
CANADA / JUDGMENT

D.A.M. v. D.M.T.

2013 BCSC 359

COURT

Supreme Court of British Columbia

DECIDED

5 March 2013

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2013 BCSC 359 D.A.M. v. D.M.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.A.M. v. D.M.T.,

2013 BCSC 359

Date: 20130305

Docket: E113896

Registry: Vancouver

Between:

D.A.M.

Claimant

And

D.M.T.

Respondent

Before: The Honourable Justice Fisher

Reasons for Judgment

Counsel for the Claimant:

C. Linde

Counsel for the Respondent:

J.J. Hittrich

Place and Date of Trial:

Vancouver, B.C.

January 28 - February 8, February 14, 18 and 19, 2013

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2013

- [1] In this highly conflicted and polarized custody dispute, each parent seeks sole custody and guardianship of their two young children. D.A.M., the claimant father, alleges that D.M.T., the respondent mother, has alienated the children from him and is causing them emotional harm. The mother alleges that the father has physically and sexually abused the children. Her allegations were reported to the police and to the Ministry of Children and Families (the Ministry). The police conducted an investigation but found the allegations unsubstantiated. The Ministry relied on the police and did not do its own investigation. The mother says that further investigation is warranted due to the nature and timing of disclosures made by the children to her and to others, and she has continued to urge the authorities to act. The Ministry became concerned that the mother, by continuing to pursue these allegations, is causing emotional harm to the children.
- [2] The children, now six and nine years old, are extremely negative towards their father. After the allegations were reported, the mother obtained an ex parte interim order for sole custody and guardianship, and a restraining order preventing the father from having any access to the children. Subsequently, the father was granted supervised access. The access visits have been very difficult for the children and for the father. The mother now seeks a final order for sole custody and guardianship, and no access by the father.
- [3] On December 24, 2012, Dr. Larry Krywaniuk completed a custody and access report under s. 15 of the Family Relations Act, RSBC 1996, c. 128. He was not able to support the allegations that the father had sexually abused the children. He found that the children are alienated from their father and it is unlikely that their animosity against him was without reinforcement and support from the mother, whether or not consciously. He was not optimistic that specialized family counselling would succeed in reuniting the father with the children and recommended that the Court consider granting custody to the father with no access to the mother for a period of time, with the children being placed in another familiar and safe environment for a period of adjustment, while participating in family counselling.
- [4] On January 3, 2013, relying on the s. 15 report, the father obtained an ex parte order removing the children from the mother's home and placing them with a relative until the conclusion of this trial, with neither parent having access. This order was confirmed on January 16, 2013, after a hearing D.A.M. v D.M.T., 2013 BCSC 357. The chambers judge concluded that the children's best interests were best protected by preserving the situation

under the ex parte order and by effectively insulating the children from the parties "each of whom, by the position of the other party, places the children at very great risk." Neither party sought a variation of this order at the start of the trial.

- [5] This is an urgent problem with few options to resolution. To say that this family has suffered tremendously is an understatement. I have no doubt that the mother firmly believes that the father has abused the children, that she must act to protect them, and that nothing will change her mind. The father is equally adamant in his denials.
- [6] Only the basic background facts are not in dispute, although each party's interpretation of past events differed considerably. I will first review these, indicating where there is conflicting evidence.

Background facts

- [7] The father, D.A.M., is 43 years old and lives in White Rock. The mother, D.M.T., is 41 and currently lives in Nanaimo, sharing a home with her parents. Both parties were born in England. They married in York on November 2, 1998. Their first child, a daughter (R.M.), was born in December 2003 and their second, a son (R.), in April 2006. D.M.T. has dual British and Canadian citizenship. In May 2008, the family immigrated to Canada and settled in Surrey, BC. The parties separated a year later, in May 2009. The allegations of sexual abuse surfaced in May 2011. D.M.T. moved to Nanaimo in September 2011.
- [8] D.A.M. is the oldest in a family of four siblings. He was raised by his maternal grandmother. His father died at a fairly young age and his mother had some emotional problems. He said he had been physically abused by a boyfriend of his mother's but had never been sexually abused. He began working at a young age. He worked in sales and later in restaurants.
- [9] D.M.T. has one older sister. Both of her parents worked as she was growing up. She did well in school and went on to university, obtaining a law degree in 1992. She did not practice law, however, as she was not able to obtain a "pupilage", or articles. She worked as a fraud investigator for about two years. She left that to work in a restaurant, work she enjoyed, and she became an assistant manager. She and D.A.M. met each other in 1997 when they were both working at the same restaurant.
- [10] Their relationship progressed to marriage after about a year. They both worked at various jobs over the years. D.A.M. eventually began operating his own businesses. The first business sold utilities and the second sold log homes. D.M.T. assisted him but her role diminished after the birth of their first child in 2003, after which she no longer worked outside the home. Unfortunately, the log home business ran into serious financial problems and by 2008, D.A.M. was facing bankruptcy. It was at this time that the family left England for Canada. Having to start over, the parties continued to struggle financially.

- [11] Because of her dual citizenship, D.M.T. sponsored D.A.M. to immigrate to Canada. When they first arrived in May 2008, D.M.T. obtained a job as a server, working long hours throughout the summer. D.A.M. was not able to work until he obtained permanent residence a few months later, so he stayed home and looked after the children. In September, D.A.M. began working in sales but did not have much success. D.M.T. worked part-time in an effort to supplement his income. However, the financial struggle continued.
- [12] D.A.M. had serious conflicts with D.M.T.'s parents, Mr. T. and Mrs. T. He described several negative encounters with them, which resulted in a complete estrangement. He attributed the problem to the parents and was quite candid about his negative opinion of them. He did not elaborate about this, but said that they were very negative and did not treat D.M.T. well. D.M.T. denied this, describing her childhood as a pleasant one and her relationship with her parents before she met D.A.M. as a good one. She said that D.A.M. caused the wedge between her and her parents and she "stupidly" allowed it to happen.
- [13] Whatever the cause of the estrangement, it is clear that the feelings on both sides are extremely negative. D.M.T.'s mother, Mrs. T., testified that D.A.M. came across as very arrogant and manipulative when she first met him. In a letter she wrote with her husband, she described D.A.M. as very abusive, "the most arrogant person I have ever met", a born liar and "a very cunning manipulative man". D.M.T.'s sister shared these views. She felt he had strange ideas and extreme religious views, and thought he may have mental health issues.
- [14] Mr. and Mrs. T. had moved to Canada in about 2005. The parties had some contact with them after they arrived in Canada in 2008. D.A.M. said that this upset their marriage. He decided to separate after D.M.T. borrowed money from her parents when they were in dire financial straits. He was opposed to this. He said that he left the marriage because he could no longer stand to be abused by D.M.T. He described this abuse as primarily verbal and added that D.M.T. had punched or shoved him twice out of anger. He said that this abuse started as the children arrived and became worse after they moved to Canada, when they began arguing daily.
- [15] D.M.T. said that she was "blindsided" by D.A.M.'s decision to leave and was initially quite upset. She described D.A.M. as dominant, quite contrary and argumentative, and said that she was the one to back down in arguments.
- [16] At the time of the separation in May 2009, the parties were living in a rented house in South Surrey, which they could no longer afford. D.A.M. moved into a shared house and D.M.T. moved into a two bedroom condominium with the children. By late 2009, D.A.M. could no longer afford the rent for his shared house and began to live in his car. D.M.T. allowed him to stay in her condo, where he slept in their daughter's bottom bunk bed. This arrangement was not easy but it continued for about six months. After that, D.A.M. continued to live in his car but he stayed at the condominium with the children when D.M.T. was working. In December 2010, D.M.T. and the children moved with her parents to Langley. D.A.M. took over her condo but, unable to afford it, moved to a bachelor suite in the same building

where he still lives. He now operates a renovation business and his income appears to have been reasonably stable since 2011.

- [17] For two years following the separation, the parties jointly parented the children. Once D.A.M. had his own residence, the children were with him from Thursday afternoon to Sunday afternoon each week. These arrangements were later reflected in a consent order, made in Provincial Court on March 14, 2011. Around that time, D.M.T. began a new relationship with Mr. H., a man she had met the previous fall.
- [18] During this time, neither party complained about the ability of the other to parent. D.M.T. testified that the children were exhibiting some anxiety and sexualized behaviours during 2010 and early 2011, which troubled her, but she did not at the time attribute anything to abuse. D.A.M. observed similar things but felt that D.M.T. put too much emphasis on the children, and the best thing would be that they stop arguing in front of them. I will come back to this issue of the children's behaviours.
- [19] In May 2011, D.A.M.'s sister, A.M., came from England for a visit. The children were excited about the visit and stayed with D.A.M. and A.M. for a week. It was after the children returned from this visit that the allegations of physical and sexual abuse surfaced through a series of disclosures the children made to D.M.T. and others. The evidence from this point on is hotly contested.

The nature of the evidence

- [20] The allegations of sexual abuse are founded upon the hearsay statements made by the children over a period of time. Because these allegations were reported to the RCMP and to the Ministry, files in relation to those investigations were admitted at trial as business records for the purpose of showing what was done by these agencies. There is much hearsay evidence contained within those files. With the exception of statements reported to have been made by the children, this hearsay evidence was not admitted for its truth.
- [21] Before I review the disclosures made by the children, it is necessary to set out the basis on which their hearsay evidence was admitted at trial.

Admissibility of the children's hearsay statements

- [22] First of all, both parties agreed that all hearsay statements made by the children were admissible for all purposes. D.A.M. does not take issue with the fact that his children made disclosures to various people. He does take issue with the veracity of the statements.
- [23] In a family law case involving allegations of physical and sexual abuse against children, hearsay evidence of statements made by the children may be admitted under the principled exception to the hearsay rule. This exception requires that the evidence is both necessary and reliable. Children do not normally testify in proceedings of this nature, particularly young children, as to do so may be very harmful to them. For this reason, the hearsay

evidence meets the necessity requirement: see *J.K.F. v J.D.F.*, [1988] BCJ No. 278 (CA); *R. v Khan*, [1990] 2 SCR 531; *S.F.R. v E.C.R.* (1997), 41 BCLR (3d) 239 (SC); *P.V. v D.B.*, 2007 BCSC 237; and *J.P. v B.G.*, 2012 BCSC 938.

- [24] Reliability for the purpose of admissibility, or threshold reliability, is aimed at identifying circumstances where the inability to test the hearsay evidence is sufficiently overcome to justify receiving it as an exception to the general exclusionary rule. This requirement may be met by showing that sufficient trust can be put in the truth and accuracy of the statement because of the way in which it came about, or by showing that in the circumstances the judge will be able to sufficiently assess its worth. The presence of corroborating or conflicting evidence may also be considered: see *R. v Khan*; *R. v Khelawon*, [2006] 2 SCR 787.
- [25] In *S.F.R.*, the indicia of reliability in cases involving allegations of sexual abuse were held to include the following factors: timing of the statement; demeanour and personality of the child; intelligence and understanding of the child; absence of motive of the child to fabricate; absence of motive or bias of the person who reports the child's statement; spontaneity; statement in response to non-leading questions; absence of suggestion, manipulation, coaching, undue influence or improper influence; corroboration by real evidence; consistency over time; and whether the statement was equally consistent with other hypothesis or alternative explanation.
- [26] If the hearsay evidence meets the test of threshold reliability, it can be admitted for its truth and its ultimate reliability is to be assessed with the rest of the evidence.
- [27] There are a whole series of hearsay statements made by the children in this case. Some statements were video recorded, many were made to D.M.T. and some were made to professionals providing therapy to the children. Except for the police, each person to whom statements were made testified at trial and was subject to cross examination. While I have concerns about the reliability of some of these statements, I consider them as a whole sufficiently reliable to be admitted for their truth.
- [28] I set out below the evidence as to what statements were made. Although D.A.M. does not take issue with the fact that the children made these disclosures, it is still necessary for me to be satisfied that certain statements were made. For the most part, I accept the evidence about what the children said. Later I assess the statements in their totality, along with the rest of the evidence.

Manuka honey

- [29] Some of the children's disclosures involve allegations that D.A.M. put manuka honey on their private parts.

- [30] Manuka honey is a natural product that has antibacterial properties. D.A.M. testified that he believes in naturopathic remedies and has used manuka honey as a topical cream to treat things like cuts and rashes on the children. He said that he did not apply manuka honey on the children's private parts. He said that he stopped applying any medication to his daughter's private parts when she was old enough to do it herself. He recalled one incident when he gave manuka honey to his daughter to apply to a rash on her "privates".
- [31] D.A.M. also said that D.M.T. has used manuka honey herself to treat cold sores. He did not know if she used it on the children and did not recall if he had used it on the children in her presence.
- [32] D.M.T. denied ever using manuka honey on cold sores. She testified that she was not aware it could be used topically until she saw D.A.M. apply it to a cold sore. She said that she never saw D.A.M. use manuka honey on the children.

The disclosures

May 2011

- [33] According to D.A.M., the children had a fantastic time during the week they spent with him and his sister A.M. in May 2011. There was one incident, however, when his son accidentally fell from a counter and suffered a serious cut to his upper thigh near the groin area, which required stitches. D.A.M. said that he put manuka honey on R.'s stitches, which the boy did not like.
- [34] A.M. testified that D.A.M.'s relationship with his children appeared fantastic during that week and she did not see anything indicating that the children had any fear of their father, nor did she see him act inappropriately. She was present when D.A.M. put the manuka honey on R.'s stitches.
- [35] On May 19, the children were exchanged in the parking lot behind the restaurant where D.M.T. worked.
- [36] According to D.M.T., the children were not "full of excitement" during the drive home. She said they made statements to her at that time that their father was mean to them. The little boy, R., started off by saying something about wanting to spend 8000 days with mommy and 8000 days with daddy. The daughter, R.M., said that they didn't want to spend 8000 days with daddy. R. said that if they spend 8000 days with mommy then daddy might not be mean to them. R.M. then told D.M.T. that their father hits them, demonstrating this by lifting her arm above her head and hitting the side of the car seven times, and adding that he squeezes her hand and twists her arm. R. said there wasn't a day that went by that their father didn't hit them.
- [37] D.M.T. said that after they got home, the children appeared sullen and repeated things about their father being mean. Mr. H., who was there with them, said that R.M. described being spanked and picked up by the back of her shirt. He also said that the children were running

around without clothes on and later playing under a blanket mimicking "doggy style" sex. D.M.T. said only that the children ran out of their rooms naked, saying they were having a naked party. Later, R.M. told D.M.T. she did not want to see her father anymore. She said that he hits her hands because she puts them behind her bottom.

- [38] D.M.T. was alarmed. She called the police. She testified that they were going to send an officer to her home and the officer arranged to have R.M. interviewed the following day. On May 20, D.M.T. went with her daughter to the police station. D.M.T. spoke to a female officer, who then interviewed R.M.
- [39] D.M.T. said that she was not given any particulars about the interview. She also said that at that point, there were no allegations of any sexual abuse and she did not contemplate anything like that.
- [40] On May 21, D.M.T. and the children went to Vancouver Island for the weekend with Mr. H. They spent the afternoon visiting Ms. G., a friend of Mr. H.'s. While the children were playing and drawing, they made a number of disclosures to D.M.T., some of which were witnessed by Mr. H. and their hostess. D.M.T. gave details of the disclosures, which can be summarized as follows:
- R. said: We don't put honey on the stitches.
 - R.M. said: Daddy puts manuka honey on our privates when they're sore. He gets globs of honey and puts it on our privates, it's sticky and yucky. Sometimes daddy's finger would go in my hole where the pee comes out by accident, that always hurts.
 - D.M.T. asked R.M: How long has this been going on?
 - R.M. said: Since I was three and [R.] was one.
 - D.M.T. said: We lived in England then.
 - R.M. said: Yes, when you went out with your friends. He did it in the morning, at lunch time, and dinner time, thousands of times.
- [41] D.M.T. testified that at this point she screamed. She went out to the balcony because she was so upset.
- [42] She said that R.M. also told her that D.A.M. put honey on R.'s "wiener" and bottom, but it is not clear when that was said.
- [43] D.M.T. said that later on, R.M. said that she didn't think her father did it because their privates were sore, she thought he did it because he liked their privates. R.M. also told her mother that she did not want to call her father "daddy" anymore. After that, both children referred to him by his first name.

- [44] D.M.T. testified that during the initial exchange with R.M., R. did not say much but at one point he stood up and said, "Nobody touches daddy." She also described the drawings the children made that day as disturbing. Copies of these drawings were exhibits at trial.
- [45] The following day, May 22, D.M.T. said that while R.M. was drawing, she said that one time her father put a shoe in her hole, and later said that her privates were "paining". D.M.T. took her to a doctor, who briefly examined R.M. and found nothing abnormal. D.M.T. then reported the matter to the police in Duncan. Arrangements were made to interview the children on May 26. After that, and before the interviews, R.M. made two more disclosures to D.M.T.:
- One time, he didn't use his finger, it was a fork or a spoon or a knife, no it was definitely a knife.
 - I didn't like it when we had the Winnebago because [D.A.M.] kept going in my bed and lying on top of me.
- [46] D.M.T. said that nothing prompted any of these disclosures and each time was very upsetting, as she did not want to keep hearing these things.
- [47] On May 26, the RCMP conducted forensic interviews of each of the children. These interviews were video recorded and partial transcripts were prepared. Neither child disclosed all of what they told their mother over the preceding weekend. I will summarize the essence of what each child disclosed to the officer about their father during these interviews.
- [48] R. said that his daddy was going to jail because he had been doing bad things to them and told them not to tell mommy; his dad made him keep bad secrets and was mean to him and his sister and his mommy; his dad smacks his bum lots of times with his hand on top of his clothes; he heard his sister tell his mommy that his father put manuka honey on her bottom; and he denied that his dad did this to him.
- [49] R.M. said that her dad hits her bottom under her clothes; her dad is always shouting and doesn't treat her nice; her dad puts manuka honey on her privates and her bum when they are sore and doesn't let her take it off and it is sticky; he puts the honey on with his finger and wipes it all over even where the pee comes out of the hole; he also touches her privates and her bum and opens them up just to see if they are sore; she has seen her father put manuka honey on her brother's "willy" and his bum; and her dad tells her to keep secrets from her mom about not paying people, not having any cereal and smacking their bums.
- [50] Meanwhile, throughout the weekend and the following week, D.A.M. was trying to contact D.M.T. by telephone but she was not answering. When he went to see the children at school they were not there. He was very worried. Eventually, he was notified by the police and advised of the allegations. He cooperated with the investigation. He has denied all allegations of physical and sexual abuse.

Summer 2011

- [51] After the May 26 interviews, D.M.T. said that the children made several more disclosures to her. In June, R.M. complained that R. was putting his fingers between his bottom cheeks and making her smell them, and R. said that his father made them copy him. On another occasion, R.M. said that sometimes her father put the honey in the hole where her pee comes from, she did not want to but she let him do it anyway, and it always hurt.
- [52] On July 6, 2011, the children were examined at the Health, Evaluation, Assessment and Liaison (HEAL) Clinic at Surrey Memorial Hospital. Both examinations, including genital examinations, were normal. The consultation report noted that a normal examination does not rule out the possibility that abuse may have taken place.

September - October 2011

- [53] On September 16, 2011, the children told D.M.T. that their father had taken naked pictures of them. This disclosure was made while D.M.T. and the children were shopping at Wal-Mart. D.M.T. was having some photos printed. While she was selecting the photos to print on a viewing machine, she saw a picture of R. bending over, showing his bottom, with his pants down. The children admitted that R.M. had taken the picture. She told them that was naughty and they were not to do that. Shortly after this, R. said that their father had taken pictures like that of him. R.M. said that he took them of her too.
- [54] Later in September, R.M. told D.M.T. that her father would lock her in the bathroom and she was not allowed to turn on the light, and while she was in there he would "do stuff" to her brother. R.M. also said that her father would then take photos of her with no clothes on and he would show them to his friends, which was embarrassing. Sometime after that, R. told D.M.T. that it was scary when he was locked in the bathroom, he had to put his "willy" in his sister's face, and it hurt his bottom.
- [55] That fall, D.M.T. decided to seek therapy for R.M. and took her to see Dr. Raymond Shred, a child psychologist. Dr. Shred met with R.M. four times between September 16 and October 18, 2011. At the first meeting, he met with R.M. together with her mother, during which R.M. made the following disclosures to Dr. Shred:
- One night she felt something drizzle on her privates, which woke her up. She later learned it was manuka honey. Her father was putting honey on her private parts and it happened in his old apartment.
 - Her father often didn't keep his promises, such as taking her to the pool.
 - Her father made her sit in the back of a truck where there was no seat and no seat belts.
 - Her father "smacks our bottoms".

· She would go back to live with her father if he would be nice. Being nice meant giving them chocolate, not smelling of aftershave, not wearing old clothes and not peeing in the bathtub.

[56] During the subsequent three meetings, which were with R.M. on her own, these disclosures were made to Dr. Shred:

- Her father took pictures of them naked. When it was her turn she did not want to do it. One of them had to be locked in the bathroom with the lights off and her father told them if they turned the lights on they would be spanked really, really hard.
- Her father took the pictures and showed them to his friends.
- Her father told her that if they told anybody about what he had done he would put them in jail, would spank them so hard "a lot of times and our buns would be glowing red" and would kill their dog.
- Her father told her he was going to pluck her eyelashes out if they told "everything".
- When he took pictures he made them pose, sometimes alone and sometimes together.

November 2011

[57] In November, R.M. told D.M.T. that one time when her father put his finger in her hole there was blood, and drips on the carpet. At this point, D.M.T. was frustrated with the lack of progress of any investigation against D.A.M. and decided to question the children and video record their statements. She did this with her cell phone, with both children together and in the presence of her parents. In the video, the children discuss many of the same things as they had before. I will summarize the most salient parts of this "interview".

[58] The video starts with R.M. describing more details about the blood.

[59] There is quite a bit of discussion throughout about the picture taking and the poses. R.M. talks about her father deleting all the pictures but then having some, or one left, "a picture of R.'s butt".

[60] D.M.T. questions both children numerous times (especially R.) about what happens to them when the other is locked in the bathroom. R.M. says her father "smacks me all over". R. says, progressively, that he sometimes takes him into the bunk bed; sometimes "puts honey on our privates"; sometimes kicks us "so hard", "sometimes he kicks 100 times and he slaps 100 times, sometimes he doesn't, sometimes he hits us just 10 times and kicks us 10 times"; when he puts honey on our privates, he pulls the skin on my "willy" and it hurts; sometimes "he even comes up on our bunk and he sits on me".

- [61] R. said that when they have sore spots, his father put honey all over, even in their eyes and in their hair. He said that his father put the honey "in the middle of our bottoms" and "smudges" it on his penis. Later, when asked if their father put the honey on a lot and how often, R.M. said yes, "every single day" and R. agreed. R.M. said it hurt because "he always went inside and his finger was always bloody when it came out", and "every single time he went inside my privates it happened".
- [62] R.M. said that her aunt, A.M., told her that she was afraid of D.A.M. and "just doesn't like him because he's scary and he smells of aftershave", and A.M. also told her not to tell anybody because if D.A.M. found out "he's going to do something nasty to her".
- [63] When asked how they felt about seeing her father, R.M. said "not good". When asked why, R. said, "Because I think he'll be very much worse" and R.M. said, "Yeah, he'll kill us probably". Later, they both said they were scared of their father.

January 2012

- [64] R.M.'s grade three teacher testified that in early January 2012, R.M. told her that D.A.M. had taken naked pictures of her and her brother, had touched her with honey and made her brother watch, and had put honey on her brother's penis. The teacher also said that R.M. told her that she was locked in the bathroom where it was dark and she was threatened that her eyelashes would be pulled out and she and her brother would go to jail if they ever told anyone what happened. She was not sure what R.M.'s last comment related to.
- [65] The teacher contacted the school counsellor and the Ministry.

February - May 2012

- [66] Dr. Krywaniuk interviewed the children individually in February and again in May 2012. He reported that during the first interview, R.M. focussed on examples of why she and her brother did not like their father but did not mention any kind of abuse. She made incidental references to posed pictures being taken while they were naked and mentioned that they got smacked on the bum but would put their hands there to protect their bums. R. told him that his father put honey on their privates one time while they were in the bathroom and that they bleed. He also said that his father smacks their bottoms even when they haven't done anything. He denied having any secrets he was told to keep. He also denied anything to do with pictures or cameras, but added that he thought his father might take pictures of his privates but he didn't know why, and his father put them in an album.
- [67] In his report, Dr. Krywaniuk described the second interviews as follows:

The themes raised by the children were similar in nature to the previous one although in a substantially more elaborate fashion. They again mentioned the issues of the honey on private parts, naked pictures and spanking. They again mentioned the bleeding but there were some incongruities in the description of the way pictures were taken. One of the children said that the

pictures were taken of them together for [sic] the other said they were not. The tone of the stories also seemed different and there was more focus on the fact that they did not like their father. On this occasion, they reported that he had threatened them in various ways and expressed fear that they would be killed or hurt in some fashion.

[68] In his testimony, Dr. Krywaniuk provided further detail about what R.M. told him. Reading from his notes, he said that R.M. talked about her father putting honey on privates; sticking his hand into her hole; his fingers bloody; bleeding on the carpet; he would put her in jail; he liked sacking and torturing them; he locked one of them in the bathroom with a key; he turned the lights off and it was very scary because he made one of them do pictures and make poses; at the beach he let R. be naked; lots of times he did the photos every day for months; she gets heart pains when she thinks of it; it happens every time close to the visits, which are not enjoyable for her because of the heart pains; he forced them to drink sweetgrass and it tastes horrible; he said it would make them grow big and strong; he said, "If you finish I will give you \$5"; he told R. to go pee in the bushes.

August - December 2012

[69] Naceeb Marcil is a counsellor in Nanaimo. In August 2012, she began seeing the children, for the most part individually, on a weekly basis. Her role was to support the children and help them deal with their anger and anxiety. These visits stopped after the children were removed from the mother's home on January 3, 2013.

[70] Ms. Marcil testified about the disclosures each of the children made to her during these sessions. These included many of the same things as disclosed previously about the manuka honey, the naked photos, being locked in the bathroom, the spanking, and the threats about not telling anyone. R.M. also made some disclosures that appeared to be new.

[71] R.M. told Ms. Marcil that her father danced with them naked; that he made a jail in the lounge area of the house, made her stay there lots of times and threatened that she would go to jail if she ever told anyone, especially the police; that he made her go pee on the boards of the jail; that he sat on her face and he was stinky; and that he would have the house cold so he could come and sleep with her, he would be naked and would want to cuddle with her.

The parties' responses to the allegations

[72] D.M.T. testified that she believes "100 per cent" that her children are telling the truth and that D.A.M. has abused them. She said that she has no reason not to believe her daughter, who would not have known about these things if they had not happened. She believes that D.A.M. applied something with his fingers inside her daughter's vagina (and it came out bloody) and in her bottom (she doubts it was manuka honey), that he did this frequently and more than once a day, and that he did so for his own sexual gratification. She believes that D.A.M. put manuka honey on her son's penis for the same reason and that the boy lied to the police on May 26, 2011 because he was scared to tell the truth. She believes that D.A.M. had

the children take their clothes off and took photos of them in pornographic positions. She explains some of the disclosures that seem exaggerated (such as he kicks us 100 times, or the insertion of a knife) as the way children express what they perceive to be the frequency of an event or what is happening to them.

- [73] As I indicated above, D.A.M. denies all allegations of both physical and sexual abuse. He said that he has probably physically disciplined his children four or five times and only spanked his daughter on the bottom one time in 2010 after an incident with her brother in the bathtub. He admitted that after R.'s fall from the counter in May 2011, he put manuka honey on the boy's stitches to keep the wound clean. He denied applying the honey to his daughter but admitted that sometime between January and May 2011 she had a rash on her privates so he gave manuka honey to her to apply herself. He denied that he ever opened up his children's privates other than to help his son wipe himself and he denied locking the children in the bathroom and taking naked photos of them.
- [74] D.A.M. says that the allegations are lies and suggests they are the result of the children being coached or somehow influenced.

The children's behaviours and the father's access visits

- [75] D.M.T. testified that beginning in 2010, the children were exhibiting symptoms of anxiety or stress. She described her son as having an obsessive compulsive habit of touching surfaces with his hands and her daughter having an obsessive compulsive habit of sniffing her hands or "bunny sniffing" with her nose (all of which she referred to as "OCD behaviour"). She said her daughter was also severely underweight and developed "heart pains" that would come and go. She talked to D.A.M. about these things, suggesting that R.M. would benefit from counselling, but D.A.M. did not agree. D.A.M. said that he did not think there was much to be concerned about. He described his son as a very "hands on" child who naturally touches things.
- [76] In the spring of 2011, D.M.T. began to notice the children behaving inappropriately with each other in the bath, using toilet talk, playing "doggy style" under blankets, and R. sticking his hands down other people's pants, mostly adults. D.A.M. also noticed behaviours that concerned him, such as toilet talk, his son pulling down his pants and referring to his "willy", and both children taking their clothes off. Mrs. T. and Mr. H. observed similar things.
- [77] On May 27, 2011, the day after the children were interviewed by the RCMP, D.M.T. obtained an ex parte interim order in Provincial Court granting her interim sole custody and guardianship and a restraining order preventing D.A.M. from having any contact with her or the children. These were followed by several orders preventing either party from removing the children from the Lower Mainland. D.A.M. did not see the children until July, after he was permitted supervised access. There were three supervised visits on July 21, July 28 and August 4, 2011. They did not go well and D.A.M. decided to stop them after the third visit. The visits resumed in March 2012, when the parties agreed that D.A.M. have supervised

access to the children for one hour on Saturday afternoons. D.A.M. began exercising this access on March 3, 2012, and continued until the end of December, although the children did not attend at various times when they were too anxious. All of the visits took place in Nanaimo at the home of Mr. and Mrs. D. Mrs. D. is a first cousin of D.M.T.

- [78] These visits have been difficult for everyone. The children attended reluctantly, were anxious, and displayed intense animosity towards D.A.M. The access supervisor's reports were adduced in evidence. D.A.M. agreed that these reports accurately summarized what occurred during the visits.[1]
- [79] According to the supervisor's reports, the children were reluctant and anxious at the first visit on July 12, 2011. D.A.M. tried to interact with them but it was difficult. R.M. told D.A.M. that he was mean, hits, and put honey on her privates. D.A.M. asked his daughter if she remembered that he gave her the jar and she put her finger in it. R.M. then told the supervisor she did not want her father there. D.A.M. left for 10 minutes. When he was outside, R.M. was angry and told the supervisor that her father is "tricky", "makes people think he's nice" and "he's never been that nice before" and is mean to them. D.A.M. came back after R.M. said it was okay. He managed to play with R. for awhile. After the visit, while the supervisor was walking the children outside, R.M. said that her father "is a liar, he put the honey on my privates and into my hole".
- [80] The second visit started badly, with R.M. yelling at D.A.M., saying that he lied, is mean and hits, and R. kicking him and calling him "evil." R.M. continued to make similar remarks. At one point, D.A.M. told her to mind her manners, and she responded by saying, "You're not in charge of us anymore. You can't tell us what to do." She also told him to shut up or to stop talking at various times. She did, however, agree to give D.A.M. one of her pictures at the end of the visit. R. refused to do the same.
- [81] The last of these visits lasted only 10 minutes. As the children walked in the room, R. yelled at D.A.M., "It is all your fault that this happened. Now we can't go to California. We're never staying at your house again! You're mean!" R.M. yelled that D.A.M. was mean and repeated what her brother had said. R. was visibly upset, holding back tears. R.M. told the supervisor she wanted to go. Both children refused to speak to D.A.M.'s sister on the phone. R.M. yelled at D.A.M. several times that he was not in charge of them anymore. D.A.M. asked the children who told them to say that. R.M. told him that was none of his business and both children called him mean and evil. D.A.M. stopped the visit, saying that he was not letting his children be stressed and used like that. R. burst into tears and told D.A.M. that this was all his fault, not mommy's.
- [82] According to D.M.T., the children were very agitated before each visit, their OCD behaviour was worse, and they were uneasy and afraid of running into their father. She testified that the children's demeanour improved after they moved to Nanaimo in September 2011; R.'s OCD completely stopped, R.M.'s sniffing behaviour was much reduced, she put on some weight, and stopped having "heart pains". She said that this improvement continued until

the access visits resumed in March 2012. After that, their behaviours worsened and R.M.'s "heart pains" resumed. They also began exhibiting new behaviours: R.M. developed a biting problem and R. began "arm flapping". D.M.T. said that all of these behavioural issues were connected to the Saturday visits with D.A.M.

- [83] R.M.'s grade three teacher testified that R.M. made great strides in her education and made lots of friends during the 2011-2012 school year. She noticed some decline in March 2012. She said that R.M. continued to make gains academically but appeared less focussed in class and upset a lot of the time. While R.M. had come a long way by the end of the school term, she said that R.M. did not appear as happy as she had in December and January.
- [84] Dr. Ute Buckstag began treating the children as their family doctor in May 2012. In June 2012, she signed medical certificates stating that the children were suffering from stress and anxiety and should not attend visits with their father for several weeks. She signed similar certificates in November, stating that the children were suffering from "post traumatic stress" and anxiety.
- [85] Dr. Buckstag's records indicate that much of the information she relied on regarding the children's stress behaviours came from D.M.T., but she testified that in June 2012, she observed R.M. smelling and biting her hand and R. flapping his hands. She said that she classified the stress as post traumatic stress in November because acute anxiety had continued for more than three months.
- [86] The supervisor's reports of the visits after March 2012 show that the children continued to be angry and distant from their father, particularly R.M. D.A.M. tried to talk to the children but it was always a struggle. There were times when he was able to interact with them but most of time he watched them play, and the children displayed more anger at some visits. R.M. often spoke for herself and her brother. At times she would call her father a liar or would hit him. At times the children would tell him they hate him or would call him names. On occasion the visit would be so negative that D.A.M. would end it early. There appeared to be little progression throughout the months and the last visit on December 29 ended early and terribly, with R. saying "I hate you" to his father and R.M. making threatening throat cutting gestures as she was leaving.
- [87] As indicated above, the children were removed from D.M.T.'s custody on January 3, 2013 and placed with D.M.T.'s cousin, Mrs. D., in whose home the access visits took place. Neither parent has had access to the children since then.
- [88] Mr. and Mrs. D. have four children of their own. Mrs. D. testified that having R.M. and R. has been challenging for her but she is managing. She said that the children were obviously upset when they first arrived, but they have settled down and now are doing well. She has not noticed any sexualized behaviours.

The investigations

- [89] The RCMP conducted an investigation in May and June 2011. They conducted the forensic interviews of the children that are described above. They received information from D.M.T. about the children's additional disclosures to her in the week preceding the interviews. They advised D.M.T. not to question the children but to be supportive if they made further disclosures to her. They interviewed D.A.M. They found no basis to recommend charges and closed their file.
- [90] The Ministry was also involved. They did not conduct their own investigation or interview the children but relied on the investigation done by the police. The Ministry's file on this matter was closed in July. After this, D.M.T. continued to report the children's further disclosures. She provided the Ministry with a copy of the video she took on November 11, 2011.
- [91] Social workers in the Ministry were concerned that the allegations increased in severity after the children had not been with their father other than on supervised visits. In late June 2011, the Ministry opened a file on D.M.T. due to concerns about the children's emotional welfare in her care. They became particularly concerned about D.M.T.'s questioning of the children as shown in the November 11 video. This file was closed in January 2012, after D.M.T. was cautioned not to interview the children, but re-opened in July 2012 due to concerns that the children were exhibiting severe anxiety. That file remains open.
- [92] Ladona Pinder is the child protection officer responsible for that file. She testified that the Ministry waited for Dr. Krywaniuk's report to assess the children's emotional health. The children were not interviewed by a social worker because they had been interviewed several times, by the police and by Dr. Krywaniuk. Those in the Ministry did not think it would be beneficial to re-interview them. After Dr. Krywaniuk's report was released, Ms. Pinder received instructions that the Ministry would have child protection concerns if D.M.T. is awarded custody of the children.

The section 15 report

- [93] Dr. Krywaniuk conducted an extensive assessment, which included interviews of each party, each child, D.M.T.'s parents and others, home visits, observations of the children before and during a supervised visit with the father, psychological testing of the parties, and a review of documents. He accurately described the situation of this family as "extremely complex and fraught with conflict and allegations".
- [94] Relying particularly on the RCMP investigation and his own interviews with the children, Dr. Krywaniuk was not able to support the allegations that the children were sexually abused by their father. At trial, he softened his opinion on this somewhat. The fact that the police closed their file was significant to him. He said that he was not able to conduct the kind of forensic interviews of the children that he usually does because by the time he got to them the information had been "trampled over" or corrupted. As a result, he was unable to draw

any conclusions from that information and felt that he could not take the issue any further than the police. Based on the information he had, he could not conclude that there was sexual abuse, but he could not rule out the possibility that it had occurred. If there was abuse (which he thought less likely) he did not think it happened the way it has come out in the children's statements.

[95] It was Dr. Krywaniuk's opinion that the children's pattern of behaviour clearly indicated alienation. He thought that a more likely explanation for any anxiety the children are feeling is that "they are caught in the middle of the situation and have a clear perception of the attitude that their mother and likely the grandparents have of [D.A.M.]", and because of this, "they may feel an obligation to report the kind of allegations that will lead to 'protection' from their caregivers". He found it difficult to accept that at their ages, the children could maintain the level of behaviour and negative attitude toward their father without some kind of reinforcement.

[96] His opinion is summarized in his report as follows:

I think it likely that the initial statements the children made were misinterpreted and that, by means that are not entirely clear to me, the children began making statements that were interpreted as indicating sexual abuse. Some of the statements, for example that [D.A.M.] inserted a knife into [R.M.'s] vagina causing it to bleed, are improbable and in that case was not supported by medical investigations. I would note that the children continued to make what seems like inconsistent and escalating descriptions of the abuse while in therapy and in the care of [D.M.T.]. I would note that therapeutic situations are by nature supportive of the client and do not satisfy the requirements of a forensic evaluation. The children's attitude towards [D.A.M.] are entirely and unusually negative and apparently underwent a very rapid metamorphosis shortly after a prolonged visit to Whistler, in the presence of [D.A.M.'s] sister, that apparently went very well. I noted that the children tend to put a negative interpretation on even benign behaviours and seemed very closely aligned with their mother in this regard. [R.M.] tends to speak both for herself and [R.] and frequently uses the word "we" when describing attitudes towards her father. This indicates to me that she is taking on the role of an 'agent', which also is a mechanism within the alienating process.

[97] Dr. Krywaniuk thought it unlikely that the level of animosity and negativism demonstrated by the children could exist without reinforcement and support of which D.M.T. was aware, although he allowed for the possibility that it resulted from "a combination of misinterpretations coupled with inadvertent reinforcement". He felt that the allegations came from outside the children's own experiences:

... given the pattern described above, it is difficult to avoid the conclusion that the children's allegations come from outside their own experiences and that they have been implanted or magnified in some manner while in [D.M.T.'s] care. ... In any event, the children are quite clearly aligned with their mother in this regard although it appears likely to me that their anxiety, particularly that of [R.M.], results from being in the middle of this uncomfortable situation which

she has been made to feel is caused by her father who represents a danger to them. It may also be that [D.M.T.] acts or responds in a fashion that makes them believe she is in danger as well, which would likely reinforce the sense of danger that the children have.

- [98] At trial, he softened this view as well. He testified that he was not sure that there was conscious intent on the part of D.M.T. to alienate the children. He explained that children can be influenced by verbal and non-verbal cues, where they pick up the attitudes of those around them and respond to the "tell me more" idea. This "shaping behaviour" can lead to exaggerated disclosures.
- [99] Nonetheless, Dr. Krywaniuk was of the view that the level of alienation of these children was significant. Given this, he opined that there was no "easy fix". He was not optimistic that specialized family counselling to reunite D.A.M. with the children would have much chance of success due to the prevailing conflict within the extended family, including "the particularly uncharitable view of [D.A.M.] held by the maternal grandparents". His view was that the most viable option was to reverse the custody and guardianship of the children to D.A.M. with no access to D.M.T. for a period of about six months. To implement this, he recommended a process whereby the children would be placed in a familiar and safe environment for a period of adjustment before being transferred into their father's care. During this time, they would engage in family counselling with D.A.M. to help repair their relationship with him. Once the children's relationship with their father is secure, access to the mother would be reintroduced gradually, provided she is able to adopt an approach that does not perpetuate the alienation.
- [100] At trial, I asked Dr. Krywaniuk if there were more options now that the children had been separated from both parents for almost two months. Assuming that D.A.M. would have some contact regardless of the custody order, he suggested that the children should be reintroduced to their father first, with the assistance of a qualified third party and perhaps with supervision to start. He said that this would provide an opportunity for a relationship to be re-established, and the mother should then be reintroduced in a way that does not create a conflict for the children.
- [101] D.M.T. takes strong issue with Dr. Krywaniuk's report and recommendations, which I will address later in these reasons.

Custody, guardianship and access

- [102] In determining the appropriate order for custody, guardianship and access, it is well known that the paramount consideration is the best interests of the child. The Divorce Act, RSC 1985, c. 3 (2nd Supp.), provides, in s. 16(8):

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

- [103] The child's best interests are to be assessed from the child's perspective, not the perspective of either parent: *Gordon v Goertz*, [1996] 2 SCR 27 at para. 69.
- [104] Section 16(10) requires a court to give effect to the principle that children should have as much contact with each parent as is consistent with their best interest and to consider the willingness of the person for whom custody is sought to facilitate such contact.
- [105] The Family Relations Act, is founded on similar principles. It provides, in s. 24(1), that 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 one 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.
- [106] Section 24(1.1) provides that "other persons" in subsection (1)(c) and "each person" in subsection (1)(e) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.
- [107] The conduct of a person is not to be taken into consideration unless the conduct is relevant to the ability of that person to act as a parent (Divorce Act, s. 16(9)) or affects a factor that must be taken into account in assessing the child's best interests (Family Relations Act, s. 24(3), (4)).
- [108] In this case, the primary issue involves alleged sexual abuse by D.A.M., which is conduct relevant to his ability to act as a parent. It may be that this court is in a position to determine whether there was in fact sexual abuse. If so, such facts must be proven on the civil standard of proof, a balance of probabilities.
- [109] However, even if it is not possible to make such findings, I must still consider whether there is a real risk that sexual abuse of the children has occurred or might occur in the future: see *Leveque v Leveque* (1983), 54 BCLR 164 (CA); *P.A.M. v A.P.M.*, [1991] BCJ No. 3020 (SC); *G.E.C. v M.B.A.C.*, [1993] BCJ No. 1393 (SC); *L.D.D. v G.D.C.*, 2006 BCSC 1499.
- [110] Mr. Hittrich submitted that the standard of proof for determining whether there is a risk of harm from sexual abuse is lower than a balance of probabilities. He characterized it as a "real risk of harm" test.

- [111] In my view, the language used in the case authorities to determine whether there is a "real risk" to the children is akin to the language used to determine hypothetical or future events. As set out in *Athey v Leonati*, [1996] 3 SCR 458, such events are given weight according to their relative likelihood, or the probability of their occurrence. A hypothetical or future possibility is to be taken into account "as long as it is a real and substantial possibility and not mere speculation". I see this as a proper standard to apply in a family law case such as this to determine whether there is a real risk of harm of sexual abuse of children, either in the past or in the future.
- [112] Also at issue is whether the mother is alienating the children and by doing so, causing them emotional harm. I see no reason not to apply the principles described above to any conduct that causes harm to children. However, in this case, the issue of alienation is closely intertwined with the issue of sexual abuse.
- [113] There is no question that the children are alienated from their father. The issue is whether this alienation is pathological (caused by the mother) or realistic (caused by the father's conduct).

Credibility and reliability

- [114] Before I assess the issues of sexual abuse and alienation, I will address in a general way the credibility and reliability of the evidence.
- [115] As noted above, the allegations of sexual abuse are founded on the hearsay statements of the children. Given their nature, such statements must be scrutinized carefully. I have not had the benefit of hearing directly from the children. Only the video recorded statements provide some evidence on which I can assess their demeanour, personality, intelligence and understanding, and whether their statements were spontaneous or responsive to leading questions or other dynamics. The primary basis on which the children's unrecorded statements can be tested is through the testimony of those who were present when they were made and by considering a number of factors as indicia of reliability.
- [116] In assessing this hearsay evidence, I have considered the following factors, as described in *S.F.R.* and *J.K.F.*: the timing of the statements; whether they were made spontaneously; the demeanour, personality, intelligence and understanding of the children; the presence or absence of motive of the children to fabricate; whether there is corroboration by real evidence; consistency over time; whether the statements are in response to non-leading questions; the presence or absence of motive or bias of the person who reports the children's statements; the presence or absence of suggestion, manipulation, coaching, undue influence or improper influence; and whether the statements are equally consistent with another hypothesis or alternative explanation.

- [117] The presence or absence of motive or bias of the person who reports the statements, or of coaching, suggestion or undue influence, depends in large part on the evidence of D.M.T. Whether there is an alternative explanation depends primarily on the evidence of D.A.M. Dr. Krywaniuk's opinion evidence is also pertinent to these, as well as the other factors.
- [118] Both parties are extremely polarized in their beliefs and their perceptions of past events. This polarization extends for the most part to their respective families and friends. Unfortunately, it has affected the reliability of some of the evidence and made my assessment quite difficult.
- [119] D.M.T. is clearly entrenched in her belief that D.A.M. has abused the children. She believes "100 per cent" that her children are telling the truth. Her family and friends also hold this view. Her mother testified that she believes D.A.M. is a pedophile and nothing could convince her otherwise. Her sister said that she has no doubt D.A.M. carried out abuse. Mr. H. said he firmly believes "on my life" that the children have been sexually abused. Even a former workmate expressed the belief that the disclosures as relayed to her by D.M.T. were true and the children needed to be protected from their father.
- [120] In her testimony, D.M.T. provided meticulous detail in essentially chronological order about most events or incidents from the time she met D.A.M. to the present. Throughout, I had the distinct impression that she has reinterpreted or reconstructed past events involving D.A.M., as well as her observations of the children's behaviour, as providing confirmation of his guilt. Some of this may be natural, in that she has looked back on things in light of her belief that D.A.M. has been sexually abusing the children for some time. However, the result is that I consider some of her evidence unreliable because it reveals a biased view of the facts.
- [121] D.A.M. is equally adamant that he has committed none of these things. However, in his effort to defend himself, it appeared to me that he was minimizing both his and the children's past behaviour and was also reconstructing past events in an effort to demonstrate that D.M.T. is not emotionally stable. While I appreciate the difficulty of trying to prove a negative, I found that his evidence overall lacked detail, particularly in areas where I would have expected clear answers.
- [122] I found the evidence about D.M.T.'s estrangement from her parents quite telling about the dynamics of the parties. Each had a different version as to the reason for the estrangement, although neither went into much detail about this (uncharacteristically for D.M.T. given the detail she provided in most of her testimony).
- [123] D.A.M. testified that D.M.T. had long-standing problems with her parents and acted like a surrogate parent to them. He was concerned that she may have been sexually abused as a child. He was quite shocked when he first met her parents, describing their mannerisms as very negative. He said that her mother did not like him and ignored him. The first falling out between them occurred after D.M.T.'s mother made an offensive comment while returning from a family trip to EuroDisney. There was another encounter after their son

was born. D.A.M. told his wife to make a choice between him and her parents.

[124] According to D.M.T., it was D.A.M. who caused the estrangement. She said that she had a very pleasant childhood, got along well with her parents, and was never abused. However, very quickly after she met D.A.M. there was a clash. She said that D.A.M. would complain about things they did, she would believe him, and gradually he caused a wedge between her and her parents. She allowed that she let this happen, and should have stood her ground.

[125] I find it difficult to accept D.M.T.'s evidence that she got along well with her parents before D.A.M. caused this wedge between them. It is contradicted by the sentiments she expressed in a letter she wrote to D.A.M. some weeks after their separation in 2009. She wrote:

I may be wrong, but I feel that a lot of what you're feeling right now has to do with my parents and I really must get through to you my feelings about them.

I know what they are like, and how they have been to you, to me and to us as a couple. I don't want you to be misguided about my feelings towards them and the pressures they have caused us.

I do not condone their behaviour in the past and I am sorry that in the early years of our marriage, I allowed them to interfere with our lives and that I allowed them to upset you. I'm so used to them and their terrible ways that often their behaviour is like water off a duck's back to me.

[126] She goes on to talk about the money she borrowed from her parents and how this could have emasculated D.A.M. as a man and a provider, and continues:

But please don't put me in the same "camp" as them. I am not my mother and I have never treated you like she treats my Dad. I purposefully do things and behave differently to my mum because I never want to be remotely like her.

...

Please know, that I know their behaviour is wrong and that they are not like other people or other parents.

[127] D.M.T. testified that she wrote this letter when she was upset that D.A.M. had left. When asked if she was being truthful, she said that she wrote what she thought D.A.M. wanted to hear so he would consider staying in the marriage. At the same time, she denied she was being dishonest.

[128] I found her explanation confusing. She said at the time she was disillusioned with her parents' behaviour because she had only listened to D.A.M.'s side. She also said that she did not believe all of what she wrote about her parents because she knew by then that D.A.M. had been wrong about a lot of things he had said about them. Yet she admitted that she had not talked to her parents about any of this at the time she wrote the letter. She finally admitted that she did not believe all of what she had written about her parents. More particularly, she said that she did not think that her parents had "terrible ways" but would

not admit that this was not a true statement; rather she said it was "not a full-rounded statement".

- [129] I do not accept D.M.T.'s evidence that she was simply placating D.A.M. in an effort to get him to come back to the marriage. She was quite adamant that D.A.M. had manipulated her and her feelings toward her family such that she had become a shadow of her former self when she wrote this letter. I find that she was expressing the views she held about her parents at the time.
- [130] That said, I accept D.M.T.'s evidence that D.A.M. was a significant cause of her estrangement from her family, and that over the years he influenced her feelings for them. D.A.M.'s own evidence that he told his wife to choose him or her parents speaks volumes about the level of influence he had on her. However, I do not accept D.M.T.'s evidence that everything she thought about her parents at that time and during the marriage was wrong. She struck me as an intelligent woman quite capable of forming her own opinions, and even if she had allowed herself to be manipulated by her husband, her relationship with her parents could not have been as fine as she describes it now for her to form such firm beliefs over the years. There is evidence that her sister has also been estranged from her parents.
- [131] This evidence is an example of what I observed to be D.M.T.'s tendency to reinterpret and reconstruct past events. It also shows that she can be strongly influenced by what others tell her and can maintain strongly held beliefs regardless of their factual foundation.
- [132] D.M.T. challenged D.A.M.'s credibility by attempting to prove that he has lied about things in his past. These things related to D.A.M. spending three months in jail in Spain when he was in his 20s and untrue statements in a 2009 life insurance application. This evidence does show that D.A.M. may have lied in the past, and I did find his explanation about Spain to be rather curious and vague, but it did not really assist me in assessing his credibility in relation to the issues in this case.

1. Sexual abuse

- [133] I will assess the issue of sexual abuse by considering the hearsay statements made by the children in the context of all of the evidence.

May 19, 2011

- [134] The first statements were made by the children to their mother the evening they returned from a one-week visit with their father and his sister. They were made quite spontaneously during the drive home. Both children made comments to the effect that their father was mean to them. R.M. was more explicit, saying that he "hits us" while demonstrating with arm movements. R. added something like, "there isn't a day he doesn't hit us". Some of these things were repeated when they got home. The children were also seen running out of their rooms naked. At bedtime, R.M. told her mother that she did not want to see her father

anymore.

- [135] I accept that the statements D.M.T. testified about were made in the car and some were repeated at home. By themselves, these statements demonstrate possible physical abuse absent another explanation. Despite the apparent spontaneity however, the statements were made by both children together and the two appear to have "fed off" each other to some extent, as the allegations became more serious with each comment. The degree and frequency of hitting is unclear, and nothing is said about the context. However, it is apparent that D.A.M. was doing things that the children did not like, to the point where R.M. expressed a desire not to see him.
- [136] D.M.T. said that at first she did not think there was anything untoward, as it sounded like D.A.M. had been losing his temper with the children. It was after her daughter said she did not want to see her father anymore that she became concerned. It is what she did after that which troubles me.
- [137] Rather than calling D.A.M. to at least seek clarification and context, she called the police. It is not clear if a police officer actually visited the home that evening (D.M.T. said only that the police were going to send an officer to her home), but D.M.T. took her daughter to the police station the following day to speak to an officer. The message the children must have received from this, especially R.M., was a strong one: their father had done something so bad that their mother had to call the police to protect them from harm.
- [138] The absence of any context for these statements makes it extremely difficult to draw any conclusions about D.A.M.'s conduct. The fact that a police officer interviewed R.M. and nothing came from that suggests the same difficulty.
- [139] There is no evidence that D.A.M. had a regular habit of hitting his children. He testified that he has "probably physically disciplined them four or five times" and spanked his daughter once on the bottom in 2010. D.M.T. had no complaints about his parenting prior to May 2011, and said little about the physical abuse disclosures. She mentioned one incident where D.A.M. was extremely angry at his son and, thinking he was about to hit the boy, she interjected to stop this. She said that D.A.M. was so angry, he threatened her with his fist and threw things at them. However, he left for awhile and calmed down, and D.M.T. was comfortable enough to leave the children with him when she went to work. D.A.M. relayed a similar story but he ascribed the anger to his wife. He said that his son had grabbed his genitals while he was talking to D.M.T., she was "ballistic", and his instinct was to get out of the house, which he did.
- [140] The only conclusion I am able to draw from this evidence is that D.A.M. treated his children harshly at times, by yelling at them and using physical discipline.

May 21-22, 2011 weekend

- [141] The sexual abuse allegations were first made on May 21, 2011, in the presence of D.M.T., Mr. H. and Ms. G. Again, the children were together. The statements began spontaneously, with R. saying, "We don't put honey on the stitches," and R.M. then talking about how her father puts manuka honey on their privates when they are sore. The rest of the disclosures were made by R.M. only. She later added, "Sometimes daddy's finger would go in my hole where the pee comes out by accident and that always hurts". In response to a question from D.M.T., R.M. said that this had been going on for a long time and frequently: "he did it in the morning, at lunch time, and dinner time, thousands of times". Later, R.M. said that she thought her father did it because he liked their privates and also said that she did not want to call her father "daddy" anymore.
- [142] D.M.T. testified (in chief) that R.M. also said that D.A.M. put honey on R.'s "wiener" and bottom. However, she gave this evidence out of sequence and it was inconsistent with her evidence the following day (also in chief) that she only found out in September that her son had been touched. It is also inconsistent with a letter D.M.T. wrote to the RCMP on August 4, 2011, where she stated that she was unable to ascertain if the sexual abuse described by R.M. on May 21 was extended to her son. (Mr. H. testified that R.M. did make these comments but his recollection of the sequence was different from D.M.T.'s) While all of this is understandable, it is critical that the evidence is sufficiently reliable to supporting a finding that a particular statement was made. Because of these inconsistencies, I am not satisfied that this evidence is sufficiently reliable and I find that this statement was not made by R.M. on May 21.
- [143] The statements R.M. did make are obviously of serious concern. The initial statements appear to have been quite spontaneous. However, as soon as D.M.T. asked a question, the allegations became more serious. And it was not until after D.M.T. reacted emotionally to what she was hearing that R.M. expressed her feeling that her father applied the manuka honey on their privates because he liked them. R. said nothing about abuse but he was present throughout.
- [144] D.M.T. felt that the drawings the children made that day were disturbing and indicative of abuse. Mr. H. suggested the same. Drawings attributed to R. contain the word "NO" written many times. There is one phallic shape and a stick figure of sorts with a dark scribble in what appears to be the groin area. Those attributed to R.M. show outlines of a hand and a foot. On the hand, the fingernails are red, the thumb is brown and there is a spider on the middle finger.
- [145] In the following days, R.M. talked about her father putting a shoe in her hole and complained that her privates were "paining". She also said that her father did not use his finger, he used a knife, and when they were in a Winnebago, he went in her bed and lay on top of her. A brief medical examination revealed nothing.

- [146] It is very difficult to assess the veracity of these statements made by R.M. While they were initially spontaneous, they became increasingly severe and some - the knife in particular - were obviously impossible in the absence of any physical evidence. D.M.T. said that she tried to "keep some normality" after these disclosures and while I certainly accept that she tried, I find it highly improbable that the children were not aware of her severe reaction and her opinion that D.A.M. had committed egregious acts. R.M. in particular had already been to see a police officer about her earlier statements. In my view, these circumstances suggest that R.M., in an effort to support her mother's opinion, may have had a motive to exaggerate.
- [147] It is very difficult to interpret the children's drawings as indicative of sexual abuse in the absence of expert evidence. I do not disagree with some of the concerns expressed by D.M.T. and Mr. H., but it is not possible to attribute the sentiments apparently expressed in the drawings to one particular cause.
- [148] That said, these disclosures were clearly of serious concern and D.M.T. was right to report this to the police.

May 26, 2011 RCMP interviews

- [149] I found the video recorded interviews of each of the children by the RCMP to be the most probative of all of the hearsay statements and I reviewed them carefully. The officer who conducted the interviews did so in a very professional manner. She was friendly and calm, had good rapport, and asked appropriate questions. Each child demonstrated an understanding of what it meant to tell the truth. Neither child appeared afraid or anxious.

R.'s interview

- [150] I found R. to be quite articulate and responsive to the officer's questions. He did not disclose any sexual abuse against himself. He said only that his father put manuka honey on his sister's bottom but she didn't like it. Significantly, in my view, he said that he knew this because he heard his sister say so while they were at Ms. G.'s house. When asked if his father ever put honey on his privates he said "no" and when asked if he would tell the officer if his father had done that he answered "yes". Later, the officer asked R. if anyone had put honey on his privates and he said "no", but when asked if he would tell his mommy if someone did, he said "no". This last answer seemed curious to me given his subsequent statements to his mother.
- [151] R. did, however, say some things that are of concern. Before the questions related to "privates", R. talked about his father doing "bad things" to them. When asked to tell more about that, he talked about "doing work for people and they pay him", "don't tell mommy", "bad secrets" and not going to "fun stuff". When asked why he did not like staying with his dad he said, "He is mean". When asked how he was mean, R. said that "he is mean to us, mean to mommy, he smacks our bums, sometimes he would smack us a lot of times". He

said that his father used his hand and would smack him on top of his clothes. When asked how many times, he said, "I don't know". The officer then asked if there was anything else he didn't like at his dad's house. His answer was more of the same theme: "he's really bad, he's doing a lot of lies and secrets, don't tell mommy a lot of stuff, don't tell mommy every single thing that is bad, don't tell mommy I've been mean to you". He also said he didn't like "not going places" and his father would not take them when they were naughty, and even when they were good and only one thing they did was bad.

- [152] I found several things in this interview that indicated there may have been some suggestion or influence on the child. After the preliminary part of the interview, the officer asked R. who he lived with. R. said "mommy" and quickly added, "daddy is going to jail". This was followed by the discussion about his father doing bad things to them. On its own, this reference to his father going to jail may not have much significance. However, at the end of the interview, R. talked about "our whole family helping us to get away from daddy". This arose after the officer asked R. if he still wanted to have visits with his father. R. said, "Yes, since he's missing us" and "if he is missing us we just want to see him for two minutes" and he would then go back home with Mr. H., mommy and R.M. It was after this that R. said, unprompted, "We're never going back to daddy's, we both don't want to. Our whole family and people are helping us to get away from daddy". He said that his mommy told him this.
- [153] These statements demonstrate that R. was quite aware that his mother and his "whole family" thought that his father had done something so bad that he was going to jail and the children had to get away from him, and that R. learned this from his mother.
- [154] D.M.T. testified that she thought R. lied to the police officer because he was afraid to tell the truth. That was not my impression of this interview. R. appeared to be candid and responsive when asked about what he knew about the manuka honey. His answers were consistent with D.M.T.'s description of what had occurred the weekend before. R. had said almost nothing but was present throughout when his sister was making her disclosures.
- [155] R. was, however, quite vague about what he meant by his father being mean, doing bad things and keeping bad secrets. The officer tried to draw him out but was unable to elicit anything specific. I am concerned about these statements, but without more information, there is little that can be determined from this interview. And it was apparent to me that some influences were at play as a result of R.'s stated awareness of what his mother and the family were doing to keep him away from his father.

R.M.'s interview

- [156] R.M. was also responsive to the officer's questions. She had her stuffed toy with her and seemed comfortable in the interview room. When the officer left her alone in the room for a few minutes, she smiled and waved towards the camera.

- [157] After some preliminaries, R.M. began by telling the officer that she understood she was there to talk about her dad and that her mom told her that. When asked what her mom said, R.M. answered, "Tell the lady everything and tell her the truth". When asked what she wanted to say, R.M. talked about her father smacking their bums. She relayed two stories, one which was consistent with the incident described by D.M.T., and to some extent D.A.M., in which R. had hit his father in the genitals. She also described the incident where her brother fell from the counter and had to go to the hospital, which was consistent with the evidence about R.'s fall during the week the children were with D.A.M. and his sister. She said that R. had split open his skin and there was blood everywhere, "a big puddle of blood".
- [158] The officer asked R.M. what things she did not like at her dad's. R.M. said that he shouts and smacks them, but added, "He really doesn't do it that often now". When asked if he smacked her over or under her clothes, R.M. said that he pulled their pants down and smacked them. She described one incident when he smacked her hands because she put them on her bum, and another when she put the vacuum on the cat and her father pulled her pants down and smacked her five times. She said that he uses his hands.
- [159] The officer then introduced the subject of who is allowed to touch privates. R.M. said, "Doctors, mom, dad". Then, unprompted, she said, "Oh yeah. That's what I was meaning to tell you. My dad, when I always have sore privates ... all he uses is manuka honey, it's really good for you. He puts his finger in it and gets it on my privates and doesn't let me take it off, it's really sticky". She said that her mom used "sudocreme" to make sore privates go away but her dad used manuka and "it's really bad for us", "he uses it on our privates and our bum". She explained that her privates get sore when she doesn't wipe when she goes pee. The officer then asked who she told about this and R.M. said "Mom ... my mom says that's not appropriate for your dad, he knows that's bad for you and your privates ... My brother wants him to get sent back to England and never come back to Canada".
- [160] R.M. appears to have been somewhat ambivalent as to whether or not manuka honey was good or bad. These latter comments show that D.M.T. had talked to her daughter about D.A.M.'s use of manuka honey and R.M. was led to believe from her that it was bad and that her father had done something "not appropriate". R.M.'s use of this kind of language suggests to me that she was repeating what her mother had said to her.
- [161] Some of R.M.'s remarks which followed strongly suggest that R.M. had learned other things from her mother. The officer asked if her dad worked and what he did. R.M. said, "Yeah, none of his friends likes him, all his friends keep ringing mommy and saying they don't like him," and, "when people work for him he doesn't give them the money back". The officer then asked if her dad told her to keep secrets from her mom and when she replied yes, asked R.M. to tell more about that. R.M. said, "Smacking our bums, not paying people and not having any cereal".

- [162] This issue of D.A.M. "not paying people" is consistent with information obtained by D.M.T. on Craigslist that indicated complaints about D.A.M. walking off jobs and not paying his workers. D.A.M. admitted that he had about two jobs "that went sideways". The important issue here is that R.M. talked about this and connected the information with her mother ("people keep ringing mommy").
- [163] This exchange was followed with the officer asking R.M. if her dad ever put manuka honey on her privates when they were not sore. R.M. shook her head. The officer then asked what happened next and how it got on her privates. R.M. said that her father "scoops it up with his finger and wipes it all over even where our pee comes out of the hole". She said that the honey soaked into her skin and in the morning her pee won't come out "because it sticks everywhere". When asked if there was any other time her father touched her privates, R.M. said, "Just to see if they're sore, he opens them up, he does that with my bum too".
- [164] I found these statements quite compelling. R.M. was very clear in her description of how her father applied the manuka honey, how it felt, and why he did it.
- [165] At this point, the officer left the room for several minutes. When she returned, she summarized why R.M. did not like going to her dad's as having no cereal, yelling and smacking them, and applying manuka honey to their privates. She then asked if R.M. had ever seen her father do "that" to her brother. R.M. said, "Yes, he always cries and screams". The officer asked where on his privates and R.M. said, "sometimes on his willy, sometimes on his bum". In response to whether she had seen her father do that, R.M. said, "Yeah".
- [166] The interview concluded with R.M. talking about her father yelling at them in the car during a trip to Whistler and trying to stop them from going to Mexico with their mother.
- [167] Regarding the sexual abuse allegations, R.M.'s disclosure in this interview was limited to her father's application of manuka honey when her privates were sore. Nothing was elicited about how frequently this occurred. I find it significant that R.M. did not tell the officer the more egregious things she had told her mother during the preceding week, such as her father's finger going "into" her "hole where the pee comes out", he did it thousands of time, she thought he did it because he liked their privates, and he inserted other things into her. While it is difficult to know precisely why R.M. did not disclose these other things, I think there is a strong inference that she did not because she was doing her best to tell the truth to the police officer.
- [168] R.M. was more specific than her brother about the physical abuse allegations. I found her statements here quite reliable as they were consistent with other evidence and they generally described yelling and spanking episodes involving discipline for bad behaviour. It is difficult to determine how serious this was but it does suggest that D.A.M. is prone to angry outbursts and physical discipline more frequently than he is willing to admit.

- [169] R.M.'s statements about her father's application of manuka honey on her are compelling not only because of their clarity but also because this clarity can be contrasted with D.A.M.'s rather vague and inconsistent descriptions about the use of manuka honey on his children.
- [170] D.A.M. testified that he stopped applying medicine to his daughter's privates when she got old enough to do it herself and he only began to use manuka honey later on. He was not specific about what medication he used to apply, when he stopped doing this, and when he began to use manuka honey. He was not specific about when the manuka was last used on his daughter.
- [171] D.A.M. said only that he remembered that the manuka honey was used medicinally between January and May 2011. He placed it during that time period because he remembered that it took place in his current apartment, which he moved into in January 2011, and he did not see the children on his own again after May. He was not able to give a more definitive time. He was able to be more precise in June 2011, when he told the police that his daughter had used the honey a couple of weeks before that, placing the incident in May. He did remember that he had an argument with D.M.T. over the phone about why she had allowed R.M.'s rash to continue for so long. D.M.T. denied having such a conversation but she did say that her daughter had a rash in 2011 when they lived in Langley, a time frame that coincides with D.A.M.'s time frame.
- [172] What is of more concern to me is the inconsistency in D.A.M.'s evidence about whether or not he actually saw his daughter's rash. At trial, he testified that he saw the rash. However, in his examination for discovery, he said that he did not notice a rash but his daughter told him about it. He acknowledged the inconsistency but explained that he saw the rash when his daughter was applying the honey. I was not satisfied with that explanation. It did not explain the inconsistency.
- [173] I also had some difficulty with D.A.M.'s evidence regarding his use of manuka honey on his son's stitches. In chief, he said that he applied it to the stitches and told R. to have his mother put it on the stitches too. He said that R. "went ballistic" because he did not like it. In cross-examination, he wasn't sure if he put the honey on R.'s stitches. He thought he did but could not say if honey was applied. He was not sure if his sister was present throughout this.
- [174] Given that this appears to have been the catalyst for the children's disclosures suggesting sexual abuse, it is surprising that D.A.M. was somewhat vague about whether he applied the honey to R's stitches in May 2011. D.A.M. was made aware of these disclosures not long after they were made. I would have thought he would have been able to put his mind to these specific events while they were still fresh in his memory and not forget them at trial. I would also have thought that an injury serious enough to require a visit to the hospital would be something that might stand out in a parent's memory, as would any treatment carried out in the days following. In any event, I accept his evidence in chief that he did

apply the honey to R.'s stitches, as he was clear about R.'s reaction.

- [175] The whole thing about whether D.A.M. told his son (as he said) to have his mother apply the honey appeared to be an attempt to deflect what I suspect was something he had never discussed with D.M.T. He did not know if she had ever used manuka honey on the children and there is no evidence that they had discussed its use as an anti-bacterial cream. D.A.M. asserted that D.M.T. had used it herself on cold sores, a fact which D.M.T. denied. He said he was not aware that D.M.T. did not have manuka honey in her home. I find it implausible that in such circumstances he would assume that D.M.T. had manuka honey and would be in a position to apply it to R.'s wound or would even agree to do so.
- [176] This issue took on another aspect with the evidence of D.A.M.'s sister, A.M., who testified that D.A.M. told D.M.T. directly not to forget to put honey on the stitches. She said that this occurred in the parking lot when they were dropping the children to their mother. This latter evidence is inconsistent with D.A.M.'s evidence and is contradicted by the evidence of D.M.T. and her former workmate who was present in the parking lot. I found A.M.'s testimony about this unconvincing in light of this conflicting evidence.
- [177] I do not accept D.A.M.'s evidence that he told his son to have his mother apply manuka honey, nor do I accept A.M.'s evidence that D.A.M. mentioned this to D.M.T. in the parking lot. Not only does this make little sense, my impression was that both D.A.M. and his sister were attempting to bolster their evidence by ascribing knowledge to D.M.T. that she did not have.
- [178] Considering all of this, I prefer R.M.'s statement to the police to D.A.M.'s evidence with respect to the application of manuka honey on R.M.'s private parts.
- [179] D.A.M.'s evidence is also inconsistent with R.M.'s statement that she saw her father apply manuka honey on her brother's "willy" and "bum". However, I accept that D.A.M. applied the honey to R.'s stitches, which were very close to his privates, and R. got very upset. This is consistent with R.M.'s description that her brother "cries and screams" when his father applies the honey. It is quite possible that this was later misinterpreted or exaggerated. R. himself did not tell the police officer that his father did this to him. However, R.M.'s statement still raises a question as to whether D.A.M. actually applied manuka honey to his son's private parts.
- [180] In my view, the evidence so far does not establish on a balance of probabilities that D.A.M. applied manuka honey to his children for a sexual purpose. R.M. does not talk about this outside the context of having a rash or a wound. Her statement about seeing her father apply it to her brother is non-specific about this. But D.A.M.'s insistence that he did not apply the manuka honey to R.M. may provide some explanation for her later accusation that her father was a liar. She said this for the first time during the first supervised visit in July 2011 after D.A.M. made reference to giving her the jar of manuka honey.

[181] The only conclusions I am able to draw from the children's statements to the police are that D.A.M. applied manuka honey to his children, on or around their private parts, for a medicinal purpose, and he also treated them harshly by yelling at them and at times using physical discipline.

September-November 2011

[182] The next disclosure of any significance was made on September 16, 2011, while D.M.T. and the children were shopping at Wal-Mart. Shortly after D.M.T. had discovered the disturbing photo of R. in her camera, the children told her that their father had taken pictures of them like that. This was followed a few weeks later with the statements about being locked in the bathroom with the lights out.

[183] These two themes subsequently emerged during R.M.'s therapy sessions with Dr. Shred and D.M.T.'s questioning of the children in November.

[184] R.M. provided some detail to Dr. Shred, saying that her father would take naked photos of them while the other was locked in the bathroom with the lights out, with the threat of spanking if they turned the lights on. She also said that her father showed the photos to his friends. All of this was accompanied by threats of putting them in jail, spanking them really hard, killing their dog and plucking out her eyelashes if they told anybody.

[185] These statements were not elicited in a forensic interview but they were elicited from a child psychologist who was careful not to ask leading questions. Dr. Shred was alive to the issue of contamination of evidence and consulted with another professional about this. Nevertheless, I was concerned that he undertook this role while a s. 15 investigation was in progress. His evidence about this was limited, however, to his observations of R.M. during his sessions with her.

[186] Dr. Shred testified that he did not get any indication that R.M. had been coached or was repeating something someone told her, and he thought that she spoke in language appropriate for her age. He said that R.M. showed him some of the poses her father asked her to do and he thought she appeared to be embarrassed about the photos having been shown to others.

[187] D.A.M. said he had never locked his children in the bathroom with the lights out but said that his daughter had done that to her brother. D.A.M.'s sister went so far as to take photos showing that his bathroom door only locks from the inside and the light switch is also on the inside. This evidence demonstrates that it is not clear how the children could have actually been locked in the bathroom, but it was not particularly helpful about the lights, given R.M.'s statement that they could have turned the lights on themselves.

[188] R.M. also expanded on the manuka honey issue in her first meeting with Dr. Shred, where she talked about her father applying it in his old apartment while she was asleep. This raises issues about frequency, timing and purpose, but provides no detail. I have some

concern arising from D.M.T.'s presence during this meeting. Although Dr. Shred said that R.M. was focussed on him throughout and interacted with her mother only at the beginning and end, it is difficult to assess what influence, if any, D.M.T. may have had on what R.M. disclosed to Dr. Shred given the way the disclosures came out over time.

- [189] R.M.'s disclosures to Dr. Shred were made in the context of a therapeutic relationship. I don't see that as a factor that necessarily diminishes the reliability of the statements but it was quite clear to me that Dr. Shred had some bias in favour of supporting the assumption that R.M.'s statements were true. I don't say this in an overly critical way because it is not unreasonable for a psychologist in a therapeutic relationship to assume the truth of what his patient tells him. And in any event, Dr. Shred did not opine on the veracity of the statements as he quite properly did not see this as his role. He was simply describing his observations in his role as a treating professional.
- [190] This issue of naked photos as described to Dr. Shred is a difficult one. In the context of R.M.'s statements, the allegation itself is obviously serious and should have elicited further investigation. If such photos had been taken, there may have been physical evidence. In her later statements, R.M. talked about her father deleting the photos but saving some or at least one and R. talked about his father putting them in an album. It is possible that further inquiries may have assisted in assessing the veracity of these allegations one way or the other.
- [191] Throughout this time, D.M.T. continued to inform the Ministry of new disclosures and continued to press it to take action. When it refused, she decided to question the children herself and record it, despite the cautions she had been given by both the police and Ministry staff.
- [192] I understand D.M.T.'s frustration. I found it surprising that the Ministry did no investigation of its own. While I do not fault it for relying on the police interviews of the children, a criminal investigation has a different purpose than a child protection investigation. I appreciate the concerns about re-interviewing the children but it may have been better if they had been properly interviewed by a social worker after these new disclosures surfaced. (However, some of the notes in the Ministry files indicate that they did not consider the disclosures made to Dr. Shred provided new information indicative of sexual abuse.) In any event, the Ministry decided to rely on the s. 15 investigation and waited for Dr. Krywaniuk's report.
- [193] It is extremely unfortunate that D.M.T. chose to take matters into her own hands because I have concluded that her questioning of the children as disclosed in the November 11 video had the effect of contaminating their evidence and compromising further investigations.

- [194] In addition to the video, a certified transcript was entered into evidence as an aid to interpreting what was said in the video. I have carefully reviewed the video. Some of the conversation is difficult to hear and the transcript was helpful in discerning what was said. I did notice several places where the transcript was not entirely accurate or did not pick up something. For the most part, however, it was accurate and a helpful aid.
- [195] There were several things that stood out in the video which caused me considerable concern. Both children were together for the entire time in the presence of their mother and their grandparents in a very nurturing and sympathetic environment. Both D.M.T. and her mother would often respond to a child's answer to a question in an emotionally reassuring way. The children appeared to respond to these reassurances at times by escalating the seriousness of what they were saying. They also appeared to feed off each other quite a bit. R.M. was the dominant child and R. would at times repeat what she said and expand on it or would copy some of her gestures. There were also times when R.M. repeated things her brother said.
- [196] D.M.T. did almost all of the questioning but her mother piped in periodically with either a question or a comment and later her father asked one pointed question that seemed to come out of nowhere. More importantly, D.M.T. asked many leading questions and repeated some questions many times. It was apparent to me that all of the things the children talked about in the video had been talked about before.
- [197] Dr. Shred and Dr. Krywaniuk both viewed the video. Dr. Shred provided little insight into the dynamics of an interview like this. He simply offered his observation that the children did not appear to look to their mother for confirmation of what they were saying and seemed to be talking about something that was important to them. In contrast, Dr. Krywaniuk provided a helpful analysis about what he saw in the video, which was consistent with my impressions when I first viewed it in court.
- [198] Dr. Krywaniuk explained the principle of "shaping behaviour", where certain comments or behaviours are emotionally rewarded, either advertently or inadvertently, and that behaviour emerges. This was evident in the escalating nature of the children's responses to the point where they were saying quite extreme things. He said that the video was "not a very good example" of how one should conduct an important evaluation because mixed in are things that could change a child's responses.
- [199] I do not intend to review everything in the video but I will provide some examples that demonstrate the basis for my concerns.
- [200] There are numerous examples of escalating negative descriptions of things. The video begins with R.M. describing in some detail blood "all over" her father's fingers and "lots of drops on the floor" that she said came from her privates. D.M.T. responds with a very sympathetic "oh dear" and her mother says, "He could have damaged her". R.M. goes on to describe her father popping "a little gland in my butt" and this is what produced the blood. After another "oh dear" comment, her description of the blood escalates to "my whole hand

was covered in blood".

- [201] D.M.T. proceeds to ask her son to tell her what happened to him when his sister was locked in the bathroom. She repeats this question many times throughout the video. R.'s first answer is "he would slap me so extra hard". His next answer, a little later, is that his father sometimes takes him into the bunk bed. D.M.T. reminds him that they talked about this a few weeks before and R. says, "sometimes he puts honey on our privates; it really really hurts". He also adds something about washing his mouth out with soap. (There had been some discussion before this where R.M. talked about her father threatening to wash their mouths with soap.) When asked the question again, R. says his father kicks them. This is followed with D.M.T. reminding R. that he had told her D.A.M. did other things when his sister was in the bathroom and R. responds by saying, "Sometimes he kicks 100 times and he slaps 100 times. Sometimes he doesn't. Sometimes he hits us just 10 times and kicks us 10 times".
- [202] After this there is a break in the recording, and later, D.M.T. returns to questioning her son about this. This time, R. expands on an earlier answer about the bunk bed and says, "Sometimes he even comes up on our bunk bed and he sits on me". At that point, R.M. agrees, saying, "Yeah, he sits on us; it pains," and (in answer to a leading question) he sits on her stomach. D.M.T. is unrelenting. She asks her son the same question again. His answer is again about the bunk bed.
- [203] I was quite disturbed by D.T.'s repeated questioning of her son about the same thing. It appeared to me that he felt some pressure to tell her something. D.M.T. was apparently trying to get R. to repeat what he had told her earlier in the fall about being scared when he was locked in the bathroom and having to put his "willy" into his sister's face (which in itself appears to be inconsistent with the idea of each child being locked in the bathroom alone). For the most part, each answer was progressively more serious. It is very difficult to assess a young child's statements when they are elicited in this manner.
- [204] During the break in the recording, D.M.T. said that she went out to the balcony for a cigarette. Mrs. T. testified that during this time, R. told her that his father had been touching his "willy". When the video starts again, Mrs. T. tells R. to "tell mommy exactly what you told me" and R. talks about his father pulling up the skin on his "willy". The child is upset at this point. Despite this, D.M.T. comes back to this topic later on when they are talking about manuka honey, and asks R. if his father ever touches his penis. This elicits a positive response and a description of how his father "smudges it on". This quickly escalates into his father "taking a whole hand of manuka honey and he puts it all over me", and R. demonstrating with his hands touching every part of his body. (Earlier, R. had said that his father put the honey on their skin, arms, eyes, and even in their hair.) This escalates even more. Near the end of the video, both children are saying that D.A.M. is applying manuka honey "every single day" and R.M. is saying that "his finger was always bloody when it came out" and "every single time he went inside my privates it happened; which he always did". This latter statement is inconsistent with R.M.'s earlier statement about the blood

happening one time.

- [205] The negative tone of the conversation carries through with the children speaking negatively about things such as the kind of gifts their father gives, the vitamins he buys and the small size of his apartment. The escalating tone reaches the point where R.M. says she thinks her father will kill them. This is in response to D.M.T. asking her how she feels about seeing him. She comes back to this when D.M.T. tells the children they are brave for telling, and admits that her father did not say he would kill them.
- [206] Throughout most of the video, R.M. did not appear particularly emotional or upset. She demonstrated how her father smacks her all over her body in a very matter-of-fact way. She did the same when she demonstrated some of the poses she did for the photos. It could be that there was an element of performing due to R.M.'s awareness that her mother was recording them. (Near the beginning of the video, she says, in quite an emphatic way, "You are recording".)
- [207] R. did get emotional at times and I observed some copying behaviour. When he demonstrated where his father put manuka honey on him, his gestures appeared to mimic to some extent those of his sister when she had demonstrated the smacking.
- [208] R.M. engages in some discussion about the photos and makes several inconsistent statements about whether they still exist. This is prompted by D.M.T. asking what they thought their father did with the photos. R. says he put them in the photo album but R.M. says that "he deleted them so nobody could see them; deleted every single one". She then says that if you looked on the camera, "you'll probably see half of them", he's still got "a little bit of them, I'm sure, because he left, like one". She clarifies that her father has "a picture machine where we print out all the pictures" like the one at Wal-Mart and says that there is only one picture left. When D.M.T. asks her what picture that was, she says, "A picture of [R.]'s butt" with some clothes on but the picture didn't show them. This description sounds remarkably similar to the photo of R. that was adduced in evidence, a photo that was taken by R.M. on her mother's camera.
- [209] D.M.T. was cross-examined about the possibility that by saying their father took naked pictures of them like the one in the photo taken by R.M., the children are transferring the blame to their father for something they did themselves. She thought the suggestion was "ridiculous" because these statements were made several months after she found out about the photo in Wal-Mart. She did not agree that in the video, her daughter may have been talking about that photo.
- [210] In my view, the suggestion put to D.M.T. cannot be lightly dismissed. The similarity between R.M.'s description of the one photo that her father kept, and the photo that she had taken of her brother is striking. And I find it significant that the first time the children said anything about naked photos was almost immediately after their mother discovered the photo of R. on her camera.

- [211] R.M.'s statement that her aunt A.M. talked about being afraid of D.A.M. was elicited by Mr. T., who asked if D.A.M. did anything when A.M. was there. It appeared to me that R.M. was trying to give a positive response to her grandfather's question. A.M. denied having any such conversation with R.M. She said she had no reason to say anything like that. I found A.M.'s evidence on this to be credible. It seemed highly unlikely that she would have had a conversation like that with R.M.
- [212] I do not say that nothing in this video is true. Some of it may be. But having both children together with their mother asking repeated and leading questions and their grandparents bolstering the supporting environment, I agree with Dr. Krywaniuk's assessment that there is much going on in this video that could have changed these children's responses. The video also left me with a strong impression that these children have talked about these things far too many times, to the point where it may now be impossible to discern what is true and what is not.

2012

- [213] The disclosures made by the children in the first part of 2012 were not substantially different. Those made to Dr. Krywaniuk in the context of the s. 15 investigation would normally have significant weight. However, Dr. Krywaniuk testified that he did not feel that the information he obtained from the children was reliable because he was concerned that the information had become contaminated. He explained that he does two interviews with each child separately. The goal of the first interview is to establish rapport, learn a bit about the child and look for things to pursue. In the second interview, he pursues the issues in some detail using proper interviewing techniques.
- [214] In this case, Dr. Krywaniuk said that each child's manner during the second interview was completely different in focus from the first. He described it this way in his report:
- In the first visit, the children seemed to respond to the nature of the discussion or the questions that I was directing towards them. In the second visit I had much more of a sense that they had something that they were going to tell me and did so with very little prompting.
- [215] At trial, he said that he was unable to ask questions because the children quickly began to talk, unbidden, and it seemed quite clear to him that there was immediately an agenda and that they had an idea of what they were supposed to tell him or what this was all about.
- [216] Dr. Krywaniuk had not seen the November 11 video at the time he wrote his report, but he testified that what subsequently he saw on the video confirmed his opinion about contaminated information.
- [217] In the last half of 2012, the children were receiving support counselling from Ms. Marcil. Some of what R.M. disclosed may have been new, but given the supportive nature of these sessions and the contamination issue, I am not confident that these additional allegations are sufficiently reliable to be considered.

Conclusion

- [218] Mr. Hittrich sought to draw parallels between this case and *J.P. v B.G.*, where Walker J. found that the father had sexually abused his children. The children in that case, who ranged in age up to seven years, had made fairly complex disclosures which included oral sex and partial penile penetration and had exhibited very troubling sexualized behaviours. The judge found that the disclosures made by the three oldest children were credible and reliable accounts of things they would not be expected to know given their ages. He rejected the evidence of the father. His finding was supported by expert opinion evidence that such highly inappropriate sexualized knowledge and behaviours indicated that the children had been abused.
- [219] The evidence in this case was quite different. The children's disclosures, while detailed in some areas, do not suggest the kind of sexualized knowledge apparent in *J.P. v. B.G.* The most explicit disclosures, by R.M., relate to the insertion of a finger or object into her "privates". The bulk of them do not necessarily suggest inappropriate sexual knowledge sufficient to indicate that these children were abused. Nor do the sexualized behaviours necessarily indicate abuse. In response to a question from the Court, Dr. Krywaniuk explained that sexualized behaviours are generally persistent and similar to things adults might be aware of, such as fondling a breast or mimicking sexual acts beyond what would be considered normal exploratory behaviour. In the absence of any other expert opinion evidence about the nature of inappropriate sexualized behaviours in the context of these children, I am not able to draw such conclusions. Finally, I have not rejected D.A.M.'s evidence as a whole, nor have I made findings about him that can be compared with those made against the father in *J.P. v. B.G.*
- [220] Dr. Krywaniuk's conclusion that abuse was unlikely was based almost entirely on the conclusions of the police. He did not review or assess the statements the children made to the police. He did not assess the statements the children made to Dr. Shred and others. He did not consider the information he obtained directly from the children to be reliable due to his concerns about contamination. He was in a difficult position on this issue but ultimately, he simply deferred to the police. He did not consider the issues of risk as I have done. Therefore, I cannot give any weight to his opinion that abuse was unlikely.
- [221] That said, given the problems with the evidence in this case, I am unable to conclude on a balance of probabilities that D.A.M. sexually abused the children. The only statements I consider reliable enough to accept for their veracity are those made by the children to the police on May 26, 2011. I also find that some of the statements are so unreliable when considered with other evidence that they cannot be accepted as true. These are R.M.'s statements about her father inserting objects such as knives into her "privates" or inserting his finger to the point where there was blood. While the absence of any physical evidence (including an intact hymen) does not rule out abuse, it does rule out abuse of this nature. Moreover, in the November 11 video, R.M. gave an inconsistent description of what caused her to bleed. She described in some detail blood "all over" her father's fingers and "lots of

drops on the floor". She said that this came from her privates but went on to describe her father popping "a little gland in my butt", which is what produced the blood. It is not at all clear that R.M. was saying that this blood was produced by her father inserting anything in her vagina.

- [222] I am also unconvinced that R.M.'s statements to Dr. Shred about her father's threats about going to jail and killing the dog were real threats. Mr. Hittrich argued that these threats explain the children's reluctance to disclose. However, in the November 11 video, R. said that they didn't actually believe the threat about going to jail and he denied that his father said anything to him about killing the dog. This was so despite D.M.T. asking R. leading questions about why he didn't want to tell her about what happened when his sister was locked in the bathroom; she said, "You told me that you didn't say anything before because [D.A.M.] told you that you would go to jail". Interestingly, R. responded by saying that they didn't actually believe him. This suggests that most of the threats R.M. described to Dr. Shred may not have been real threats.
- [223] As I indicated before, from the statements the children made to the police, I am able to conclude that D.A.M. treated the children harshly at times by yelling at them and using physical discipline. I am also able to conclude that D.A.M. applied manuka honey to his children, on or around their private parts, for a medicinal purpose. I am not able to determine how often he may have done this and if he did it at any time for an improper purpose. I find that the children were upset by this conduct.
- [224] Additionally, some of the children's statements do raise questions about what may have happened while they were in the care of their father. The statements about keeping "bad secrets" cause me particular concern.
- [225] It is significant, in my view, that before May 2011, the children were not exhibiting untoward anger toward their father or undue anxiety about spending time with him. D.M.T. was comfortable sharing custody and access with D.A.M. until these disclosures were made. She said that R.M. was showing reluctance to go to her father's in early 2011 but provided no detail about this. There is some evidence that R.M. was reluctant at times to go to school, but this was occurring as early as 2010, according to Mrs. T. and may have had something to do with R.M. being bullied. D.M.T. said that some girls were mean to her in 2010 and R.M. told Dr. Shred about one of them. My impression was that D.M.T.'s evidence about this was an attempt to reinterpret past events to confirm her belief about D.A.M.
- [226] The children's animus against their father arose quite suddenly and in the absence of any evidence that D.M.T. had a motive to manipulate or fabricate. I am satisfied that something happened with their father that these children did not like, which caused them to disclose to D.M.T.
- [227] Accordingly, it is my view that there is a real risk that D.A.M. may have conducted himself in an inappropriate manner and in such a way as to upset his children.

[228] However, this by itself does not explain the abrupt and sustained negative attitude the children have towards their father.

2. Alienation

[229] As I said before, the evidence is clear that the children are alienated from their father. The primary question is why.

Dr. Krywaniuk

[230] Dr. Krywaniuk concluded that the alienation is the result of misinterpretations of the children's statements, reinforced by the negative attitude that D.M.T. and the grandparents have against D.A.M.

[231] Mr. Hittrich argued quite strenuously that Dr. Krywaniuk was biased in his approach by concluding that there was no sexual abuse, failing to take relevant factors into account, such as the parties' more positive history in the first two years after separation, and unfairly favouring D.A.M. despite the negative results in some of his psychological tests.

[232] In my view, Dr. Krywaniuk's conclusion about abuse did affect his assessment of the alienation issue. Even though he could not rule out the possibility that abuse had occurred, he addressed this issue as if abuse had not occurred. He did not consider whether there were any risk factors or some basis for the children to be angry at their father, and whether this may have had an effect on their attitude.

[233] Dr. Krywaniuk did not give much consideration to past events but he was generally aware of the positive aspects of D.M.T.'s attitude towards D.A.M. prior to May 2011. He said that he did not overlook these things but they were not his focus. He considers the past important only to understand the issues and how they will play out in the future. While I understand this approach, in a case like this, the way the parties functioned as a separated family in the two years prior to May 2011 ought to have been considered more carefully. To me, this does have some bearing on assessing the causes of the alienation. D.M.T.'s generally positive approach to joint parenting prior to the children's disclosures suggests that she had no motive to manipulate the children against their father.

[234] Dr. Krywaniuk also seemed to pay little attention to some of the test results, in particular the MMPI-2. He explained that this test uses response patterns and matches them with a prototypical group, and the profile descriptions cannot be used to describe an individual. Rather, they must be considered along with other sources of information, and one cannot draw conclusions on the basis of the test results only. However, the MMPI results for D.A.M. revealed a profile that in some ways was quite consistent with the evidence and with my impression of D.A.M. Dr. Krywaniuk reported:

Individuals with similar clinical profiles would be seen as experiencing mild to moderate emotional distress, largely associated with worry about what is happening with them. The profile suggests that he can be stubborn, argumentative and angry although he is usually able to control

this. At times, he likely exhibits episodic angry outbursts, especially in response to stress. Otherwise, individuals with similar profiles are seen as demonstrating good concentration skills and memory. He tends to be resentful of demands placed upon him but does not spend a lot of time analysing the behaviour of others. Individuals with similar profiles tend to have a history of poor interpersonal relations that may be characterized by passive resentment, anger and suspiciousness. ... There are high levels of suspiciousness, probably with respect to the current situation and he reports significant levels of family discord, also probably related with the current circumstances.

[235] He was not prepared to draw any conclusions about risk on the basis of one test. However, when this profile is considered with the evidence, it does suggest that there may be risk factors related to angry outbursts and poor interpersonal relations.

[236] However, I do not think Dr. Krywaniuk can be faulted for overall bias. He quite properly did not consider the test results determinative for either party. While he seemed to view D.M.T. less favourably than he did D.A.M., he agreed that her test results were more positive in some things. In respect of the MMPI, he reported:

Individuals with similar profiles are not experiencing emotional distress and she generally indicates that she is happy in her daily activities and finds life interesting and pleasurable. Given the current situation, this is somewhat surprising. Others would likely see her as bright and cheerful and optimistic but she is likely to use repression or denial to maintain this cheerful outlook. Although she believes she thinks clearly and logically, others might see her as being flighty and unfocused. On the other hand, she also feels that her judgment now is good. She tends not to analyze her behaviour or the behaviour of others but generally believes that others can be trusted and have her best interests at heart. Individuals with similar profiles tend to be quite self-confident. For the most part, she interacts easily with others and would be seen as a very conventional individual who respects the norms of society. ... There are indications that she is experiencing stress reactions and physical symptoms in response to them. There times when she may be demanding of affection and support, which may also result in a tendency to form superficial relationships.

[237] I found some of these descriptors quite consistent with my impression of D.M.T., particularly her tendency not to analyze her own behaviour or that of others, and to generally believe that others can be trusted. This accords with her evidence about her estrangement from her parents and her 100 per cent belief in the veracity of her children's statements. It may help to explain what I perceived to be a tendency to maintain strongly held beliefs regardless of their factual foundation.

[238] Despite these issues, I found Dr. Krywaniuk's perceptions of the overall dynamics in this family to be a helpful and independent assessment, and I agree with some of his observations and conclusions about how the alienation progressed to the extent it did. I agree with his opinion that D.M.T. and her parents have played a significant role in alienating the children. There is evidence that D.M.T.'s conduct in the presence of the

children had the effect of reinforcing her negative views of D.A.M., and this was magnified by the grandparents.

- [239] I also found Dr. Krywaniuk's observations of the children quite probative. They are the only independent observations before the court. He described the children's demeanour in both interviews (which I have already reviewed), as well as before and during their visit with their father.
- [240] He said that the children appeared relaxed and chatty on the way to the visit. They did not react when their mother drove away and they showed no signs of distress, fear or negative anticipation. However, as soon as they stepped into Mrs. D.'s house their demeanour quickly changed, "like they flipped a switch", and their facial expressions became angry. Their reaction to their father, in the same sullen, angry and antagonistic way, seemed artificial. He described their behaviour as controlled rather than spontaneous, lacking a genuine quality of anger, and not suggesting fearfulness. He said that they clearly had the idea to portray themselves as angry and not wanting to be there, they maintained that position, and they did not seem to have any regret over these angry feelings towards their father. Despite this, their anger was not apparent at times during play. Dr. Krywaniuk observed that R. appeared to forget that he was angry at times.
- [241] This latter observation is consistent with Mrs. D.'s observations during the visits and some of the visitation reports. Mrs. D. said that sometimes, when the children were having fun, they would talk to their father until R.M. would realize what they were doing.
- [242] These observations suggest some kind of pathological alienation. Dr. Krywaniuk opined that a lack of regret, and putting a negative spin on everything that could possibly be seen as negative, are symptoms of alienation. He explained that a separation of affection occurs where negative views or attitudes are displayed in the presence of the children, and when this goes on over a period of time, the children's views gradually become shaped to conform to those of their caregivers. Eventually, the children start to create issues that fulfill the needs of the alienator and become agents in their own right.
- [243] This explanation makes sense to me in light of the extreme animus D.M.T. and her parents hold against D.A.M. It is highly improbable that the level of negativism demonstrated by the children could exist without reinforcement and support, even if it is done inadvertently.

Negative messages

- [244] After the separation, D.M.T. re-connected with her parents after a long period of estrangement, and since December 2010, she and the children have lived with them. They regularly look after the children when D.M.T. is at work.

- [245] It is clear that D.M.T.'s family holds a very dim opinion of D.A.M. Mrs. T. testified that when she first met him, D.A.M. came across as very arrogant and manipulative. She expressed her views in a letter she wrote with her husband, that D.A.M. is very abusive, "the most arrogant person I have ever met", a born liar and "a very cunning manipulative man". She believes that D.A.M. has twice threatened to kill her husband and wished to harm her during the trip to EuroDisney. And, as mentioned above, she firmly believes that D.A.M. is a pedophile.
- [246] D.M.T.'s sister testified that she pulled away from seeing D.M.T. and D.A.M. because D.A.M. had strange ideas that he expressed forcefully and she did not want her children exposed to this. She has described him as nasty, arrogant, conniving and a liar, and thinks he may have some mental health issues. She believes that D.A.M. intended to cause her father serious harm and does not doubt that D.A.M. abused his children.
- [247] D.A.M. quite candidly admitted that his view of D.M.T.'s parents was extremely negative but he denied any intent to harm D.M.T.'s father. In the absence of any testimony from Mr. T., there is no basis to conclude otherwise. He was not questioned about any intent to harm Mrs. T.
- [248] It is clear that the feelings on both sides are extremely negative. However, D.A.M.'s views have not affected the children's relationship with their mother or their maternal grandparents. Given the extent the children are now alienated from their father, the extremely negative opinions and beliefs held by D.M.T. and her parents about D.A.M. must be considered, since these are the people who have been the children's primary caregivers since May 2011.
- [249] D.M.T. testified that she does not say negative things about D.A.M. in front of the children. This was corroborated by her mother and Mr. H. Mrs. T. also said that neither she nor her husband say negative things about D.A.M. in front of the children.
- [250] I do not accept this evidence. Right from the start, D.M.T.'s actions made it clear to the children that she believes their father has done something wrong. She called the police and took R.M. to the police station for an interview after the initial disclosures on May 19, 2011, and before the sexual abuse allegations surfaced. When they did surface, D.M.T.'s reaction, quite understandably, was fierce. Although she said that she tried to maintain an atmosphere of normality, she admitted that she screamed when she realized the import of what R.M. was saying and was so upset that she was unable to recall where she slept that night. The disclosures clearly caused her extreme distress, which was evident when she testified. I certainly accept that this is a natural response and I don't fault her for it at all. However, it was obvious to me that she was not able to shield the children from her reaction to what they were telling her.

- [251] The events that followed involved the children being interviewed by the police, examined by doctors, questioned by D.M.T., supported through psychological and support counselling, and interviewed again by Dr. Krywaniuk. The children also spoke about the abuse with D.M.T. and others at various times.
- [252] D.M.T. became completely consumed by the issue. It affected her relationship with Mr. H., which ended in September 2011. (Mr. H. testified that this issue completely devastated their relationship.) As she grew more frustrated with the decisions made by the police and the Ministry, she sought support from her Member of Parliament, a child and youth advocate, and the RCMP commissioner. Her conviction that D.A.M. has sexually abused the children is so strong that at times she has been unable to control her anger against him. D.A.M. testified that on two occasions when he saw her in the court building she screamed at him and called him a pedophile.
- [253] And importantly, as I outlined above, some of the statements made by the children to the police included things that they could only have learned from D.M.T. and it was apparent that some negative influences were at play. In the November 11, 2011 video, D.M.T. actively questioned the children and encouraged them to tell her about what their father did to them. This evidence shows that D.T reinforced their father's negative conduct both directly and indirectly.
- [254] I did not find the evidence of Mrs. T. and Mr. H. on this point to be credible. They were both overly emphatic. Mrs. T. said that D.M.T. "never" says anything negative and Mr. H. said "never once" did he hear D.M.T. say anything bad about D.A.M. in front of the children. Moreover, Mr. H. had a very subjective understanding of what constitutes "anything bad".
- [255] On June 3, 2011, D.M.T. was interviewed by an RCMP officer. While she was still in the interview room, she spoke to Mr. H. on his cell phone while he was in the car with the children. This conversation was recorded, to D.M.T.'s knowledge. The statements made in this recording were part of the police file. These statements were not admitted for their truth but simply to prove that they were made.
- [256] In the conversation, D.M.T. was upset that the police were not supporting her. Some of Mr. H.'s comments, made in the presence of the children, were:
- "They've got to protect the children ... we got two kids that are saying it on their own, they've said it to professionals ..."
- "...in this country, criminals have more rights than the victims do."
- "Well, he'll do it to somebody else."
- "Well they obviously don't know what he's capable of and what dirt he's been telling her ..."
- [257] Given the context of this conversation and the fact that it took place only about two weeks after the initial disclosures, it is very likely that the children would have been aware that these comments related to their father. And despite the clearly negative connotations in

this conversation, Mr. H. said that he did not think it was inappropriate for the children to hear what he said. In my view, this is an example of a trusted adult conveying to the children a very negative message about D.A.M. and Mr. H.'s inability to recognize what he was doing shows a distinct bias.

- [258] I find that D.M.T. quickly formed the belief that D.A.M. had sexually abused the children and this belief has become so firmly entrenched that she no longer has the ability to apply reason to her conviction. She has reinterpreted many things that happened in the past in a way that supports her belief, she cannot recognize the influence she has had on the children, and she has ignored anything which suggests that at least some of the children's statements may not be true.
- [259] Finally, I do not accept Mrs. T.'s evidence that neither she nor her husband make negative comments in the presence of the children. I found her denials about this unconvincing, particularly in the context of the intense animus she and her husband hold against D.A.M. It is not probable that their attitudes were not communicated to the children.
- [260] Accordingly, I find that negative opinions about D.A.M. or his conduct have been imparted to the children by D.M.T., her parents, and to some extent Mr. H., either directly or indirectly and perhaps inadvertently, all of which had the effect of influencing R. and R.M. in a negative way against their father.
- [261] I say this without casting sinister motives on D.M.T. I understand and accept that her primary motive was to protect her children and to get the authorities to listen. I do not think she set out to influence her children or to corrupt their evidence, but unfortunately some of her actions had this effect.

3. Best interests of the children

- [262] This is an extremely difficult case of alienation which appears to be both realistic and pathological. Children who are seriously alienated from one parent are considered to be at risk for future problems. Dr. Krywaniuk explained this in his report:

Children who are alienated to this extent, which includes [R.M.] and [R.], are generally deemed to be in unhealthy situations and are felt to be at risk for future difficulties. These situations are considered to be harmful to their welfare and general and psychological development. Quite apart from the fact that they have an extremely negative perception of their father, the alienation is likely to create a negative template for their own future relationships and parenting attitudes.

- [263] Despite my conclusion about D.A.M.'s risk, it is my view that it is in the best interests of these children to begin a professionally guided process of reconciliation and reintegration with their father. D.A.M.'s evidence about his positive relationship with the children before May 2011, corroborated by his sister and several of his friends, was essentially uncontradicted. He was a regular part of the children's lives until this abrupt change.

- [264] And despite my conclusion that D.M.T.'s role in the alienation of the children did not stem from an improper motive, her conduct has had a significant effect. The question is whether this problem can be ameliorated if D.M.T. retains custody. I have concluded that it can, under certain conditions. With the exception of this issue, the evidence clearly shows that D.M.T. is a loving mother who is capable of providing her children with a stable home environment. She is also a responsible, dependable worker with a good job as a lawyer's assistant and good prospects for the future.
- [265] I have concerns relating to D.M.T.'s lack of awareness of her conduct and its negative effect on her children. Her strongly held belief of D.A.M.'s guilt will make it extremely difficult for her to participate in any process of reintegration. It will be even more difficult for her if she continues to reside with her parents given their overwhelmingly negative views of D.A.M. even aside from the sexual abuse allegations. However, I have some confidence in her ability to respect the assessment I have done and understand that it is in her children's best interests to move forward now and begin a process of healing. My view is that such a process must involve counselling with a skilled professional with the objective of re-uniting R. and R.M. with their father. It is imperative that D.M.T. supports this process.
- [266] I do not think that supervised access, which was in place throughout most of last year, should be continued. The supervised visits were extremely difficult for everyone. The children exhibited significant anxiety over these visits and their anger has not subsided. Instead, D.A.M.'s access to the children will be through his participation in a counselling process with a professional experienced in cases of alienation and sexual abuse. I anticipate a process where the counsellor works with each child, with D.A.M., and eventually with D.M.T., in individual and joint sessions. When and how often D.A.M. and the children are brought together, and whether D.A.M. should see the children without supervision, will be under the direction of the counsellor. I realize there will be a financial cost to this but I see no other alternative that will address the needs of these children. In all of the circumstances, I think it is appropriate that the parties share this cost equally.
- [267] At this time, an order for joint custody and guardianship is not in the children's best interests given the complete breakdown in the relationship between the parties. Neither will be able to cooperate sufficiently to make this work. Whether this will be feasible in the future may depend on the outcome of the counselling process I have described.
- [268] Therefore, I intend to make an order on the following terms:
1. D.M.T. will have sole custody and guardianship of the children;
 2. the primary residence of the children will be with D.M.T. on the condition that she re-locate her residence to a location different from that of her parents;
 3. for a period of up to six months, D.A.M.'s access to the children will be at the direction of a qualified counsellor or psychologist within a counselling process designed to reconcile and re-unite D.A.M. with the children;

4. D.M.T. must refrain from any conduct that conveys negative messages about D.A.M. to the children and must follow the advice of the counsellor where necessary; and
 5. this order is reviewable in six months.
- [269] The children are to continue to reside at the home of Mrs. D. for a period of time sufficient to allow the parties to retain the counsellor and begin the reconciliation process, and to allow D.M.T. to re-locate her residence. Neither party is to have access to the children until the counsellor has been retained, and any access shall be at his or her direction. It is important that the counsellor meet with the children and with D.A.M. prior the move back to their mother's care. I appreciate the hardship further delay may cause to the parties and the imposition this will have on Mrs. D. and her family, but I do not anticipate a lengthy period of time.
- [270] By making a reviewable order, I expect that the parties will bring evidence about the progress of the counselling process. I do not expect the counsellor to prepare an assessment for the court, as I do not want to compromise a therapeutic relationship. However, the counsellor will have to provide some information to the parties, within the bounds of his or her professional obligations of confidentiality, for the purpose of assisting them to bring the necessary evidence. I will remain seized of this matter.
- [271] I have not made any orders about the children's contact with D.M.T.'s parents, as they are not parties to this proceeding. However, I suggest that D.M.T. follow the advice of the counsellor on this issue.

Child support

- [272] D.A.M. must pay child support in accordance with the Federal Child Support Guidelines. There was little evidence led about D.A.M.'s income and no submissions were made. D.A.M. reported a net income of about \$30,000 in his 2011 tax return and \$32,000 in his financial statement (which was incomplete). On the basis of this evidence, D.A.M.'s income for Guidelines purposes is determined to be \$32,000. This requires a monthly payment of \$495.
- [273] Both parties will also be required to exchange income tax information, including copies of their income tax returns and tax assessments, on June 1 of each year.
- [274] In the unique circumstances here, D.A.M. must pay this child support to Mrs. D. retroactively for the months of January and February, as well as for the month of March. I understand he has paid some money to her already and the retroactive amount is to be net of any prior payments he has made. After that, his payments are to be made to D.M.T.

Conclusion

- [275] This has been a very difficult case from many aspects. This family has suffered tremendously. It is unusual for children to be removed from their primary caregivers with no contact with either parent pending trial. I hope that this interim period has given the children time to be free from these issues.
- [276] Mr. Hittrich stated that D.M.T. does not understand how her children could have been taken away from her in such circumstances. I am keenly aware of how painful this has been for her. I hope this judgment will help her to understand this Court's responsibility to consider the best interests of her children.
- [277] No submissions were made on costs. The parties have leave to do so if they are unable to agree.

Fisher, J.

- [1] The set of visitation reports provided by counsel for the Respondent included a number of emails between D.M.T. and the supervisor that should not have been put into evidence. I have disregarded these documents. I have considered only the reports themselves. Some of the reports contained hand-written notes or commentary, which I have disregarded. I have not considered one report that involved a visit that D.M. did not attend.

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