
CANADA / JUDGMENT

D.C.H.R. v. J.R.

2013 BCSC 1407

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 1407 D.C.H.R. v. J.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.C.H.R. v. J.R.,

2013 BCSC 1407

Date: 20130806

Docket: 34088

Registry: Penticton

Between:

D.C.H.R.

Claimant

And

J.R.

Respondent

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Appearing on his own behalf:

D.C.H.R.

Counsel for the Respondent:

K. Ginther

Place and Date of Hearing:

Penticton, B.C.

June 11 to 14, and

June 17 to 20, 2013

Place and Date of Judgment:

Penticton, B.C.

August 6, 2013

- [1] This is a matrimonial action in which the issues include the determination of the custody and principal residence of the children of the marriage, spousal support, division of assets and debts, and child support.

I. BACKGROUND

- [2] The parties began to cohabit in January 1999, were married in January 2000 and separated on October 1, 2008. There are two children of the marriage, both boys, D.R. aged 13 and B.R. aged 11. I made an order for divorce at the commencement of the trial.
- [3] Since separation, the children have resided principally with the respondent, J.R. ("Ms. R."), in the former matrimonial home in Summerland. The claimant, D.C.H.R. ("Mr. R."), has, however, had liberal access to the children. He currently lives a short distance away in the same community.
- [4] Ms. R. is not in another relationship but Mr. R. is living common-law with S.G. ("Ms. G.") and two of her three children. Her oldest child resides with her former spouse. The two children who do live with Ms. G. and Mr. R. are boys, aged 11 and 9. They live in rental accommodation.
- [5] When they first met in August 1998, Ms. R. was employed as a clerk for Wal-Mart in Calgary and Mr. R. held an unskilled labouring job. Both had graduated from high school. Ms. R. had begun, but had not yet completed, a course towards a diploma as a teacher's aide. She completed this training in the fall of 1999, paying for the course with funds set aside for her education by her grandparents. Early in the marriage, Mr. R. determined that he, too, would have better prospects if he had a trade. Thus between 2003 and 2007, Mr. R. apprenticed as a carpenter. Financing for his education came from the family pool of funds. He said that he wrote his interprovincial ticket exam but failed it by one point. However, I understand that after 2007, when employed by others, he has effectively worked as a journeyman carpenter.

- [6] After completing his training in 2007, Mr. R. incorporated a company as a vehicle with which to carry on a construction business. Mr. R. was the sole shareholder, director and officer of 0769390 BC Ltd. which did business under the name of All Custom Construction ("the company").
- [7] After she obtained her diploma as a teacher's aide, Ms. R. began to work on-call for School District 67 in the Penticton area. However, it was not until September 2007 that she was offered a full-time position with her probationary period ultimately being completed in March of 2008. Initially, Ms. R. had worked an evening shift at a nearby Wal-Mart store so that Mr. R., or if he was not available, her mother, could look after first one, then their two children when she was at work. On days when she was called to work as a teacher's aide, she obtained a babysitter for the children, usually her mother if her mother was available.
- [8] Ms. R. has been hearing impaired since she was a small child. She uses hearing aids supplemented by lip reading. However, in early 2006, she first became aware of another health issue. Her vision began to deteriorate. She was referred to a specialist in Vancouver and, in November 2007, was diagnosed with retinitis pigmentosa, a progressive condition for which there is apparently no remedy. Although she can still read, in March 2010, she was required to give up her driver's licence.
- [9] The combination of her hearing impairment and her deteriorating vision ultimately led to Ms. R. not being able to fulfil the functions of a teacher's aide. Thus, from September 2012 to December of that year, she was placed on short term disability which became long term disability as at the end of December 2012. Although she must be periodically assessed, there appears little likelihood that Ms. R. will ever again be able to function as a teacher's aide and may well never be in a position to re-enter the job market.
- [10] Mr. R.'s efforts to operate a construction business were not a financial success. This was in part due to a downturn in the economy in 2008, but also because Mr. R. was evidently not a good businessman and financial manager. Ms. R. did take care of paying some of the company's bills on direction from Mr. R. but both the company and Mr. R. soon had claims against them for the company having failed to remit withholding taxes and Goods and Services Tax as well as Workers' Compensation Board ("WCB") premiums. In April of this year, the company was ultimately dissolved for its failure to file annual reports.
- [11] At one point, the company made a proposal to creditors so that it would not be petitioned into bankruptcy. However, the company failed to abide by the terms of the proposal.
- [12] Unable to operate a business through the company due to its accumulated debt liabilities, Mr. R., in 2011 and 2012 operated a proprietorship under the name of Crown 5 Custom Homes. He apparently had no better success in managing that business as there are obligations to the WCB and Canada Revenue Agency ("CRA") outstanding from that business, too, for the same reason, failure to remit premiums and withholding taxes.

- [13] In August 2008, just after Ms. R. and the children returned from a short vacation at the home of her sister in Prince George, Mr. R. announced that he no longer wished to be part of their family and that he was leaving her. In fact, he left the family home on October 1, 2008. Ms. R. was somehow of the idea that they were just having a break from each other but that was evidently not the intention of Mr. R. This was brought home to Ms. R. with more clarity when Mr. R. began seeing another woman.
- [14] Prior to his leaving, the parties agreed, without the benefit of lawyers, on a child and spousal support arrangement whereby he paid \$200 every two weeks for child support and \$100 every two weeks for spousal support. In addition, he agreed to pay for medication for the children to the extent it was not otherwise covered by Ms. R.'s employment plan, as well as half of the house insurance and half of the mortgage payment on their home to the extent that it was not covered by rental from a rental suite in the home. As well, he said that he would contribute towards the children's shoes and school supplies.
- [15] After separation, the parties' financial affairs continued to be entwined, although entangled might be a better word. At the time of separation, Mr. R. had a poor credit rating. No doubt this was due in part to his poor management of the company and the way in which he conducted his business affairs, but it was also significantly adversely affected by Ms. R.'s action in forging his name on an application for a Capital One credit card. She did this in May 2005, utilizing the card, without his knowledge, for a few years for personal purchases as well as some for the family, but failing to make all of the payments on the resulting invoices. She finally confessed to Mr. R. but, by then, her part of the damage to Mr. R.'s credit rating had been done.
- [16] Because of Mr. R.'s difficulty in getting credit, he had an arrangement with Ms. R. whereby he used her CIBC Visa card as a supplementary cardholder for personal, and occasionally business, purchases. As well, from time to time he required money for business purposes, such as paying employees, so that Ms. R. would take cash advances (as only she could do as the primary cardholder) and transfer them to Mr. R. or the company.
- [17] At the time they separated, the parties owed considerable credit card debt so they refinanced their mortgage to obtain enough money to pay off this debt. After payment of the debt there remained something in excess of \$13,000 which Ms. R. then transferred from the parties' joint account to her own personal account on the basis, she said, of wanting to secure a pool of funds for her and the children. Mr. R. claims he had no idea she was going to do this. In any event, that action was followed by her making cash advances to him when required, both from that pool of funds and from her CIBC credit card.
- [18] On a reasonably regular basis, Ms. R. provided Mr. R. with, at first handwritten statements, later typed statements sent to him by email, in which she listed what he, according to her, owed her for child and spousal support, other agreed contributions to the household expenses, as well as certain other bills, some of which related to the operation of the company. According to Ms. R., sometimes Mr. R. paid and sometimes he didn't. According to

Mr. R., although he could not always pay, often when he did the money didn't find its way to the payment of the bills for which he had given her the money. Neither party was able to put before me evidence from which I could gain a complete understanding of their financial dealings with one another from which I could construct an accurate accounting of their financial affairs. This includes the extent to which Ms. R. received rental for the suite and what portion of that she may have applied to the first mortgage.

- [19] The parties purchased the matrimonial home in April 2001, putting down \$5,000, half of which was loaned to them by each of her parents and his parents. In due course these loans became gifts. A mortgage was obtained from CIBC Mortgages Inc. A second mortgage was placed against the property in early 2010 to obtain funds so that Mr. R. could carry out certain renovations to the home which, at the time, apparently required a new roof and new siding. Virtually from the time of separation, Mr. R. has been pressing to have the matrimonial home sold. However, Ms. R. has resisted this. By the time the parties got to trial, however, it was apparent to both of them that they had no other financial alternative but to put the home on the market. I directed that that take place forthwith after the completion of the trial. I was advised on July 30, 2013, that the home has now been sold for \$235,000. With payment of sales commission, closing costs, taxes, and the two mortgages, little will remain. I was advised that only about \$10,500 will be left to pay other debts including the two judgments that were registered against Mr. R.'s interest in the property in 2012 by the CRA.
- [20] At the present time, Ms. R.'s income consists of a Canada Pension Plan ("CPP") disability pension which is topped up by her long term disability for a total of \$1,600 a month (for 10 months of the year). For July and August of each year, her income is reduced from \$1,600 to \$760. Thus her total yearly income is \$17,520. She also receives a CPP benefit for each child of \$220 a month which will continue until each boy is 18 years of age.
- [21] On May 5, 2011, a consent order was made a Judicial Case Conference, without prejudice to either party, whereby Mr. R. was ordered to pay child support of \$315 a month based on an assumed income of \$20,000 a year.
- [22] At the time of trial, Mr. R. was in his third month of working for Wildstone Special Projects Division Ltd. ("Wildstone") of Penticton. The most recent paystub attached to his Form F8 financial statement filed June 3, 2013, was dated May 30, 2013, and covered the pay period from May 12 to 18, 2013. That indicated that his year-to-date earnings were then \$5,664.88. He was apparently still then in a probationary period with Wildstone but stated in evidence that he did not expect his rate of pay to change at the conclusion of the probationary period. In his Form F8, Mr. R. declared his current annual income at \$33,280 a year. Counsel for Ms. R. suggested that, given his new employment, I should impute income to him of \$52,000 a year.

- [23] At the time of trial, Mr. R. was in arrears with respect to the payment of child support by about \$1,100. He concedes that he has not paid any spousal support or contribution to the mortgage on the home or other household expenses since May of 2010. It is his position that, prior to that point, Ms. R. benefitted from the income he generated from the company and thus should be equally responsible for its debt to the CRA until May 2010. Ms. R. takes the position that she should be responsible for an equal share of the CRA obligation only until August 2008, the point at which Mr. R. told her he was leaving her or, at the latest, October 1, 2008, the date he moved out.
- [24] The evidence did not provide me with either a description or a value of the furnishings either in the former matrimonial home or the residence of Mr. R. except to the extent that on February 23, 2010, Mr. R. charged to Ms. R.'s CIBC Visa card \$1,500 at Penny Lane Bargain Outlet in Summerland and \$1,220.72 at The Brick in Penticton. The specifics of what was purchased were not in evidence although the nature of the merchants would suggest that the purchases were likely for use in a home. Mr. R. has personal goods stored in the garage of the matrimonial home as well.
- [25] There was evidence respecting certain tools, equipment and vehicles owned by the company or the proprietorship of Mr. R., from time to time, some which were sold by Mr. R. to others (in one case, at least, for different amounts depending on which document the transaction was recorded). It is Ms. R.'s position that at the time of separation, the company assets were worth approximately \$22,400. To the extent they still exist, what the value of those assets is at the time of trial is much less clear. Mr. R. appears to have appropriated many of them for use in his subsequent proprietorship and, now that he is no longer operating that, he may have retained them personally.
- [26] The parties, the company and Mr. R.'s subsequent proprietorship all purchased fuel both during the marriage and after separation from Barry Beecroft Fuel Distributors Ltd. ("Beecroft") of Penticton. Helpfully, that purchased by Mr. R. for himself or the company or the proprietorship was recorded on two individual account numbers. That purchased by Ms. R. was recorded on another account number. Following separation, at least up to a certain point, Ms. R. would receive the Beecroft invoices and tell Mr. R. how much she needed from him or the company to pay them. It is his position that this was one of the instances when he gave her money to pay the accounts (although he admits he didn't always provide all the money necessary to clear the accounts) but the money wasn't always directed to them. He thus took it upon himself, he says, to pay some lump sum payments on the outstanding Beecroft accounts. Although a number of Beecroft invoices were put into evidence by Mr. R., none was sufficiently current to give me an idea of what is currently owed to Beecroft. It was Mr. R.'s evidence that the current balance owing to Beecroft is something in the area of \$6,500.

- [27] It was Mr. R.'s evidence that he has a 2008 Pontiac Montana valued at \$13,000 for which he is making payments of \$400 a month to the Valley First Credit Union. He also says that he has a 1991 GMC Crew cab pick-up truck which he purchased for \$2,500 and has fixed up; a work trailer and various tools having together a value of about \$14,000; and a 1985 GMC S10 pick-up for which he traded a \$600 snowmobile. He added that he has a 1969 Triumph valued at about \$300 which he has had since he was 17 years of age.
- [28] During the marriage, the parties acquired a timeshare at Lake Okanagan Resort. There is no evidence from which I can determine its current market value, if any. Recently, only Ms. R. has been paying the monthly maintenance fees and charges relating to the timeshare. It was not made clear to me whether these fees and charges are current or in arrears at the time of trial.
- [29] The evidence did not address whether Ms. R. still owns a vehicle notwithstanding that she cannot now drive one or whether, subsequent to her having to give up her driver's licence, she sold her vehicle. Mr. R. did not advance any claim with respect to any vehicle that may be owned by Ms. R. in any event.
- [30] The parties' oldest child, D.R., may suffer from attention deficit hyperactivity disorder. No medical opinions were before me with respect to the boy's condition. It appears that, for a number of years, he was on medication but it was the view of Mr. R., at least, that the boy functioned better when he was not on medication. A newer, stronger medication was tried recently which adversely impacted on his health so that it was quickly discontinued. At the time of trial, the child was waiting to be seen by a psychiatrist in Kelowna for diagnosis and possible recommendations as to future treatment. That may have taken place by now.
- [31] Mr. R. and Ms. G. were quite critical of Ms. R.'s parenting. Ms. G. stressed that the children were given wholesome foods and good meals when on access time at their home. Both Ms. G. and Mr. R. expressed reservations as to the diet of the children in Ms. R.'s home which, they suggested, leaned to fast and packaged foods and more junk food than would be permitted at their home. They were also critical of the amount of time they understood the children were permitted to spend on their computers at the home of Ms. R., particularly playing video games as well as watching television. It was Ms. R.'s evidence that the children were not permitted as much time to play video games and watch television as was being suggested by Mr. R. and Ms. G. but, even on her evidence, it was clear that the children had more access to video games and television at her home than they did at the home of Mr. R. and Ms. G. Similarly, with respect to the food available for the children in her home, Ms. R. stressed that she did not feed the children the diet of junk and unwholesome food that Mr. R. and Ms. G. suggested.

- [32] Both boys are active playing baseball and attend Sadie, a teen youth center near the matrimonial home. They appear to both have good marks in school although, in the last year or so in particular, both have been frequently late or absent from school. Part of this Ms. R. attributes to D.R.'s ongoing illness and emotional difficulties as well as the emotional fallout from the stresses between the parties.
- [33] The younger child, B.R., is in apparent good health.
- [34] Mr. R. and Ms. G. emphasize the various activities with which they are engaged with the children, including Ms. G.'s two children, so that, when with them, the children have a healthy outdoor lifestyle with camping trips and the like. Obviously, life for the children with Ms. R. is not as oriented to activities because of her hearing and visual impairment. She is not in a position to drive the children to activities or for camping trips and, for transportation for the children, relies on her parents, friends or Mr. R.
- [35] Both parties complained of instances where each has not been kept advised of medical and dental appointments made by the other for one or other of the children and sometimes not being given the opportunity to be present for those appointments.
- [36] Mr. R. and Ms. G. refer to two or three incidents involving D.R.: on one occasion he ran away from home - he went a few blocks from home to the Shell station where Ms. G. works, eventually returning home after some intervention by Ms. G. and a cooling off period. In another incident he apparently yelled out an upper window that his mother was trying to kill him. The other was where he was apparently hit by Ms. R. with a door when she opened it and he was behind the door. These were all instances of situations, said Ms. R., where she was attempting to discipline D.R. for inappropriate behaviour.
- [37] Mr. R. and Ms. G. also complain that Ms. R. made D.R. sign a contract agreeing to go to church until he was aged 13 (after which, apparently according to the contract, he was free to choose whether he was going to go or not). As he has just turned 13, this may be a non-issue. Ms. R. agreed that she made him sign the contract because she thought it was important that he went to church until he was old enough to make a decision as to whether that was something he wished to continue. She pointed out that both she and Ms. G. come from the same type of church background.
- [38] It is Ms. R.'s position that, while the children should have liberal contact with their father, frequent lengthy accesses such as is presently the case with the children being at the home of Mr. R. and Ms. G. every second week from Wednesday after school until the following Monday morning and after school until 8:00 p.m. on the Wednesday of the alternate week, are not in their best interest. In her view, if the point of the access is for the children to have time with Mr. R., then the lengthier access should be reduced to Friday after school to Monday morning when they would have the whole weekend with him. It was her view that the present access rotation is hard on the children during the school year.

- [39] Mr. R. suggested two-week rotations with each parent although his residence would be considered the primary one. He suggested that during the first week of the rotation there be a mid-week visit with the other parent overnight after school until 7:00 p.m. the following evening. He said that he or Ms. G. would provide the transportation. The following week would see access to the parent who did not have custody during that two week period from after school on Friday until Monday morning (or Tuesday morning if it was a long weekend). Both parties made suggestions respecting holiday access for the other party which I will deal with later in the judgment.
- [40] Ms. R. seeks sole custody believing that she cannot successfully co-parent with Mr. R. She cited the lack of success of co-parenting meetings they had between October 2011 and January 2012. Ms. R.'s parents and Ms. G. were involved in these meetings along with Ms. R. and Mr. R. Mr. R. and Ms. G. agree that the meetings were not successful although each side blames the other for the lack of success. Notwithstanding this, it is Mr. R.'s view that a joint custody order is appropriate.
- [41] One incident that Ms. R. pointed to which, in her view, illustrated Mr. R.'s penchant for doing as he pleased without consultation, was his decision at the end of 2011 to have the two family dogs stay at his residence rather than at hers where they had always been. The dogs were the boys' pets apparently and, according to Ms. R., the boys were upset by this decision on the part of Mr. R. Mr. R. explained that he was upset because Ms. R. had decided to cage the larger of the two dogs when she was out of the house (apparently because it was urinating in the house). It was his view that the cage was too small for the dog. Ms. R. disputed that the cage was too small and disputed that her care of the dogs was inappropriate. In any event, the dogs continue at the residence of Mr. R. and Ms. G.
- [42] Ms. R. put into evidence a "Views of the Child" report by Mr. Jeffrey Peterson, a lawyer, who specializes in doing such reports. He interviewed each child individually on December 1, 2012, at the Penticton courthouse. The parties agreed to the preparation of the report. The children were delivered to the courthouse for the interviews by Ms. R.
- [43] In their interviews, each boy indicated that he preferred to live the majority of the time with Ms. R. D.R. was particularly negative about Mr. R., apparently being annoyed with him for having failed to keep a promise to do something for D.R. the day before. Both parties agreed that this negativity about Mr. R. was uncharacteristic of D.R. Both boys indicated that they slept better at the home of Ms. R.

II. DISCUSSION

1. Custody

- [44] Section 16 of the Divorce Act, R.S.C. 1985, (2nd Supp.), c. 3 provides:

Order for custody

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Interim order for custody

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses or by any other person, make an interim order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage pending determination of the application under subsection (1).

Application by other person

- (3) A person, other than a spouse, may not make an application under subsection (1) or (2) without leave of the court.

Joint custody or access

- (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.

Access

- (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Terms and conditions

- (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.

Order respecting change of residence

- (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

Factors

- (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.

Past conduct

- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

Maximum contact

- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [45] As the parties were divorced at trial, s. 16 of the Divorce Act is the legislation that guides me in determining the issue of the custody of the two children of the marriage and which of the parties should provide the primary residence for them. At para. 94 of *Hansen v. Mantei-Hansen*, 2013 BCSC 876, Madam Justice Humphries described the adjudicative task under s. 16 of the Divorce Act as follows:
- [94] The Divorce Act leaves the consideration of what is in the best interests of the children to the consideration of judges, aided by the evidence they have heard, their observations of the witnesses, their common sense, and an extensive history of case law. The best interests of the children may be considered in the context of the myriad of individual and complex relationships and factors that underlie that concept. This is also reflected in the phrase in s. 16(8) giving context to the consideration
- [46] At this point in time, the children have resided principally with Ms. R. for close to 5 years, a significant proportion of their lives. Since Mr. R. began cohabitating with Ms. G. in February 2011, Mr. R.'s access to the children has increased significantly given his ability, since that time, to provide a better environment in which that access can take place. Of course, Ms. G. has a lot to do with making that work, both in providing good meals, even-handed discipline and the housekeeping and care that goes with providing a safe and healthy environment for children.

- [47] On the other hand, notwithstanding the criticism of Mr. R. and Ms. G. of Ms. R., I am satisfied that, on the whole, she too provides a good basic home environment for the two boys. Undoubtedly, she has significant physical challenges with impaired hearing and eyesight, but the boys are used to living with those disabilities and have adapted to them. I am satisfied that the safety and care of the children are not compromised by Ms. R.'s disabilities.
- [48] Undoubtedly, because the family home has just sold, Ms. R. is about to face a period of upheaval in her life until she is settled into a new residence. Inevitably, that upheaval will also affect the lives of the boys, as would be the case with any family in similar circumstances. I have seen nothing in the evidence to suggest that the boys are not capable of adjusting to the change of a new residence. The sale of the home has occurred since the trial in June, of course, and at the time of writing this judgment, I assume that Ms. R. will obtain a new residence within reasonable proximity to Mr. R.'s residence in Summerland so that exchanges for access can continue.
- [49] Mr. R. and Ms. R. seem to have fewer problems in making decisions for the benefit of the children when they are dealing one on one than, for example, when they had co-parenting meetings which involved her parents and Ms. G. as well. Each has, of course, demonstrated a measure of acting without consulting the other, such as when making medical or dental appointments and, in the case of Mr. R., unilaterally deciding that the children's dogs would remain at his home and not return to the home of Ms. R.
- [50] Undoubtedly, the children continue to want to have a good relationship with Mr. R., one that involves a significant amount of time with him. But by "time with him" I do not mean simply being at his residence when he is not around. They want to spend time with their father, not simply time at their father's home. That message certainly comes through from the Views of the Child report.
- [51] I do not agree with the submission of Ms. R. that the parties are so incapable of communicating with respect to the children that it is necessary that I grant her sole custody. I agree with Mr. R. that it is appropriate that I make an order for joint custody. However, I conclude that it is in the best interests of the children to maintain the status quo such that the children have their principal residence at the home of Ms. R.
- [52] The terms upon which the parties shall exercise joint custody shall be as follows:
1. In the event of the death of a party, the surviving party will have sole custody of the children;
 2. Each party will have the obligation to advise the other party of any matters of a significant nature affecting the children;

3. Each party will have the obligation to discuss with the other party any-significant decisions that have to be made concerning the children, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare of the children;
 4. The parties will have the obligation to discuss significant decisions with each other and the obligation to try to reach agreement on those decisions;
 5. In the event that the parties cannot reach agreement on a significant decision despite their best efforts, the party with the primary residence of the children will be entitled to make those decisions and the other party will have the right to apply for an order respecting any decision the party considers contrary to the best interests of the children, under s. 16(1) of the Divorce Act; and
 6. Each party will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counselors, medical professionals, and third-party caregivers.
- [53] If the parties wish to add any further terms by consent, they may incorporate them in the order prepared to reflect this judgment.
2. Access
- [54] I agree with the submission made on behalf of Ms. R. that the current access schedule, although designed with the best of intentions to try to maximize contact between the children and Mr. R., is resulting in undue stress on both the children and the parties by the children being bounced back and forth between the parties' homes too frequently. Even though what I'm about to order will have the consequence of the children spending less time during the school year at the home of Mr. R., it will not, to a significant extent, reduce their actual interaction time with him as it is on the weekends that he is available to be with them. Therefore, I order that, during the school year on alternate weekends, Mr. R. shall have access to the children from after school on Friday until the commencement of school on Monday or, if a long weekend is involved at the time when his access will otherwise take place due to a statutory holiday or a teaching staff professional day, that extra day will be included for his access weekend.
- [55] On Wednesday of the week that he will not be exercising weekend access, Mr. R. shall have access to the children from after school until 8:00 p.m.
- [56] In all cases, Mr. R. shall be responsible for picking up and dropping the children off either at the residence of Ms. R. or the school as is appropriate.
- [57] The children may have reasonable telephone access at any time with Mr. R. when they are at Ms. R.'s home and with Ms. R. when they at Mr. R.'s home.

- [58] At the conclusion of the trial the parties advised me that they had agreed that, for the summer of 2013, like the summer of 2012, the children would spend alternating weeks with each of them. As the parties have agreed to this arrangement for 2013, I am content that it continue for the balance of the summer. However, for the summer of 2014, and ensuing summers, I conclude that it will be less stressful on the children in terms of moving back and forth between homes if they spend the first three weeks of July at the residence of Mr. R., the next three weeks with Ms. R., then a week with Mr. R. and the balance of the summer vacation at the home of Ms. R.
- [59] The parties should share the children's winter and spring school breaks equally with Ms. R. to have the whole of Christmas Day in 2013 and then alternating so that Mr. R. has the whole of Christmas Day in 2014 and so on.
- [60] I make no specific provision for the children being with either party on the children's birthdays or the parties' birthdays, nor with respect to Mother's Day and Father's Day. Generally speaking, the children can be at the residence they are otherwise scheduled to be at on the dates when these events happen to fall. However, I leave it open to the parties to make such arrangements for any specific occasion that they deem appropriate. The point of these directions is to provide stability for the children so they are not constantly being shuffled back and forth between parents to accommodate the parents' needs as opposed to those of the children's.
- [61] The parties have liberty to apply if there is some aspect of access that they wish me to deal with in addition to the above.

3. Spousal Support

- [62] Mr. R.'s declared income for tax purposes during the past 5 years has ranged from a high of \$58,200 in 2008 down to \$8,300 in 2012. For 2009, 2010 and 2011, his income was roughly in the \$25,000 a year range. Ms. R. seems convinced that Mr. R. had income during these years that he has not disclosed.
- [63] I find that Mr. R.'s business and personal financial records are unreliable and probably inaccurate. However, the extent to which he has amassed debt to WCB, CRA and Beecroft over the past years is a good indication that he has not operated his construction businesses profitably. If he had been paying the required remittances and his creditors, he arguably would have had fewer funds for living expenses than he did. Probably the most prudent financial decision Mr. R. has made in the last 5 years is to have taken the job with Wildstone where he can get a paycheque and not be responsible for operating his own business. Given the trail of debt that he has left behind him, I have concluded that it is pointless to add more by ordering that Mr. R. pay arrears of spousal support as requested by Ms. R. It will create just one more debt that he won't have the money to pay on top of the considerable debt load that he will still be facing even after the distribution of proceeds of the sale of the matrimonial home.

- [64] In any event, I conclude that it is probable that Ms. R.'s financial circumstances over the past 5 years, however modest, were probably at least as good of those of Mr. R.
- [65] Prospective spousal support is another matter. Based on the small amount of evidence that I have as to what Mr. R.'s likely income will be in the future, I conclude that it is probable that he will be capable of earning something in the range of \$35,000 a year and I impute income to him in that amount for the purpose of calculating spousal support payable to Ms. R.
- [66] Ms. R. is not entitled to compensatory spousal support. During the marriage she qualified for a position as a teacher's aide, a job that would have paid her an ongoing decent income and would have provided her with reasonable security had it not been for the illness that has developed. Her hearing difficulties she had before the marriage. Her vision problem developed during the marriage. It is not her fault that she is now on a CPP pension supplemented by long term disability. Her circumstances are much more challenged financially than those of Mr. R. As noted above, I impute an income to him of \$35,000 a year. He lives with Ms. G. who has an income of approximately \$22,000 a year.
- [67] On the evidence before me it appears improbable that Ms. R. will be able to again be actively employed. Notwithstanding that, Mr. R.'s present income is not sufficient to enable him to pay spousal support, given his obligation (see below) to pay child support. A calculation under the Spousal Support Advisory Guidelines yields that result. While I find that Ms. R. is otherwise entitled to prospective spousal support, the reality is that at the present time, Mr. R. cannot afford to pay it. I therefore set spousal support at a nominal \$1.00 per year.

4. Assets and Debts

- [68] It is clear from the evidence that, during the marriage, both parties acted irresponsibly with respect to their finances. Ms. R. sometimes rented out the apartment in the matrimonial home but it is not clear whether she always applied that rent to the first mortgage as agreed between the parties. Ms. R. forged Mr. R.'s name on an application for the Capital One credit card and then did not keep the account in good standing, resulting in a bad credit record for Mr. R. In some sense, he has paid her back for that by using her credit card and then failing to pay for his purchases. The sale of the matrimonial home has helped pay their significant debt, such as the two mortgages, but the parties are still left with more debt than they probably have the money to pay.
- [69] As for assets, these are nominal. Ms. R. shall have allocated to her all of the furnishings from the matrimonial home together with any vehicle she may presently own. I allocate to Mr. R. any tools and equipment, including vehicles, of which he has possession and which may, at some point in time, have been used for the business of the company, the proprietorship or himself personally. This includes all of the vehicles I have described above as well as the chattels he has in storage in the garage of the matrimonial home (he should remove these forthwith).

- [70] I agree with counsel for Ms. R. that, at some point soon after Mr. R. established the company, there may have been real value in the company assets. But those assets have much depreciated, to the extent that they are still in his possession. The assets were used to generate income which paid the child support and spousal support (for a period of time at least) that the parties negotiated between themselves.
- [71] Mr. R. concedes that he owes Ms. R. \$8,000 for funds she withdrew from the CIBC credit card and which he then directed be advanced to the company. He owes her that \$8,000 because, essentially, it was money that she advanced to him so that he could advance it to the company. She did not loan the money to the company.
- [72] Mr. R. had total control over the company from the date of separation. Ms. R. did not benefit overall from those operations although I agree that money earned through the operation of the company produced the income from which Mr. R. paid the modest spousal support he did through to May 2010. But equally one might say that the funds to pay support may have come from money properly owing to the CRA. The debt owing to the CRA as at October 1, 2008 was \$25,875. That makes Ms. R.'s share of the CRA debt \$9,700. She may offset most of this with the \$8,000 Mr. R. owes her for funds advanced to him for the company to use from her credit card.
- [73] As noted earlier, in February 2010, Mr. R. purchased furnishings for his residence from The Brick and goods from Penny Lane Bargain Outlet totalling some \$2,720. I find that it is improbable that he fully compensated Ms. R. for these purchases as well as for numerous other smaller purchases he made from time to time on her credit card. However, the financial records that have been put before me are so incomplete that, at this point in time, it is essentially impossible for me to determine who owes what portion of the CIBC Visa debt beyond the \$8,000 that Mr. R. acknowledges. However, I am satisfied that Mr. R.'s accumulated obligations to Ms. R. at least offset any remaining balance of the CRA debt for which she is responsible.
- [74] As a consequence, I direct that Mr. R. will be fully responsible for the CRA debt and Ms. R. will be fully responsible for the balance owing on the CIBC Visa card. From the balance remaining from her portion of the sale of the home, she may have enough to pay at least half of the CIBC Visa debt. The CRA will not be as fortunate. Neither will Beecroft.
- [75] Although there do not appear to be sufficient funds to pay the Beecroft debt, as between them, I conclude that Ms. R. is responsible to Beecroft for the balance outstanding on account 5205 and Mr. R. is responsible for the balances outstanding on accounts 3214 and 9477.
- [76] The Lake Okanagan Resort timeshare should be listed for sale forthwith. The reality is that such timeshares are often slow to sell. In the meantime, the parties should share equally the ongoing expenses relating to it and Mr. R. should account to Ms. R. for his share of expenses she has paid to date.

- [77] I direct that the parties' CPP credits will be divided pursuant to the provisions of the Canada Pension Plan, R.S.C. 1985, c. C-8, for the period of cohabitation being January 1, 1999 to October 1, 2008. However, any pension that Ms. R. managed to qualify for during her short time as a full-time teacher's aide, I direct shall be for her benefit only. It will be allocated fully to her due to her more difficult financial circumstances. And, I conclude, to the extent that the pension is there, it largely accumulated after separation.
- [78] Mr. R. can retain possession of the two dogs, Butler and Dozer. He shall be fully responsible for their well-being as well.

5. Child Support

- [79] Although the consent order respecting child support made by Master Young in May 2013 was without prejudice to either side to seek to vary it, I would make no retrospective change in that order. To the extent that there are arrears at this point, Mr. R. is responsible to pay them. However, on the income I impute to him of \$35,000 a year, he is responsible for the payment of child support of \$539 a month for the two children of the marriage pursuant to the Federal Child Support Guidelines effective September 1, 2013.
- [80] Each party shall provide to the other her or his CRA notice of assessment for the previous year by May 31 each year following the filing of her or his income tax return.
- [81] In addition, Mr. R. shall pay 65% of any extraordinary expenses relating to the children. It will be Ms. R.'s responsibility to first provide him with copies of paid receipts or make such other arrangement with Mr. R. upon which they both agree.

III. SUMMARY OF CONCLUSIONS

- [82] 1. The parties shall share joint custody of the two children of the marriage on the terms noted above.
2. The principal residence of the children shall remain with Ms. R.
3. Ms. R.'s claim for spousal support is allowed and is set at \$1.00 per year.
4. The remaining assets and debts of the parties will be divided as noted above, with Mr. R. being responsible for the CRA debt and Ms. R. being responsible for the CIBC Visa debt. The Lake Okanagan Resort timeshare shall be listed for sale with the parties equally responsible for its maintenance in the meantime.
5. Mr. R. shall pay child support of \$539 a month commencing September 1, 2013 and 65% of any extraordinary expenses required to be paid on their behalf.

IV. COSTS

[83] I agree with the submission on behalf of Ms. R. that her income is not sufficient to enable her to pay court hearing fees notwithstanding that she set this matter down for trial. To pay those fees would result in her being unable to meet her everyday expenses. See *Vilardell v. Dunham*, 2013 BCCA 65.

[84] Otherwise, as Ms. R. was largely successful on the principal issues involved, she is entitled to her costs against Mr. R. on Scale B.

"Melnick J."

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