
CANADA / JUDGMENT

C.D.G. v. D.J.P.

2010 BCSC 1216

COURT

Supreme Court of British Columbia

DECIDED

31 August 2010

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2010 BCSC 1216 C.D.G. v. D.J.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.D.G. v. D.J.P.,

2010 BCSC 1216

Date: 20100831

Docket: E091843

Registry: Vancouver

Between:

C.D.G.

Plaintiff

And

D.J.P.

Defendant

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Plaintiff:

T.R. Bell

Counsel for the Defendant:

K.J. Heinrichs

J.K. Broadhurst

Place and Date of Trial:

Vancouver, B.C.

April 12-16, 19-22,

and April 27-29, 2010

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2010

INTRODUCTION

- [1] The parties to this divorce proceeding separated on May 23, 2009, following about 10 years of marriage and about 11 ½ years of cohabitation. The plaintiff wife, CG, is currently unemployed, except that she has been earning about \$200 per month editing film scripts. The defendant husband, DP, works as a portfolio manager for a financial services firm. The parties' older child is their daughter, V, who is seven years old. Their younger child is their son, A, who is four years old.
- [2] The parties disagree about parenting and financial issues. With respect to parenting, CG seeks primary residence of the children, while DP seeks equal time parenting, and relies on the report of a psychologist, Dr. England. DP agrees that he should pay child support and spousal support, but the parties differ on the proper calculation of DP's income, and on what if anything should be considered as CG's income for determining support. CG seeks reapportionment of assets in her favour, while DP argues that the assets should be divided equally.
- [3] In addition, CG made an application during the course of the trial for an order that DP should be found to be in contempt of court, both by failing to pay child and spousal support as ordered, and by disposing of registered education savings plan ("RESP") funds despite an order restraining disposal of family assets.
- [4] The unusual features in this case include V's diagnosis of "dyspraxia", and CG's allegations that DP has acted violently and in ways displaying poor judgment as a parent.
- [5] The parties both asked that the style of cause be amended to refer to them by initials only, on the basis that publication of the allegations of violence and discussion of V's dyspraxia could harm the children and DP's career. They relied on *D. v. D.*, 2008 BCSC 306, 51 R.F.L. (6th) 334, in which the court made such an order on the basis that public disclosure of the family's personal circumstances and history would be harmful to the children. I make such an order, and release these reasons for judgment using initials only, on the basis of the potential harm to the children of using the full names.

[6] The issues proceeded to a trial occupying 10½ days.

BACKGROUND FACTS

[7] Before the parties met, CG had obtained her B.A. degree with a major in communications and minor in psychology. She obtained work at film production companies in the areas of Vancouver and Los Angeles, California. She progressed to positions developing and editing stories, earning about \$24,000 per year.

[8] Before the parties met, DP also studied communications at university.

[9] The parties met in February 1994, when DP worked selling ad space for a trade publication for the film business.

[10] The parties started living together in Los Angeles in August 1997, and were married on February 14, 1999.

[11] The parties moved to Vancouver in 1999. DP obtained a job as a financial planner for the entity which is now CIBC Wood Gundy ("CWG"). He continues to work for CWG. CG obtained work for about a year for a non-profit organization doing fund-raising and communications work. CG then moved to a job in marketing for a software company, working there until the spring of 2001, when the job ended. She has not worked full time since 2001.

[12] Both parties were eager to become parents. Their daughter V was born in November 2002. The parties essentially agreed that CG would primarily care for the children, and would remain out of the workforce until the children were at school.

[13] DP worked long hours, even after V was born, usually from market opening at 6:30 a.m., returning home at 6:30 p.m. or 7:00 p.m.

[14] Periodically, CWG has provided DP with funds under a discretionary "Loan Bonus" program. Essentially, CWG would provide a lump sum to employees like DP, on the basis that it was a loan. Over an agreed period, CWG would notionally credit the loan account by the amount due to repay it. As a result, DP's taxable income included the repaid portion of the loan, consisting of both principal and interest, rather than the lump sum at the time DP received it.

[15] Periodically, CWG has provided DP with stock options exercisable years later. The value, if any, of those options depends on the market price of the stock when the options mature. DP would routinely exercise the options and sell the stock, receiving equity compensation from Solium Capital.

[16] CWG paid DP a first Loan Bonus of \$9,791 in January 2002.

[17] CWG paid DP a second Loan Bonus of \$30,523.69 in January 2005. It was to be repaid over a period of 5 years ending in January 2010, at the rate of \$508.73 per month (being \$6,104.76 per year).

- [18] The parties' son, A, was born in January 2006.
- [19] CWG paid DP a third Loan Bonus of \$50,000 in January 2006. It was to be repaid over 10 years ending in January 2016, at the rate of \$416.67 per month (being \$5,000 per year).
- [20] In early 2006, DP enquired with CWG about becoming an associate portfolio manager, and moving from commissions based on sales transactions to commissions based on portfolio size. DP anticipated that this change in his business model would result in a short term reduction in income, but a long term increase in income and in time to devote to the family.
- [21] In early 2006, V began receiving speech therapy, and she continues to do so.
- [22] DP's line 150 income in 2006 was \$183,780. CG's was about \$20,000, which was income DP paid her on the basis that CG was providing marketing services to DP. Without the income-splitting, DP's income would have been about \$204,000.
- [23] In 2007, DP completed course work to qualify as a portfolio manager.
- [24] In late 2007, V was in kindergarten, and started receiving treatment from a paediatric physiotherapist.
- [25] DP's line 150 income in 2007 was \$208,044. CG's was about \$22,000, again primarily from income-splitting.
- [26] In early 2008, V started receiving treatment from Ms. Ward, a paediatric occupational therapist, who continues to see V.
- [27] In April 2008, DP was admitted to CWG's Advisor Managed Account Program, and designated an Associate Portfolio Manager.
- [28] The parties took marriage counselling with Mr. Matthews from spring 2008 to June 2009. DP started coming home earlier on Mondays, Wednesdays and Friday, but not consistently.
- [29] DP's line 150 income in 2008 was \$138,168. This is a significant decline, to about two-thirds of his 2007 income, which DP attributes to his new business model. Again, CG's income of about \$23,0000 arose primarily from income-splitting.
- [30] CWG paid DP a fourth Loan Bonus of \$55,000 in June 2008. It was to be repaid over 10 years ending June 2018 at the rate of \$458.33 per month (being \$5,500 per year).
- [31] By early 2009, the parties were living in a home on Handsworth Road in North Vancouver, B.C. ("Handsworth Home").
- [32] The first incident that CG relies on as showing DP's bad judgment occurred in March 2009, before the parties separated, and I will refer to it as the "First Incident". DP was doing math problems with V, and she began to cry. CG concluded that DP was being unnecessarily demanding, and she took him into the next room to tell him to calm down. She blocked the door so that he could not leave while she was talking to him.

- [33] CG testified that DP forcibly grabbed her, leaving visible marks on her upper arms. Around this time, CG's personal trainer, Ms. Bolt, saw visible marks on CG's upper arms.
- [34] DP testified that he gently physically moved CG to the side. He testified that this would not have been sufficient to cause bruising.
- [35] After considering all the evidence, I have concluded that DP was rough with CG in the First Incident, and in fact was more physically forceful than he realized.
- [36] The parties started living separately but under the same roof on May 23, 2009. At that time, CG was 38 years old, DP was 43 years old, V was six years old, and A was three years old.
- [37] The events of June 15, 2009 were contentious, and I will term them the "Second Incident". CG's evidence was essentially that, after she hid DP's briefcase from him, DP became enraged. CG testified that DP restrained CG from going outside, cancelled her panic button calls to police, repeatedly pushed her and stomped on her feet in front of the children, followed CG to a neighbour's home, and entered that home without permission by opening the locked front door. DP left when the neighbour asked him to leave the neighbour's home. CG suffered bruising and a broken toe in the course of the Second Incident.
- [38] DP's evidence was that he was unable to find his briefcase, and that CG denied knowing where it was. He testified that CG began to scratch him, and he held her arms to prevent her from attacking him further, and that she fell down. He acknowledged that CG was bruised from being restrained by DP. He testified that he tried to help her get back on her feet, but she continued to scream. He testified that she repeatedly turned on the alarm and he repeatedly turned it off. DP suggested that CG used the opportunity to create a situation to force DP out of the Handsworth Home. DP suffered a scratch on his temple in the Second Incident.
- [39] There is a tape recording of part of the Second Incident. It is likely that CG inadvertently stopped and restarted the recording briefly. The tape recording includes a lot of screaming, most of which sounded like CG, but some of which sounded like one or both of the children. Unfortunately, at one point in the recording, DP asked V to come and see what was happening, and said that CG was acting crazy.
- [40] Again, after considering all the evidence, I have concluded that DP was rough with CG, and used more force than he realized. CG screamed almost continuously and uncontrollably. This created a difficult situation. It would have been much better if DP had left the area and allowed CG to calm down, instead of involving V in their dispute.
- [41] Initially, no one was charged with a criminal offence in connection with the Second Incident.
- [42] CG left the Handsworth Home with the children on June 15, 2009, and the three of them stayed with CG's mother until about July 3, 2009.

- [43] CG commenced these divorce proceedings on June 17, 2009. The relief sought in the statement of claim includes interim and permanent child and spousal support. CG did not immediately apply for interim child or spousal support.
- [44] On June 24, 2009, Cullen J. made an order ("Cullen 2007 Order") including the following terms:
- (a) by consent, the parties have interim joint custody and interim joint guardianship of V and A, with primary residence to be with CG in the Handsworth Home, and on the basis that if the parties cannot agree on significant decisions concerning V and A, CG shall have the right to make that decision, subject to DP having a right to seek review of the decision by the court;
 - (b) DP shall vacate the Handsworth Home within ten days, after which CG shall have exclusive occupancy of the Handsworth Home;
 - (c) DP shall have reasonable and generous interim access with V and A, to include at least alternate weekends from Friday at 5:00 p.m. to Sunday at 5:00 p.m. ("Weekend Access"), and access from 3:00 p.m. to 6:00 p.m. on Tuesdays and Thursdays in weeks before Weekend Access, and Mondays, Wednesdays and Fridays on the weeks after Weekend Access;
 - (d) each party shall facilitate one daily telephone access between the children and the other party when the children are in his or her overnight care;
 - (e) by consent, both parties were restrained from disposing of or dealing with family assets or other assets in issue between the parties pending written agreement between the parties or further order of the court;
 - (f) by consent, the parties were restrained from entering premises where the other party and V and A reside, and the parties were restrained from directly or indirectly annoying, communicating with, or attempting to communicate with, the other party and the children, save and except for the purposes of exercising access or communicating as joint guardians and custodial parents;
 - (g) by consent, the parties were restrained from speaking with the children about this lawsuit and from speaking adversely about the other party in the presence of the children; and
 - (h) by consent, a report under s. 15 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), was to be prepared by an agreed psychologist, to be paid for by DP at first instance.
- [45] In July 2009, CG borrowed about \$7,000 from the parties' joint line of credit.
- [46] Around July 3, 2009, CG and the children moved back into the Handsworth Home, and DP moved into rental accommodation.
- [47] There was another incident on July 20, 2009 ("Third Incident"), this time involving a disagreement between DP and CG's father, AG. AG was about 73 years old at the time. AG thought that DP had said something mean to V on a prior occasion, and made a cryptic comment which DP responded to with a cryptic comment. AG then provoked DP by kicking

DP's car door into DP's leg. DP responded by pushing AG onto the ground. DP says he did so because AG reached out with his hands to grapple with DP. CG took a photograph of DP standing above AG who was seated on the ground. Fortunately, AG was not injured.

- [48] DP used excessive force in the circumstances. He is a far younger and stronger man than his father-in-law. While it was inappropriate for AG to kick DP's car door into DP's leg, DP overreacted and acted childishly by pushing AG.
- [49] Following the Third Incident, DP began videotaping the events when he picked up the children and dropped them off.
- [50] By consent order made August 4, 2009 by H. Holmes J. at a judicial case conference, DP was required to remain in his vehicle for all pick-ups and drop-offs of the children, CG was required to take all steps to ensure that third parties on her behalf, including her parents, stay in the house and do not approach DP's vehicle, and CG was required to put the children directly in their car seats.
- [51] There was another incident on August 7, 2009 ("Fourth Incident"). DP was picking up the children from the Handsworth Home and videotaping the exchange. V was objecting to leaving the Handsworth Home, and DP pointed the camera at V. CG took the camera, and DP chased her and pushed her, asking her for the camera.
- [52] Mr. Lowry, a friend of CG's, grabbed DP, which restrained DP from trying to get the camera out of CG's hands. DP got into his car. The children were buckled into their car seats. Even though the sliding door beside A was still open, DP drove about one-half block down the road before stopping and shutting the door.
- [53] CG did not return the camera to DP. She reported the incident to the police and gave the camera to them.
- [54] In August 2009, the parties hired Ms. Perotta, a counsellor, to assist the children. The children continue to see her.
- [55] In August 2009, CG first gave DP notice of her intended application for interim spousal and child maintenance.
- [56] There was another incident on August 28, 2009 ("Fifth Incident"). DP was picking the children up from the Handsworth Home. CG was putting the children in DP's car, but was doing so slowly. While CG was leaning into the car, DP drove his car so that it lurched forward a few inches. DP testified that looking back, he would now choose not to apply the accelerator.
- [57] DP's action in causing the car to lurch was a childish and unsafe way of indicating his displeasure with CG for taking a long time to say goodbye to the children.
- [58] V experienced a significant weight gain in the summer of 2009.

- [59] In late September 2009, DP was charged with assault causing bodily harm in connection with the Second Incident. Those charges have now been stayed.
- [60] DP was released on an undertaking dated September 30, 2009 ("Undertaking"), including these conditions:
- (a) DP was to have no contact directly or indirectly with CG except for the purposes of picking up and dropping off the children or in the presence of legal counsel or attending court; and
 - (b) DP was not to attend at the Handsworth Home, except that he could attend in his vehicle at the front of the property for the purposes of picking up and dropping off the children. During those drop-offs and pick-ups, DP was to remain in the vehicle with his vehicle turned off until the children were safely placed in the vehicle or removed from the vehicle.
- [61] By September 2009, CG had withdrawn a total of \$17,000 from the joint line of credit.
- [62] On October 15, 2009, DP and CG were both at the school playground. DP was volunteering at V's school, when CG and A arrived to pick up V. DP went over to A at the playground and played with him. CG called the police and advised them about the incident.
- [63] DP was charged with breaching his Undertaking on October 16, 2009. He was released on a recognizance ("First Recognizance") which included the two conditions to the Undertaking which are quoted above.
- [64] On October 28, 2009, Master Donaldson made an order ("Donaldson 2009 Order") including the following :
- (a) by consent, DP shall pay interim interim child maintenance of \$1,444 per month commencing November 1, 2008, payable on the 15th of each month;
 - (b) by consent, DP shall pay the following:
 - (i) V's occupational therapy expenses;
 - (ii) V's paediatric physiotherapy expenses;
 - (iii) V's speech therapy expenses; and
 - (v) family counselling expenses; and
 - (c) by consent, DP shall pay CG interim interim spousal support of \$1,595 each month commencing November 1, 2009, and payable on the 15th of each month.
- [65] CG took V to a dietician in November 2009.
- [66] DP failed to pay the child and spousal support due November 15, 2009.

- [67] DP provided CG with a cheque dated December 15, 2009. She tendered it to the bank, and it was returned marked "account closed." DP had closed the account. He testified that he did so because there were insufficient funds to honour the cheque, and closing the account would avoid the fee applicable to cheques returned for insufficient funds.
- [68] In December 2009, DP suggested, through counsel, that CG agree to use equity from the Handsworth Home for expenses, and advised that the December support cheque would likely be returned for insufficient funds. CG did not respond to the suggestion about using equity. She may not have understood that DP was suggesting using his equity alone to satisfy support payments.
- [69] DP did not even make a partial payment of child or spousal support during the period November 15, 2009 to March 31, 2010.
- [70] DP applied for a credit card but his application was denied in December 2009.
- [71] In December 2009, DP received \$2,839.12 from CWG. His line of credit showed available credit of at least \$3,276.87. He had about \$1,600 in available credit on his Visa credit card.
- [72] DP's line 150 income in 2009 was \$126,624. This consisted of net commission income of \$104,790.36, plus attributed Loan Bonus income of \$16,604.76, plus equity compensation of \$13,766.30 from Solium Capital, less expenses. DP did not receive a Loan Bonus lump sum payment in 2009. He has not split income with CG since 2008. He argued that he had actual employment expenses of about \$2,000.
- [73] In January 2010, one of DP's credit card providers lowered his credit limit.
- [74] The parties had set up an RESP for the children's education. The value on January 29, 2010 was \$34,375.15.
- [75] In January 2010, DP was paid about \$7,650 by CWG. His line of credit showed almost \$1,500 in available credit. In that month, DP sold Olympic tickets for about \$1,100, being about \$100 above cost.
- [76] In mid-January 2010, CG withdrew about \$11,000 from the RRSPs despite the Cullen 2009 Order. Her counsel advised DP's counsel about the withdrawal at about the time it occurred. CG testified she did not know that the RRSP in her name was a family asset.
- [77] On or about February 4, 2010, DP redeemed \$25,775 of the children's RESP account without telling CG or seeking her consent.
- [78] The next day, February 5, 2010, DP redeemed a further \$3,535 of the children's RESP account, again without telling CG or seeking her consent. The RESP balance on February 26, 2010 was about \$5,000.

[79] In February 2010, CG sold her diamond ring for \$7,500 to raise money for bills. She also withdrew a second sum of about \$4,500 from the RRSP on February 12, 2010, and a third sum of about \$8,000 on February 17, 2010.

[80] On February 11, 2010, DP was required to deposit \$1,000 for a Recognizance of Bail ("Second Recognizance"), and there was a change to the applicable conditions. The first relevant condition quoted above regarding the Undertaking was changed to provide as follows:

You are to have no contact directly or indirectly with CG. You may have indirect contact with CG for the purposes of picking up and dropping off the children or in the presence of legal counsel or attending court and as may be incidentally required when attending at public school or sporting or musical functions for V or A.

[81] The second relevant condition of the Second Recognizance was the same as in the Undertaking and First Recognizance.

[82] CG swore a financial statement on March 29, 2010. It revealed to DP for the first time that CG had withdrawn further amounts from the RRSP account for a total withdrawal of \$24,000.

[83] On a date in March 2010, DP spoke to CG at V's school. I term this the "Sixth Incident". DP was there to pick up the children, and CG was there to say hello to V. DP spoke angrily, in the presence of his children, saying words to the effect that he would accept CG's schedule, but that she was not going to get away with it again. DP testified that he said this, but denied that he did so in an angry tone. However, based on the evidence of another parent, who had no interest in the outcome of this case, I have concluded that DP's tone was angry and aggressive.

[84] CG did not report the Sixth Incident to Crown Counsel.

[85] The parties have engaged in lengthy email correspondence, and both of them have been unpleasant in that communication. Both have been inclined to fall into general criticism of the other, rather than maintaining their focus on the issue at hand and the best interests of the children. DP has sometimes responded defensively to emails from CG that on their face did not seem critical.

[86] At trial, CG was 39 years old, DP was 44 years old, V was six years old, and A was three years old.

[87] A is an energetic, physical, fun-loving boy. At trial, A was attending preschool from 9:15 a.m. to 11:45 a.m. on Mondays, Wednesdays and Fridays. A is expected to commence afternoon preschool Mondays through Thursdays from 1:00 p.m. to 3:30 p.m. in September 2010. A is expected to commence full-time kindergarten in September 2011.

[88] V is a sweet and happy girl who is social and enthusiastic. Her dyspraxia presents challenges in speaking and in tasks requiring physical coordination, including writing and dressing.

- [89] The school system has classified V as requiring a full-time special education assistant, on a full or shared basis. At trial, V was attending Grade 2, from 8:50 a.m. to 3:00 p.m. on weekdays.
- [90] A and V get along well together.
- [91] At trial, CG was unemployed, but was reading one or two scripts per month. She anticipates earning \$200 per month, being \$2,400 per year. She has not explored updating her skills, and wants to wait until A is in school all day. She would consider retraining. She was trying to re-establish her former contacts in the film industry.
- [92] At trial, DP was working full time as an Associate Portfolio Manager for CWG. DP testified that he expected his 2010 earnings to be similar to his 2009 earnings of \$126,624. He testified that he expected that his income will only include one month of loan repayments in respect of the 2005 second Loan Bonus, as well as a full year of loan repayments regarding the 2006 third Loan Bonus and the 2008 fourth Loan Bonus. He testified that he does not anticipate receiving any further Loan Bonuses. He also testified that he expected that the amount he will receive as compensation for equity will be less than in the past. DP has a pension through CWG.
- [93] Regarding the January 2006 third Loan Bonus of \$50,000, 51 months had elapsed to April 2010, at \$458.33 per month, so, \$21,250.17 had been repaid, and \$28,749.83 was still owing. Regarding the June 2008 fourth Loan Bonus of \$55,000, it was repaid at \$458.33 per month, so as at April 2010, 22 months (i.e. \$10,083.26) had been paid off, leaving \$44,916.74 still owing. The unpaid amounts total \$73,666.57.
- [94] CWG presently has a Retirement Transition Plan ("RTP") for which DP might become eligible. The RTP provides that participation remains entirely at the discretion of CWG, and can be offered to employees whose combined years of age and service total at least 60. Employees who participate in the RTP must enter into an agreement not to compete with CWG for five years.
- [95] DP presently has 10 years of service to CWG, and he is 44 years old, so his combined age and years of service is only 54, and he is not yet eligible for the RTP. DP testified that his intention is to retire at the age of 65, if possible. He testified that he expected to work to age 65 in part because of the financial consequences of the marital breakdown.
- [96] The children's expenses have included the following ("Existing Therapy Special Expenses"):
- a) counselling costs for the children with Ms. Perrotta, a counsellor, for a total of \$450 per month;
 - b) costs for V's two monthly sessions with Ms. Ward, a paediatric occupational therapist, for a total of \$200 per month;

- c) costs for V's two monthly sessions with Ms. Oxenham, a speech therapist, for a total of \$200 per month;
 - d) costs for V's two monthly sessions with Ms. van Doorn, a paediatric physiotherapist, for a total of \$170 per month.
- [97] Those expenses total \$1,020 per month, but there is some insurance coverage for the expenses, and the net payable is about \$800 per month. DP has been paying those expenses.
- [98] The Handsworth Home has an appraised value of \$1,020,000. At the trial date, the amount outstanding under the mortgage was about \$300,000, so that the net equity was about \$720,000.
- [99] At trial, CG was living in the Handsworth Home with V and A. DP was living in a three bedroom basement apartment, which is about a 15 minute drive away. Both parents have set up their homes to make them orderly for V.

EXPERT EVIDENCE

- [100] Dr. England provided a custody and access report under s. 15 of the Family Relations Act. She was examined at trial by counsel for both parties. CG called the evidence of Dr. Wingrin, paediatrician, and Dr. Posthuma, psychologist.
- i) Dr. Wingrin
- [101] Dr. Wingrin was accepted at trial as being qualified to give expert evidence as a paediatrician with experience in dyspraxia.
- [102] Dr. Wingrin testified that dyspraxia involves dysfunction in motor planning, and it was a lifelong condition with varying degrees of severity. The condition can be helped with therapies but cannot be cured. V has dyspraxia affecting not only fine and gross motor coordination but also speech. Dr. Wingrin testified that it was rare to have dyspraxia affecting both speech and motor coordination. Dr. Wingrin testified that people with dyspraxia can suffer communication problems, emotional immaturity, and difficulty with independence, academic studies, and social interaction.
- [103] Dr. Wingrin thought that a parenting schedule with frequent transitions was not a good idea for V, although Dr. Wingrin conceded she was not an expert in custody and access issues and that she was speaking as a parent. Dr. Wingrin's concerns related to V's difficulty with planning and organizational capacity. However, Dr. Wingrin agreed that V's parents could assist her in those areas.
- ii) Dr. England
- [104] Dr. England's report was made pursuant to s. 15 of the Family Relations Act. As a result, the facts stated in her report constituted prima facie evidence of the truth of those facts: See *Wu v. Sun*, 2006 BCSC 1891, 62 B.C.L.R. (4th) 192.

[105] Dr. England recommended that the parents spend equal time parenting the children, on a schedule of alternating 2-day, 2-day, and 3-day periods ("2/2/3 Schedule"). Dr. England testified that her goal in recommending a parenting plan was to effect meaningful contact between the children and both their parents, rather than simply visiting access with one. In her view, a mix of weekday and weekend access was necessary to achieve that goal.

iii) Dr. Posthuma

[106] Dr. Posthuma was qualified as a psychologist with experience in preparing and critiquing custody and access reports. His report was based entirely on his review of Dr. England's report and her file. Dr. Posthuma did not interview or test the parties, or observe their interactions with the children, or contact people who knew the parties.

[107] Dr. Posthuma challenged Dr. England's recommendations on two grounds: first, her interpretation of DP's psychological test results, and second, the degree of her investigation and concern about V's dyspraxia.

[108] Dr. Posthuma conceded that, although test results suggest character traits, in the majority of cases, not all the traits would be found in the test subjects. The suggested character traits are generalized suggestions of propensities, not determiners of behaviour.

[109] Dr. Posthuma testified that co-parenting requires an ability to see the validity of the other parent's view. He considered that the material showed that DP sees the problem as CG and not DP himself.

[110] Dr. Posthuma agreed that, if the court determined that DP would act in the best interests of the children, a co-parenting arrangement would be best for them.

[111] Dr. Posthuma assumed that DP did not have a reasonable basis for suspecting that CG's mother took steps which encouraged the RCMP to charge DP with assault regarding the Second Incident. In fact, DP did have a reasonable basis for that suspicion. Dr. Posthuma's opinion was also based in part on an incorrect assumption that DP completed the Parent History Survey knowing that he could not correct his response by providing it in typing or on a fresh form.

[112] Dr. Posthuma raised a concern about whether V's grades were deteriorating and about whether she had been acting up.

ANALYSIS

1. Credibility

[113] CG argued that wherever her evidence conflicted with DP's, her evidence should be preferred, and that DP's evidence should be rejected. She referred to DP's failure to comply with the court orders, to his manner under cross-examination, and to his evidence about how he used the funds he obtained from the children's RRSP.

[114] DP is volatile and defensive in matters concerning his marriage breakdown, and has persuaded himself that he has acted reasonably. As a result, his evidence is coloured and must be considered carefully. However, I am not prepared to reject his evidence whenever it conflicts with CG's. All the evidence must be considered in the context of the whole of the evidence.

2. Contempt

[115] CG argued that DP should be found in contempt of two court orders. She argued that DP acted in contempt of the Donaldson 2009 Order when he failed to pay child and spousal support as ordered. She argued that he acted in contempt of the Cullen 2009 Order when he disposed of about \$29,000 worth of RESP funds. She argued that the court should impose a fine of \$1,500, on the basis of \$250 for each of six incidents of contempt, being two redemptions of the RESP, and four months (December 2009, January, February and March 2010) in which DP failed to pay CG the child and spousal support totalling \$3,039 per month as ordered.

[116] CG admitted that she too acted contrary to the Cullen 2009 Order when she cashed in the RRSPs, although she did not realize they were family assets. CG says she regrets contravening the Cullen 2009 Order and that she needed money to buy groceries because DP had failed to honour his obligation to pay child and spousal support. However, she withdrew \$24,000 from the RRSPs, and the total unpaid support for the four months was about \$12,000.

[117] DP argued that his failure to pay support as required by the Donaldson 2009 Order arose from his effort to ensure that he could maintain his finances for the long-term benefit of the family. DP argued that in that sense he did not deliberately breach the court order.

[118] To establish contempt, CG must prove that DP had notice of the order, that he did not comply with it, that the noncompliance was deliberate as opposed to accidental or unintentional, and that the defendant is, in fact, capable of complying with the order: *Swann v. Swann*, 2009 BCCA 335, 71 R.F.L. (6th) 269, at para. 10.

[119] The Court of Appeal summarized the principles governing contempt in *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551, 21 B.C.L.R. (4th) 340, at para. 18, as follows:

[18] The principles governing a motion of contempt are uncontroversial. I would summarize the principles relevant to this case in this way:

1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable: *Glazer v. Union Contractors Ltd. and Thornton* (1960), 33 W.W.R. 145 (B.C.S.C.) at 151.

2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt: *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at 229.
 3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction: *Melville v. Beauregard*, [1996] O.J. No. 1085 (Gen. Div.) at para. 13; see also *Berge v. Hughes Properties Ltd.* (1988), 24 B.C.L.R. (2d) 1 (C.A.) at p. 8, cited in *Hama v. Werbes* (2000), 76 B.C.L.R. (3d) 271 (C.A.) at para. 8 where the need for clarity and precision in the order to be enforced was discussed.
- [120] DP had notice of both the Donaldson 2009 Order and the Cullen 2009 Order, and in fact consented to some or all of both orders. DP did not comply with the orders, when he failed to pay the child and spousal support ordered, and when he cashed in the children's RESP.
- [121] DP chose to pay other creditors instead of honouring the court orders and supporting his own children and estranged wife. DP thought that it would be better for his credit rating and for his long term financial situation if he preferred those other creditors.
- [122] DP ought to have complied with the court orders. He should have known, before he entered into the Donaldson 2009 Order, that he would have a cash flow problem in December 2009 which would make it difficult to pay the agreed amount of support. He should have paid the support as ordered, or applied to the court forthwith for a variation of the order, or to permit him to mortgage some of his equity in the Handsworth Home.
- [123] DP was in contempt of court. He wilfully chose to prefer other creditors.
- [124] Parties to family proceedings must honour court orders. DP's failure to do so requires punishment.
- [125] Often, the appropriate punishment is a fine or a period of imprisonment. In this case, DP has ongoing responsibilities as a father and husband. Putting him in jail at this point would harm his dependants, as would a significant fine.
- [126] DP's punishment for contempt of these orders will be suspended for six months from the date of these reasons for judgment. So long as DP complies with all court orders in effect during that period, the punishment will not come into effect. The suspended punishment will come into effect if DP fails to comply with any court order in the six-month period, and will be a fine of \$1,500 for the six instances in which DP's actions or inactions were in contempt of court. In light of DP's assets and income, that is a manageable fine, while not being so little that it will encourage future acts of contempt.
3. Parenting
 - a) Schedule

[127] CG argued that the children should reside primarily with her. She suggested a complex schedule, which provided for the children to be with their mother most of the time on weekdays, to spend more time overnight with their father than at present, and that the children would not be away from either parent for more than three days.

[128] DP argued that the children should see their parents equally.

[129] Dr. England recommended that the children spend equal time with each parent, on a 2/2/3 Schedule.

[130] CG argued that the schedule recommended by Dr. England would be too great a change from the existing arrangements, that it would involve too many transitions between residences, that it was inappropriate for V in light of her dyspraxia, and that it was unrealistic in light of DP's need to maximize his employment income. CG also argued that DP's conduct, in particular in the six incidents, displayed bad judgment, which should be taken into account in determining the appropriate parenting arrangements.

[131] Sections 16(8) and (10) of the Divorce Act, R.S.C. 1985 (2nd Supp.) c. 3, are as follows:

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

...

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

[132] Section 24 of the Family Relations Act is as follows:

24(1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

(1.1) The references to "other persons" in subsection (1) (c) and to "each person" in subsection (1) (e) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.

- (2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well being of the child.
- (3) If the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court must not consider that conduct in a proceeding respecting an order under this Part.
- (4) If under subsection (3) the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).

[133] I will first discuss CG's concerns about a 2/2/3 Schedule concerning DP's conduct in the six incidents and his judgment, DP's need to maximize his employment income, V's dyspraxia, the number of transitions, and the degree of change from the status quo.

i) DP's Conduct and Judgment

[134] DP has displayed poor judgment in the period since separation. The most concerning are the First, Second, Third and Fifth Incidents, when he used excessive force, and his failure to pay child and spousal support ordered by the court.

[135] DP used excessive force in the incidents referred to. He did not intend to do so, and lost control of himself.

[136] Dr. England testified about three distinct kinds of domestic violence: first, coercive-controlling violence; second, situational couple violence; and third, separation instigated violence. The first, coercive-controlling violence, is likely to precede a separation and continue after separation, and is of significant concern. In Dr. England's view, DP displayed separation-instigated or situational violence, which are less concerning because such violence is not likely to continue.

[137] I accept this evidence from Dr. England, and agree with her analysis that DP's use of excessive force is not likely to be a continuing problem. It occurred in the early stages of the parties' separation. The First Incident was three months prior to separation, but presumably when the marriage was not going well. The Fifth Incident was 2½ months after separation.

[138] DP had not displayed conduct of using excessive force during the period of almost 11 years when the parties co-habited. DP's conduct in using excessive force was inappropriate, and indicated immaturity and lack of judgment, but is not likely to be repeated.

[139] DP over-responded in situations of conflict. However, he is a dedicated and active father. On balance, DP's over-reaction during the early stages of the marital breakdown are not such that his contact with his children needs to be limited. It does, however, suggest that contact between the parties should be minimized.

[140] DP made further serious errors of judgment when he acted in contempt of the Donaldson 2009 Order regarding support. However, on the basis of the orders in these reasons for judgment, that conduct is not likely to be repeated.

ii) DP's Need to Maximize his Employment Income

[141] The 2/2/3 Schedule recommended by Dr. England would have the effect that in a 28 day period, DP would be free of parenting duties only 14 days, and of those, only 10 would be weekdays.

[142] It is important for the parenting schedule to permit DP to earn what he reasonably can, particularly because at the time of trial he was essentially the sole family income-earner.

[143] DP's job permits him real choice in when he works. Most of his work time is reading and analyzing investment possibilities, which is work he can do on evenings and weekends. He has few client meetings, and can schedule them for days he is not responsible for the children.

[144] CG argued that DP's decreasing income demonstrates that he needs to be available to work during ordinary business hours of 9:00 a.m. to 5:00 p.m., Mondays through Fridays, and that the parenting schedule must reflect that. She also argued that during the period the parties co-habited, DP worked long hours at the office, and that it was unrealistic to expect that to change.

[145] DP argued that he could work 10 hours on each of the 14 days in every 28 days when he is free of parenting obligations, and about two hours on each weekday that the children are with him, for a total of 160 available work hours in each 28 day period. DP argued that he will be able to maintain a high income by working those hours.

[146] DP's income declined in 2008, prior to the parties' separation, and has continued at the lower level. The decline occurred primarily because of DP's transition to a portfolio-size commission basis and the state of the stock market. In addition, DP needed to deal with legal and emotional issues regarding the marriage breakdown, and that likely had a negative impact on his earnings.

[147] It is essential for DP to restore his prior level of earnings. He must take active steps to do so, including "prospecting" for new clients.

- [148] There is reason to wonder if DP may try to organize his work to permit significant parenting, only to slip into old habits and be unable to do so. Although the parties disagreed about DP's hours, their marital counsellor's evidence supported CG's evidence that DP resolved in 2008 to spend more time with the children, only to slip at a later date into spending less time with the children. However, the parties were cohabiting at the time, and the children were in CG's care when DP was late.
- [149] On balance, the evidence supports the conclusion that DP can organize his work so that it enables him to devote a significant time to parenting.

iii) V's Dyspraxia

- [150] V is a child with special needs. V receives the support of a special education assistant at school. She continues to need the assistance of a private speech therapist, occupational therapist, and physiotherapist. Both parents support V's need to obtain treatment from those professionals.
- [151] V's particular challenge with her academic studies is with mathematics. DP is more comfortable than CG with assisting V with mathematics.
- [152] At trial, CG and Dr. Posthuma raised concerns that V may be regressing at school. However, in the questionnaire CG completed for Dr. England, CG indicated fewer concerns than DP. Considering all of the evidence, including that of V's teacher, V appears to be receiving the support she needs.
- [153] Dr. England considered the impact of V's dyspraxia on suitable parenting arrangements. She concluded, and I agree, that both parents are able to provide V with the necessary support. Both appreciate V's needs, and have set up their homes to assist her. Both parents support V obtaining the necessary treatments.
- [154] Because V's parents are now separated, meaningful contact with both parents will require V to transition between her parents' homes. The fact of her diagnosis of dyspraxia has not altered her need for meaningful contact with both parents.
- [155] Both parents provide V with the necessary support for her dyspraxia. DP provides her with assistance with mathematics, which V particularly requires.
- [156] In these circumstances, the fact of V's dyspraxia diagnosis is a neutral factor in determining a suitable parenting regime.

iv) Number of Transitions

- [157] The 2/2/3 Schedule recommended by Dr. England requires three transitions per week. Dr. England recommends that they occur at school, to minimize the contact between the parents.

- [158] The schedule suggested by also CG also requires three transitions per week, although not all are for overnight stays.
- [159] The number of transitions is related to how long the children are apart from each parent. For example, alternate week parenting, or alternating 2/2/5/5 day parenting, requires fewer transitions.
- [160] The proposed 2/2/3 Schedule provides that the children will not be away from either parent for more than three days at a time. This is a suitable period for these children at their young ages. The number of transitions is a neutral factor in determining a suitable parenting regime.
- v) Degree of Change from Status Quo
- [161] Dr. England testified about gradual parenting changes, which are "staged", and sudden extreme parenting changes, which she termed "flooding". In this case, Dr. England did not consider the move to a 2/2/3 Schedule to be so extreme as to be "flooding". In her view, because the children are already spending alternate weekends with each parent, the change would not be significant.
- [162] I accept Dr. England's opinion on this issue. The change to a 2/2/3 Schedule is not so extreme that it would likely cause the children any long-lasting distress.
- vi) Discussion
- [163] CG and DP are both loving, dedicated and capable parents. CG has been a stay-at-home mother, and has been primarily in charge of the children's care. She has the support of her parents and neighbourhood friends. Her challenge as a parent is to separate sufficiently from her children. She would benefit from seeking advice from a counsellor to assist her to do so.
- [164] DP is the parent more likely to encourage the children to be adventurous and to encourage them to develop even when they may resist. He has been receptive to parenting advice from Ms. Perotta, and should be able to continue to develop as a parent.
- [165] I accept Dr. England's opinion that children do best when their fathers are meaningfully involved in their lives, and are not just visitors. V and A are close to each other emotionally, and they should move together between their parents' homes.
- [166] The question for the court is what schedule is in the best interests of the children. Where, as here, both parents are loving, dedicated and able parents, the best schedule is often dictated by the work schedule of the parents and any special needs of the children. An appropriate schedule will provide meaningful contact with both parents. Here, CG is not presently working many hours, and DP's work hours are flexible.

[167] CG has been a stay-at-home mother for years now. That was an arrangement the parties made when they were together. The marital breakdown requires a new arrangement in which the children have meaningful contact with both parents.

[168] The 2/2/3 Schedule recommended by Dr. England is appropriate for V and A. It will apply subject to a review in two years, as suggested by Dr. England. Also as recommended by Dr. England, the transitions are to occur around the children's school day with V not being exposed to both parents at the same time. If the parties are unable to agree on the schedule for special single event days, and longer holidays, they have liberty to apply.

[169] If either parent anticipates being unable to care for the children on their scheduled parenting time, they must notify the other parent and permit that other parent to care for the children if available.

b) Guardianship

[170] CG argued that the parties should have joint custody and joint guardianship pursuant to the "Joyce" model, by which she would have the right to make all parenting decisions on which the parties disagreed, subject to review by the court. I will refer to that as being the "default decision-maker". In contrast, DP argued that the parties should have joint custody and guardianship.

[171] At my suggestion, the parties considered whether they should each be the default decision-maker for some decisions, as was ordered in *Buddingh v. Pilon*, 2002 BCSC 1123. CG was opposed, on the basis that there was a link between school and health issues facing V, and that DP's anger and poor judgment made this unworkable. DP was interested in such an order. DP suggested that he be the default decision-maker for medical and therapy health, religion, and half of the children's activities, and that CG be the default decision-maker for education, dental health, and half of the children's activities.

[172] DP seeks an order appointing a parenting co-ordinator. He relies on *Hunter v. Hunter*, 2008 BCSC 403, 52 R.F.L. (6th) 109, as authority for the court appointing a parenting co-ordinator when one parent does not agree. DP suggests that if the parties continue to disagree on a parenting issue following consultation with the parenting co-ordinator, the parenting co-ordinator be entitled to make the decision, subject to review by the court.

[173] That delegation of the court's authority was not made in *Hunter v. Hunter*. In that case, the court raised but did not resolve the question of whether that would be an improper delegation of the court's authority. Instead, the court appointed a parenting co-ordinator with limited responsibility.

[174] The parties are experiencing high conflict in their separation. The results of DP's violent over-reactions have included police involvement. DP's contempt of court in failing to pay child and spousal support as ordered exacerbated the problems.

- [175] The parties both demonstrated a tendency in their interactions to focus on the disagreement between them rather than their children's best interests. In these circumstances, a guardianship arrangement in which one parent is the default decision-maker for all matters is likely to heighten conflict rather than resolve it.
- [176] The parties have not displayed serious disagreement over matters such as how the children should be educated or treated medically, and they are not likely to do so. Their disagreements have focussed primarily on scheduling, and minor matters such as haircuts and birthday parties. A guardianship regime in which each parent is the default decision-maker for some matters has the best hope of encouraging each parent to treat the other the way they would like to be treated regarding questions for which they are not the default decision-maker.
- [177] Neither parent has particular expertise in medicine or education, and so dividing the spheres of decision-making has an element of arbitrariness. However, CG has taken the lead in dealing with the speech, occupational, and physical therapists, and with the counsellor, and she should be the default decision-maker in those areas. DP should be the default decision-maker in respect of the children's education and medical issues apart from the speech, occupational and physical therapy and counselling. Neither party is particularly religious, but DP has the stronger interest, and he should be the default decision-maker for religion. CG should be the default decision-maker for extracurricular activities. She should ensure that those activities do not conflict with V's therapy treatments, that the children are not over-committed, and that activities occurring every two weeks are scheduled so that each parent deals with an equal number of them.
- [178] In this case, without the consent of the parties, I am not prepared to order that the parties are bound by the decision of a parenting co-ordinator. However, I urge the parties to use the assistance of an independent third party to assist them in resolving issues in the children's best interests.
- c) Telephone Access
- [179] CG seeks an order that the children no longer have telephone access to DP, or alternatively, that such access be limited to the middle day of any three day period when the children are with her, or in the further alternative, that V be allowed to have a telephone so that she can call the parent she is not with at the time.
- [180] CG is opposed to DP having access to the children through a "webcam" camera attached to the computer. DP agreed at trial that he would not seek access to the children using a webcam in CG's home.
- [181] Dr. England recommended that if the 2/2/3 Schedule is implemented, that the parties no longer have telephone access to the parent they are not staying with at the time.

[182] DP's position is that Dr. England's recommendation for no telephone access should be followed, with the result that the parties will exercise their parenting time when they have it, and transfer the children to the other parent when it is time to do so. DP is opposed to V having a cell phone at this point. He is concerned that at her young age, she will have difficulty keeping track of the phone.

[183] Dr. England's interviews with the children showed that they were concerned about CG missing them, and that the children did not have their own strong feelings of missing their mother. In these circumstances, telephone access may create discomfort rather than solve it. Unless the parties agree or the court orders otherwise, the children will not have telephone access to the parent who is not caring for them.

4. Restraining Order

[184] CG seeks an order that paragraphs 9-12 of the Cullen 2009 Order remain in force. Those are the paragraphs providing that the parties are restrained from entering the other party's residence, and from molesting or communicating with the other, except for access and guardianship matters. CG argued that she is fearful of DP.

[185] DP is agreeable to a mutual restraining order continuing for one year after release of these reasons for judgment, with the parties to have liberty to apply to extend the term. That is an appropriate order in this case.

5. Child Support

a) DP's Income

[186] CG argued that DP's income should be determined to be \$157,612, on the basis that it is the average of his line 150 income for the three years 2007 through 2009, or alternatively, on the basis that such an amount should be imputed to him.

[187] DP argued that his income should be found to be \$105,869.86. He argued that his income had fallen and will remain reduced in the short term, because he had changed from working for transactional commissions to working for commissions based on portfolio size. He argued that his earnings before 2007 do not accurately reflect what he is now able to earn, because of his shift to portfolio-size commissions. He argued that, while there will be a short term reduction in his income, over the long term his income should increase.

[188] DP argued that his pre-separation 2008 income of \$138,168 is similar to his 2009 income of \$126,624, which includes about six months following separation. He argued that he does not expect to earn any further "Loan Bonuses". He argued that the "Loan Bonus" possibility should be handled separately, on the basis that if he receives a Loan Bonus in any given year, the support he must pay should be increased both retroactively and prospectively to take the Loan Bonus into account, such that CG is paid directly from the lump sum Loan Bonus.

- [189] DP argued that he does not expect his income to decline from assuming increased parenting responsibilities. He argued that if his income does decline, he would expect that his position at this trial would militate against any reduction in his maintenance obligations.
- [190] Sections 16 and 17(1) of the Federal Child Support Guidelines, S.O.R./1997-175, are as follows:
16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
- 17.(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
- [191] In *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263 (S.C.), Pitfield J. referred to the combined effect of sections 16 and 17 of the Guidelines as follows, at paras. 18-20:
- [18] The reasonable interpretation of the combined effect of ss. 16 and 17 must be that if there is a material difference between the amount determined under s. 16 and the high, low, or average amount, as the case may be determined under s. 17(1)(a) or (b), the amount determined under s. 16 should be questioned for fairness and that should be fairness in relation to historical patterns.
- [19] The mere fact of difference will not result in a finding of unfairness. The degree of permanence associated with the difference between the s. 16 determination and the result of the s. 17 analysis will be material. Since one objective of the Guidelines is to ensure that children benefit from the financial means of parents, and annual income is a good measure of those financial means, they should gain when income goes up, and lose when it goes down. Indeed, that is contemplated by s. 14 of the Guidelines which provides that for purposes of variation, a change in circumstances is any change that would result in a different child support order being made. A change in annual income is just such a circumstance.
- [20] The quality of the change in income from historical levels must be considered. An increase might have the appearance of permanence as with a promotion or change of employment. The increase might be the temporary result of increased overtime or decreased downtime. A decrease might be permanent because of a change of employment, disability, or unemployment or it might be temporary and the result of factors adversely affecting employment in the short term. The quality of the increases or decreases and the reasons giving rise to them must be addressed in order to assess the fairness of the s. 16 determination in the context of s. 17.

[192] In *Jakob v. Jakob*, 2010 BCCA 136, the court wrote as follows at para. 46:

[46] The calculation of income for the payment of support is based on a payor's capacity to pay; it is a payor's income or earning capacity that determines the amount of support he or she will be required pay. Actual income may not always reflect a payor's capacity to pay. Where income has fluctuated in previous years, in the sense that it has increased and decreased over a fixed period of time, and it is anticipated that it will continue to fluctuate in that manner, it may be appropriate to take an average of fluctuating income for a fixed number of years to calculate a payor's income or earning capacity.

[193] The first step is to determine DP's income for the purposes of child support. This is complicated by both the structure of commissions that DP is entitled to receive, and his employer's unusual "Loan Bonus" program.

[194] DP's income is based on a complex commission formula. It fluctuates based on changes to the commission formula, and for some of his clients, on the results his clients' portfolios achieve, and for other clients, the sales transactions. The results depend both on market forces and on DP's efforts.

[195] DP's income is difficult to predict. The use of a three year average is the most appropriate way to determine his income for the purposes of child support.

[196] Section 16 of the Guidelines requires the court to consider DP's line 150 income. Section 17 permits the court to determine an amount that is reasonable and fair in light of any pattern of income.

[197] In this case, it is unlikely that DP will receive further Loan Bonuses. The lump sums paid to him have been used for family purposes, and the notional principal and interest payments do not reflect an ability to pay. Accordingly, for the purposes of determining DP's income for support purposes, it is appropriate to consider his income net of the repayment of past Loan Bonuses.

[198] The income DP has received from exercising stock options is different. It is part of the complex manner in which he is remunerated. It is appropriate to include this income in considering his three year average income.

[199] The appropriate method of determining DP's income for child support purposes is to calculate his income for the three calendar years of 2007 through 2009, net of Loan Bonus payments but including any income-splitting with CG and any equity payments. The average of that sum for the years 2007-2009 will be his income for Guidelines purposes ("Guideline Income").

[200] If the parties are unable to agree on that figure, they have liberty to apply, or if they agree, to have the amount determined by the registrar. DP must pay the table amount of child support applicable for a payor with Guideline Income.

[201] For the future calculation of DP's Guideline Income, all sources of income must be considered. As a result, any future Loan Bonus income will be used to determine DP's Guideline Income. DP's receipt of the lump sums will give him the ability to pay, and he can reserve funds for payment in later years.

b) CG's Income

[202] DP argued that employment income of \$20,000 per year should be attributed to CG on the basis of her skills and ability.

[203] CG testified that she expected to earn \$200 per month, being \$2,400 per year for one to two scripts per month. She estimated that each script required four to six hours of work. However, she testified that in an application for a mortgage, she estimated her income would be \$70,000, which she described as a "rosy" estimate.

[204] Assuming child and spousal support of \$3,039 per month, CG would receive about \$36,500 per year. Her "rosy" estimate therefore was that she will earn about \$34,000 per year in employment income. The evidence at trial was that she earned about \$24,000 per year in her film production work.

[205] CG has skills and ability. She has been out of the workforce for about nine years. It will likely take her some months to find appropriate work. Accordingly, for the purposes of determining contributions to future special expenses, CG's employment income will be imputed to be \$20,000 per year commencing March 1, 2011.

c) Future Table Child Support Payments

[206] The Federal Child Support Guidelines require parents to contribute to their children's support on the basis of the payor's income. With respect to the shared custody situation in which a parent has the children more than 40% of the time, s. 9 provides that a number of factors must be considered for determining the amount of child support payable. DP argued that even if he has the children more than 40% of the time, the child support should still be the table amount based on his Guideline Income. That is an appropriate order in the circumstances.

d) Future Special and Extraordinary Expenses

[207] The children's special and extraordinary expenses include A's preschool costs, and the Existing Therapy Special Expenses.

[208] CG anticipates that the children may require other special expenses, such as for after school care, tutors, and orthodontics. She proposes that the parties must share only those further special and extraordinary expenses that they agree upon or that are ordered by the court.

[209] DP argued that he should continue to pay the entire Existing Therapy Special Expenses, and the parties should share any other expenses pro rata on the basis of their incomes as determined by the court. He argued that responsibility for special expenses should be reviewed annually.

[210] In this case, it is appropriate that DP continue to pay the Existing Therapy Special Expenses. If the parties agree upon any further special expenses, they shall be shared pro rata on the basis of DP's Guideline Income calculated as discussed above and CG's employment income as set out above. Both parties have liberty to apply for annual review of payment of special expenses, and if they cannot agree on the proper calculation for the pro rata sharing.

e) Retroactive Child Support and Arrears

[211] CG seeks child support retroactive to the date of separation, for the five-month period June 15, 2009 to November 15, 2009. She seeks arrears of child support for the period December 15, 2009 to the date of trial.

[212] DP is opposed to an order for retroactive child support. The issue was not raised in CG's opening statement at trial, and DP said that as a result, he did not provide evidence relevant to retroactive child support, such as what payments he made prior to October 2009 in respect of the expenses for the parties. CG's application for maintenance was submitted in August 2009, and heard in October 2009. The Donaldson 2009 Order does not refer to a claim for retroactive child support.

[213] The evidence at trial did not fully canvass the facts relevant to retroactive child support. Assuming support for the five-month period from June 15, 2009 to November 15, 2009 at \$1,444 as ordered in the Donaldson 2009 Order, CG's claim would be for about \$7,000. DP may have evidence concerning what expenses he paid in that period.

[214] CG has liberty to apply for an order regarding retroactive child support.

6. Asset Division

a) Determination of Family Assets and Debts

[215] The parties agreed that the following are family assets:

- (a) the Handsworth Home;
- (b) the parties' bank accounts;
- (c) the RRSP account;
- (d) the household chattels;
- (e) the parties' CPP credits;
- (f) DP's employment pension; and

(g) CG's 1997 Jeep Cherokee vehicle.

[216] The parties disagreed about whether DP's possible future RTP interest was a family asset.

[217] CG argued that DP's right to an RTP interest may arise in the future, and that the court should order DP to advise her if it does, and she should have liberty to apply at that time for an order about whether she should receive a portion of the proceeds. CG argued that the potential future RTP interest was like that in *Rutherford v. Rutherford* (1979), 120 D.L.R. (3d) 473, 14 R.F.L. (2d) 41 (S.C.). In *Rutherford*, the pension was unusual, because its existence was subject to legislative change. The court deferred the question of whether the wife was entitled to an interest in the pension to the future, when the court could determine the amount of the husband's interest in the pension.

[218] DP relies on *R.A.C. v. V.L.C.*, 2009 BCSC 825. In that case, at paras. 185-224, Griffin J. considered whether the book of business of an Investment Associate at Scotia McLeod was property, and concluded it was not property. DP argued that, similarly, there is no assurance that he will receive anything under the discretionary RTP.

[219] DP does not have any interest in the RTP at present. At best, he knows that it is possible that when he wants to retire, CWG may offer him participation in the RTP or something like it, and the years of service might include a portion of the period he lived with CG. If DP chose to retire at the age of 54, he would have 20 years of service, and together with his age the total would be 74. In that situation, he would qualify even without taking into account the years he lived with CG.

[220] DP has nothing more than a possibility that in the future, his years of service to CWG may enable him to get a benefit. He does not have an interest in the RTP. The RTP is not an asset of DP's, and is not a family asset.

[221] The parties agreed that the mortgage on the Handsworth Home, which was about \$304,000 at the trial date, was a debt which should be taken into account.

[222] The parties essentially agreed that their respective unsecured debts reflected their expenses since separation, and should not be taken into account in asset division. However, CG argued that if she is not entitled to retroactive support, the indebtedness she incurred on the line of credit should be shared between the parties. Because the issue of retroactive support is not resolved, CG has liberty to apply for an order sharing the indebtedness she incurred on the line of credit.

b) Reapportionment of Family Assets

[223] CG argued that the family assets should be reapportioned so that she receives 65% of the Handsworth Home, and the other assets should be divided equally. She relied on *Astaforoff v. Astaforoff*, 2002 BCSC 1079, in which the spouse was awarded 60%, and *Lodge v. Lodge* (1993), 79 B.C.L.R. (2d) 360, 48 R.F.L. (3d) 365 (C.A.), in which the spouse was awarded 75%. DP argued that the family assets should be divided equally.

[224] Sections 56 and 65 of the Family Relations Act are as follows:

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

(2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

(3) An interest under subsection (1) is subject to

- (a) an order under this Part or Part 6, or
- (b) a marriage agreement or a separation agreement.

(4) This section applies to a marriage entered into before or after March 31, 1979.

...

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient,
or
- (f) any other circumstances relating to the acquisition, preservation, maintenance,
improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.
- [225] CG seeks reapportionment on the basis of s. 65(1)(e) and (f) of the Family Relations Act.
- [226] This was a medium length marriage, in which the parties cohabited for about 1½ years before marriage and about 10 years after marriage. The parties have now lived separate and apart for about one year. Neither party brought significant assets into the relationship. The family assets were acquired during the marriage, and portions of the RESP and RRSP were disposed of following separation. None of the property was acquired by one spouse through inheritance or gift.
- [227] CG has spent about nine years out of the workforce, most of that to be a stay-at-home mother. Her need to become economically independent and self-sufficient is significant.
- [228] CG argued that she will need education to achieve marketable skills. She did not present any plan for further education or training, and argued that she would like to wait until A is in school full time before she returns to the workforce. A is expected to commence full-time kindergarten in September 2011. CG argued that she should receive a greater share of the family assets to compensate her for the capital loss she suffered by staying out of the workforce while raising the children.
- [229] It is likely that, if CG had not stopped working to raise the children, she would have acquired workplace experience and opportunities for advancement that would have improved her income-earning capacity.
- [230] DP concedes that CG is entitled to spousal support. He argued that he earns enough that the support he pays will be sufficient to ensure that her needs are met, and that the parties will enjoy a similar standard of living moving forward. He argued that the parties have a similar need for capital assets to provide a similar home for the children.
- [231] DP argued that his failure to pay spousal and child support as ordered prior to trial arose from factors which will not exist following the release of reasons for judgment. He argued that the factors included his need to pay expenses related to litigation while his assets were frozen.
- [232] CG suffered a reduction in her income-earning capacity as a result of assuming full-time homemaker responsibilities during the marriage. As a result, an equal division of the family assets would be unfair.

[233] CG is entitled to 65% of the equity in the Handsworth Home, and half of all other family assets. The equity in the family home is about \$720,000. CG's receipt of 65% would mean she retains \$468,000, being \$108,000 more than \$360,000, which is 50%. DP's receipt of 35% would be \$252,000.

c) Division of Family Assets

[234] The appropriate date from which to determine reapportionment pursuant to s. 65 is the date of the triggering event. In this case, there was no triggering event prior to trial. CG asked that the court make a declaration pursuant to s. 57 of the FRA that there is no reasonable prospect of reconciliation. I make that declaration as part of these reasons for judgment.

[235] Generally, the appropriate date for valuing family assets will be the trial date, although the court has discretion to fix another date, not earlier than the triggering event, if that is necessary in order to achieve fairness. See *N.M.M. v. N.S.M.*, 2004 BCSC 346, 26 B.C.L.R. (4th) 80.

[236] I will deal with a series of assets, setting out how they are to be restored and divided.

[237] DP argued that he should be ordered to pay the following from his share of the family assets:

- a) forthwith repay \$29,210 to the children's RESP;
- b) forthwith pay CG the difference between the outstanding child and spousal support of \$15,195 and his share of the \$24,000 which CG removed from the family RRSPs, in satisfaction of arrears of child and spousal support;
- c) pay \$20,000 to his solicitors to hold in trust, to be paid in its entirety to CG if DP fails to pay his support obligations in a timely way, and to be paid to DP one year after providing it to his solicitors if DP complies with his support obligations in a timely way.

[238] All those orders are appropriate here.

[239] The spousal RRSP account had a balance at trial of about \$25,239, after CG had removed \$24,000. DP argued that the remaining balance should be divided equally by spousal rollover, and that CG should account for the money she removed by crediting it against the amount DP owes her for arrears of support. That is appropriate. If the parties cannot agree on the appropriate values net of income tax, the question is referred to the registrar.

[240] With respect to the RESP, neither party shall make any withdrawals from the RESP account without either the written consent of the other party or further court order permitting the withdrawal.

- [241] There is a CIBC trust account for V. The parties should maintain that trust account on the basis that neither party shall make any withdrawals from that account either without the written consent of the other party or further order of the court permitting the withdrawal.
- [242] There was no evidence concerning the value of the Jeep Cherokee. Unless the parties agree otherwise, it should be sold and the net sale proceeds divided equally.
- [243] The parties agreed to a reference to the registrar to determine how to distribute the household chattels.
- [244] The parties shall each retain those bank accounts in their respective names, and close all joint accounts after dividing equally any funds in those accounts.
- [245] DP's pension shall be divided pursuant to Part 6 of the Family Relations Act, and the parties shall equalize their Canada Pension Plan credits at source as provided by the CPP regulations. The relevant dates are the marriage on February 14, 1999, and the separation on May 23, 2009.
- [246] CG seeks the opportunity to purchase DP's interest in the Handsworth Home within 30 days of judgment, on the basis that if she does not complete the purchase in that period, that the property will be listed for sale, with the parties to have joint conduct of sale.
- [247] DP is willing to allow CG a month to attempt to buy out his interest in the Handsworth Home. He agrees that if she is able to keep the home, such as if her parents are able to assist her in the purchase, it will be nice for the children to be able to stay there.
- [248] It is appropriate for CG to have 30 days from judgment, or such longer period as the parties agree, to buy out DP's interest in the Handsworth Home.
- [249] DP will be solely responsible for the following debts, which are in his name alone and which he incurred following separation:
- a) CIBC Line of Credit of about \$50,000;
 - b) CIBC AAA Visa Account of about \$5,400;
 - c) CIBC Aero Gold Visa Account of about \$15,000; and
 - d) Amex account of about \$1,700.
- [250] DP will also be solely responsible for repayment of the existing indebtedness arising from the Loan Bonuses. They are repaid as a term of his employment, and have not been considered as part of his income for determining support.
- [251] CG will be solely liable for the following debts which she incurred following separation, subject to CG's right to apply for contribution from DP to the line of credit in lieu of retroactive support:
- a) TD Canada Line of Credit of about \$17,000, which is in both names; and

b) TD Gold Select Visa of about \$10,500.

7. Spousal Support

[252] CG seeks spousal support on both compensatory and non-compensatory grounds. She seeks lump sum spousal support, and seeks retroactive spousal support and payment of arrears.

[253] DP agreed that he should pay spousal support on an ongoing basis, and repay arrears. He opposes lump sum spousal support, and retroactive spousal support.

a) Future Spousal Support

[254] The first issue is whether CG is entitled to spousal support.

[255] CG is entitled to compensatory spousal support, to compensate her for the negative impact on her income-earning capacity of the time she took out of the workforce to care for the children. The unequal division of assets is insufficient to fully compensate her for the impact on her earning capacity. In addition, CG is entitled to non-compensatory spousal support on the basis of her need to support herself and the children.

[256] There was no evidence at trial about what new career or retraining CG might pursue, or what the related costs would be. Her evidence at trial suggested that she would pursue further work through networking, rather than retraining.

[257] The Spousal Support Advisory Guidelines ("SSAG") are intended to reflect the state of the law, rather than to change it. They are not legislated, and are only advisory. They are a useful tool in determining issues of quantum and duration of spousal support, and they can be used as a guide to a range of awards that may be appropriate.

[258] Where children are involved, the SSAG use a complex formula involving tax and child benefits. Where children are involved, the calculations are usually done by software. They require the input of the income of the parties. In this case, it is important to ensure that the figures used with the SSAG software reflect DP's payment of special expenses.

[259] The SSAG produce a range of the suggested quantum of spousal support. In this case, because spousal support is payable on both a compensatory and non-compensatory basis, the figure at the high end of the range should be used.

[260] For the period commencing September 1, 2010, DP shall pay spousal support at the high end of the SSAG range, using his Guideline Income determined as set out above, and using zero for CG's employment income for the period to March 1, 2011, and \$20,000 for CG's employment income for the period commencing March 1, 2011. If the parties cannot agree on the calculation, it shall be determined by the registrar.

[261] CG needs to find work. Because she is not yet working, the quantum of spousal support should be reviewed in two years. Both parties have liberty to apply for a review of quantum of spousal support for the period commencing September 1, 2011.

b) Arrears of Spousal Support

[262] As set out regarding division of assets, DP shall pay all arrears of support from his share of the family assets, and with a set-off regarding CG's removal of funds from the RRSPs.

c) Retroactive Spousal Support

[263] As with retroactive child support, CG has liberty to apply for an order for retroactive spousal support.

d) Lump Sum Spousal Support

[264] CG seeks lump sum spousal support on the basis that DP failed to pay the periodic spousal support required by the Donaldson 2009 Order, and on the basis of the high degree of animosity between the parties. She hopes to use any lump sum ordered to purchase DP's interest in the Handsworth Home, and thereby to minimize her mortgage payments.

[265] DP is opposed to the payment of lump sum spousal support.

[266] Section 15.2 of the Divorce Act provides as follows:

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sums and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

[267] As set out above regarding division of assets, DP must post security for payments, and pay any arrears forthwith from his equity in the Handsworth Home. The circumstances which led to DP's contempt of court in failing to pay support were unusual, relating to the inaccessibility of family asset capital and the need to pay legal fees, and should not be repeated following the release of these reasons for judgment.

[268] CG will have difficulty meeting her expenses if she does not receive ongoing spousal support, and instead receives a lump sum. Determining a lump sum for spousal support would be difficult here, where both parties may have very different levels of income in the future. In addition, awarding lump sum spousal support would deprive DP of access to capital which could assist him to set up a household suitable for his parenting responsibilities.

[269] This is not an appropriate case for lump sum spousal support.

COSTS

[270] As requested by counsel for CG, the parties have liberty to address the issue of costs following the release of these reasons for judgment. If they cannot agree on costs, they should schedule a hearing before me through the registry.

SUMMARY

[271] In summary form, the order is as follows:

1. The style of cause is amended to refer to the parties by initials.
2. DP acted in contempt of court. The punishment is a fine of \$1,500, but the punishment is suspended for six months from the date of these reasons for judgment. So long as DP complies with all court orders in effect in that period, the punishment will not come into effect.
3. The children shall spend alternating two-day/two-day/three-day periods with each parent. The transitions are to occur around the children's school day, and to avoid contact between the parties when possible. A parent who is unavailable during scheduled parenting time shall give the other parent the opportunity to care for the children. If the parties are unable to agree on the schedule for special single event days and longer holidays, they have liberty to apply. The parties have liberty to seek a review of the parenting schedule in two years.
4. The parties shall have joint custody and joint guardianship, on the basis that if the parties cannot agree, CG shall be the default decision-maker for speech, occupational and physical therapy, counselling, and extracurricular activities. DP shall be the default decision-maker for the children's education, medical other than the therapy and counselling referred to, and religion.
5. The children will not have telephone access to the parent who is not caring for them, unless the parties agree or the court orders otherwise.
6. Paragraphs 9-12 of the Cullen 2009 Order will remain in effect for one year after release of these reasons for judgment, with the parties to have liberty to apply to extend the term.

7. DP's Guideline Income will be determined using the formula described above. If the parties are unable to agree on the amount, they have liberty to apply, or if they both agree, to have the amount determined by the registrar. DP will pay the table amount of child support applicable to his Guideline Income.
8. Responsibility for ongoing special expenses is as set out earlier in these reasons for judgment.
9. CG has liberty to apply for an order regarding retroactive child and spousal support and sharing the indebtedness under the line of credit.
10. The court declares that the parties have no reasonable prospect of reconciliation.
11. CG is entitled to 65% of the equity in the Handsworth Home, and the other assets are to be divided as set out above. If CG is unable to buy out DP's interest in the Handsworth Home within 30 days of the date of these reasons, or such longer period as the parties agree, the property is to be sold, with the parties to have joint conduct of sale.
12. DP is required to make the payments from his share of family assets for restoration of the RESP, payment of support arrears, and security for future support payments, as set out above.
13. CG shall transfer a share in the RRSP to DP as set out above.
14. The bank accounts, pension and CPP credits will be divided as set out above. The RESP and the trust account for V will be held subject to the terms set out above.
15. The determination and division of household chattels is referred to the registrar, by consent.
16. Unless the parties agree otherwise, the Jeep Cherokee shall be sold and the proceeds divided equally.
17. The parties will be responsible for debts as described above, except that CG has liberty to apply for an order sharing responsibility for the line of credit in lieu of retroactive support.
18. For the period commencing September 1, 2010, DP shall pay spousal support calculated as set out above. Both parties have liberty to apply for a review of the quantum of spousal support for the period commencing September 1, 2012.
19. The parties have liberty to apply in respect of costs.

[272] Except in case of emergency, I am seized of parenting issues.

"Madam Justice Gray"

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