
CANADA / JUDGMENT

Carter v. Carter

2009 BCSC 1152

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1152 Carter v. Carter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Carter v. Carter,

2009 BCSC 1152

Date: 20090825

Docket: E6610

Registry: Chilliwack

Between:

Shawn Graeme Carter

Plaintiff

And

Nicole Yvonne Carter

aka Nicole Yvonne Abbott

Defendant

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

Andrew T. Briscoe

Counsel for the Defendant:

Keith A. Bowman

Place and Date of Trial:

Chilliwack, B.C.

June 9-12, 2009

Place and Date of Judgment:

Chilliwack, B.C.

August 25, 2009

[1] This is a matrimonial proceeding where the primary issues between the parties relate to the division of assets, spousal support, child support and various extraordinary expenses. The defendant also seeks damages for an assault that occurred in February 2008.

Background

[2] The parties met in high school and began to live together in 1991, the year after they finished grade 12. The plaintiff, Mr. Carter, did not in fact graduate from high school until some years later. Both parties are now 36 years old.

[3] The parties married in 1995. They had two daughters. Megan and Grace, who were 12 and 9 years old respectively at the time of trial. From the time that their first child was born, Ms. Abbott was largely an "at home" parent, though she held a variety of part-time jobs.

[4] The parties originally rented accommodation at several locations and bought a small townhome in Chilliwack in 1995. They moved to a larger home in June 1999. The parties resided together in that home until November 2003 when they separated. A Consent order made on April 18, 2007 contained a declaration under s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], that there was no reasonable prospect that the parties would reconcile.

[5] Ms. Abbott returned to school in November 2006 and graduated as a registered care attendant the following May. She is presently enrolled as a full-time student at Douglas College and hopes to graduate as a psychiatric nurse in December 2011. The two children have had their primary residence with each of their parents at different times. In the main, however, they have resided with their mother. This has certainly been true since early 2008.

[6] On February 4, 2008, Mr. Carter struck Ms. Abbott. He was thereafter arrested. It is this battery that gives rise to the defendant's claim for damages.

Issues

- [7] Prior to the commencement of the trial, counsel for the parties had reached agreement on numerous issues, including access as well as an amount for basic child support commencing on July 1, 2009. The agreement of the parties on these various issues is referenced at para. 127 of these Reasons. The following issues, however, remain to be decided:
1. Whether there should be a reapportionment under s. 65(1) of the FRA of the equity in the family home;
 2. Whether an order for spousal support, including retroactive spousal support, should be made;
 3. Whether any order for retroactive child support should be made;
 4. The responsibility of each of the parties for various extraordinary expenses through to the date of trial.
 5. The responsibility of Mr. Carter for certain expenses incurred in preparing the matrimonial home for sale; and
 6. The damages arising from the February 2008 battery of Ms. Abbott.

Mr. Carter's Income

- [8] Before turning to these specific questions, it is necessary to deal with the amount of Mr. Carter's income for support calculation purposes.
- [9] Immediately after graduation, Mr. Carter went to work in the family business which was started by his grandfather and is now run by his parents. The business is presently called Valley Cycle Locksmith. Historically the business sold sporting goods. Approximately 30 years ago, it became a store which specialized in locks and related products. Mr. Carter has no direct interest in the business. He is paid a salary. That salary has varied over time. In 2004, Mr. Carter reported a salary of \$42,000. In 2005 through 2008 Mr. Carter reported a salary of \$48,000. His 2005 salary was slightly higher because he received some payments in lieu of taking holidays for the year. Recently Mr. Carter received a pay increase which brings his income to \$56,400 annually.
- [10] The difficulty arises from the fact that Mr. Carter has received at least two forms of cash payment over time which he has not reported or recognized on his income tax returns. First, he historically received an amount of approximately \$400 a month directly from his mother. This level of payment, at least until 2003, was static. Second, Mr. Carter would periodically assist people who were locked out of their homes or cars and would sometimes be paid cash for such work. This generally occurred if he were called out after hours or on a weekend.

- [11] Mr. Carter did not deny the receipt of such monies. He acknowledged receiving the \$400 amount historically and he agreed that he had in the past been paid cash for services he provided to persons after business hours.
- [12] Before dealing further with this issue, I should say that I found Mr. Carter to be a truthful person. He gave his evidence in a forthright and responsive manner. He regularly made admissions which were harmful to his position on different issues without hesitation. Furthermore, though the tenor and content of this proceeding was often emotional, his answers were measured. If he had no memory, or an imprecise memory of given events, he said so. Counsel for Ms. Abbott urged that I ought not to accept Mr. Carter's evidence as a result of his having failed to properly report his income on his income tax returns. Mr. Carter's failure to report his income fully or accurately cannot be excused, but it does not in my view, diminish from the weight or value of the evidence that he gave at trial on various issues.
- [13] Conversely there are aspects of Ms. Abbott's evidence that I have not accepted. She was prone to overstatement. She would periodically not respond directly to the questions asked of her. On occasion she gave evidence intended to advance her position which was shown on cross-examination to be inaccurate. The amount of money the parties had saved prior to buying their home is but an example of this. To the extent there has been a conflict or difference in the evidence of the parties, and absent other objective evidence, I have generally relied on the evidence of Mr. Carter.
- [14] Ms. Abbott deposed in an affidavit filed earlier in these proceedings that she believed Mr. Carter had additional non-reported monthly income of about \$1,000. She said at trial that this was based on her discussions with and observations of Mr. Carter when she was with him prior to their separation. Based on Mr. Carter's own evidence, this sum would have historically been perhaps \$600 per month. This \$600 figure was made up of the \$400 amount I've referred to and of a further amount of approximately \$200 for after hours work. Both parties recognized that their respective estimates were not precise. Ms. Abbott said that the \$1,000 figure was a "guesstimate".
- [15] Ms. Abbott's estimate included amounts which she said Mr. Carter and his father would generate, for example, from buying old safes at auctions, fixing up those safes, and selling them at a profit. She said, however, that she did not know if such profits went into "one pocket, or the safe, or was divided...I don't know". Mr. Carter said he did not generally receive such monies and I accept that evidence.
- [16] Ms. Abbott also said she believed that old sporting good stock from the former business had been written off by the company as "dead stock", that sales from such stock was "free money" and that the sale of such stock "never touched the till". Mr. Carter generally denied this and indicated that the sale of sporting goods were treated no differently from other company sales. I accept this. To the extent that there was deviation from this practice, I do not believe this was of any consequence. It is to be remembered that the sporting goods stock being

discussed is more than 30 years old and that interest in such stock would necessarily be limited.

- [17] Ms. Abbott also suggested that Mr. Carter would, with some regularity, simply take cash from the store's cash register or safe if he required it; for example, if the parties wanted to go away for the weekend. Mr. Carter acknowledged that this may have occurred in isolated circumstances, but denied that it occurred with any regularity. Again I accept this. The evidence throughout suggested that Mr. Carter's mother carefully managed both the store's finances as well as payment to Mr. Carter.
- [18] Furthermore, the payments Mr. Carter received prior to the separation of the parties are of little direct relevance and, based on Mr. Carter's evidence, have changed significantly since that separation.
- [19] In June 2003, the parties bought a van with, in part, \$10,000 loaned from Mr. Carter's mother. Thereafter, Mr. Carter said, the \$400 a month he had been receiving from his mother was applied towards this loan. In my view, the fact that this sum was being applied to a loan as opposed to being provided to him directly does not alter the fact that his de facto income was higher than reported. Some years later when he inquired from his mother whether the loan had been repaid, he learned that it had. She then resumed providing him with monthly payments, but only at the level of \$200 per month, and later at only \$100 per month. More recently, Mr. Carter no longer receives any such regular cash payments from his mother. This change stems partly from the fact that more of the company's receipts are dealt with electronically than in the past and partly because the company has more employees than it did historically.
- [20] The cash payments Mr. Carter received for after hours work have similarly been reduced; he indicated that in most months he has received nothing, and in some months perhaps \$100 or \$150. Mr. Carter's evidence of his cash income post-separation was uncontradicted and I accept it.
- [21] The lack of precision in the evidence and the fact that the cash monies Mr. Carter received fluctuated with time renders any precise calculation of an average cash income unrealistic. I believe an average figure of \$350 per month or \$4,200 per year from November 2003 to date accurately reflects Mr. Carter's cash income. This figure is likely low early in the period and high in the latter part of this time frame. Nevertheless, it is this average figure that I have added to Mr. Carter's reported income on an annual basis for various calculations.

1. Should There be a Reapportionment in the Equity of the Family Home?

[22] Section 65(1) of the FRA provides:

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.

[23] The following principles create a framework within which s. 65 issues are analyzed:

- a) the equal division contemplated under s. 65 of the Act should prevail unless the application of one or more of the criteria in s. 65(1) would render that result unfair;
- b) Ms. Abbott, as the spouse seeking reapportionment, bears the onus to establish the appropriateness of such reapportionment: *Bain v. Bain*, 2008 BCCA 49, 78 B.C.L.R. (4th) 13 at para. 36;
- c) the court should first deal with the appropriate allocation of assets and then address issues of maintenance. *Clarke v. Clarke* (1997), 46 B.C.L.R. (3d) 37, 34 R.F.L. (4th) 382 (C.A.) at para. 64; and
- d) "...the fundamental question is whether the statutory division is unfair having regard to the factors listed in s. 65 at the triggering event. Where the triggering event antedates the trial, it is important that only matters up to that date be taken into account in deciding whether the statutory division is unfair": *Mann v. Mann*, 2009 BCCA 181 at para. 46, referencing *Blackett v. Blackett* (1989), 63 D.L.R. (4th) 18, 40 B.C.L.R. (2d) 99 (C.A.).

[24] The parties sold the matrimonial home in February 2008. They netted in excess of \$218,000 for that sale. By agreement each party received \$50,000 from the proceeds of sale. As at the date of trial, \$120,982.39 remained to be distributed. It is this figure, or a portion of it, that Ms. Abbott seeks to have reapportioned to her benefit.

[25] The primary basis relied on by Ms. Abbott to support her claim is found in s. 65(1)(e) and is based on her assertion that she requires such a reapportionment in order to continue her education, upgrade her skills and thereby achieve economic independence and self-sufficiency. In addressing an analysis under s. 65(1)(e), a court is driven by various factual and conceptual considerations. Of primary importance is the recognition that in many instances a spouse, generally the woman, will subordinate her place in the workforce in order to advance the interests of her family. She will often thereby sacrifice her ongoing career development, training and any promotion she might otherwise have enjoyed and ultimately end up in a significantly disadvantaged economic position.

[26] In the case of *Lodge v. Lodge* (1993), 79 B.C.L.R. (2d) 360, 31 B.C.A.C. 72 (C.A.) [cited to B.C.L.R.], Prowse J.A., speaking for the court, addressed a reapportionment of property at paras. 20-21:

The fact that spouses, usually women, who stay at home to care for their children often suffer such a loss is now being recognized in the case law, frequently in relation to statutory provisions relating to maintenance. One expression of this loss is found in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), where, in considering the support provisions of the Divorce Act, 1985, Madam Justice L'Heureux-Dubé, speaking for the majority, made the following comments at p. 388 of the decision:

The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions, and lack of access to fringe benefits, such as pension plans, life, disability, dental, and health insurance. As persons outside of the workforce cannot take advantage of job retraining and the upgrading of skills provided by employers, one serious economic consequence of remaining out of the workforce is that the value of education and job training often decreases with each year in comparison to those who remain active in the workforce and may even become redundant after several years of non-use. All of these factors contribute to the inability of a person not in the labour force to develop economic security for retirement in his or her later years.

Madam Justice McLachlin, in separate concurring reasons, adopted the following comments from the reasons for judgment of Twaddle, J.A. in the Manitoba Court of Appeal, at p. 398 of the *Moge* decision:

As Twaddle J.A. put it:

"Depending on the duration of the marriage, and the wife's education and work experience, economic self-sufficiency may mean a permanent disadvantage from which the wife cannot recover. Having concentrated her efforts for many years on looking after the home, the husband and the children, the wife may have lost opportunities to learn, to train, to grow. Those lost opportunities may not be regainable.

The husband, in the meantime, may not only have earned a living for the family, or part of one, but also have expanded his knowledge and experience in work-related areas. He may have a higher earning potential than his wife because of their domestic arrangements."

[27] The second principle that assists in providing a framework for the application of s. 65(1)(e) is definitional. The concepts of economic independence or self-sufficiency, absent some benchmark, are of limited assistance. It is generally understood that these concepts are tied to the standard of living enjoyed by the spouse seeking a reallocation prior to any separation of the parties: See *Bain v. Bain* at para. 37, *Boonstra v. Boonstra*, [1994] B.C.J. No. 2882 at para. 36, and *Kennedy v. Kennedy* (1994), 98 B.C.L.R. (2d) 287 at para. 22.

[28] Section 65(1)(f) is also relevant to an analysis under s. 65(1)(e). In *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1, 17 R.F.L. (4th) 55 [cited to B.C.L.R.], the court addressed the interrelationship between paragraphs (e) and (f) of s. 65(1) and said at para. 46:

... It seems to me that, when dealing with the matter of reapportionment under s. 51, the appropriate level of economic independence and self-sufficiency under subs. (e) will be a matter to be decided to some extent with regard both to the pre-separation standard of living and to the economic circumstances, or "capacity", of the other spouse referred to in subs. (f). In this way, it seems to me, the past earnings and future earning capacity of the spouses are necessarily relevant considerations on reapportionment of assets.

[29] Ms. Abbott's desire to continue with her education and enhance her qualifications and work skills underlies her effort to have the equity in the family home reapportioned in her favour. In my view, the circumstances which existed between the parties up to the triggering event do not support the conclusion that giving effect to the statutory division provided for in s. 65(1) would be unfair.

[30] When the parties married in 1995 they both had relatively limited educations. Ms. Abbott had finished high school and obtained a certificate in ornamental horticulture after taking a course for about one year from the University of the Fraser Valley. The work was seasonal, didn't pay well, and Ms. Abbott developed allergies to certain plants. She subsequently secured employment at a hog farm and within six months of being hired became a supervisor in the laboratory which dealt with the artificial insemination of the animals. She worked at this facility from 1992 to April 1997. She repeatedly emphasized in her evidence how much she enjoyed the work and the environment. There was no hint in her evidence that she aspired to anything different or "better" or that working at this facility in any way compromised any other career aspiration.

- [31] After the parties' first child, Megan, was born in June 1997, Ms. Abbott stayed at home. The parties had their second child, Grace, in August 1999. Ms. Abbott indicated that the parties agreed that she should stay at home to be a mother. There was no real discussion between the parties about Ms. Abbott obtaining further training or skills. There seemed to be a general understanding between them that Ms. Abbott would likely return to the workforce when the children were of school age.
- [32] After Megan was born Ms. Abbott did some housecleaning for others, and also worked with a photographer proofing photographs. After Grace was born, Ms. Abbott continued this part-time employment and also began to sell Avon products.
- [33] From 1991 to date, Mr. Carter has continued to work as a locksmith in his parent's store. At some point he completed his high school degree. He apparently enjoys his work, has obtained no further qualifications, and has no further career aspirations.
- [34] I was presented with very little evidence about the lifestyle of the parties prior to their separation in 2003. Ms. Abbott did say that they did not go on vacations but might go to the island for a weekend. She said they generally did not have much money in their chequing account. In 2003, Mr. Carter had declared income of \$43,000 while Ms. Abbott generated income of approximately \$3,500. Even with the additional cash supplements that Mr. Carter received, the lifestyle of the parties, with two young children, would have necessarily been quite modest.
- [35] I am supported in this conclusion by two further facts. In 1999, after having been together for eight years and married for four years, the parties bought a new home for \$172,000.
- [36] In order to acquire this new home they used monies that Mr. Carter had received from his parents. Mr. Carter had received a gift of \$25,000 the previous year which he had invested. That sum had grown to \$34,000 at the time of their intended purchase. They had saved, on their own, virtually no other funds which they could put towards the purchase of their new home. Though they had earlier purchased a townhome, they broke even on the sale of that home. Ms. Abbott originally sought to assert that some portion of the sale of the new home was achieved with savings which she and Mr. Carter had assembled, or from the sale of the townhouse. She subsequently resiled from this in cross-examination. Indeed, apart from the \$34,000 figure I have referred to, the parties had to borrow a further \$10,000 from Mr. Carter's parents in order to cover the legal fees, taxes, and other costs associated with the conveyance of the property.
- [37] This example, along with the \$10,000 Mr. Carter borrowed from his mother for the van, and the combined gross earnings of the parties in 2003, are consistent with the parties living a relatively simple and frugal lifestyle.
- [38] When the parties separated in November 2003, Mr. Carter went to live in his parents' home. For a period of approximately 15 months, the parties made an effort to work out their differences. During this period of time, Mr. Carter provided the whole of his take-home pay,

or approximately \$2,600 monthly, to Ms. Abbott for her use. From these monies she maintained the matrimonial home and the children. Mr. Carter had some lunches and most dinners with the family. He would bathe the children and read to them and then return to his parents' home for the evening. The parties did not cohabit during this time. Mr. Carter survived on the cash monies he received.

- [39] Mr. Carter also gave the van that had recently been purchased to Ms. Abbott in 2005. There was some discussion between the parties about whether Mr. Carter gifted the van to Ms. Abbott or whether the transfer of the van, a family asset, to Ms. Abbott was something I should consider when addressing Ms. Abbott's various claims including the claim for reapportionment. I do not believe I need address this issue squarely. I do believe, however, that Mr. Carter sought throughout the period in question to act decently and generously towards Ms. Abbott and his children. The defendant does not accept this.
- [40] After March 2005 it became apparent to the parties that they would not be able to save their marriage and that they should get on with their respective lives. During the months of March, April, and May 2005, Mr. Carter continued to provide Ms. Abbott with \$1,400 per month and thereafter paid her \$900 per month until March 2007. Mr. Carter said these amounts were arrived at by Ms. Abbott after discussion between the parties. Ms. Abbott did not dispute this. Commencing in March 2007, Mr. Carter began to make monthly child support payments of \$729. This figure was based on the Guideline amount that was referable to his then reported income.
- [41] In May 2005, Ms. Abbott returned to work at a hog farm. She went to a different facility and was again hired as a supervisor. She worked there until November 2006. At the time she left, she was earning about \$14.00 per hour. Her 2006 income tax return reveals that she made approximately \$30,000 in the first ten months of the year.
- [42] Ms. Abbott again appeared to enjoy the work. Unfortunately, at this new facility, she was required to work very long hours and averaged more than 200 hours a month. She found the pace unsustainable and believed the hours were interfering with her ability to parent properly. By November 2006, the younger child, Grace, was in grade 1.
- [43] She determined that she enjoyed the "medical side" of what she did and decided to return to school to become a registered care attendant. She started a six month course in November 2006 at the University of the Fraser Valley and graduated from that institution in May 2007.
- [44] In May 2005, Ms. Abbott received an ICBC settlement in the amount of \$17,600 for a 2002 motor vehicle accident. She invested this sum and by June 2006, it had grown to in excess of \$24,000. Ms. Abbott used this sum, together with the \$900 a month she was still receiving from Mr. Carter, to return to school. She was still residing in the matrimonial home when she returned to school. It appears the parties had worked out an informal shared custody arrangement, with Ms. Abbott being the primary caregiver at that point in time.

- [45] When at school Ms. Abbott discovered both a significant interest in and a real aptitude for her studies. She found the work easy and her teachers encouraged her to go on and become a registered nurse. She graduated from her program at the top of her class.
- [46] On April 18, 2006, Master Keighley dealt with a number of issues which existed between the parties (including a s. 57 declaration, as mentioned above).
- [47] As of April 18, 2006, Ms. Abbott was on the verge of graduating as a registered care attendant. It is not quite clear whether she had actually secured a job with her new designation by April 18, 2006, but I believe on balance that it is likely she had or was very close to doing so. Ms. Abbott said that it was at the Judicial Case Conference before Master Keighley that she first mentioned her plan to move to North Vancouver to Mr. Carter. She was considering moving to North Vancouver to work at Lions Gate Hospital. It appears that Ms. Abbott actually told Mr. Carter that she had been hired as a care attendant at Lions Gate Hospital in the first week of May 2007, that she had moved to North Vancouver in May 2007, and that she started work at Lions Gate Hospital in June 2007.
- [48] Though Ms. Abbott did not again return to school to begin work on her nursing degree until September 2007, a date which post-dates the triggering event, she appears to have had this in mind prior to April 2007. She said that very early on in her registered care attendant program various teachers had encouraged her to continue with her studies. Accordingly, although there was some lack of precision in the evidence, I have dealt with this issue as though Ms. Abbott had formed an intention by April 18, 2006 to return to school to obtain a nursing degree.
- [49] The job which Ms. Abbott secured as a registered care attendant paid approximately \$21.60 per hour. It is a position that afforded her flexible hours and that would have generated an annual income, based on a 40-hour week, of almost \$45,000 annually. This figure does not include any benefits or overtime. Though Ms. Abbott admitted that the position, being a union position, had benefits attached to it she did not know what the value of these benefits would be.
- [50] Ms. Abbott has no intention of working as a registered care attendant. She said that "her skills and intellect are better than that", and that she had no wish to spend her life dealing with "soiled pads". She also had concerns about the long-term job security associated with the position.
- [51] Though it is likely Ms. Abbott fixed on her present desire to be a psychiatric nurse some time after April 2007, the only evidence relating to the income she might generate after graduating with a nursing degree was given in the context of that particular position. Thus I was told that on graduating with her nursing degree she would earn in excess of \$28.00 per hour or approximately \$60,000.00 per year if she worked at a government institution. This sum again excluded any benefits or overtime. Ms. Abbott admitted that if she worked at a private institution she could earn markedly more than this. Specifically, she was aware of several colleagues who earned approximately \$35.00 per hour at private institutions and

knew of one person who earned \$50.00 per hour. These hourly wages would convert to incomes of approximately \$75,000 and \$100,000 annually, exclusive of benefits, respectively.

- [52] In my view, Ms. Abbott's decision to continue with her education is not directed towards becoming economically independent and self-sufficient as those words are used in s. 65(1)(e). Obtaining a further degree in nursing is not required or directed towards allowing Ms. Abbott and her children to achieve the standard of living which they enjoyed during the course of the marriage. The income which she can earn as a care attendant together with the amounts that her husband pays by way of child support give rise to an income which matches or surpasses the family income prior to separation. It also roughly approximates the income of Mr. Carter, though an equalization of incomes is not required under s. 65(1)(e).
- [53] Instead, obtaining this further academic qualification would give rise to a significant betterment in her economic position. To some extent, all professional education has as its purpose providing an individual with increased self-sufficiency and job satisfaction. The object of s. 65(1)(e) is not, however, to provide a spouse with ideal employment or an optimal professional position. Instead, it is intended to enable a person, who has potentially sacrificed job opportunities or professional advancement to further the marriage, an opportunity to acquire education or skills training that will provide them with a level of self-sufficiency and independence. The barometer of such economic independence is again, generally speaking, the standard of living that prevailed during the marriage.
- [54] In the circumstance of this case, Ms. Abbott, in staying at home with the children after 1997, did not give up any opportunity for higher education or advancement in another field. I was urged to conclude that had Ms. Abbott not stayed home with the children, she would likely have progressed further professionally. This, however, is not consistent with the evidence. Before deciding to stay home with their first child, Ms. Abbott worked at the hog farm for almost five years in a job that she "loved". It was this position that she returned to in 2005. She subsequently chose to consider different career options primarily because of the lack of flexibility in her schedule and the significant time requirements of her existing employment.
- [55] Indeed, there was no suggestion from Ms. Abbott that on registering to become a care attendant her ultimate goal was to become a nurse. Instead, it was after undertaking her program and upon coming to realize that she had a real aptitude for such study that Ms. Abbott decided to pursue further education. Defendant's counsel suggested to me that the degree or certificate Ms. Abbott obtained as a registered care attendant was a "stepping stone" to her becoming a nurse. In a sense this is true but it is not relevant to the issue in question. Ms. Abbott now aspires to obtain a Masters Degree in Nursing and to perhaps teach one day. In this sense, her nursing degree will also be a "stepping stone" to further advancement.

- [56] In my view, Ms. Abbott's interest in learning came to her late in life. She has discovered an interest and an aptitude which she was unaware of prior to or throughout her marriage and which she had never expressed any intention of pursuing.
- [57] The plaintiff accepts that it was appropriate for Ms. Abbott to obtain a diploma as a registered care attendant. This qualification has provided her with the opportunity to work more flexible hours and to improve her income earning potential. The defendant's current aspiration to obtain a further degree engages different considerations. It is an aspiration directed to providing Ms. Abbott with enhanced job satisfaction so that her personal potential will be better realized. It is an aspiration directed towards substantially increasing her income and improving her economic self-sufficiency beyond the level she enjoyed prior to separation. Although these are laudable objectives they are not objectives which warrant a reapportionment under s. 65(1).
- [58] I have focussed on the issue of economic self-sufficiency in response to the plaintiff's primary submission. The following additional factors also militate against any potential reapportionment:
- a) The parties were married for 14 years. They were separated for six years of that time. Ms. Abbott, at the time of separation was 31 years old. The marriage was one of "average length".
 - b) A number of cases, Toth being an example, focus on the career advancement enjoyed by one spouse while the other cares for the children and oversees the home. Mr. Carter was a locksmith in 1997 and remains a locksmith today. His salary has not changed significantly. Thus, this is not a case where Mr. Carter is leaving the marriage with various marketable skills or professional credentials which he accumulated during the marriage.
 - c) The parties acquired their home in 1999, or four years before they separated. The longer a marriage continues following the receipt of a gift or inheritance the less relevant that factor has to a reapportionment: Lodge para. 17. Here Mr. Carter used a gift from his parents, which had grown to \$34,000, to acquire a home which in 1999 had a value of \$172,000. This gift formed the whole of the down payment for the family home. Four years is a sufficiently short period of time for the source of the monies used for the acquisition to remain relevant. Mr. Carter does not seek any reapportionment in his favour in recognition of his having used his parent's gift to acquire the home. He argues, and I agree, that it is, however, a factor which militates against any potential reapportionment of the proceeds resulting from the sale of the property in favour of the defendant.
 - d) As stated above, at the salary level Ms. Abbott can achieve as a care attendant, particularly if benefits are considered, the parties would enjoy similar levels of income. Though the object of s. 65(1)(e) is not to equalize income (Pasnak v. Pasnak, 2000 BCSC 1374 at para. 28), it is relevant that the parties enjoy such parity in earning potential.

- e) The parties have historically shared custody of their children. As of the date of the triggering event, Mr. Carter had primary care of his children. Ms. Abbott did not require reapportionment to provide the primary home for the children.
 - f) There is no history of Mr. Carter refusing to pay child support. Thus, this is not a case where Ms. Abbott had primary responsibility for the children without support or assistance.
- [59] One further factor warrants mention. In 2005, when the parties realized they would not be able to reconcile, they met with a mediator. One of the matters arising from these meetings was an oral agreement between the parties that Ms. Abbott would stay in the family home, obtain refinancing, and pay Mr. Carter \$50,000 for his interest in the home. At that time the property had an appraised value which provided the parties with approximately \$150,000 of equity in the home. The ostensible benefit to Mr. Carter of this agreement was that Ms. Abbott would not thereafter seek spousal support and that she agreed to stay in Chilliwack rather than move elsewhere with the children. Ms. Abbott had disliked living in Chilliwack for some time but was prepared to continue to reside there if she could remain in the family home. Mr. Carter, who wanted to keep the children nearby, originally agreed to this proposal. Thereafter, Ms. Abbott encountered some delay in obtaining financing which she attributed to Mr. Carter's failure to act quickly to remove himself from different jointly-held credit cards. Ultimately, with the passage of time, and a rising real estate market, Mr. Carter told Ms. Abbott that he was unwilling to proceed with the transaction. Ms. Abbott, in turn, promptly announced that she would be leaving Chilliwack with the children.
- [60] The defendant referred to these events not to establish any legal right arising from the agreement itself, but rather to show that a reapportionment in favour of Ms. Abbott was something that was earlier agreed to and that that earlier agreement was persuasive in establishing what the parties thought was fair. I do not believe this is so. The oral agreement the parties arrived at was animated by markedly different considerations than the ones which are engaged by s. 65(1). It appears that Mr. Carter's initial agreement was driven primarily by his desire to keep his children nearby. Similarly, no part of the agreement from Ms. Abbott's perspective appeared to have anything to do, at least overtly, with her becoming economically independent. Still further, there was no discussion of child support, child custody or of other related issues in this agreement. Such considerations are directly relevant when undertaking an analysis under s. 65(1). Thus, I do not believe this earlier agreement or understanding bears on Ms. Abbott's present efforts to have the proceeds from the sale of the matrimonial home reapportioned in her favour.
- [61] In my view, Ms. Abbott has not satisfied the onus of establishing that an equal division of the proceeds emanating from the sale of the family home would be unfair.

Spousal Support

- [62] The Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, s. 15.2(4) and (6) and the FRA ss. 89 and 93(4) establish the statutory framework within which an order for spousal support is to be made. These respective provisions are interpreted in similar fashion; I have laid out the provisions of the Divorce Act below.
- [63] The criteria for granting interim or permanent support under the Divorce Act are set out in s. 15.2(4):
- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [64] The objectives of an order for spousal support are set out in s. 15.2(6):
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [65] Entitlement to a support order can be established on a non-compensatory or needs basis (see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577; *Yemchuck v. Yemchuck*, 2005 BCCA 406, 257 D.L.R. (4th) 476), or a compensatory basis. The invariable starting point for an analysis of these provisions is *Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 [cited to S.C.R.], in which the majority judgment, given by Madam Justice L'Heureux-Dubé advanced a "compensation model" as appropriate to give effect to the objectives in the Divorce Act. She said at 860-61:

Legislative support for the principles of compensation may be found in ss. 15(7)(a-c) and 17(7)(a-c) which are extremely broad in scope and which direct the court, in making or varying a support order, to recognize any economic advantages or disadvantages arising from the marriage

or its breakdown, to apportion between the spouses any financial consequences arising from the care of children over and above those consequences which have already been made the subject of child support and to relieve economic hardships arising from the marriage. As a matter of statutory interpretation, it is precisely the manner in which compensatory spousal support is able to respond to the diversity of objectives the Act contains that makes it superior to the strict self-sufficiency model.

Although the promotion of self-sufficiency remains relevant under this view of spousal support, it does not deserve unwarranted pre-eminence. After divorce, spouses would still have an obligation to contribute to their own support in a manner commensurate with their abilities. In cases where relatively few advantages have been conferred or disadvantages incurred, transitional support allowing for full and unimpaired reintegration back into the labour force might be all that is required to afford sufficient compensation. However, in many cases a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages. In such cases, compensatory spousal support would require long-term support or an alternative settlement which provides an equivalent degree of assistance in light of all of the objectives of the Act...

[66] She went on to say at 864:

The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative. In so far as economic circumstances permit, the Act seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown...

[67] She continued at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution...

[Citations omitted]

[68] I have noted that it is generally accepted that a court should deal with the appropriate division of property before returning to considerations of spousal support. At the same time the two matters are closely related. In Toth, Taylor J.A. commented at para. 59:

In discussing the relationship between maintenance and the division proper under Pt. 3 of the FRA, it is useful to note that s. 51(e) [now s. 65(1)(3)] and (f) of the FRA relating to reapportionment of property, incorporate concepts which are also found in the maintenance provisions of both the Divorce Act, 1985 and the FRA. Thus, property division and maintenance are closely intertwined. One advantage of this legislative tie is that s. 51 [now s. 65] may be utilized in the division of property to reflect the relative abilities of the parties to become or remain economically independent and self-sufficient (s. 51(e)), and the respective capacities and liabilities of the parties s. 51(f). These concepts are also relevant to determinations of spousal maintenance.

[69] Taylor J.A. stated earlier, at para. 38:

The emphasis of the "compensatory" approach, adopted in Moge v. Moge with respect to periodic maintenance under the Divorce Act, and in Lodge v. Lodge with respect to reapportionment of family assets under the Family Relations Act, is in both cases on a wife's loss of opportunity to acquire or advance in a calling, suffered as a result not simply of the marriage but rather of unequal assumption of child-raising and housekeeping duties during the marriage, and her consequently diminished or limited earning capacity on marriage breakup.

[70] It is clear that application of the broad principles advanced in Moge remains a fact driven exercise. Thus, in determining the applicability of these principles to a given case, Taylor J.A. also said at para. 38:

There must be an evidential basis for compensation in the facts of the particular case, and any compensation must, of course, meet the test of fairness to both parties.

[71] In Kennedy, Newbury J., as she then was, after referring to Moge at length said at para. 13:

Despite the Court's view that judicial notice may be taken of the general economic impact of divorce on women, the majority was also careful to make the point (beginning at 369) that the "traditional" and "modern" stereotypes of marriage are not altogether satisfactory, i.e., that "there are ... many cases which do not fall easily into either category." L'Heureux-Dubé J. noted in this regard that "there are much more sophisticated means which may be resorted to in order to achieve the objectives set out in the Act" (at 373). By this, her Ladyship was presumably referring to the application of the "compensation model". But the use of judicial notice in applying that model may, with respect, also lead to a stereotypical view that lacks validity in many instances. The marshalling of various statistics regarding average earnings and female poverty in Canada, for example, does not assist significantly in determining the quantum of loss in a particular case. Nor does the fact (of which I would have thought any court could be cognizant without resorting to learned treatises) that the vast majority of divorced women who have been in a traditional marriage find themselves at a disadvantage vis a vis women who have been able to pursue their

jobs or careers without interruption, assist in determining whether the general cause and effect suggested by the cited reports necessarily holds true in a particular instance such that a particular woman can be assumed to have been disadvantaged by her marriage vis a vis what her position would have been had she been in the market continuously.

[Emphasis in original]

- [72] Thus it does not flow as a matter of necessity that a spouse who leaves the workforce for a period of time is disadvantaged, has sacrificed professional or employment opportunities they otherwise may have enjoyed or has, on the breakup of the marriage, been relegated to a lower standard of living than that experienced during the pendency of the marriage.
- [73] In this case, the sweeping themes that underlie the "compensation model" have little applicability to the circumstances of the parties. I have already said that I do not believe that Ms. Abbott would have enjoyed any change or improvement in her position had she not stayed at home with the children from 1997 to 2005. She was prior to that time a person with relatively limited education and limited skills.
- [74] Furthermore, when the parties separated in 2003, and thereafter when it became apparent that they would not reconcile in 2005, there is no evidence of any change of substance in the standard of living that Ms. Abbott had enjoyed until that time. It cannot be said that Mr. Carter "reaped the economic advantages" of Ms. Abbott having left the workforce for a period of time. In addition, though this was a marriage of moderate length, "the presumptive claim of an equal standard of living" on dissolution was largely satisfied.
- [75] Until May, 2005, Mr. Carter paid Ms. Abbott either \$2,600, which was his full take-home pay, or \$1,400 a month. There is no basis for any spousal support during that time. From May 2005 until October 2006, Ms. Abbott worked at the hog farm. She had, as I have indicated, an annual income of approximately \$35,000. She received \$900 a month in child support from Mr. Carter. Mr. Carter had an annual income of approximately \$52,200 which includes the cash sums he received. Using the Spousal Support Advisory Guidelines ("SSAG") and recognizing that their purpose is "advisory" (Yemchuck, at para. 62), no spousal support would have been payable to Ms. Abbott throughout this period.
- [76] From November 2006 to April 2007 Ms. Abbott returned to school full-time, and continued to receive child support in the amount of \$900 a month until March of 2007, and received \$729 thereafter. Her average income in 2006 and 2007 was approximately \$25,000. Mr. Carter's income continued to be \$52,200. During this period, according to the SSAG, Ms. Abbott would again be entitled to no support.
- [77] After graduating as a care attendant in April 2007, Ms. Abbott had a potential income which, inclusive of benefits, largely matched and possibly exceeded the income of Mr. Carter. Mr. Carter continued to pay \$729 a month in child support. Using the marital standard as a yardstick, Ms. Abbott was able to maintain and enjoy a reasonable standard of living. The capital assets of the parties at that time were also substantially the same.

- [78] Since Ms. Abbott returned to school on a full-time basis in September 2007 to obtain her Bachelors Degree in Nursing, she has only worked during the holidays or when she is between academic terms.
- [79] Ms. Abbott prepared an estimate of her annual living expenses. This estimate was also intended to serve as a preview of her anticipated annual expenses until December 2011, when she is expected to graduate. This estimate fixes Ms. Abbott's anticipated expenses at approximately \$68,000 a year. Relatively little of this amount, approximately \$5,360 annually, is for tuition and books. When one recalls that the combined gross annual income of the parties as recently as 2004, inclusive of the cash amounts Mr. Carter received, was approximately \$55,000, this anticipated budget is surprising.
- [80] Early in 2008, Ms. Abbott rented a home in West Vancouver. She has resided there since. She presently resides in a house that originally rented for \$2,800 a month, but on which she was able to renegotiate a reduced monthly rent of \$2,500.
- [81] In her evidence, Ms. Abbott sought to paint a picture of extreme financial adversity. She gave many examples of such distress. One such example was of her regularly eating cabbage or oatmeal, after her children went to sleep, because she was able to prepare such meals on a dollar a day. I am of the view that such descriptions of extreme privation are overstated. They are simply not consistent with the money she has expended or the budget she has prepared. Though a precise calculation of her expenses and income is rendered difficult because Ms. Abbott's academic terms do not correspond with calendar years, on my calculation, in the two years since graduating as a care attendant, Ms. Abbott has expended at least \$60,000 annually to provide for herself and her children. In 2007 and 2008, she had combined reported income of approximately \$53,000. She received \$50,000 from the sale of the matrimonial home in 2008. She has received \$729 monthly from Mr. Carter. She cashed in an RRSP which had a value of approximately \$7,300 in 2008. She has also received various student loans.
- [82] The decision made by Ms. Abbott to return to school and reside in the area she has chosen, which is a neighbourhood of considerable affluence, are measured decisions made by an intelligent and mature person. She has chosen to invest the monies received from the sale of the matrimonial home, for example, not to re-establish the lifestyle she historically enjoyed or to make herself financially independent in the sense that I have described, but to create a new life for herself. She aspires to a career that will provide her with enhanced financial rewards, enhanced job satisfaction and enhanced career options. She "detested" living in Chilliwack and wishes to reside in a fundamentally different neighbourhood. All of these are her prerogatives. She will receive the balance of her half of the sale of the matrimonial home or a sum of approximately \$61,000. She is free to use these monies to complete her education and to achieve her various ambitions. In the long term she will be the beneficiary of these investments.

- [83] Conversely, Mr. Carter is content to reside in Chilliwack. He has used the monies he received from the sale of the matrimonial home to purchase a condominium in Chilliwack. He enjoys the work he has always done and appears content with his existing lifestyle.
- [84] There is no basis either within a "compensation model" or a "needs model" for Mr. Carter to make additional spousal support payments in order to enable the defendant to achieve her various personal and professional goals.

Child Support

- [85] The plaintiff seeks retroactive child support from Mr. Carter. The basis for this claim is that from March 2007 onwards Mr. Carter paid \$729 in monthly child support. This figure is the appropriate Guideline amount based on Mr. Carter's reported income of \$48,000. As I have said, Mr. Carter did generate further unreported income which I have fixed at \$4,200 annually. Thus at all material times, Mr. Carter's actual income, for Guideline purposes was \$52,200 and the amount of child support he should have been paying was \$791.00.
- [86] I was urged to consider the fact that Mr. Carter used a gift from his parents to purchase the matrimonial home, which he has not sought to be reapportioned, as well as the fact that he gave the family vehicle to Ms. Abbott on separation as a basis for rejecting a claim for retroactive child support. I was also urged to consider that the \$2,600 a month figure he paid for 15 months, the \$1,400 a month figure he paid for three months and the \$900 figure he paid through to March 2007 were all well in excess of what was required under the Child Support Guidelines. It was argued that since the claim being made was for retroactive support, it was reasonable to consider all of these amounts or payments. As I have said, I accept that Mr. Carter has generally sought to act responsibly and generously towards his children, but I do not believe that it would be appropriate to consider these factors.
- [87] Mr. Carter did not fully or accurately report his income and that conduct should not be condoned. Consequently he is to pay the additional amount of \$62.00 monthly from March 1, 2007 to July 1, 2009 at which time the parties have agreed that Mr. Carter is to begin paying \$900 monthly. Mr. Carter is, however, to make no adjusted payments for the period from June 1, 2007 to February 1, 2008. During the first three months of this period, the children resided with Mr. Carter about half the time and thereafter he had primary care of the children until early February 2008.
- [88] In addition, an Order of Master Keighley dated August 27, 2007, in anticipation of the children coming to live with Mr. Carter and of Ms. Abbott starting school in North Vancouver, determined that neither party was to pay the other child support after September 1, 2007. After February 2008, until relatively recently, the children were with Ms. Abbott on a virtually full-time basis. Thus, by my calculations, Mr. Carter is to pay an additional \$62.00 monthly for a total of 20 months through to July 1, 2009 or total of \$1,240.00.

- [89] In making this order I have considered the various factors referenced in *S.(L.) v. P.(E)*, 1999 BCCA 393, 67 B.C.L.R. (3d) 254 starting at para. 66, which are relevant to an order for retroactive support. These factors include the needs of the two children, Mr. Carter's ability to pay and Mr. Carter's conduct in making incomplete financial disclosure.

Home Care Expenses

- [90] In April 2007 Master Keighley ordered that the parties share equally the reasonable amounts that were to be incurred in preparing the matrimonial home for sale. That sale occurred in February 2008. The defendant argues that Mr. Carter has not paid his share of these expenses.
- [91] I was given no precise calculation of what the defendant said she paid in respect of home repair, maintenance costs or other expenses after April 2007. Instead, I was directed to a set of invoices which I was told were ostensibly to relate to various relevant expenditures.
- [92] It is not easy to make sense of these invoices. Many, if not most, relate to earlier expenses incurred by Ms. Abbott in 2005 and 2006. Some, such as an invoice from a Dr. Sims seem to have no relevance. Others, such as a bill from Home Depot, bore a handwritten notation "kid's' sandbox". It was also acknowledged by the parties that Mr. Carter paid various offsetting expenses such as the BC Hydro account. I was, however, given no tally of what the payments made by Mr. Carter amounted to.
- [93] Ultimately, I believe that there are approximately \$2,000 in maintenance costs, in municipal taxes and in municipal utility payments that appear relevant and pertain to the time period in question. Mr. Carter is to pay the defendant \$1,000 towards these accounts. I was also told that there was as of yet an unpaid Terasen Gas account in the amount of \$729.50. Each party is to pay 1/2 of that account as well.

Special or Extraordinary Expenses

- [94] Master Keighley's August 27, 2007 order directed that the parties were to pay for the children's extraordinary expenses in accordance with the Federal Child Support Guidelines and their respective incomes. It also expressly directed that the children were to be registered in Tae Kwon Do lessons, that Grace was to begin guitar lessons, and that Megan was to begin piano lessons.
- [95] Ms. Abbott has assembled a list of relevant expenses which total \$9,266.21. This list contained expenses for dental and medical expenses, for Registered Education Savings Plan ("RESP") payments, for extracurricular activities, and for school activities.
- [96] Ms. Abbott acknowledges that Mr. Carter has paid \$2,000 towards orthodontic expenses. Thus she says the extraordinary expenses she has incurred, to which Mr. Carter should contribute, have a value of \$7,266.21.

[97] Ms. Abbott does not acknowledge various amounts that Mr. Carter's mother has paid for various expenses for the children. Mr. Carter's mother has paid the following expenses:

1. Grace's Tae Kwon Do lessons for approximately two years until December 2007 at a cost of approximately \$70 per month;
2. Grace's guitar lessons for one year until February 2008 at a cost of approximately \$100 per month;
3. Megan's piano lessons for three years until February 2008 at a cost of approximately \$100 a month;
4. The children's Medical Services Plan ("MSP") expenses at a cost of \$1,400 annually. She continues to make those expenses to this date.

[98] I believe it is artificial to say that these payments or portions of them cannot be attributed to Mr. Carter. Master Keighley's order expressly contemplated some of these specific expenses. Mr. Carter's mother could have just as easily given her son a cheque as paid the amounts herself. Certainly, there should be no disincentive created for her wishing to assist the parties and their children with such expenses.

[99] Though most expenses on Ms. Abbott's list pertain to 2008 and 2009, some extend into mid-2007. Indeed the RESP payments extend as far back as 2005. I believe it is reasonable to recognize the \$1,400 Mr. Carter (or his mother) has paid for MSP payments over the past two years as well as a further \$1,000 for other expenses. Based on the figures I have described above, Mr. Carter's mother was paying approximately \$270 monthly for various expenses of the children. I have credited Mr. Carter with approximately four months of such expenses for the later part of 2007 until the end of February 2008. Thus, I believe Mr. Carter should be recognized as having contributed a further \$3,800 to the expenses of the children. In total then, Mr. Carter has contributed \$5,800 to the children's special expenses during this period.

[100] During the period in question (2007-2008), Ms. Abbott has had an approximate annual salary of \$25,000. Mr. Carter has had a salary of \$52,200. Based on these various approximate figures, Mr. Carter is to pay a further \$3,000.00 to Ms. Abbott on account of these expenses.

[101] Ms. Abbott also seeks contribution from Mr. Carter for childcare expenses she incurred in 2005 and 2006 while working at the hog farm. The total amount of such expenses over the two year period, by my calculation, was \$3,495. Such expenses, which were not previously claimed by Ms. Abbott, fall squarely within s. 7 of the Guidelines. Based on the incomes of the parties that I've referred to earlier, Mr. Carter is to pay Ms. Abbott \$2,300.00 for such childcare expenses.

[102] The parties have agreed on a mechanism for calculating extraordinary expenses in the future. They have, however, asked for direction relating to certain imminent extraordinary expenses.

- [103] The disagreement on these further specific expenses is a reflection of an issue which infuses much of the dispute between the parties. The first category of expense arises in respect of extracurricular activity and school trips. Ms. Abbott proposes, for example, to send one of her daughters on a school trip to Quebec City next year. The cost of this trip is expected to be \$2,500.00. Mr. Carter was cross-examined on whether he was supportive of this idea and whether he agreed that such a trip would benefit his daughter. In my view, those questions were somewhat unfair and missed the point.
- [104] It is clear that both Ms. Abbott and Mr. Carter care a great deal for their daughters. The fact is, however, that after taxes and child support payments, \$2,500 represents approximately one month's income for Mr. Carter. Though he may wish for his daughter to go to Quebec City, as he said he did, it is likely that while Ms. Abbott is in university such expenses are simply beyond the parties.
- [105] During the trial, however, it became apparent that the \$2,500 fee for the Quebec City trip could be lowered to \$1,400 if the parties donated their time to various activities associated with the trip. On that basis, I believe the expenditure is reasonable. But for that reduction in cost, I would not have approved it.
- [106] One of the concerns expressed on behalf of Mr. Carter was that expenses had been incurred without his knowledge and concurrence. It appears that commencing in September 2009, his involvement in his children's lives will increase and it is likely that he will thereby be kept abreast of their activities.
- [107] I believe Ms. Abbott should provide Mr. Carter with various invoices or expenses as they are being incurred and am directing that she do so. I am also directing that no more than \$1,500 be incurred annually for extracurricular expenses or school trips without the approval of Mr. Carter. I believe this sum is reasonable and represents the approximate amount expended for such expenses for the past two years on a prorated basis.
- [108] The second category of expenses relates to the children's healthcare, which is obviously paramount. Mr. Carter can, through his work, secure re-imbursement of up to \$2,000 annually for medical and dental bills for himself and his children. Mr. Carter's mother is prepared to continue to fund the costs associated with MSP for the children. Mr. Carter is to be given credit or recognition for such MSP payments in the future. Ms. Abbott is able to secure further health insurance for the children from her place of work for the sum of \$260 annually. This coverage would, for example, pay for certain categories of medical or dental expenses and would not require Mr. Carter to tap his company plan, leaving that plan available for orthodontic expenses or eye glasses or other expenses not covered by other plans. I believe that these various forms of coverage are all appropriate and should all be secured.
- [109] The next set of potentially necessary expenses are those associated with academic performance. During the trial there was an issue of whether Megan, who struggles with math, should be getting private tutoring at a cost of approximately \$100 a month. It

subsequently became apparent that her school would be able to provide some form of additional math tutoring to Megan at a much lower cost. Obviously the parties should work diligently to ensure that they obtain such tutoring for the children as may be necessary at as reasonable a cost as possible. Had a lower cost tutoring option for Megan not presented itself, however, I would have approved the expenditure. Ms. Abbott has also been contributing \$45 in total on a monthly basis to RESPs for her daughters. I believe that this too is a reasonable expense.

[110] The total amount which Mr. Carter is to pay Ms. Abbott for special or extraordinary expenses she has incurred is \$5,300.00.

The Assault Claim

[111] On Monday, February 4, 2008, Mr. Carter struck Ms. Abbott. The act, said to constitute a battery, gives rise to a claim for various forms of relief.

[112] Mr. Carter admits that he struck Ms. Abbott. He expressed genuine remorse and regret for his act, which he accepted was wrong and inexcusable. His conduct was made worse, in a sense, because it occurred before his children.

[113] Ms. Abbott admits that this act was not consistent with Mr. Carter's general character and that he had never before struck her.

[114] While recognizing that there can be no real explanation for such conduct, the circumstances leading up to the events of February 4 have some relevance, if only to place Mr. Carter's conduct in context.

[115] There is significant disparity in the evidence between the parties about what transpired on Sunday, February 3. I need not make any determination on which precise version of the events is accurate. In my view, the events reflect badly on both parties and reflects conduct that evidences how significantly relations between them had deteriorated.

[116] I do not intend to go into details of the events on the day prior to the assault. In short, when Mr. Carter went to pick up his children in North Vancouver that Sunday, Ms. Abbott and the kids were not at home (and unbeknownst to Mr. Carter, she had already moved to West Vancouver). Mr. Carter began to return to Chilliwack though Ms. Abbott had advised him she was only a few minutes away. The parties exchanged a series of heated text messages, culminating in Ms. Abbott's threat to withdraw the children from school in Chilliwack and move them to North Vancouver. Mr. Carter responded with a series of angry and vulgar messages. Ms. Abbott obtained legal advice and made arrangements to exchange the kids the following day. Ms. Abbott was told not to engage in direct discussion with Mr. Carter.

- [117] Therefore, the last substantive communication from Ms. Abbott was her indication that she would be changing the children's school the next day. Mr. Carter says he phoned both the police and Special Services that day to try to obtain assistance, but was told they could not intercede.
- [118] The parties arranged to meet the next day at a diner within a strip mall in Langley. Ms. Abbott arrived first with a friend and the children. When Mr. Carter pulled up, he parked his truck in a way that prevented Ms. Abbott's car from exiting and was clearly already angry. The children went to Mr. Carter's truck while he sought to engage Ms. Abbott in a discussion. She responded several times saying the matter should be handled by lawyers and sought to get back into her vehicle. Mr. Carter kicked her car door, dented it and thereby caused approximately \$225 of damage. Ms. Abbott swung around and kicked Mr. Carter. He says she swung her purse at him. At that point Mr. Carter struck her. He says this was done with an open hand. Ms. Abbott says it was done with a fist and that he punched her. I am inclined to accept Mr. Carter's evidence if only because he is a physically strong person, apparently trained in martial arts and Ms. Abbott who is quite slight, concedes that she was not knocked down. In any event, Ms. Abbott retaliated, struck Mr. Carter several times with her purse and pursued him for about two car lengths. She then retreated to the diner. The police were called. Mr. Carter waited outside for them and was arrested. He was subsequently released on bail. As a result of the incident, he lost custody of his children and for the next seven or eight months was only able to see his children with supervised access. Mr. Carter said this made him feel like "a monster".
- [119] The defendant claims that as a result of Mr. Carter's actions she suffered a "whiplash like" injury. This reflects a self-diagnosis on the defendant's part. There was no medical evidence lead to support her assertion or diagnosis. Ms. Carter was in class on the next day following the events in question and concedes she did not see a physician for more than a year to address the matter directly. The reason for this, she said, is because she knew a doctor would tell her to get physiotherapy or some other treatment which she could not afford. Ms. Abbott says she has had headaches and neck pain as a result of her injury. She said that periodically this pain is so extreme that she vomits. She did obtain some free physiotherapy treatments at her work place. She went to two massage treatments in West Vancouver in October 2008. She has obtained further physiotherapy in the weeks preceding the trial.
- [120] I do not accept Ms. Abbott's diagnosis or that she has suffered a soft tissue injury. Ms. Abbott has a family physician. At a minimum I would have expected some evidence from that physician to discuss the nature of Ms. Abbott's injuries as well as the prognosis for those injuries. There is no evidence that the injury Ms. Abbott complains of has limited her ability to engage in any past or ongoing activity. She has not missed a day of school or a day of work because of it. I do not accept her explanation for not so much as seeing a physician. She is a very bright woman who works in an environment surrounded by health professionals. It is hard to imagine that she would not seek the guidance or input of someone if she was genuinely struggling with her injury to the extent that she

communicated.

[121] In all of the circumstances, including what I consider to be some exaggeration on the part of Ms. Abbott, I believe an award of \$2,000 is appropriate. In making this award, and recognizing that each case turns on its distinct facts, I have been guided by the case of *Kovacic v. Kovacic*, [1998] B.C.J. 1710 (S.C.).

Punitive Damages

[122] The case of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, provides extensive guidance on the objects which are served by punitive damages as well as the constraints that exist for any such order. Thus, punitive damages are intended to punish (in the sense of retribution), deter, and denunciate (para. 68). At the same time, the "primary vehicle for punishment is the criminal law" and in Canada, punishment that has been imposed by a criminal count is a factor "of potentially great importance" (para. 69).

[123] In this case, Mr. Carter was arrested and charged with assault, spent a night in jail, was involved with various criminal processes for a year, lost custody of his children, and was limited to supervised access to his children until October 2008. He was directed to and has completed a 10 week counselling program dealing with conflict management. In my view, these various matters, in combination, have achieved the object of deterrence and denunciation and there is no need for a further award of punitive damages.

Aggravated Damages

[124] While aggravated damages are also compensatory, they are to be awarded only in cases where a defendant's conduct has been "particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety". To allow such damages there must be a finding that a defendant was "motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff": *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, paras. 188 and 190.

[125] There was nothing in Mr. Carter's conduct which satisfies these criteria, and accordingly, no award for aggravated damages is warranted.

Conclusion

[126] I make the following orders:

- a) the defendant's claim for a reapportionment of assets is dismissed;
- b) the defendant's claim for spousal support, including retroactive spousal support, is dismissed;
- c) the plaintiff is to pay \$1,240.00 in retroactive child support;

- d) the plaintiff is to pay \$5,300.00 for past extraordinary and special expenses;
- e) the plaintiff is to pay \$1,000 towards expenses incurred in preparing the matrimonial home for sale;
- f) the plaintiff is to pay \$2,000 as damages for his battery of Ms. Carter on February 4, 2008; and
- g) as success between the parties has been divided, each party is to bear their own costs of this action.

[127] In addition, I make the following orders, each of which has been consented to by the parties:

- a) Subject to s. 12 of the Divorce Act, the parties are divorced from each other, the divorce will take effect on the 31st day after the day of this Order.
- b) The defendant shall have sole custody of the children.
- c) The plaintiff and the defendant shall have joint guardianship of the children. Joint guardianship shall be defined as follows:
 - (i) the parents are to be the joint guardians of the estate of the children;
 - (ii) in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the children;
 - (iii) the custodial parent will have the obligation to advise the other parent of any matters of a significant nature affecting the children;
 - (iv) the custodial parent will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the children, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of the children;
 - (v) the non-custodial parent will have the obligation to discuss the foregoing issues with the custodial parent and each parent shall have the obligation to try to reach agreement on those major decisions;
 - (vi) in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts the custodial parent shall have the right to make such decision;
 - (vii) the non-custodial parent shall have the right, under s. 32 of the FRA to seek a review of any decision which that parent considers contrary to the best interests of the children; and
 - (viii) each parent will have the right to obtain information concerning the children directly from third parties including, teachers, counsellors, medical professionals and third party care givers.
- d) Access to the children shall be as follows:

- (i) the plaintiff shall have ongoing access to the children on alternating weekends from Friday afternoon to Sunday evening;
 - (ii) during the school summer vacation each of the parties shall have two uninterrupted one week periods of time with the children with the dates to be arranged between the parties;
 - (iii) commencing in September 2009 the plaintiff shall have access to the children for three out of every four weekends with the second of those three weekends being from Friday evening to Saturday evening and the other two being from Friday evening to Sunday afternoon to commence Thursday evening if the following Friday is a holiday or professional development day and to continue to Monday afternoon if that Monday is a holiday or professional development day;
 - (iv) the children shall be with the plaintiff from Christmas Eve at noon to Christmas Day at noon in odd numbered years and from Christmas day at noon to Boxing Day at noon in even numbered years with the children to otherwise be with the defendant and the remainder of the Christmas school break shall be divided equally between the parties;
 - (v) the plaintiff shall have such other mid-week access to the children as is agreed to between the parties; and
 - (vi) access exchanges shall continue to occur in Langley with a third party to be present unless otherwise agreed upon by the parties.
- e) The defendant shall not move the children's residence outside of British Columbia without the written consent of the plaintiff or court order. If the defendant wishes to move the children's residence outside of the Fraser Valley/Lower Mainland area and that is opposed by the plaintiff the parties shall attempt to resolve the issue through mediation and if that is unsuccessful either of the parties may make an application to the court in that regard.
 - f) On a Guideline income of \$59,500 the plaintiff shall pay to the defendant the sum of \$900 per month as basic child support commencing July 1, 2009 and continuing on the first day of each month until and including May 1, 2010.
 - g) On or before May 15 of each year commencing May 15, 2010 the parties shall exchange their Income Tax Returns and corresponding Notices of Assessment for the purpose of adjusting the plaintiffs monthly child support obligation and determining the proportion of extraordinary expenses that are to be paid by each of the parties.
 - h) Basic child support shall be adjusted annually and commencing June 1, 2010 the plaintiff shall pay the defendant monthly basic child support in the Guideline amount for British Columbia calculated on the greater of \$59,500 and the plaintiffs line 150 income as shown on his Notice of Assessment for the preceding calendar year. The plaintiff may seek a variation of this term in the event that there is an involuntary, material and unforeseen change in his circumstances.

- i) The plaintiff shall forthwith transfer to the defendant \$4,928.01 from his RRSP to the defendant's RRSP account P0071003-9 at London Life investment, such transfer being by means of an inter-spousal rollover pursuant to the provisions of the Income Tax Act.

"Voith J."

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