Wright*, 2001 BCSC 838. The result is that the presumption of equal ownership of family assets described in Part 5 of the Act does not apply. Nor do the "fairness" provisions of s. 65 of the Act apply. Ms. Smith must rely on the equitable doctrine of unconscionability to attack the validity of the cohabitation agreement.
- [11] Ms. Smith and Mr. Bucholtz both rely on *Morrison v. Coast Finance Ltd.* (1965), 54 W.W.R. 257 (B.C.C.A.), which sets out the test for unconscionability. An unconscionable bargain is one induced by a form of equitable fraud. A party claiming unconscionability must prove two elements; first, the inequality in the positions of the parties "arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger", and

second, the "substantial unfairness of the bargain obtained by the stronger" (Morrison, *supra*, p. 259). Once the inequality in the positions of the parties is proved, the question is whether the transaction was so unfair that it creates a presumption of fraud.

- [12] The law on unconscionability within the context of spousal agreements was recently reviewed by the Court of Appeal in *Klassen v. Klassen*, 2001 BCCA 445, [2001] B.C.J. No. 1360. The Court endorsed the Morrison decision: Where there is a misuse of power by the stronger party to obtain from the weaker party a bargain that is considerably under value, the bargain is voidable and may be set aside. In each case the question is one of fact.
- [13] Was there a misuse of power in this case resulting in an agreement that was grossly unfair? The answer is "no". The cohabitation agreement is valid and governs the parties for purposes of rights to property and assets. The basis for this conclusion follows.

Factual context:

- [14] The facts relevant to this issue are the following:
- (a) the circumstances of each party before they began cohabiting as spouses;
 - (b) the history of the relationship between the parties as spouses, including the financial arrangements between them and their respective contributions to the assets held by Mr. Bucholtz; and
 - (c) the circumstances surrounding the concluding of the cohabitation agreement and the terms of the agreement.
- (a) The circumstances of the parties before cohabitation as spouses

Stuart Bucholtz

- [15] Stuart Bucholtz was born in Langley, B.C. He is 42 years of age. He grew up in White Rock, B.C., with his parents and siblings. He graduated from high school and completed some courses at the community college level.
- [16] When he was 17, Mr. Bucholtz moved to his current home at 25021-80th Avenue in Langley, a ten acre farm property then owned by his parents. After graduating from high school, he and a friend spent a couple of years making bedroom furniture in a workshop located on the farm. In 1980, when he was 20 years old, Mr. Bucholtz enrolled in a licensing course for real estate sales. His parents were successful realtors and his interest in the business came from them.
- [17] Mr. Bucholtz obtained his realtor's license in 1981. In 1982, he was one of the top realtors in his office. That year, Mr. Bucholtz married Lesley Clark. In 1983, a son, Solon Bucholtz, was born. Mr. Bucholtz and his family left for a year of travel in Europe. When they returned in late 1984, Ms. Clark began attending community college while Mr. Bucholtz worked on the farm and looked after Solon.

- [18] In early 1985, the marriage broke down; Mr. Bucholtz and Ms. Clark separated in June 1985 and were eventually divorced. Ms. Clark obtained sole custody of Solon with access by Mr. Bucholtz to Solon three days per week. This arrangement continued until 1988 when Ms. Clark moved to Montreal. With the agreement of Mr. Bucholtz, she took Solon with her. Solon returned to Langley to be with Mr. Bucholtz for school holidays.
- [19] Mr. Bucholtz resumed work as a realtor in 1985. He focused on residential land development and the acquisition of land for subdivision. He continued to live on the farm in Langley, which consisted of an old hand-hewn barn and farmhouse, large gardens, pasture and an orchard. He rented the property from his family and worked to maintain it. He restored the house and barn to their original condition, and tended the gardens and orchard.
- [20] In 1988 Mr. Bucholtz bought the farm from his parents. He also leased from his parents two six-acre parcels of land contiguous to the farm. He eventually purchased these parcels using, for the most part, \$250,000 he received as a gift from his father.
- [21] Mr. Bucholtz also has a one-quarter interest in a vacant building lot in Surrey, purchased in the mid-1980's. His three siblings hold the remaining three-quarters interest.
- [22] In about 1988 Mr. Bucholtz began investing in mortgages, in those days a lucrative pursuit that did not involve the day-to-day office management demanded by land development and real estate sales.
- [23] At about the same time, he incorporated a company called Attica Ventures ("Attica") to manage his property interests and mortgage investments. He is the sole shareholder. The company has some land holdings but deals primarily with mortgage investments.
- [24] Mr. Bucholtz is also a 50% shareholder in a numbered company incorporated in 1988; his parents hold the remaining interest. The company was incorporated to develop a subdivision in Surrey. The proceeds from the sale of the subdivision were used by the company to invest in mortgages secured by real estate. The numbered company has acquired some land holdings by virtue of defaulted mortgages.
- [25] Since 1990, the main source of Mr. Bucholtz's income has been mortgage and land investments that he manages from home one day per week with a telephone and fax machine. He spends the rest of his week working on his farm, maintaining the property and growing vegetables, fruit and herbs. He has a few sheep and other farm animals. He is also an avid traveler and frequently takes extended periods of time to travel to Asia and Europe.

Linda Smith

- [26] Linda Smith has lived most of her life in Surrey, B.C. She is 38 years old. She obtained a high school degree in 1981. After completing high school, she worked for a year as a nanny. After that, she worked at a recycling depot and then in a jewelry store.

[27] In 1985, Ms. Smith obtained a position as a government employee in the B.C. Liquor Distribution Branch, clerking in a liquor store. She initially worked as an auxiliary employee. In 1989 she obtained regular employee status with a full time position in the liquor store at the Guilford Mall in Surrey which paid, at that time, about \$13.50 per hour.

[28] Ms. Smith lived with her parents in Surrey until she moved to Langley to live with Mr. Bucholtz. At the time, she owned no property. Other than her employment earnings and government pension, and a few thousand dollars in R.R.S.P.'s, Ms. Smith had no assets.

(b) The relationship between the parties

[29] Mr. Bucholtz and Ms. Smith began a relationship shortly after they met at a Christmas party in December 1986 but did not cohabit as spouses until many years later. They disagree both on the date they began living together as spouses and the date they separated. The length of the relationship is relevant to specific provisions in the cohabitation agreement and generally to the issue of whether the agreement is unconscionable.

[30] In the proceedings, Mr. Bucholtz testified that Ms. Smith began "moving toward" living with him in a spousal relationship in 1995. Ms. Smith testified that she began living with Mr. Bucholtz in 1990 or 1991, although she earlier deposed in an affidavit that they "began living together, on and off, at his home in 1993".

[31] I conclude, on the evidence set out below, that the parties began living together as spouses in August 1995.

[32] From the outset, the relationship was characterized by conflict and periods of separation. The parties argued and as a result stopped seeing one another from time to time.

[33] Between 1987 and 1990 Ms. Smith frequently stayed with Mr. Bucholtz for two to three days at a time, and for longer periods during vacations, but maintained her residence in the home of her parents. She was working full-time at the liquor store and was financially independent of Mr. Bucholtz.

[34] In 1990, Mr. Bucholtz decided to begin travelling. His work schedule was flexible and conducive to spending extended periods of time away. He planned a six month trip to Asia commencing in October 1990. Ms. Smith obtained a leave of absence from her job and traveled with him. On this and every other trip until May 1995, Ms. Smith paid all of her own travel expenses.

[35] The parties returned from Asia in March 1991. They again traveled to Asia in September 1991, returning in March 1992. Although the evidence of the parties conflicts on this issue, I find that Ms. Smith continued to live primarily at her parents' home throughout this period of time.

- [36] In the fall of 1992, Mr. Bucholtz decided to again travel to Asia, but this time traveled alone. He left in November 1992, and returned in February 1993. Ms. Smith stayed at the farm, having agreed to feed the sheep and generally maintain a presence on the farm during Mr. Bucholtz's absence. She continued working full time at the liquor store throughout this period.
- [37] When Mr. Bucholtz returned from Asia, he advised Ms. Smith of his relationship with a woman he met while travelling. This news placed strain on an already troubled relationship. Again, while Ms. Smith contends she was living in a spousal relationship with Mr. Bucholtz at this time, I conclude that Ms. Smith continued to live primarily with her parents. There is no dispute that at some point in late 1993 or early in 1994, Ms. Smith moved into a suite in the basement of her parents' home. She and Mr. Bucholtz sought counseling and decided not to have contact for a period of time. They saw little of each other for some months.
- [38] Ms. Smith's mother had been in ill health for some time and increasingly required care, which Ms. Smith provided. In early 1994, Ms. Smith's mother died. Thereafter, the parties began seeing more of each other. Ms. Smith frequently stayed with Mr. Bucholtz. In May 1994 they again broke off the relationship. Ms. Smith moved to the residence of a friend who lived a few miles from Mr. Bucholtz in Langley.
- [39] By the fall of 1994 the parties were again seeing each other. Mr. Bucholtz had planned a trip to Nepal and invited Ms. Smith to accompany him. She agreed to do so. They left for Nepal in November, returning in February 1995.
- [40] In the spring of 1995 Mr. Bucholtz began planning a trip to Indonesia. He wanted to travel with his son, Solon, and arranged with Lesley Clark to meet in Bali where she and Solon would be travelling. The trip was to commence in May 1995 and continue for four months.
- [41] Mr. Bucholtz asked Ms. Smith to make the Indonesia trip with him and Solon. She accepted. For the first time, Mr. Bucholtz paid all of Ms. Smith's travel expenses.
- [42] Shortly before the parties left for Indonesia, Mr. Bucholtz invested \$100,000, the proceeds from the sale of an investment property, in shares in an investment mortgage company known as Tralee Investments ("Tralee"). He advised Ms. Smith that he wished to provide her with a loan of the \$100,000, in the form of the shares in Tralee, and a gift of the interest accruing annually on the funds. The rate of return at that time was approximately 14%. Mr. Bucholtz proposed that the loan be secured by way of a promissory note. Ms. Smith agreed, and signed a promissory note dated May 1, 1995.
- [43] The parties left for Indonesia in May 1995 and returned at the end of August 1995. Mr. Bucholtz testified that upon their return, Ms. Smith began living with him at the farm. I accept that evidence.

- [44] In September 1995, Ms. Smith discovered she was pregnant. She and Mr. Bucholtz were delighted although the pregnancy had not been planned. They were disappointed to learn in November 1995, after attending for an ultrasound test, that Ms. Smith was no longer pregnant.
- [45] In March 1996, Ms. Smith discovered she was again pregnant and again the parties were very pleased. Their relationship, however, continued to be difficult. Ms. Smith was of the view that Mr. Bucholtz was controlling and rigid, and belittled her in front of others. In May 1996, following a quarrel, Ms. Smith packed her clothes and moved to her father's house. She was at the time about three months pregnant. She lived with her father for approximately four months.
- [46] About two months after Ms. Smith left, the parties began to attend counseling with a family counselor named Lawrence Stoyanowski. They first saw the counselor on July 16, 1996, and saw him again on several occasions until their reconciliation in the fall of 1996. In late August, they traveled to Osoyoos for a vacation together at the summer home of Mr. Bucholtz's parents. In September, they went on a kayaking trip. Ms. Smith moved back to the farm at some point in September.
- [47] In September 1996, Mr. Bucholtz's son, Solon, relocated from Montreal to Langley to live on the farm with his father and Ms. Smith. Solon was then thirteen years of age and entering high school. In October 1996, Ms. Smith went on maternity leave. Frazer was born November 6, 1996.
- [48] From the time Ms. Smith began living with Mr. Bucholtz in August 1995 until approximately one month before the birth of Frazer, she continued to work full time for the Liquor Distribution Branch at an annual salary of approximately \$30,000. Both before and after the parties began cohabiting, they kept separate bank accounts and dealt with their finances separately. In accordance with the financial arrangements between the parties, Ms. Smith did not contribute to the mortgage or any of the household expenses, including groceries. She did not pay rent. From May until August 1995, Ms. Smith traveled in Indonesia with Mr. Bucholtz, who paid all of the travelling expenses. For the balance of the year she worked full time and kept her salary for her own use. When she was not at work, she contributed by cooking, cleaning and maintaining the household, and by assisting in the harvesting and canning of the fruit and vegetables grown on the farm.
- [49] In 1996, Ms. Smith received the first of the annual dividends from Tralee in accordance with the loan arrangement the parties entered into the previous year. Although her income tax return for 1996 was not entered in the proceedings, Ms. Smith acknowledged that she received the dividends, which at the time were approximately \$15,000, and the full time salary from her employment until October 1996, when she went on fifteen weeks of paid maternity leave. I conclude from the evidence that Ms. Smith's total income for 1996 was approximately \$35,000, none of which she was required to contribute to household expenses or other expenses of daily living.

- [50] Ms. Smith remained on leave from her employment for all of 1997. After exhausting maternity leave benefits, she took ten weeks of parental leave and an additional year of unpaid leave. Her income for 1997, as disclosed by her tax return, was approximately \$20,000. About \$15,000 of that was derived from the Tralee dividends.
- [51] After Frazer's birth in November 1996, Ms. Smith spent all of her time looking after Frazer and attending to the daily living needs of the family. Her work in the home increased significantly as she was no longer working at the liquor store. She cooked, cleaned, assisted with the harvesting and canning of fruit and vegetables, and fulfilled the role of primary caregiver for Frazer. In addition, she assisted Mr. Bucholtz with the care of Solon. She looked after the farm and the children for about six weeks in early 1998 while Mr. Bucholtz traveled in Nepal.
- [52] Ms. Smith did not want to give up her position at the liquor store. It was a union job with good benefits, including a pension and medical and dental benefits. Mr. Bucholtz left to Ms. Smith the decision as to whether she would return to work. In order to keep her regular position, Ms. Smith was required to work a minimum number of hours after one year of unpaid leave. In March 1998, Ms. Smith decided to return to work at the liquor store for one extended shift per week, the equivalent of .25 of a full time job, in a job sharing arrangement with another employee. She typically worked on Saturday for 8.75 hours. Her income for 1998, according to her tax return, was approximately \$25,000, of which \$14,000 was derived from the Tralee dividends.
- [53] Ms. Smith's income for 1999, as reflected in her tax return, was about \$21,500. Of that, about \$13,500 was derived from Tralee dividends. The balance was employment income. Her job sharing arrangement ended in early January 1999 and she took an unpaid leave of absence until the end of February 1999, when she began another job share similar to the one she had the year before.
- [54] From the time the parties began living together, Mr. Bucholtz spent his time managing his mortgage and property investments and maintaining the farm. Because of a downturn in the real estate market and the economy generally, returns on his mortgage investments were not as good as they had been. Investment opportunities decreased. His companies acquired properties as a result of defaulted mortgages. He saw a slight drop in his income from Attica, the company in which he was the sole shareholder.
- [55] Mr. Bucholtz began irrigating and otherwise preparing some of his property for a community garden or "U Grow" operation. The project involves creating small garden plots and renting them to people who wish to grow their own produce and flowers. He received a gift of \$250,000 from his father which he applied to the purchase of two six acre parcels of land he was leasing from his family, one of which contained the community gardens. He planned to move an old house on to one of his properties in order to rent it, and began preparing the property for the house.

- [56] With respect to domestic duties, Ms. Smith asserts she provided all of the care to Frazer and did all of the cooking, cleaning and laundry. She says she did all of the canning and drying of farm produce, and kept the gardens in the front of the house. Mr. Bucholtz says that while Ms. Smith was primarily responsible for the care of Frazer, he actively assisted. He says the household chores, including cooking, cleaning and laundry, were shared responsibilities as were tasks related to the harvesting and preserving of farm produce. It is common ground that Mr. Bucholtz did most of the grocery shopping.
- [57] I conclude on the evidence that some of the domestic duties were shared and that Mr. Bucholtz assisted in the care of Frazer when he was not working outside the home. The parties otherwise divided their duties in fairly traditional fashion from the time Frazer was born until the relationship ended two and a half years later: Ms. Smith was generally responsible for the care of Frazer and the day to day functioning of the household while Mr. Bucholtz was responsible for the maintenance of the farm and his investments. When Ms. Smith returned to work on a part time basis, Mr. Bucholtz cared for Frazer during Ms. Smith's absence.
- [58] The parties' disagreements increased after the birth of Frazer. On March 15, 1999, after another fight, Mr. Bucholtz asked Ms. Smith to leave. Frazer was two and a half, and still breastfeeding. Ms. Smith left with Frazer and moved to her father's home.
- [59] It was Mr. Bucholtz who asked Ms. Smith to leave, but I conclude on the evidence that he did not, as contended by Ms. Smith, "throw her out". They both recognized the relationship was not viable and must end. They both knew they could not continue living together. Neither suggested in evidence that the relationship ended prematurely or that yet another reconciliation was possible. The arguments were frequent and heated. Each was thoroughly disenchanted with the other.
- [60] I further conclude that the relationship ended on March 15, 1999, when Ms. Smith left with Frazer, and not on October 1, 1998, as Mr. Bucholtz asserts. Ms. Smith filed an income tax return some time after the separation that was completed by Mr. Bucholtz's sister, an accountant who had assisted Ms. Smith with her returns for some years. In the return, Ms. Smith claimed a separation date of October 1, 1998. Ms. Smith says she did so on the basis of accounting advice. Regardless of her motive for completing the return in that manner, the parties lived together as spouses until Ms. Smith moved from the farm on March 15, 1999.
- (c) The cohabitation agreement
- [61] Mr. Bucholtz testified that from time to time after he and Ms. Smith began seeing each other, and certainly well before they began living together, he raised with Ms. Smith the issue of property division. Having been through the breakdown of his marriage with Ms. Clark, and with a son of that relationship to support, Mr. Bucholtz advised Ms. Smith that he intended to ensure he retained sole ownership of property and other assets acquired by him before and during a relationship.

- [62] Mr. Bucholtz further testified that when the parties began to cohabit in August 1995, he raised with Ms. Smith the issue of a cohabitation agreement to address issues such as ownership of property. He advised Ms. Smith that he did not wish to enter into a marriage-like relationship without an agreement in writing that clearly delineated his assets and providing, in the event of separation, that he would retain all assets except those specifically acquired by the parties jointly. As Mr. Bucholtz put it, he told Ms. Smith that such arrangement might not be acceptable to some, but if Ms. Smith did not agree to the arrangement the parties "would have to part company then and there."
- [63] Ms. Smith testified that Mr. Bucholtz had made his views concerning his assets known to her, and that she advised him she "was not with him for his money". She said she had "no problem in principle" with his desire to ensure that assets he acquired would remain his. However, Ms. Smith did not recall any discussions about a cohabitation agreement until the parties were separated in the summer of 1996.
- [64] In the course of the meetings with the family counselor during the parties' separation in the summer of 1996, the matter of the cohabitation agreement was discussed. Mr. Bucholtz testified that Ms. Smith acknowledged in these counseling sessions the "prominent features" of the cohabitation agreement which the parties had discussed before they began cohabiting.
- [65] Ms. Smith agreed in evidence that during the parties' separation in 1996 Mr. Bucholtz raised the issue of a cohabitation agreement. She was aware the agreement would deal with his assets but understood the parties would have further discussions about the contents of the agreement before it was drafted. Ms. Smith testified that Mr. Bucholtz presented her with a draft cohabitation agreement, without any further discussion, long after Frazer was born.
- [66] Mr. Bucholtz testified that in mid-October 1996, following discussions between the parties in counseling, he provided his lawyer with an outline of the matters he wished to address in a cohabitation agreement. His lawyer provided him with a draft of an agreement a few weeks later.
- [67] The parties' counselor, Mr. Stoyanowski, gave evidence in the proceedings. He confirmed that the parties met with him several times between July 16 and October 4, 1996. His clinical notes reflect that discussions took place about the cohabitation agreement, but Mr. Stoyanowski could not determine from the notes whether those discussions occurred in 1996, or in the fall of 1997 when the parties had further counseling sessions.
- [68] Ms. Smith gave birth to Frazer in November 1996. Mr. Bucholtz testified that he provided Ms. Smith with the draft cohabitation agreement in mid-December 1996. He told Ms. Smith she ought to seek independent legal advice and gave her \$500.00 toward the cost of the advice.

[69] Although Ms. Smith's recollection was that Mr. Bucholtz did not provide her with the cohabitation agreement until well into 1997, I conclude that she received it in early December 1996. Ms. Smith sought legal advice from a solicitor, Gordon Neate, about the draft agreement. In a letter to Ms. Smith dated January 6, 1997, Mr. Neate refers to a meeting he had with Ms. Smith on December 16, 1996.

[70] Mr. Neate gave evidence in the proceedings. He was unable to locate Ms. Smith's file and accordingly did not have the assistance of any file notes to refresh his memory as to the number of meetings he had with Ms. Smith or the precise nature of their discussions. He testified that December 16, 1996, was likely the first time they met. At that time, Ms. Smith provided him with the draft agreement and a synopsis of the relationship between the parties. They discussed specific concerns Ms. Smith had about the agreement.

[71] Mr. Neate's letter of January 6, 1997, provides an overview of the draft agreement which accurately summarizes the essence of the agreement proposed by Mr. Bucholtz:

The focus of the agreement is that each of you will retain whatever property you may own in your own name prior to cohabitation and during cohabitation. Any property that you acquire during cohabitation that is registered or purchased in both of your names is to be divided equally upon separation. The parties waive all rights to claim spousal support from the other. Regarding the child of the relationship the agreement sets out the parties shall have a joint custody and joint guardianship. The Agreement also makes provision for voluntary reduction of the amount owing pursuant to a Promissory Note executed by you in favour Mr. Bucholtz (sic).

[72] The agreement provided for the parties to maintain separate bank accounts and to keep all of their financial affairs separate. It also provided that Mr. Bucholtz would pay all expenses relating to the home, including utilities, taxes and insurance. This provision reflects the arrangements already in effect.

[73] With respect to assets of the parties, the agreement is clear. As Mr. Neate notes in his letter:

Paragraph 12 states that neither party shall rely on any oral expression or conduct that might suggest one party is holding property in trust for another. This means that verbal expression such as "this is our house" or "what is mine is yours" do not have any bearing on the division of assets as set out in the agreement.

[74] With respect to assets acquired by either party before the execution of the agreement, the agreement provided that any "income, profits and capital gain on the sale and disposition of his or her separate property shall adhere to the party who originally owned the assets ..."

[75] The agreement further specified that assets acquired after the execution of the agreement that were purchased or inherited by one party would remain the separate assets of that party. It also required that each party waive any right to the other party's estate

- [76] The agreement also addressed the matter of the \$100,000 loan. In essence, Ms. Smith was to continue receiving on an annual basis the interest on the funds in the form of dividends from the shares in Tralee.
- [77] In addition, on the anniversary date of the agreement each year, the principal balance of the loan was to be reduced by \$10,000 for the duration of the parties' cohabitation as spouses. In the event of the parties' separation, Ms. Smith was obliged to pay the balance of the loan in cash or by way of assignment of the Tralee shares to Mr. Bucholtz.
- [78] The agreement provided that the loan, including the interest accruing on the shares, would satisfy any claim Ms. Smith might otherwise have against Mr. Bucholtz as a result of the relationship. The loan is described as "consideration" to Ms. Smith "for any disadvantages that may arise against her and are in full and final satisfaction of any maintenance or asset claims Ms. Smith may have against Mr. Bucholtz arising from their relationship".
- [79] As well as giving an overview of the proposed agreement, Mr. Neate in his letter of January 6, 1997, undertook a clause by clause analysis of the agreement for his client. His letter refers specifically to the provisions that were raised by Ms. Smith as a concern and discussed in their meeting of December 16, 1996. The areas of concern related primarily to the absence of provision for Frazer in Mr. Bucholtz's will, and the absence of any provision for a home for Ms. Smith and Frazer in the event of Mr. Bucholtz's death. Ms. Smith was aware that Mr. Bucholtz had bequeathed the farmhouse to his son Solon.
- [80] Mr. Neate testified that he advised Ms. Smith her agreement to waive any interest in Mr. Bucholtz's assets would prevent her from claiming an interest in the family residence. For that reason, he said, he raised with Ms. Smith the possibility of proposing an amendment to Mr. Bucholtz's will, or including a provision in the agreement, for a life estate in the residence in her favour or outright transfer of the property to her in the event of Mr. Bucholtz's death.
- [81] Mr. Neate's letter contains several suggested amendments to the agreement with respect to these concerns. The letter does not suggest any amendments to the terms of the agreement relating to the division of assets with the exception of the disposition of the home in the event of Mr. Bucholtz's death.
- [82] With respect to the forgiving of \$10,000 annually on the \$100,000 loan, Mr. Neate explained the significance of the arrangement to any future claim Ms. Smith may have against Mr. Bucholtz in the event of their separation:
- ... [the agreement] acknowledges that you are accepting the amended terms of the loan in complete satisfaction of any claim that you may have against Mr. Bucholtz for maintenance or share of assets owned by him. You may feel that this is a rather attractive option if the entire \$100,000.00 is ultimately forgiven ... however, obviously the bargain would be somewhat less than satisfactory if you and Mr. Bucholtz were to separate in the near future.

- [83] Mr. Neate was unclear as to the dates on which he met with Ms. Smith, but testified that between December 1996 and December 1997, they met "at least half a dozen times". Mr. Neate formed the impression during this time that Ms. Smith's relationship with Mr. Bucholtz was "somewhat oppressive" and that she was under "considerable pressure" to sign the agreement. Ms. Smith did not, however, advise Mr. Neate that Mr. Bucholtz had threatened her with any negative consequences should she refuse to sign the agreement. Nor was there any suggestion that Mr. Bucholtz had emotionally or physically abused her.
- [84] Mr. Neate had telephone discussions with Mr. Bucholtz's lawyer concerning the agreement, but could not recall the contents of those discussions. While it was his practice to communicate in writing about any concerns or proposed amendments to agreements such as the one in issue, he now cannot locate Ms. Smith's file and has no record of any correspondence sent on Ms. Smith's behalf to Mr. Bucholtz's lawyer. He did, however, provide Ms. Smith some time ago with a copy of her file at her request. Neither Ms. Smith nor Mr. Bucholtz produced in these proceedings any correspondence that may have passed between their lawyers concerning the cohabitation agreement.
- [85] Mr. Neate advised Ms. Smith the agreement in its proposed form gave her very little. Upon separation, Ms. Smith would have no share in any of the assets currently held or later obtained by Mr. Bucholtz and no interest in the home; she would receive no spousal maintenance and would be required to repay the existing balance, if any, on the loan.
- [86] Ms. Smith advised Mr. Bucholtz that she did not wish to sign the agreement. When Mr. Bucholtz asked Ms. Smith why, she responded that she "just didn't like it". He asked Ms. Smith whether the issue was the division of assets upon separation; she replied the assets were not the issue.
- [87] Mr. Bucholtz testified that because Ms. Smith had previously agreed with his views on the issue of assets, her refusal to enter into an agreement was undermining the relationship. He asked Ms. Smith to consider mediation as a method of reaching an agreement they could both accept. Ms. Smith raised the issue of mediation with her counsel, Mr. Neate, but was advised by him not to enter into mediation in the absence of legal counsel. Mr. Bucholtz would not accept that as a condition of mediation.
- [88] Discussions between the parties about the cohabitation agreement ensued for several months. They again attended their counselor, Lawrence Stoyanowski, for a number of sessions in the fall of 1997. Mr. Stoyanowski testified that when Ms. Smith expressed reluctance to sign the agreement he asked her whether she was concerned about issues of property and assets. Ms. Smith responded that her concerns were not about money. She stated that she should not have to sign a cohabitation agreement if her relationship with Mr. Bucholtz was based on love and trust.

- [89] Mr. Stoyanowski testified that at no time during counseling with the parties did Ms. Smith suggest that Mr. Bucholtz was, or had been, physically abusive toward her. Nor did she suggest that Mr. Bucholtz had threatened her in any way. It was apparent from the discussions during counseling that concluding a cohabitation agreement was important to the continued relationship of the parties, so Mr. Stoyanowski suggested to Ms. Smith that she seek the advice of legal counsel as to her options.
- [90] Ms. Smith sought the advice not only of legal counsel, but of her father, Floyd Smith, and a close friend, Carla Pearson. Both testified in the proceedings that they advised Ms. Smith not to sign the agreement.
- [91] It is clear from the evidence that the parties did discuss the cohabitation agreement drafted by Mr. Bucholtz's counsel and that some changes were made to the draft. The basis for the discussions was Mr. Neate's letter of January 6, 1997, which Ms. Smith provided to Mr. Bucholtz. Although the evidence is unclear as to the precise timing, at some point in the fall of 1997 Mr. Bucholtz provided his legal counsel with the amendments he and Ms. Smith had discussed and to which he was prepared to agree. His counsel provided him with the new agreement, incorporating the changes as instructed. Mr. Bucholtz signed the agreement on November 27, 1997.
- [92] Ms. Smith testified that she felt she had no choice but to sign the agreement. Mr. Bucholtz had made it clear that if she did not sign it, the relationship was over. As the house belonged to Mr. Bucholtz, she would have to move out. She had a young child, and did not want to put him in daycare and return to work in order to support him. Ms. Smith says she felt "trapped" by her circumstances.
- [93] Ms. Smith returned to Mr. Neate's office on December 9, 1997, because she understood she must sign the agreement in the presence of a lawyer. Mr. Neate testified that he was surprised to see Ms. Smith, but she told him the parties had reconciled their differences and she was now prepared to sign the agreement. The cohabitation agreement bears Ms. Smith's signature and the date of December 9, 1997, and Mr. Neate's signature as witness. Mr. Neate prepared a Solicitor's Certificate of Independent Legal Advice and he, along with Ms. Smith, endorsed the Certificate on the same date.
- [94] Mr. Neate did not see Ms. Smith again until May 1999, when she returned to his office seeking advice as to whether there was any basis on which to have the cohabitation agreement set aside. She had separated from Mr. Bucholtz a couple of months earlier. Ms. Smith told Mr. Neate that before she signed the agreement Mr. Bucholtz had threatened to "have her put down", or, in other words, to have her killed, if she ever attempted to lay claim to his assets. Ms. Smith also told him Mr. Bucholtz had been emotionally and physically abusive toward her during the relationship.

- [95] Ms. Smith testified that while she could not recall the date, Mr. Bucholtz made the threat to "have her put down" some time before she signed the cohabitation agreement. Not surprisingly, Mr. Bucholtz adamantly denies making the threat.
- [96] I cannot accept Ms. Smith's evidence about the threat. Ms. Smith could not recall when the threat was made, nor was she able to give it any context except to say Mr. Bucholtz made the threat in the kitchen at the farm. She did not raise it with her family counselor, with her legal counsel before signing the agreement, with family or with friends, all of whom she had spoken to about the agreement. At the same time Ms. Smith says she was facing this serious threat, she also says she believed she and Mr. Bucholtz "were a family", and that a relationship built on love and trust did not require a written agreement. I accept Mr. Bucholtz evidence that he did not make the threat.
- [97] Ms. Smith also asserts there were several occasions on which Mr. Bucholtz either hit or pushed her, or threw things at her. Mr. Bucholtz denies hitting or pushing Ms. Smith, but admits to losing control in two instances during heated arguments with her. On one occasion he threw an object at the wall beside Ms. Smith; on another occasion he grabbed her arms and held her face.
- [98] It is unclear whether Ms. Smith relies on these allegations of abuse to say she feared Mr. Bucholtz and for that reason signed the cohabitation agreement. In any event, I conclude from the extensive evidence given by each of the parties about the dynamics of their relationship that they contributed equally to its stormy nature. Each was equally capable of shouting, swearing and throwing objects in the heat of the moment. Ms. Smith left the farm in anger on several occasions after they had quarreled; on one occasion she drove through the closed farm gate.
- [99] When Ms. Smith left for the last time on March 15, 1999, she moved with Frazer to her father's home. She and Frazer reside there still. A few weeks later Ms. Smith returned to Mr. Neate's office to seek advice about the cohabitation agreement. Mr. Neate advised her, among other things, that she could seek spousal maintenance under the Act but must do so within one year of her separation from Mr. Bucholtz. Ms. Smith did not do so.

Analysis

- [100] As indicated earlier, s. 120.1 of the Act does not apply and therefore the fairness of the cohabitation agreement cannot be measured against the presumption of equal sharing of family assets contained in the Act. At common law, there is no presumption of an equal sharing of assets upon the breakdown of a spousal relationship. The cohabitation agreement can only be attacked using the equitable doctrine of unconscionability.
- [101] On the facts set out above, I cannot conclude that the cohabitation agreement is, in the words of the court in *Morrison*, supra, a "grossly unfair" bargain obtained by an abuse of power. The bargain is not an unconscionable one for the following reasons:

-
- [1] Mr. Bucholtz did not accumulate his assets at the expense of Ms. Smith. He was in a much better position economically than Ms. Smith, but had obtained that economic advantage before August 1995, when the parties began living together as spouses.
- [2] Ms. Smith entered the spousal relationship with a full time job and good employment benefits but no other assets. She has maintained that job although she is currently working on a part time basis. The decision to return to work after Frazer's birth was left to Ms. Smith, as was the decision to work part time.
- [3] The parties never combined their financial resources. Ms. Smith agreed, from the outset of the relationship and well before she became pregnant with Frazer, that the parties would keep their finances completely separate and that she would not contribute any of her salary to the mortgage or other household expenses. Before she began living with Mr. Bucholtz she had known him intimately for almost nine years and was aware of his views, however ungenerous, concerning the preservation of his assets.
- [4] The facts do not support the claim by Ms. Smith that she was threatened, intimidated or abused by Mr. Bucholtz.
- [5] From November 1996 to March 1999, Ms. Smith was Frazer's primary caregiver and worked in the home cooking, cleaning, and gardening, and harvesting and preserving produce from the farm. She continued to earn income during this time. None of her income was applied to Mr. Bucholtz's assets.
- [6] When the parties began living together as spouses, Mr. Bucholtz loaned Ms. Smith \$100,000.00 in the form of the Tralee shares, and gave her the accrued dividends which amounted to, on average, about \$14,000.00 annually. That amount is equivalent to more than 50% of the salary Ms. Smith earned from her job at the liquor store when she first began living with Mr. Bucholtz. Ms. Smith received those payments in each of the years 1996, 1997, 1998 and 1999.
- [7] In 1995 and for most of 1996, Ms. Smith worked full time and kept her earnings. She paid nothing toward living expenses and did not contribute to the mortgage. For the years 1997, 1998 and 1999 her income was \$20,000.00, \$25,000.00 and \$21,000.00 respectively, most of it derived from the Tralee dividends, the rest from her salary and benefits. In these years, her income was for her personal use. Again, she paid nothing toward living expenses although she bought some of Frazer's clothing and toys with her money.
- [8] Ms. Smith consulted with her lawyer on several occasions over a period of twelve months concerning the cohabitation agreement. Mr. Neate's letter to Ms. Smith, which sets out her concerns about the agreement and suggests certain amendments, does not suggest changes to the provisions concerning Mr. Bucholtz's assets in the event of separation. Ms. Smith provided the letter to Mr. Bucholtz and it formed the basis of discussions between the parties concerning possible amendments. There is no evidence to suggest that Ms. Smith or her lawyer proposed some other means of accumulating assets as spouses or dividing them

in the event of separation.

- [9] Mr. Bucholtz and the family counselor asked Ms. Smith whether her reluctance to sign the agreement stemmed from the provisions concerning property and other assets. Ms. Smith consistently said she had no difficulty with those aspects of the agreement. She said she had no disagreement in principle with Mr. Bucholtz's keeping any assets that had not been acquired jointly by the parties.
- [10] Mr. Bucholtz offered to enter into mediation to achieve an acceptable cohabitation agreement but Ms. Smith, on advice from her lawyer, refused the offer.
- [11] Ms. Smith did not allege that Mr. Bucholtz misled her with respect to the nature and extent of his assets, or led her to believe she had any interest in them.

Fairness of the agreement

- [102] But for the cohabitation agreement, what is the nature of the compensation Ms. Smith would receive for her contributions during the relationship? Ms. Smith conceded in argument that her contributions were not substantially and directly linked to the acquisition or maintenance of Mr. Bucholtz's assets; as a result, she was not seeking the imposition of a constructive trust over those assets. She argued instead that her domestic services were indirect contributions entitling her to a sum of money based on the concept of quantum meruit.
- [103] I have considered the circumstances, and the compensation granted, in the cases cited by Ms. Smith on the issue of unjust enrichment. In these cases, which do not involve written agreements between the parties, a sum of money was awarded on the basis of quantum meruit for unpaid indirect contributions (primarily domestic services) to the relationship by one of the spouses. I am satisfied, based on my review of the compensation awarded in these cases, that the financial provisions of the cohabitation agreement are not an unconscionable bargain.
- [104] The parties cohabited as spouses for three and a half years. For about two and half of those years, Ms. Smith provided household and childcare services. As has been increasingly recognized by our courts, a spouse cannot be expected to provide domestic services for free. Domestic contributions are of equal value as financial contributions: see *Peter v. Beblow*, [1993] 1 S.C.R. 980. As I have noted, Ms. Smith did not provide childcare and household services for free. On average, she earned about \$24,000 per year during the time the parties lived together. She did not pay for living expenses during that time.
- [105] Counsel for Ms. Smith provided the court with a number of decisions concerning the setting aside of separation agreements between married spouses. Section 65 of the Act applied in those cases, giving the court jurisdiction to reapportion assets, despite a separation agreement, if the agreement was unfair in light of the presumption of equal shares in family assets. In each case, the fairness of the agreement was measured against

the presumptions arising under Parts 5 and 6 of the Act. Those cases do not apply here because, as indicated, s. 120.1 of the Act is not retrospective in effect.

[106] The provisions of the Act that do apply to unmarried spouses are those dealing with spousal and child support. Ms. Smith did not apply for spousal support under the Act despite being advised by her lawyer to do so; any such claim is now statute barred. The issue of child support for Frazer is dealt with later in this decision.

[107] I have considered, in light of the above findings, the cases cited by Ms. Smith in which the court set aside cohabitation agreements between unmarried spouses. Those cases rest on findings of fact that do not resemble the facts of this case: *Lafreniere v. Sajna*, [1988] B.C.J. No. 1257 (S.C.); and *Atkinson v. Caton*, 2000 BCSC 1157, [2000] B.C.J. No. 1604. In each case, the abusive, deceptive and otherwise egregious conduct of the asset-owning spouse, coupled with the financial and indirect contributions of the non-owning spouse, resulted in a finding that the agreement was unconscionable.

[108] The financial provisions of the cohabitation agreement in this case are by no means generous. But in all of the circumstances, the agreement is not an unconscionable bargain and Ms. Smith must be held to it.

[109] It follows that:

- (a) Ms. Smith's claim that Mr. Bucholtz was unjustly enriched must be dismissed; and
- (b) because the parties cohabited until March 1999, Mr. Bucholtz must reduce the principal balance owing on the \$100,000 loan by \$10,000 (December 7, 1998, being the completion of the first year of the agreement); and Ms. Smith must either assign to Mr. Bucholtz the remaining nine-tenths of the Tralee shares and all dividends accruing since March 15, 1999, or retain those shares and pay him the amount of \$90,000 (cohabitation agreement, paragraphs 19(e) and (f)) and an amount equal to all dividends that have accrued on the shares since March 15, 1999.

2. IS JOINT CUSTODY OF FRAZER APPROPRIATE?

[110] Ms. Smith asks for sole custody and guardianship of Frazer, with access to Mr. Bucholtz the first and third weekends per month and one overnight visit in the second and fourth weeks. Mr. Bucholtz's seeks, as his main position, joint custody and guardianship; he seeks to have Frazer live with him three days each week and with Ms. Smith four days each week.

[111] Ms. Smith's argument against joint custody is two-fold. First, she says she has been Frazer's primary caregiver and sole custodial parent since his birth; because Mr. Bucholtz is seeking to alter the status quo he must show that the current arrangement is not in Frazer's best interests. Second, she says joint custody is not workable because the animosity between the parties has resulted in their inability to cooperate as joint custodial parents.

- [112] The issue in this case, as in all cases involving custody of children, is whether the custodial arrangement sought is in the best interests of the child. There is no presumption of law in favour of joint or sole custody. As the Court of Appeal noted in *Robinson v. Filyk* (1996), 28 B.C.L.R. (3d) 21, the court is entrusted with the best interests of the particular child whose custody arrangements are in issue. Presumptions of law may diminish the ability of the court to consider all of the individual circumstances of the child in order to safeguard his or her best interests.
- [113] I am charged in this case with considering the unique circumstances of Frazer Bucholtz, and having done so I conclude that joint custody is in his best interests. At this stage in Frazer's life, given his age and development, he should live with Ms. Smith four days each week and with Mr. Bucholtz three days. The facts on which I base my conclusions are the following.

Factual context

- [114] Frazer was two and a half years old when the parties separated in March 1999. He was still breastfeeding at the time and Mr. Bucholtz acknowledged Frazer must be with his mother. In the two years since the separation, Frazer has lived primarily with Ms. Smith in her father's home. He has spent most weekends with Mr. Bucholtz and longer periods of time by agreement with Ms. Smith or by court order.
- [115] Since the separation, Mr. Bucholtz has made considerable efforts to obtain access to Frazer. Shortly after the separation he asked Ms. Smith to consider weaning Frazer so the child could more easily move back and forth between the parties' homes and have overnight visits at the farm. Ms. Smith declined. She also declined the suggestion that she express breast milk to facilitate overnight visits with his father. Mr. Bucholtz had Frazer only during the day, usually when Ms. Smith was at work. The exception was approximately a month after the separation, when Ms. Smith was hospitalized suddenly for five days. Frazer stayed with Mr. Bucholtz throughout the hospitalization. After that, Ms. Smith was prepared to agree only to visits during the day.
- [116] Mr. Bucholtz suggested they find a mediator to help them reach an agreement on access. Ms. Smith agreed. They met with a mediator by the name of Melanie Saunders in June 1999, who helped them arrive at a tentative access schedule. Mr. Bucholtz was to have Frazer for one day, including overnight, per week for three weeks, and then two days per week. Ms. Smith was working one extended shift per week, usually Friday or Saturday, so they agreed Mr. Bucholtz would take Frazer from Friday to Sunday one week and Saturday to Monday the next week. They agreed this arrangement would remain in place at least for the summer of 1999.

- [117] In September 1999, Ms. Smith agreed to let Frazer travel with Mr. Bucholtz to Ontario for a week to visit family friends. In October and November 1999, Ms. Smith agreed to Mr. Bucholtz having Frazer for blocks of three and four days. In late November Mr. Bucholtz left for a two month trip to India.
- [118] Following the separation, Mr. Bucholtz agreed to pay \$300 monthly for Frazer's support and to share equally any additional expenses so long as Ms. Smith provided receipts. Shortly before Mr. Bucholtz was scheduled to leave for India, Ms. Smith filed an application for child support in the amount of \$550 based on her understanding that Mr. Bucholtz's income was about \$70,000. She did not discuss an increase in Frazer's support with Mr. Bucholtz before making the application. Mr. Bucholtz agreed to pay the increased amount on a without prejudice basis while he was away on the understanding that Ms. Smith could bring the application back on once he returned. Mr. Bucholtz continued to pay \$550 per month until May 2000 when he filed his income tax return. He then reduced the payments to \$335 per month based on his taxable income and the Federal Child Support Guidelines.
- [119] While in India, Mr. Bucholtz met a woman, Sofia Reis, with whom he began a relationship. Ms. Reis was a native of Portugal traveling in India. Ms. Smith had, in the fall of 1999, also begun a relationship with a man who was a family acquaintance.
- [120] When Mr. Bucholtz returned from India, he and Ms. Smith were getting along quite well. Mr. Bucholtz suggested that Frazer stay with him for five consecutive days every two weeks instead of two days each week. Ms. Smith, after some hesitation, agreed to four consecutive days of access every two weeks. This schedule continued for several weeks.
- [121] In March 2000, Ms. Reis came to stay with Mr. Bucholtz for a month. Mr. Bucholtz did not tell Ms. Smith about his new relationship, nor did he tell her about Ms. Reis' visit. Ms. Smith heard from Frazer after one of his four-day access visits that Ms. Reis was staying at the farm. Ms. Smith was upset that she had not been told, and was concerned about the impact of the new relationship on Frazer.
- [122] Ms. Smith concluded that the extended access visits were not working well for Frazer. She believed Frazer was cranky and tired after four days away, and advised Mr. Bucholtz that they must revert to the two days per week schedule. Mr. Bucholtz was not happy with this but complied. In June 2000, he wrote to Ms. Smith proposing a new access schedule of alternating weeks with Frazer and a couple of fourteen day periods during the summer. Ms. Smith refused to agree to the schedule on the basis that Frazer, now three and a half, was too young to be away from her every second week and for the longer periods in the summer as proposed. Mr. Bucholtz on several occasions from April to September 2000, proposed mediation to resolve access but Ms. Smith refused. In June 2000, Mr. Bucholtz commenced the action giving rise to these proceedings.

- [123] Access arrangements became more difficult to make. Ms. Smith was of the view that Frazer was not handling the weekend access visits with his father very well. She reported that Frazer cried and acted out when Mr. Bucholtz arrived to take him to the farm and when Ms. Smith dropped him off at the farm. She also reported that when Frazer was returned at the end of the weekend he was agitated, unruly and unable to sleep.
- [124] Ms. Smith called a number of witnesses to give evidence about Frazer's behaviour after access visits. Ms. Smith's father, Floyd Smith, testified that Frazer was sometimes unwilling to be left with Mr. Bucholtz and was "ratty" upon his return. Mr. Smith noted that Frazer was "ratty" at other times as well.
- [125] Diane Smith has been Frazer's preschool teacher since January 2000. She testified that Frazer is a very well-adjusted little boy, popular among the children in class, intelligent, and generally meeting all expectations in terms of development for a youngster his age. She noted that earlier this year Frazer seemed a bit sensitive on a few occasions after the weekend but that has since resolved. She did not observe any behavioral problems that would require intervention.
- [126] Dharam Khalsa is a parenting support worker in a program called "Support for Parents of Young Children". She testified that Ms. Smith sought her assistance because of stress in her life and her concern about Frazer's behavior after access visits. She made a number of visits to the Smith home between August 1999 and January 2000. She was present in the home on one occasion after Frazer returned from a weekend visit with his father. She noted that Frazer was short-tempered and had difficulty eating. Ms. Smith reported that Frazer had not slept well the night before. Ms. Khalsa told Ms. Smith that Frazer's behavior was "somewhat normal" for children his age after an access visit. She did not suggest any kind of assistance for Frazer, such as counseling, but would have done so had she felt the problem was serious. She did not see Ms. Smith after January 2000 because Ms. Smith reported that she was more comfortable with her situation.
- [127] Because she perceived that Frazer was not coping well with his weekends away from her, Ms. Smith did not want to increase the length of the visits. Mr. Bucholtz, for his part, wanted access for alternating one-week periods and longer periods in the summer. In July 2000, the parties appeared before Master Joyce (as he then was), who ordered that Frazer's weekend visits with his father continue and that Frazer spend three nine-day blocks with his father during the summer. Master Joyce also ordered an assessment pursuant to s. 15 of the Act concerning the issue of custody.
- [128] The parties agreed that Dr. Michael Elterman would perform the s. 15 assessment. Dr. Elterman is a clinical and forensic psychologist who has prepared hundreds of court reports on custody and access. Between August 10, 2000, and October 30, 2000, he interviewed the parties and their collateral references and made visits to the home of each party to observe the parents interacting with Frazer. He observed Ms. Smith's father, Floyd Smith, with Frazer in the Smith home. He observed Frazer with Sofia Reis, who now lives at

the farm with Mr. Bucholtz, and with Mr. Bucholtz's son, Solon. He also interviewed Ms. Reis because she is actively involved in parenting Frazer with Mr. Bucholtz, and Solon because he had experienced parenting by Mr. Bucholtz.

[129] Dr. Elterman issued a lengthy report on February 18, 2001. The gist of his report is a recommendation that the parties have joint custody with Frazer residing with Ms. Smith four days each week and Mr. Bucholtz three days. Dr. Elterman concluded that Frazer was too young to be with each parent for alternating weeks but felt such an arrangement would likely be appropriate in two or three years' time.

[130] Dr. Elterman recounted Ms. Smith's reports of Frazer's behavior problems following his weekend visits with Mr. Bucholtz and Ms. Reis. He also described the difficulties the parties have had with shared access, access transfers and other aspects of joint parenting. Dr. Elterman was clearly aware of the friction between the parties and the difficulties they have encountered with joint parenting. Despite these problems, he concluded that Frazer's interests were best served by a joint custody arrangement. In his report he states:

What I have found is echoed by the collateral references and regardless of the strengths and weaknesses of each parent there is a high commitment on the part of both parents to be as good a parent as possible to Frazer. Both parents in this case have both time and energy to give him and both are mainly at home during the week. The collateral references that I spoke to on both of their parts were consistent with my own impressions. I found Ms. Reis to be a positive, thoughtful influence. Solon is a teenager who is close and admiring of his father and, in my own impressions, a credit to the way that he has been raised by Mr. Bucholtz ...

... In my observation of Frazer with both parents, I found him to be attached to both and to be well looked after in each home. I have no concerns about his physical care in either home and he certainly seems well supervised by both parents. I suspect that the behavioral problems are a reflection more of the atmosphere, animosity and what he overhears more than the actual time away [from Ms. Smith] ...

[131] Dr. Elterman suggested the differences between the parents be addressed by "providing an alternative avenue for the 2 parents to speak about issues rather than at the front door". He proposed the parents attend a monthly meeting with a family counselor or mediator to talk about present and future issues arising from their joint parenting of Frazer.

[132] Dr. Elterman was called to give evidence about his recommendations. He reiterated his view concerning joint custody with access divided on a three-day/four-day basis. When asked about extended access periods for vacations, he expressed the view that a two-week absence from one parent was the most Frazer could handle at his age. Even at that, Dr. Elterman cautioned that Frazer should have constant telephone access to the absent parent during the two-week period.

- [133] Ms. Smith disagrees with Dr. Elterman's recommendation concerning joint custody, and is critical of the methodology he used to prepare his report and the facts upon which he based his conclusions. She sought a review of the report by another forensic and clinical psychologist, Dr. Conrad Bowden. Dr. Bowden provided a report and was called to give evidence with respect to its contents. Dr. Bowden did not conduct his own clinical assessment and did not offer any opinion on the issue of custody. His evidence was limited to offering a critique of the methodology used by Dr. Elterman and, in particular, the personality tests Dr. Elterman administered to the parents. He also offered his views as to possible causes of Frazer's behavior, as described by his mother, after access visits with his father.
- [134] Both Dr. Bowden and Dr. Elterman testified that behavioral problems in children after access visits may be the result of any number of factors. The animosity engendered by a custody dispute is an obvious source of stress to a child. New relationships begun by one or both parents is another. Both psychologists acknowledged that Frazer likely experiences anxiety when separated from each of his parents. Both were careful to say there must be evidence of a direct link between behavioral problems and access visits before any adverse conclusion could be reached about the effect of access visits on the child.
- [135] While I have no doubt Ms. Smith holds an honest belief that Frazer's visits with his father were affecting him in a negative way, there is simply no objective evidence to support her view. Neither the parenting counselor nor Frazer's preschool teacher was concerned by Frazer's behavior. Both saw a happy, well-adjusted child.
- [136] Family members and friends of both Ms. Smith and Mr. Bucholtz testified in the proceedings. They spoke positively about the parenting skills and dedication of both parents and described their own involvement in Frazer's life. Floyd Smith is clearly a doting grandfather to Frazer and is very involved in his life. Mr. Bucholtz's parents are also dedicated grandparents with much time and energy for Frazer. Sofia Reis, Mr. Bucholtz's partner, is committed to caring for Frazer. Everyone, including Ms. Smith, agreed that Ms. Reis was a positive addition to Frazer's life.
- [137] After hearing some sixteen days of evidence in this case, including almost four days of evidence from each of the parents, I have reached the same conclusion as Dr. Elterman: Ms. Smith and Mr. Bucholtz are both dedicated parents who bring different strengths, resources and styles to their parenting responsibilities. Frazer's best interests require that the ongoing decisions concerning his education, extracurricular activities and other aspects of his life be made jointly by his parents, and that he grow up experiencing his parents in equal measure.
- [138] Ms. Smith has been Frazer's primary caregiver since the parties separated, and has dedicated herself to her son in an admirable way, but Mr. Bucholtz has made every effort to obtain access in order to be Frazer's caregiver as well. He has cared for Frazer regularly since the separation, taking him each weekend and for longer periods during the summer

months. Frazer has a home with Ms. Smith, but he also has a home at Mr. Bucholtz's farm with his own room and his own belongings. He has friends who live near the farm. He regularly spends time with Mr. Bucholtz's extended family.

- [139] Ms. Smith has certainly had more time with Frazer; in that sense she remains his primary caregiver. Frazer is actively involved in the community surrounding the Smith home. Ms. Smith has enrolled him in numerous activities, including preschool, at the neighboring community center. She participates with him in almost all of his activities. Frazer has friends who live in his neighbourhood and with whom he regularly attends activities.

The status quo

- [140] In *Poole v. Poole* (1999), 64 B.C.L.R. (3d) 70, the Court of Appeal discussed the relationship of a stable environment to the health and emotional well-being of a child. In assessing stability, the court must determine what the "status quo" is for the particular child. The Court cited Madam Justice Stromberg-Stein in *Mitchell v. Mitchell*, [1998] B.C.J. No. 1684 (S.C.), who said, "The 'status quo' implies the relationships and way of life of the child in a particular location, not merely a geographic locale."
- [141] What is the status quo in this case? Ms. Smith says it is Frazer's life in the community surrounding her home. I am of the view that is not entirely correct. In the two years since his parents separated, Frazer has spent more time in Surrey with Ms. Smith but that is largely because the parties have been pursuing litigation to determine custody and access arrangements for much of that time. As Dr. Elterman noted, Frazer has two homes, one with each parent, and has a full life in the homes of both parents. A joint custody arrangement whereby Frazer spends four days with his mother and three days with his father will not constitute a significant change in the status quo. Frazer has strong attachments to both parents and their extended families. His way of life will continue in much the same manner as before.

Cooperation between the parties

- [142] I have considered the authorities presented to me on the issue of joint custody between parents who have a history of conflict or difficulty communicating. In many of those cases, the parents actively involved the children in their disputes and withheld access as a means of control. In those cases, the court concluded the best interests of the children were not served by a joint custody order.
- [143] In the present case, my conclusion that joint custody is appropriate is not one I have reached by default. I am of the view that it is in Frazer's best interests to have both parents with their different personalities, resources, and world views equally involved in his life and the decisions that must be made about his life. The differences these parties have had on access issues are to a great extent caused by the litigation. Any blame for lack of cooperation between them is, on the evidence, shared blame. To deny joint custody

because these parents have had some difficulty cooperating would be to reward one of the parents for his or her intransigence. I agree with Dr. Elterman's view that they are capable of overcoming their differences for purposes of effectively co-parenting Frazer.

[144] Dr. Elterman proposed that the parties attend counseling or mediation once each month to discuss any differences they have with respect to decisions about Frazer. The counseling would focus entirely on present and future co-parenting issues, not past relationship problems. I endorse that recommendation.

[145] One issue that might otherwise be appropriate for the parties to discuss in counseling is the choice of Frazer's kindergarten. However, the fall term of school will begin soon and the parties have indicated they are prepared to have the court deal with the issue. The parties have expressed differing views on the type of school Frazer ought to attend. Ms. Smith prefers to have Frazer enrolled in a neighbourhood school which offers kindergarten but not a French immersion program. Mr. Bucholtz prefers Frazer's enrolment in a francophone school (CADRE program) although neither he nor Ms. Smith is bilingual.

[146] Both parents have indicated they could "live with" a French immersion program. Simon Cunningham Elementary School, which is in Ms. Smith's neighbourhood, has a French immersion program at the kindergarten level. Unless the parties agree to some other arrangement, I conclude that Frazer ought to attend Simon Cunningham in the French immersion kindergarten class.

[147] I turn now to the issue of access. As indicated, Frazer will routinely spend four days per week with Ms. Smith and three days per week with Mr. Bucholtz. Ms. Smith regularly works an extended shift at the liquor store one day per week on Saturday. The current access arrangement sees Frazer with Mr. Bucholtz Friday morning to Sunday morning one week and Saturday morning to Monday morning the next week. I note the access provided in para. [148] does not give Ms. Smith any access to Frazer on the weekends during the school year. Ms. Smith wishes to have some weekend time with Frazer to engage in activities involving other members of her family and friends, most of whom have weekends off and work weekdays. At the same time, she wants a schedule that permits her to continue working Saturdays in her job sharing arrangement. Mr. Bucholtz wishes to have some extended time with Frazer each month to facilitate outings such as camping and skiing trips.

[148] In light of these considerations, access will be as follows unless otherwise agreed by the parties:

[1] For two weeks each month (alternating), Frazer will spend from Thursday after school, where he will be picked up by Mr. Bucholtz, until Sunday at 7:00 p.m. with Mr. Bucholtz, when he will be returned to Ms. Smith's residence;

- [2] For the other two weeks each month, Frazer will spend from Friday after school, where he will be picked up by Mr. Bucholtz, until Monday after school with Mr. Bucholtz, when he will be picked up from school by Ms. Smith; in the event the Monday is part of a holiday long weekend, Mr. Bucholtz will return Frazer to Ms. Smith's residence by 7:00 p.m.
- [3] With respect to the remaining weeks of this summer: Frazer will spend from August 10, 2001, when he will be dropped off by Ms. Smith at Mr. Bucholtz's residence, until 5:00 p.m. August 16, 2001, with Mr. Bucholtz when he will be returned to Ms. Smith's residence by Mr. Bucholtz; he will spend from August 16 to 27, 2001, with Ms. Smith who will return him to Mr. Bucholtz's residence at 10:00 a.m. Monday, August 27; Frazer will remain with Mr. Bucholtz until Monday, September 3 at 7:00 p.m. when he will be dropped off by Mr. Bucholtz at Ms. Smith's residence;
- [4] With respect to summer holidays after this year, Frazer will spend his summer school holidays equally with each parent. If there is no agreement on dividing this time, Frazer will spend alternating two week blocks with each parent until he is at least seven years old. The parent with whom Frazer is staying will ensure that he has telephone contact with the other parent every two or three days;
- [5] For the annual school spring break, Frazer will spend his first spring break with Ms. Smith and the next with Mr. Bucholtz and alternate in this manner thereafter;
- [6] With respect to all other holidays (statutory holiday weekends, Christmas, New Year, Easter etc) and other special occasions, the parties are entitled to equal amounts of time with Frazer. Failing agreement, they will use the services of the counselor/mediator to arrive at a satisfactory schedule for Frazer's time with each parent.
- [7] As suggested by Dr. Elterman, when Frazer is seven or eight years of age the parties may wish to change to a system of alternating weeks of access by each parent, and longer blocks of time during summer holidays with each parent.
- [149] Dr. Elterman's recommendation with respect to counseling is a prudent one. The parties will engage the services of a counselor/mediator to meet once per month for at least the next eight months to discuss and make decisions concerning issues such as Frazer's education and extra curricular activities, and to discuss any ongoing problems or grievances that arise from their co-parenting. They will bear the cost of counselling equally between them.
3. WHAT ARE THE APPROPRIATE CHILD SUPPORT ARRANGEMENTS FOR FRAZER?
- [150] Several issues arise with respect to child support for Frazer:
- (a) Should an income greater than that reported by Mr. Bucholtz be imputed to him for purposes of assessing maintenance for Frazer?
- (b) Should an income greater than that currently being earned by Ms. Smith be imputed to her?

(c) As Mr. Bucholtz will have custody of Frazer more than 40% of the time, is a reduction in his child support payments appropriate (Guidelines, s. 9)?

(d) Should an order be made for retroactive payment of child support?

(a) Imputing income to Mr. Bucholtz

[149] Mr. Bucholtz, until recently, has been paying child support in the amount of \$335 per month, based on an income of roughly \$39,000. As of June 2001, Mr. Bucholtz has paid \$352 because his year 2000 tax return discloses a "line 150" income of \$45,874. Ms. Smith says Mr. Bucholtz's income for purposes of paying child support far exceeds his income as disclosed in the tax returns.

[150] Mr. Bucholtz's financial statement filed in the proceedings for the year 1999 discloses net capital holdings of \$1,891,828.98. His farm lands are valued at about \$850,000. The worth of the holdings in Attica and the numbered company is valued at approximately \$800,000. Investments in other companies total about \$100,000. He has approximately \$220,000 in R.R.S.P.'s. He has a cash account of approximately \$50,000. As a result of my conclusions concerning the cohabitation agreement, he also has approximately \$100,000 in Tralee shares.

[151] Mr. Bucholtz's debts consist primarily of a mortgage in the amount of \$200,000 against his home. He had paid off his mortgage but mortgaged the house again in 1997 to secure a line of credit he uses to finance mortgage investments. His financial statement discloses an annual mortgage cost of \$8,433.88. He claims total annual expenses of almost \$60,000 but pays those without incurring debt.

[152] Mr. Bucholtz spends a half day per week managing the investments held by Attica and the numbered company. He works from home using his telephone and a fax machine. He travels occasionally to check on his properties and schedules meetings from time to time with people to generate more investment opportunities. He derives almost all of his income from the earnings of his two companies. In addition, he has some interest income from other investments.

[153] Mr. Bucholtz's minimal and flexible hours permit him to pursue his interests in organic farming, outdoor leisure activities and travel. He spends much of his time maintaining his farm properties, growing organic produce and raising a few sheep. The farm is not an income-producing venture. Moreover, Mr. Bucholtz has been able to substantially reduce his taxable income by writing off the farm expenses. The community garden, or "U Grow" operation, Mr. Bucholtz recently developed on one parcel of his land has, to date, generated only farm losses. Nonetheless, Mr. Bucholtz is optimistic the gardens will eventually become quite profitable.

- [154] Mr. Bucholtz has experienced a fairly significant decrease in his annual income since 1997. His total "line 150" income over the past several years as disclosed in his tax returns is as follows: for 1997, \$96,080.10; for 1998, \$68,571.92; for 1999, \$38,900.00; and for 2000, \$45,874.00.
- [155] Mr. Bucholtz explained that the mortgage investment business has not been as lucrative in the past few years because of the declining real estate market in British Columbia. The value of land has decreased particularly outside the lower mainland. Mr. Bucholtz's companies have suffered some capital losses due to delinquencies in mortgages and foreclosures, and rates of return are low. Nevertheless, the market is now showing signs of new life; income from investment mortgages and land development is rising. Mr. Bucholtz expects that his income from his mortgage investment business will improve over the next few years.
- [156] Tax returns of Attica and the numbered company, complete with schedules, were filed in the proceedings for the years 1997 to 1999 inclusive. Mr. Bucholtz, as sole shareholder of Attica, has been in a position to deduct numerous expenses. In 1998, for example, the company paid wages of approximately \$5,000 to Mr. Bucholtz's son, Solon, who was then 16 years of age. In 1999, Attica deducted a cost of \$22,140 in salaries. Approximately \$18,000 was paid to Mr. Bucholtz; neither Mr. Bucholtz nor his accountant could recall who received the remaining \$4,140. By way of further example, Mr. Bucholtz writes off significant vehicle, office and promotional expenses through Attica yet works only a few hours per week, primarily from home. These are all allowable deductions from an accounting perspective because Mr. Bucholtz is the sole shareholder in Attica.
- [157] Ms. Smith argues there are several options available to the Court to determine Mr. Bucholtz's income for purposes of paying child support. She says the Court may:
- (a) determine Mr. Bucholtz's income on the basis of the expenses he has claimed where there is no corresponding increase in debt (*Ebrahim v. Ebrahim*, [1997] B.C.J. No. 2039 (S.C.));
 - (b) impute income to Mr. Bucholtz because he is not reasonably using his assets of approximately \$1,900,000 to generate an income (Federal Child Support Guidelines, s. 19(1)(e));
 - (c) impute income from Attica's gross revenues (Guidelines, s. 18(1)(a)); or
 - (d) include in Mr. Bucholtz's income many of the expenses he is allowed to deduct for income tax purposes (Guidelines, s. 19(1)(g)).

[158] Mr. Bucholtz is prepared to pay child support based on his annual income regardless of the amount of time Frazer lives with him. He proposes that he pay \$436 per month, which is based on an income of \$51,118.74, the average of his "line 150" income for the years 1998, 1999 and 2000 (Guidelines, ss. 16 and 17). He acknowledges the fluctuating nature of the mortgage investment business may require an approach such as averaging his income from the past three years.

Analysis

[159] The relevant Guideline provisions for purposes of assessing income are ss. 16 to 19. Under s. 16, the court must determine the parent's annual income using the "sources of income" described under the heading "Total income" in the T1 form issued by Revenue Canada and adjusted under Schedule III. Section 17 permits the court to look at patterns of income in the three most recent tax years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[160] Section 18 of the Guidelines permits the court, where a parent is a shareholder of a company, to include in the parent's annual income all or part of the pre-tax income of the corporation (18(1)(a)). Section 19 allows the court to impute income in a variety of circumstances, including where a parent unreasonably deducts expenses from income.

[161] As noted by Martinson J. in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.), at para. 27, it is not necessary to find that a spouse is deliberately underreporting income in order to invoke these Guideline provisions. The Guidelines are designed to establish a fair standard of support for children regardless of a spouse's intent:

...parents have a joint and ongoing obligation to support their children and in order to meet this legal obligation a parent must earn what the parent is capable of earning. Imputing income is the way in which the court gives effect to this legal obligation. The Guidelines are not designed to punish parents who try to avoid child support payments. Instead, they are designed to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation (s. 1(a)).

[162] Martinson J. also noted (at para. 28) that a parent's spending for business objectives, however valid, may not be relevant to child support issues:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support.

[163] That approach was recently endorsed by the Court of Appeal in *Kowalewich v. Kowalewich*, 2001 BCCA 450, [2001] B.C.J. No. 1406. After citing the *Baum* case with approval, the Court went on to say (at para. 44-45) that while fairness does not require a court to second-guess a spouse's business decisions, it does require:

...that a spouse's allocation of pre-tax corporate income between business and family purposes be assessed for fairness by an impartial tribunal when parents cannot reach agreement on priorities as they would in an intact family...

To determine whether "total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the Guidelines, the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.

[164] With those principles in mind, what approach should the court take in this case? I reject the suggestion that Mr. Bucholtz could more reasonably use his assets to produce an income. Although his Financial Statement indicates net capital holdings at about \$1,900,000, it is unrealistic to suggest that he could liquidate his holdings and instead invest the money. I accept Mr. Bucholtz's evidence that to sell the assets of his companies at this point would be financially imprudent. I also accept that he cannot reasonably be expected to sell his farm property which is essentially his home and is where he pursues his interest in raising organic produce.

[165] I do, however, accept that a number of Mr. Bucholtz's company expenses and personal deductions, while appropriate for accounting purposes, have artificially lowered his total income for purposes of child support under the Guidelines. The most recent complete Financial Statement filed pursuant to Rule 60D of the Rules of Court is for the 1999 taxation year. The statement discloses "Total income" at \$38,910.31. His employment income (\$43,328.81) and income from investments (\$12,536) totaled \$55,865.79. He claimed a rental income loss of \$7,653.87, a loss of \$3,082.93 for his sheep venture and a loss of \$6,218 for his "U Grow" project.

[166] Almost all of Mr. Bucholtz's employment income (the \$43,328) was derived from Attica, of which he is sole shareholder, and from the numbered company, in which he holds a 50% interest. He pays himself a salary from Attica, which is essentially whatever money is left in the company after all business expense deductions are made. In 1999, Mr. Bucholtz deducted \$4,140 in wages that neither he nor his accountant could explain. He deducted \$1,209 in capital cost allowance, \$3,018 for promotions, \$1,952 for office expenses and \$6,644 for vehicle expenses.

[167] As noted, Mr. Bucholtz manages Attica and his other investment interests from home, working on average a few hours per week. His office is an alcove with a computer and fax machine. I conclude that a significant portion of the vehicle and promotional expenses and all of the capital cost allowance, are amounts that ought to be included in Mr. Bucholtz's income pursuant to s. 18(1)(a) of the Guidelines: see *Dornik v. Dornik*, (1999), 1 R.F.L. (5th) 37 (B.C.C.A.); *Meuser v. Meuser*, [1988] B.C.J. No. 1614; *Elliott v. Elliott* (1997), 30 R.F.L. (4th) 339 (Alta. Q.B.); *Baum v. Baum*, *supra*. The office and cell phone expenses are reasonable business expenses.

- [168] I also conclude that with respect to Mr. Bucholtz's personal deductions, the "farm" loss for the sheep is not a reasonable deduction pursuant to s. 19(1)(g) of the Guidelines. Mr. Bucholtz does not earn his living from the farm, which has never produced an income. He earns his living from his mortgage investments. His farm losses are legitimate deductions for income tax purposes but not for purposes of child support: *Beutler v. Maki* (2000), 194 Sask. R. 109 (Sask. U.F.C.). The deduction for the losses incurred by the "U-Grow" operation are somewhat more reasonable, as Mr. Bucholtz expects a return on that investment sometime in the future. It is appropriate to include one-third of that expense in his pre-tax income. On the evidence, I conclude that the rental income loss should also be added to his total income.
- [169] Historically, Mr. Bucholtz's investments have earned substantially more than they are earning now. In 1996, for example, his line 150 income was \$96,000. As his counsel points out, if the case had been heard last year, his income averaged over the preceding three years pursuant to s. 17 of the Guidelines would have been almost \$68,000. That amount does not take into account the various personal and corporate deductions that would be added to his income in those years for purposes of the Guidelines.
- [170] For the year 2000, Mr. Bucholtz reported a \$6,000 increase in his total income. Taking into account all of the variables as described, and in particular the pretax income of Mr. Bucholtz's companies, the personal deductions disallowed for purposes of the Guidelines, and the income averaging provisions of s. 17 of the Guidelines, I impute an income to him of \$80,000.
- (b) Should a higher income be imputed to Ms. Smith?
- [171] As noted earlier, Ms. Smith holds a full time position with the Liquor Distribution Branch with an annual salary of approximately \$38,000. Since Frazer's birth she has worked .25 of a full time job in a job share arrangement with another employee. Her Financial Statement discloses employment income of \$7,273 annually. She has no property or other assets, and has significant debt as a result of borrowing money from her father for living expenses and the funding of this litigation.
- [172] Ms. Smith's terms and conditions of employment are governed by the collective agreement between her union and the government. She is covered by medical, dental and pension plans. Frazer is on her dental plan, which is a significant benefit. Under the collective agreement, Ms. Smith's position is full time. She does not have the option of working part time. The job share she currently has is a voluntary arrangement with another employee to which the employer has acquiesced, but may end at any time. Her job involves shift work under the collective agreement, including "swing shifts" which means she must work evenings every other week once she returns to full time employment.
- [173] The significance of her work circumstances is that she has very little flexibility to increase her hours of work unless she can find a colleague willing to accommodate her. The one extended shift per week arrangement she now has works well because she has time to focus

on Frazer's needs. She is actively involved in Frazer's preschool, which has parent participation, and has him enrolled in many activities that require her to be with him. Frazer will be attending kindergarten in the coming school year but that involves only half days each week. Shift work for Ms. Smith means that for significant periods of time she cannot care for Frazer when he comes home from school, nor can she make day care arrangements.

- [174] It is not reasonable at this point in Frazer's life to expect Ms. Smith to return to work full time. Her employment options are limited. She has been wise not to give up her current employment particularly with its collective agreement benefits and hourly rates of pay. These jobs are increasingly rare. The one disadvantage is the lack of flexibility in hours. That is the reality of her job. If she can arrange a job share that permits her to work some additional hours, given the increased amount of time Frazer will be with his father, she should do so.
- [175] There is no basis at this time to impute an income to Ms. Smith. For purposes of the Guidelines, her income is as disclosed in her Financial Statement.
- (d) In light of the shared custody order, should the court decrease the amount of child support otherwise payable by Mr. Bucholtz?
- [176] Section 9 of the Guidelines requires the court to consider certain factors where a spouse has physical custody of a child for not less than 40 percent of the time over the course of a year. Those factors include the table amounts payable by each spouse, any increased costs of shared custody, and the means, needs and other circumstances of each spouse and of the child for whom support is sought.
- [177] I conclude that it is not appropriate to order any reduction in the payments Mr. Bucholtz is required to make to Ms. Smith for Frazer's support. Mr. Bucholtz advised the Court that he is committed to providing the full amount of support for Frazer based on his income even if he has equal custody of his child. His counsel hedged that commitment slightly by suggesting that if an income other than that asserted by Mr. Bucholtz was imputed to him, he may wish to rely on s. 9 of the Guidelines. I do not accept that condition as an appropriate one. Mr. Bucholtz provided no evidence to suggest there would be any increased cost to the shared custody arrangements. His financial resources are vastly better than Ms. Smith's. On the factors enumerated in s. 9, there is no basis to order any set-off for Mr. Bucholtz.
- [178] Given the relative incomes of the parties, it is appropriate to order that Mr. Bucholtz pay 80% of all extraordinary expenses. The parties agree that the expenses incurred by Ms. Smith for preschool, all extracurricular activities in which Frazer is enrolled, dental expenses not covered by Ms. Smith's plan, and all other expenses for which Ms. Smith has provided receipts, are appropriately characterized as extraordinary expenses for purposes of the Guidelines. I conclude that the counseling Ms. Smith has arranged for Frazer at "The Ark" is also an appropriate extraordinary expense, and that the counseling should continue

at the discretion of the counselor.

[179] To date, Mr. Bucholtz has paid \$225 toward these expenses. Ms. Smith is entitled to be reimbursed retroactively for all extraordinary expenses she has paid for Frazer since the separation, based on Mr. Bucholtz's obligation to pay 80% of those expenses.

(e) Is an order for retroactive child support appropriate?

[180] The Court has jurisdiction to order retroactive child support under the Act where the parties were not previously married: see *T.(E) v. T.(K.H.)* (1996), 25 R.F.L. (4th) 98 (B.C.C.A.); and *L.S. v. E.P.* (1999), 67 B.C.L.R. (3d) 254 (B.C.C.A.). As was noted by the Court of Appeal in *L.S. v. E.P.*, the use of the term "retroactive" is questionable, since the obligation to pay support arises immediately upon the birth of the child and continues regardless of whether or when the custodial spouse brings an action.

[181] The discretion to make such an order is not exercised as a matter of course. There must be some justification for it due to the potential for unfairness to the paying parent: *L.S. v. E.P.*, supra. Having weighed the arguments for and against retroactivity, I conclude that in this case there is good reason to order retroactive payment of support for Frazer.

[182] Mr. Bucholtz began paying child support when the parties separated in March 1999. He did so in accordance with the Guidelines based on a pre-tax income of approximately \$39,000. For a five month period commencing in late 1999, he paid a greater amount based on a notionally higher income. It comes as no surprise to Mr. Bucholtz that he has had an obligation to provide financial support to his son both before and after the separation. That support is the right of Frazer, not his mother.

[183] The support provided until now has not been sufficient. Ms. Smith has incurred significant debt to support Frazer. Courts have ordered retroactive support in cases where the custodial parent has borne a disproportionate share of child maintenance expenses: *L.S. v. E.P.*, supra. In this case, fairness requires that Ms. Smith be compensated for meeting Frazer's needs over and above her financial capacity to do so. I am satisfied that Frazer was in need of support and that Mr. Bucholtz had the ability to provide it during the period of time in question.

[184] I order that Mr. Bucholtz pay a lump sum to Ms. Smith in an amount equal to the difference between the support he is now required to pay and that he has been paying since March 1999.

[185] Because the incomes of both parents will likely change from year to year, I order the parties to produce to each other, annually, their filed income tax returns by June 15 of the year.

SUMMARY OF FINDINGS

[186] The cohabitation agreement is valid and Ms. Smith's claim against Mr. Bucholtz for unjust enrichment is accordingly denied.

- [187] The parties will have joint custody of Frazer, who will reside four days each week with his mother and three days with his father.
- [188] An income of \$80,000 is imputed to Mr. Bucholtz who will pay child support of \$637 per month to Ms. Smith. Mr. Bucholtz will bear 80% of costs for extraordinary expenses.
- [189] Ms. Smith is entitled to retroactive child support from March 1999, in a lump sum payment.
- [190] The parties will meet once each month for the next eight months with a counselor or mediator experienced in family matters to discuss and resolve co-parenting issues.
- [191] The parties may speak to costs.

"WEDGE J."

WEDGE J.

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Prepared on 30 October 2026 · Esheria