
CANADA / JUDGMENT

E.A.L. v. H.M.G.

2010 BCSC 509

COURT

Supreme Court of British Columbia

DECIDED

16 April 2010

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2010 BCSC 509 E.A.L. v. H.M.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.A.L. v. H.M.G.,

2010 BCSC 509

Date: 20100416

Docket: E062371

Registry: Vancouver

Between:

E.A.L.

Plaintiff

And

H.M.G.

Defendant

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:

K. S. Thompson

Counsel for the Defendant:

C. Linde

Place and Date of Hearing:

Vancouver, B.C.

December 14-18, 2009;

January 6, 2010

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2010

I N D E X

Paragraph

INTRODUCTION 1

HISTORY OF THE LITIGATION

A. Pre-trial Proceedings 11

B. The Trial 20

C. Post-trial Proceedings and Events 36

DISCUSSION

A. Contempt, Variation and Arrears 69

1. Payments ordered and payments made 69

2. Contempt allegations 75

3. Contempt defences 78

4. Change in circumstances 82

5. Variation 102

6. Arrears 109

7. Contempt 114

B. Mobility 129

1. The plaintiff's plan 129

2. The defendant's plan 141

3. The view of the child(ren) 147

4. Cross-examination and evidentiary issues 180

5. Analysis 186

C. Prohibition of Further Applications 206

CONCLUSION 213

INTRODUCTION

- [1] Before me for decision are four post-trial applications in this family law proceeding. These applications arise in what can only be described as an environment of deep mutual hostility and distrust that unfortunately has characterized these proceedings throughout.
- [2] The principal focus of the plaintiff's mistrust has been her perception that the defendant has been withholding financial information and hiding income, nourished by the undoubted fact of his failure to comply with his disclosure obligations and court orders concerning disclosure. The principal focus of the defendant's mistrust has been his perception that the plaintiff seeks to use the children as a weapon against him, particularly by threatening to move them away from him. Each is highly critical and suspicious of the other.
- [3] The first application is that of the plaintiff, Ms. L., for an order finding the defendant, Mr. G., in contempt of the orders for the payment of spousal and child support made by the Honourable Mr. Justice Warren following the trial of this action. That trial occupied five weeks in October and November of 2007. Mr. Justice Warren rendered judgment on March 31, 2008, indexed as 2008 BCSC 387.
- [4] The second application, inextricable from the first, is that of the defendant for an order varying Warren J.'s orders for the payment of spousal and child support, and cancelling the arrears that have accumulated.
- [5] The third application, by the plaintiff, is for a mobility order permitting her to move with the four children of the marriage, of whom she has sole custody, to her home province, Prince Edward Island, where the parties were married in 1994.
- [6] Finally, the plaintiff applies for an order pursuant to s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, prohibiting the defendant from bringing any further applications in this matter without leave of the court.
- [7] As should be apparent, these applications prey upon each party's worst fears. They must be viewed in the context of the litigation as a whole, and in particular the trial, which is discussed in some detail below. But in essence the situation comes down to this. In his judgment following the trial of this action, Warren J. made orders for support and the division of assets with a view to crafting a regime that would allow the custodial parent, Ms. L., and the four children to remain living in their existing neighbourhood and environment, and maintain regular access to the children by the defendant, all of which was considered to be in the children's best interest. At the same time, Ms. L. would be assisted in achieving economic self-sufficiency pending her return to the workforce after upgrading her

education.

- [8] Regrettably, apart from access, these goals have not been realized.
- [9] Mr. G. says that this is because he does not now (and in fact never did) earn the income that was attributed to him, so that it is nothing short of impossible for him to keep up with the support orders imposed upon him. He asserts that he has been paying what he can, but simply cannot sustain the lifestyle of the plaintiff and the children in the way that the judge contemplated or that Ms. L. seems to expect. In the circumstances, he submits, the support orders pronounced by Warren J. need to be varied to accord with current reality. Ms. L. and the children will simply have to move from the Dunbar area on the west side of Vancouver to an affordable neighbourhood, perhaps in Richmond or Burnaby, and she must start contributing to her own support through full employment, of which she is more than capable.
- [10] Ms. L. says that the problem remains Mr. G.'s refusal to comply with court orders, and his continued insistence on paying what he thinks he should pay, rather than what he has been ordered to pay. But she submits that whatever the cause of his failures of compliance, the fact is that it is no longer possible for her to carry on living with the children in the manner contemplated by the judgment as a preferable alternative to moving to Prince Edward Island. Accordingly, she should now be permitted to move there with the children, where they can afford not only to live but to prosper, rather than face enforced poverty in the Lower Mainland.

I turn to review the history of these proceedings.

HISTORY OF THE LITIGATION

A. Pre-trial Proceedings

- [11] The parties separated on or about March 22, 2006, and this action was commenced on July 7, 2006. A subsequent judicial case conference resulted in a direction to the parties to proceed with applications for interim spousal and child support at the earliest opportunity.
- [12] October 30, 2006, the plaintiff's application came on for hearing before the Honourable Mr. Justice Pitfield, who declined to accept much of the evidence produced on behalf of the defendant, as it was not delivered until the Friday before the Monday hearing. For the purposes of that interim application, Pitfield J. determined the defendant's annual income to be \$400,000, and ordered child support, including s. 7 expenses, at \$7,790 per month. The application for interim spousal support was adjourned. The defendant was granted liberty to apply to vary the order for interim child support, of which application Pitfield J. seized himself, stating:

I will say that I am unlikely to favourably consider any application for variation unless payments in accordance with the order I have made are paid, and I will most assuredly not make any order to vary unless there is full disclosure of the circumstances pertaining to [Mr. G.'s] professional and personal pursuits.

- [13] The defendant applied to stay or vary that order before the Honourable Madam Justice Ross on December 19, 2006, who heard the applications due to the unavailability of Pitfield J. Madam Justice Ross noted that payments had not been made in accordance with Pitfield J.'s order, and that there had yet to be full and proper disclosure. Accordingly, Her Ladyship was not prepared to entertain the application to vary or stay Pitfield J.'s interim order for child support.
- [14] Turning to the question of spousal support, Ross J. concluded for the purposes of that application that the defendant's annual income was between \$250,000 and \$325,000, and ordered spousal support of \$4,189 per month.
- [15] As I understand it, the defendant took steps to appeal from both interim support orders, but did not proceed with either appeal.
- [16] In the spring of 2007, the plaintiff applied for liberty to move with the children from British Columbia to Prince Edward Island, which was her home, and where she has extended family. She also applied for a contempt order against the defendant for disobeying the orders of Pitfield J. and Ross J., of which orders the defendant was by then \$120,000 in arrears. These matters came before Master Donaldson on April 18, 2007, who did not have jurisdiction to hear the contempt application. That was adjourned to the trial. His Honour refused the mobility application on the ground that it was premature and ought to be dealt with at trial. He ordered interim joint guardianship and custody of the children, with the children's primary residence to be with the plaintiff.
- [17] Because of continuing disagreements over the issues of guardianship, custody and access, Master Tokarek ordered on May 31, 2007, that Dr. Peggy Koopman prepare a report for the court with recommendations concerning custody and access, pursuant to s. 15 of the Family Relations Act, R.S.B.C 1996, c. 128.
- [18] The plaintiff then applied for an order requiring the defendant to produce, and list on a List of Documents, a number of documents and categories of documents, by July 31, 2007. That application came before Master Taylor on July 24, 2007, and the order was granted by consent.
- [19] On September 11, 2007, the defendant retained his current counsel, Mr. Linde, and applied to adjourn the trial which was scheduled to commence on September 24, 2007. The Honourable Mr. Justice Myers adjourned the trial one week, and made further orders for the production of documents, as well as ordering the defendant to make himself available to Dr. Koopman, and directing the plaintiff to make the children available to Dr. Koopman with the defendant.

B. The Trial

- [20] The trial commenced on October 1, 2007. In his Reasons for Judgment, Warren J. commented on the continuing difficulties with the production of documents, and explained as follows:
- [23] During the trial, approximately three days were devoted to dealing with the plaintiff's objection to the defendant's attempt to introduce documents, photographs, and other items into evidence that had not been disclosed in any of his lists of documents. I upheld the plaintiff's counsel's objection and ruled that none of the undisclosed documents the defendant sought to introduce could be used save by agreement of counsel or by plaintiff's counsel on cross examination of the defendant or his witnesses, and if plaintiff's counsel did use any of the evidence so introduced, then they would be subject to re-examination by the defendant's counsel.
- [21] His Lordship referred at length to Dr. Koopman's s. 15 report, stating as follows (I have corrected typographical errors in the quotations from the report):
- [78] As ordered by Master Tokarek on May 31, 2007, Dr. Peggy Koopman prepared the Report. Dr. Koopman is a registered psychologist with extensive experience in these matters. The Report is lengthy and thorough and includes a review of the Reasons for Judgment of Mr. Justice Pitfield, Madam Justice Ross, Master Donaldson, and Master Tokarek, as well as the twelve affidavits sworn by the parties.
- [79] Further, she reviewed the educational plans for each of the four children and reports from their school; the reports and notes of the child therapists and their tutor; certain email exchanges between the parties; a psychological assessment report of one of the children by Dr. Edward Shen, and an occupational therapist assessment of one of the children. As well, Dr. Koopman interviewed the plaintiff on five occasions and the defendant on four occasions, and met with the children at the parties' respective homes. Dr. Koopman interviewed various other individuals, including a parenting counsellor, a child therapist, and the business partner of the defendant.
- [80] In Dr. Koopman's summary and observations, several passages are particularly noteworthy. For example, Dr. Koopman wrote that the parties, which for years had appeared to be role models for parenting as a team, are now:
- destroying the fabric of their marriage and their parenting cooperation through mistrust and financial matters and their lack of respect for each other has severally impacted their children's emotional security and the bonding they have felt since birth to both parents.
- [81] Dr. Koopman also observed that:

both clients love their children but are enraged one with the other. Each parent indicates to the writer that all they want is peace and to move forward but they are mired down in negativity that is impacting their children as much and probably more than themselves. Both parents have acted out inappropriately around their children regarding their negative feelings for the other parent. The writer and their child therapist, Barbara Tredger, both heard and witnessed the children's reactions to this unsolicited information.

[82] Later, writing of the unresolved resentments that have built up during the marriage, Dr. Koopman wrote:

capturing the children has become the last power move either can conflict on the other and unfortunately they are doing just that. Each has mentioned that the other is engaging in 'payback time'. The defendant has stated that throughout his marriage, when things became heated, he was threatened with removal of his children to PEI and now he is facing his worst fears. [Ms. L.'s] worst fear are realized when she loses her family home, has no job and does not believe that [Mr. G.] will be there for them financially.

[83] Dr. Koopman made a number of recommendations. Under the heading Education and Medical Needs, she noted that while three of the four children require special assistance with their learning disabilities, in her opinion their current needs are not as severe as they were at the time of the initial diagnosis. She noted that all of the children are doing well in school and their changing needs could likely be accommodated in any good school system with time and appropriate resources.

[84] With reference to the learning disabilities and the prospect of a move to PEI, Dr. Koopman opined that one of the key traits of learning disabled children is their lack of flexibility and need for consistency and structure. Change is not tolerated well and although the children are familiar with PEI, they had not been to school there. Dr. Koopman opined that a move risked upsetting the children because by moving into an unfamiliar situation they would have to adapt, and if they were to initially struggle academically, they may suffer a blow to their self-esteem, which has been preserved in their present school situation. Further, one of the children is gifted and needs to be challenged academically, and Dr. Koopman was concerned that the child may lose interest in school and not reach her potential if the family moves to PEI. Finally, Dr. Koopman observed that there were no Catholic schools in PEI and the children had become accustomed to religion being a significant part of their day-to-day life. She felt, however, that they could remain an active part in the Catholic community in PEI, particularly as the rest of the plaintiff's family is active within the church.

[85] Turning to the children's psychological state, Dr. Koopman noted that:

There appears no one associated with this family who does not believe that the children have been severely impacted by the separation of their parents. There is some disagreement on which parent had been the most denigrating of the other in the presence or earshot of the children.

[86] It was Dr. Koopman's impression that both parents have contributed more than their share to the children's exposure and knowledge of the parties' difficulties and this is producing anxiety and increasing the children's sense of accountability, unresolved stress and divided loyalties.

[87] While each child had told Dr. Koopman of their love for PEI and the relatives who lived there, each had also told Dr. Koopman that they did not want to move to PEI because they would not see their father as much. Each of the children (and one in particular) strongly expressed a desire to spend more time with their father. Dr. Koopman found it obvious that the plaintiff's plan for the defendant's monthly visits to PEI was not feasible due to time constraints and reduced finances.

[88] Dr. Koopman then expressed the following opinion:

These children are closely bonded to both parents. They have never lived without both of them in their lives for very long. The parents, as being described, present different but complementary styles to their children's lives and formed a balance that they have profited from. Everyone that was interviewed by the writer and the writer's own observation is that these children are delightful but also individuals. They have obviously been fostered and nurtured to be who they are by both parents and have therefore been able to bring forth their individualities and have been validated conjointly by both parents. A sudden lack of one parent and a lack of these important balancing agents can be very detrimental to the children's development of identity and personal security, eg. one parent has almost disappeared from their lives, they can be certain that the other will not also be taken from them. If they move to PEI the children will very likely suffered grief and loss over not being with their father. They have already demonstrated emotional problems over the separation and frustration in not being with both parents equally. If the next move is taken in which they see the father considerably less and he has less input into their lives some significant alterations in life view can take place that may well cause serious adjustment problems in different ways to each of the children.

Having said all of the above, sustainability cannot be ignored for this mother with four children. The writer of this report is not a forensic accountant and it is not my task nor should I venture into that area. However, if the best alternative is for the children to remain in the Lower Mainland, then a financial consultant or court ordered secured sum each month must be in place so that this mother can plan a future for her children. I do not get the impression that [Ms. L.] is unwilling to work to support her children but she is afraid that she may not able to do so to a level necessary

The writer believes that these children need both parents. The parents in the past have provided a good balance and style, personality and parenting. It is the opinion of the writer that this can happen again in a 50/50 parenting arrangement. The children have fully furnished and decorated rooms with appropriate personal toys and welcoming situation in each of the parent's homes. Also, if they were leave to the Lower Mainland for PEI, they would also be leaving a new but needed relationship [the defendant's girlfriend] who has been somewhat of a port in the storm

for them and would be a loss as well.

This equally shared 50/50 parenting arrangement is in alignment with what the children have told the writer more than once that they desire. The writer has seen this plan worked with other families on a two-week basis in each home. Weekly changes for young children can be more disruptive. The increase in time from the defendant with his children could take place over the next two months in the opinion of the writer if all else can be resolved regarding finances.

The writer cannot state strongly enough however that this plan, which I believe is best for the children's emotional health, will only work if the parties, especially the defendant, will commit to a reasonable feasible, permanent and unchangeable financial support regime that his wife and children can count on. Insisting [Ms. L.] should work when she may take months perhaps a year to find suitable employment is not reasonable.

It is the clinical opinion of the writer that if the defendant and the court cannot arrive at a reasonable, but not lavish, sustainable monthly sum for [Ms. L.], then she would be justified to move to PEI with the children as the second best alternative in order to sustain herself and her children.

[emphasis by Warren J.]

[22] The court also heard expert evidence from Barbara Tredger, a child and family therapist who had worked with all four children over a span of 24 sessions. Ms. Tredger reported that all four children expressed fear of their father's anger, saying that they felt that they had to be on their best behaviour around him. It was her view that the children love their father and wanted to be with him, but that their ability to have a relationship with their father was due to the stability that they had in their mother's environment. She felt that in the years following the separation, the continuing hostility between the parents resulted in a good deal of stress to the children. In these circumstances, she did not agree that a 50/50 parenting arrangement was best, given that it was the stability of the mother that offset the father's hostility. Ms. Tredger was of the view that a move to a new community would be unsettling for the children, although their familiarity with PEI would make a move there less of a change for them than a move to an entirely new community.

[23] Further expert evidence was received from Dr. Alan Posthuma, retained by the plaintiff to respond to Dr. Koopman's report. Mr. Justice Warren's references to Dr. Posthuma's report included the following excerpts:

While it is, of course, axiomatic as stated by Ms. Tredger and Dr. Koopman [that] the children need both parents, this assumes that both parents are working together providing consistency and care. Failing this, it is then important to insure that the primary caregiver (parent) is not being stressed by the other parent to the extent that the welfare of the children is jeopardized.

[101] Dr. Posthuma considered Dr. Koopman's reference to the plaintiff's large and very supportive extended family in PEI, and concluded:

... in terms of the relocation, if the Court can establish that the mother has been the primary caregiver, and that the information contained in Dr. Koopman's report with regards to the circumstances in PEI are correct, then relocation would be in these children's best interests, and certainly, preferable to the children remaining in Vancouver and exposed to ongoing parental conflict and the undermining of consistent parenting practices. The arguments provided by Dr. Koopman against relocation do not seem supported by her own fact pattern.

[24] After a thorough review of the evidence and submissions, including the evidence of the defendant and his new partner, Ms. W., Warren J. set out his conclusions, following which he pronounced an order for divorce.

[25] As to credibility, Warren J. made the following finding:

[408] The plaintiff's counsel correctly argued that where there is a conflict in the evidence of the plaintiff and the defendant, the evidence of the plaintiff is to be preferred. However, I go further. Because of the numerous inconsistencies in the defendant's evidence, his failure to produce documents as ordered on time or in some instances at all, and because of his admissions under cross-examination that much of his evidence given under oath at his examination for discovery or in his affidavits was false, I am inclined to not accept his evidence at all unless it is corroborated by the evidence of a reliable witness.

[409] The evidence of the plaintiff, on the other hand, although at times long-winded and rambling, was reliable and supported by the evidence of objective witnesses, documents, and the evidence of the defendant extracted on cross-examination. Accordingly, where there is any conflict between the evidence of the parties, I accept the evidence of the plaintiff.

[26] Mr. Justice Warren then turned to the issue of custody and guardianship, concluding that the plaintiff ought to have sole custody of the children, with joint guardianship on the "Joyce Model" in which the final decision, in the event of disagreement, rested with the plaintiff. In arriving at this conclusion, Warren J. made the following comments:

[412] During cohabitation, I conclude that the plaintiff was the parent primarily responsible for the day-to-day childcare, although there is no doubt that the defendant was devoted to the children and in his own way was actively involved in their lives. I do not think that the defendant is lacking love for his children; rather, at present, he is more inclined to ensure that "his rights" as a father are not infringed. Greater attention to the needs of the children, rather than focusing on his rights as a parent, would yield great benefits for both the children and the defendant.

...

[414] The present condition of the children is one of uncertainty, largely because of the precarious financial circumstances of their parents brought about in large measure by the actions of the defendant. I find that the plaintiff has laboured mightily to maintain a level of security for the children and to remove them from the rancour of the litigation. They have

remained in their home and continued at their school and their activities and in my view their stability and sense of security is best achieved in their present environment. They are doing remarkably well in school and they have many friends in the area. Their educational and healthcare needs are well attended to and the plaintiff has undertaken all steps necessary to ameliorate the trauma of the separation.

...

- [416] The evidence satisfies me that the children have a deep bond with their father and although I have found reason to be critical of his conduct since the separation in so far as it has affected them, the children remain firmly attached to both parents.
- [27] The judge then considered the issues of mobility and access. After quoting again from Dr. Koopman's report, His Lordship remarked as follows before dismissing the plaintiff's claim for leave to move with the children to PEI:
- [420] The evidence of the plaintiff leads me to conclude that she believes that the children would much prefer to remain in Vancouver and her primary, if not only reason for moving is to achieve a level of material and financial security that has not been available here since the autumn of 2006. Although the children love visiting PEI, it is my view that their home is in Vancouver and I share Dr. Koopman's view that removing one parent from the children's daily lives can be very detrimental to them. Further, on the evidence of the plaintiff, the children are well settled into their school and they have many friends in the area. Their therapist is near, as is their family doctor. Although the children have an attachment to PEI and their extended family there, it is as a place to visit rather than to live. In my view, the disruption from their school and present environment would not be in their best interests, and only the lure of a reliable financial base motivates the plaintiff. By the orders I make in this case, I intend to provide that base.
- [421] Furthermore, in part because of the children's attachment and bond with the defendant and in part because of the Report, it is apparent that the objectives of s. 16(10) require an access order that will facilitate extensive time with their father. This objective, which I conclude is in their best interests, cannot be achieved if the children were to move to PEI.
- [28] It will be observed that Warren J. did not wholly adopt the opinion of any one expert. He rejected Dr. Koopman's primary recommendation of 50/50 parenting, granting sole custody of the children to the plaintiff. At the same time, he rejected the plaintiff's mobility application, in order to preserve extensive access by the defendant as recommended by Dr. Koopman, to be supported by a "reliable financial base".
- [29] The judge then turned to the establishment of that base. While noting that there was "ample reason to be cautious in approaching the defendant's evidence of his income...", Warren J. set Mr. G.'s income for child and spousal support purposes at \$275,000. As to the plaintiff, the judge stated as follows:

- [424] Presently, the plaintiff has no employment income. However, after the turmoil of the separation and the end of litigation, she should be able to put her talents and training to good use. Her qualifications as a nurse are dated but, as she has demonstrated, she can work in some capacity at least until she returns to University to obtain her Master's degree. I recognize that the separation was emotionally devastating for her and that, together with your childcare responsibilities, had a significant impact on her ability to continue with Pfizer and led to her taking disability leave. It is time now to move on, but in the meantime she is in need of spousal support from the defendant and she will likely need continuing spousal support until some time after she graduates.
- [30] After reviewing the Child Support Guidelines and the Spousal Support Advisory Guidelines, Warren J. made the following orders:
- [428] The defendant is ordered to pay child support of \$8,551 [inclusive of s. 7 expenses] per month and spousal support of \$2,500 per month commencing on December 1, 2007. The parties may apply to review the amount of spousal support following three years from the entering of this order or upon a material change in the circumstances of either party.
- [429] The defendant's claim to reduce the support orders and to cancel or reduce the arrears is dismissed. He had an ability to pay; opportunities to appeal the orders or to make application to vary in a timely manner and failed to do so. In my view, there is no merit to such relief. As of the commencement of the trial, the defendant was approximately \$130,800 in arrears under the two support orders. However, he is entitled to a "credit" of approximately \$14,800 for payments he has made. Accordingly, I fix the arrears at \$115,950, which are to be paid to the plaintiff by October 1, 2008 with the appropriate pre-and post-judgment interest.
- [31] Mr. Justice Warren then turned to the division of assets. He awarded the plaintiff a sole interest in the two real estate properties, consisting of the matrimonial home in Dunbar and a summer cottage in PEI, while ordering that the defendant was to be the sole owner of his shares in the corporations he partly owned. With respect to the real estate properties awarded to the plaintiff, His Lordship commented as follows:
- [432] I make this order because there is a demonstrated and established need for the plaintiff to have the equities in these properties as a necessary first step to becoming and remaining economically independent and self-sufficient. The plaintiff has the physical and educational ability to return to full-time employment, but this will take some time and retraining. The defendant has demonstrated that he is blind to his financial responsibilities and to orders imposed upon him. He is prepared to put his own expectations first and his unreliability exposes the plaintiff to the risk that he will default in making regular payments. The funds available in the two properties will provide some measure of assurance and funding to allow her to resume studies and obtained her Master's in nursing. Eventually she may be economically independent of the defendants and self-sufficient.

- [32] In addition, Warren J. ordered the defendant to pay to the plaintiff the costs of foreclosure proceedings taken against the matrimonial home by reason of the defendant's non-compliance with the support orders. These costs amounted to \$27,931.67.
- [33] Finally, Warren J. considered the question of contempt, setting out the following observations:
- [442] There is overwhelming evidence that demonstrates that the defendant has not complied with a number of court orders including the support orders of Pitfield and Ross JJ. These orders were not appealed or any appeals launched were abandoned and applications to vary the orders were not pursued. Rather, the defendant chose to pay whatever he thought he should pay.
- [443] Further, I conclude that with full knowledge of the orders and the financial obligations, the defendant chose to pay for expenses of his own choosing and facilitated a rearrangement of corporate finances so that Mr. Hassman [his business partner] could take additional funds from the companies. Any surplus funds he had were not paid over to the plaintiff in even an attempt to comply.
- [34] Mr. Justice Warren then noted that the defendant was also in breach of his disclosure obligations and orders requiring him to produce documents, and concluded by finding him in contempt of court for his wilful disobedience of the court's orders. The imposition of a penalty was adjourned pending full submissions from counsel, and an opportunity for the defendant to purge his contempt. The parties were at liberty to speak to costs, with the judge noting that (para. 448):

... in my view the need for a trial became inevitable and was unduly lengthened and made significantly more complex by the defendant's conduct and failure to comply with the production orders. Further, the defendant has admitted to lying under oath and a strong case has been made, based on a prima facie consideration of the issue, of reprehensible conduct deserving of the court's rebuke in the form of special costs.

- [35] No appeal was taken from this judgment.

C. Post-Trial Proceedings and Events

- [36] The trial ended on November 20, 2007, with judgment being reserved.
- [37] On January 31, 2008, an agreement was concluded to sell the former matrimonial home in Dunbar (in which the plaintiff was subsequently awarded a sole interest) for \$1,920,000. After all adjustments, including deducting the mortgage balance, the parties' secured line of credit, and the commissions, liens, taxes and transactional fees owing, the net amount to be realized was \$1,161,313.50.

- [38] On March 26, 2008, the defendant filed Notice of Motion dated February 15, 2008, seeking an order finding the plaintiff in contempt of the order of Master Donaldson pronounced April 18, 2007, concerning interim guardianship and custody. The application did not proceed.
- [39] On March 31, 2008, Warren J. delivered his Reasons for Judgment.
- [40] With an effective date of April 4, 2008, the defendant transferred his 49% shareholding in two of his corporate vehicles, MD Analytics Inc. and Kermode Business Services Inc., to his solicitor, Mr. Linde, to cover outstanding legal fees and disbursements totalling approximately \$100,000, and ongoing fees. At the same time, the defendant resigned his positions as director and Chief Executive Officer of MD Analytics Inc., (MD Analytics) and as director and Secretary of Kermode Business Services Inc. (Kermode). He continued on as an employee. The defendant had never previously disclosed the existence of Kermode. The plaintiff was unaware of these events until January of 2009.
- [41] The parties returned before Warren J. on June 2, 2008, to deal with the question of costs. The defendant argued that the judgment stripped him of any assets, leaving him with nothing but his ability to work and make use of the companies that were awarded to him (not mentioning that he had divested himself of his shareholdings in those companies), and that to award costs against him would upset the balance sought to be achieved by the award. Mr. Justice Warren said this (2008 BCSC 887):
- [4] ... The balance sought was really to award to the plaintiff (the custodial parent of these four children), a sufficient asset base and income base as to permit her to remain or, more importantly, to permit the children to remain, within the jurisdiction and in close proximity to their father, with whom, I have pointed out, they have bonded.
- [5] To award costs against [Mr. G.] would in my view not upset that balance which I hoped to achieve. His counsel submits that [Mr. G.'s] income is not the \$275,000 which I found it to be. Time will tell whether my finding was correct, but those were my findings and I stand by them.
- ...
- [10] I do not propose to repeat the findings about [Mr. G.'s] conduct that are in my judgment.... It is sufficient for my purposes to say that this litigation demonstrates more than any case in which I have been involved as a judge the appropriateness not only of an award of costs, but of an award of special costs.
- [11] I have found [Mr. G.] in contempt of court for his wilful disobedience of a number of court orders. As opportunities to resolve this matter in a more timely and appropriate manner were passed over by him, to deny [Ms. L.] her costs, including special costs, would in my view defeat the very purpose of an award of costs. Accordingly, I do not repent my earlier view that the plaintiff is entitled to her costs. Indeed, I find that she is entitled to special costs, and I so order.

- [42] On July 14, 2008, the plaintiff bought a home for herself and the four children on West 33rd Avenue in the Dunbar neighbourhood for the sum of \$1,032,000. She used \$450,000 from the proceeds of the sale of the matrimonial home as a down payment, and financed the balance with a mortgage from the Royal Bank of Canada. The net proceeds paid to Ms. L. had amounted to \$640,000 after payment of debts and legal fees. After this purchase, Ms. L. invested the balance of the net proceeds in a Royal Bank investment account. The balance as at October of 2008 was approximately \$130,000.
- [43] Also in July of 2008, the defendant served an application for an order finding the plaintiff in contempt of the order of Warren J. with respect to the division of the family chattels. The Notice of Motion was dated July 17, 2008, and was supported by two affidavits sworn by Mr. G. on July 16, 2008. The application did not proceed.
- [44] On December 22, 2008, Mr. G. sold his shares in another of his corporate vehicles, Gotham Online Health Care Communications Inc. (Gotham), back to the company to repay an indebtedness consisting of monies advanced to him by Gotham between 2003 and 2007. The total amount of the debt thus satisfied was \$145,078.93.
- [45] Following the judgment, the defendant failed to pay spousal and child support at the level ordered. Also unpaid by the end of 2008 were the plaintiff's special costs, which came to approximately \$420,000, the foreclosure costs in the amount of \$27,931.67, and the arrears which Warren J. ordered to be paid by October 1, 2008, in the amount of \$115,950 plus interest.
- [46] On January 12, 2009, counsel for the plaintiff filed Notice of Motion seeking orders:
- 1) imposing a penalty for the defendant's contempt as found by Warren J. in his Reasons for Judgment;
 - 2) entering the order pronounced by Warren J. on March 31, 2008;
 - 3) finding the defendant in contempt of the trial order for failing to pay child support as ordered;
 - 4) finding the defendant in contempt of the trial order for failing to pay spousal support as ordered;
 - 5) fixing the amount of child and spousal support arrears since pronouncement of the trial order;
 - 6) requiring the defendant to obtain leave of the court before bringing any further applications in this proceeding; and
 - 7) costs and special costs.
- [47] Items 3 through 7 are part of the applications before me.

- [48] It was in the process of preparing for this application that the plaintiff's solicitor discovered the defendant's transfer of shares, the change in his status and the existence of Kermode.
- [49] After several adjournments, the matter of the penalty for the contempt found by Warren J. in his Reasons for Judgment came on for hearing on March 19, 2009. On April 3, 2009, Mr. Justice Warren sentenced the defendant to a period of incarceration of 10 days, a sentence upheld on appeal on July 10, 2009. This was Warren J.'s last involvement in this litigation. At this point, the Honourable Chief Justice Brenner (as he then was) assigned the continuing management of this case to me in view of Warren J.'s impending retirement.
- [50] Mr. Justice Warren noted that the trial orders had yet to be obeyed fully, the arrears remained unpaid, the defendant had transferred his shareholdings in his private companies to his lawyer in consideration for legal fees, and had divested himself of his interest in a boat used by his company. These latter two transactions were observed to be indications of the defendant's continuing tendency to choose where his money would go in preference to the plaintiff. Neither before Warren J. nor before me was the issue of whether either of these transactions constituted a fraudulent preference raised for determination.
- [51] It further came to light that the defendant had neglected to disclose the existence of Kermode during the course of the proceedings. The defendant deposed that he had forgotten about it and apologized for the lapse. No doubt the release of the judgment on March 31, 2008, jogged his memory, as he transferred his shares in that company to his solicitor four days later. According to Warren J.,

This failure to disclose illustrates, at the very least, the negligence of the defendant in addressing the court-ordered obligation to disclose. At its worst, it could be an example of the defendant deliberately hiding assets. I note that this asset came to the attention of the plaintiff only because her counsel had conducted a corporate search. The plaintiff has a right to be suspicious of the defendant's nondisclosure.

[Oral Reasons for Judgment, 3 April 2009, Van. Reg. No. E062371, para. 26]

- [52] The defendant's approach to the issue of sentencing was also of concern to the judge. In paras. 21 and 22 of his Oral Reasons for Judgment, Warren J. noted as follows:

What was not addressed [by defendant's counsel] was the vast number of authorities which underscored the importance of the rule of law in a modern society and which deal extensively with contempt of court. Counsel appeared to focus more on the presumed motives of the plaintiff than on the fact that his client had neither complied with a number of court orders nor taken appropriate steps to purge his disobedience. Counsel did not address the mitigating factors of the principles of sentencing until I urged him to do so. In fact, counsel glossed over, in my view, the importance for a citizen to obey court orders unless and until they are varied or reversed on appeal.

[Emphasis added]

[53] I refer to this passage because in the hearing before me, the defendant repeatedly referred to the trauma he had suffered as a result of his time in jail. While I do not doubt that his incarceration was traumatic for him, it became quite clear that the defendant was still unwilling to take responsibility for his own behaviour in failing to obey court orders, and that both he and his counsel continued to blame the plaintiff for the penalty that was imposed upon him for his own unlawful conduct. Three examples are found in his affidavit # 26 sworn November 6, 2009:

35. Any actual anger I have felt, and in fact never verbalized, towards the Plaintiff, has to do with her putting me into jail and failing utterly to consider how this might impact the children.

...

68.(b) Ms. W. was horrified with the sentencing, as was I. We were emotionally distraught and devastated with the jail sentence. I was in fact, terrified and not only scared for my own well being and safety and not knowing what was happening, but I was devastated that our four children have to now live with the fact that their father was in prison, at the application of the mother.

...

113. The Plaintiff never discussed or engaged me in conversation as to the Plaintiff's belief that [daughter A.M.] should go to [a private school that was unaffordable]. I never knew about this until recently. If the plaintiff considered the tuition to be important, she could have saved money by not trying to put me in jail for 90 days

[54] By letter to plaintiff's counsel dated April 21, 2009, Mr. Linde referred to the feelings and emotions that his client had felt in jail, and stated "Maybe the kids are upset because it was their mother who caused all of this".

[55] This complete lack of insight on the defendant's part (abetted by his solicitor, who should know better) was troubling, particularly as it was addressed by Warren J. during the argument on March 19, 2009, concerning the appropriate penalty for the defendant's contempt. At that time, in response to Mr. Linde's rather inflammatory submissions concerning the plaintiff's 'thirst for vengeance', Warren J. said this:

THE COURT: I'm going to interrupt you, Mr. Linde. The penalty that is to be imposed is for the wilful disobedience by your clients of orders of this court made in 2007 and -- 2006, 2007.

MR. LINDE: Yes.

THE COURT: And has nothing whatsoever to do with what you can attribute as the attitude of the plaintiff. [Mr. G.] was ordered to do certain things, produce certain documents, pay certain sums. He didn't do it and he offered no explanation for it. It's got nothing to do... it's out of the plaintiff's hands as to the penalty.

[56] As the Court of Appeal stated in Mr. G.'s appeal (2009 BCCA 321 at para. 8):

Contempt of court is an issue between a party and the court. It is not concerned with the merits of the dispute between parties to litigation (*Frith v. Frith*, 2008 BCCA 2 at para. 36, 47 R.F.L. (6th) 286). Although the issue is pursued by the respondent, the court's determination that [Mr. G.] is in contempt only indirectly affects her interests. As was stated in *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1992), 10 O.R. (3d) 46 at 53, 94 D.L.R. (4th) 748 (C.A.), a finding of contempt of court "transcends the dispute between the parties; it is one that strikes at the very heart of the administration of justice ...".

[Emphasis added]

[57] At about the same time as this hearing, the defendant apparently took steps to make an assignment into bankruptcy. Astonishingly, given his position that there has been a material change in his circumstances that requires Warren J.'s support orders to be varied, almost no information concerning these bankruptcy proceedings was put into evidence. All I have is the following statement in Mr. G.'s affidavit sworn April 14, 2009:

15. Due to the financial debt load and support commitments that exceed my actual salary, I have had to commence bankruptcy proceedings to manage my debt load and make and allocate as much of my income as possible to the Court-ordered support payments.

[58] In addition, attached as Exhibit "J" to Mr. G.'s affidavit #19 sworn October 9, 2009, are copies of what he describes as "accounting bankruptcy monthly statements from May to September 2009". These are statements of monthly income and expenses filled out by the defendant on forms prepared by Abakhan & Associates Inc. No other documents relevant to this question were adduced into evidence by the defendant. The plaintiff did adduce copies of two monthly income and expense statements headed "IN THE MATTER OF THE BANKRUPTCY OF [H.M.G.] (Summary Administration)".

[59] As to the precise nature of this process, I am left in the dark. The appropriate documentation has not been produced. There is, for instance, no sworn statement in the prescribed form showing the debtor's property, the names and addresses of all his creditors, and the amounts of their respective claims.

[60] The bankruptcy can have no effect, of course, on Mr. G.'s obligations to pay child support and spousal support as ordered, including his liability for arrears. It may have an effect on his liability to the plaintiff for the special costs and foreclosure costs ordered by Warren J., although that issue is not before me to decide, and I do not decide it (nor could I on the evidence before me).

- [61] The first Case Management Conference over which I presided took place on May 19, 2009, at which time I agreed that the defendant's application for an order varying the orders of Warren J. should properly be heard at the same time as the plaintiff's application for the remaining matters set out in her Notice of Motion of January 12, 2009, as set out above. I directed that the hearing of these applications be set down for three days, and they were duly scheduled to be heard on October 19, 20 and 21, 2009.
- [62] On October 5, 2009, the plaintiff's solicitor issued Notice of Motion concerning the mobility application, serving it, together with a new supporting affidavit, on counsel for the defendant.
- [63] On October 9, 2009, the defendant's solicitor issued Notice of Motion with a further affidavit of the defendant in support, applying for an order that the plaintiff be declared in contempt of the joint guardianship provisions of the trial order. In compliance with Rule 56(7), the motion papers were served personally upon Ms. L. at her home, predictably causing upset in the family. The defendant has not proceeded with that application.
- [64] At the defendant's request, a further Case Management Conference was held on October 15, 2009, in preparation for which the defendant served Notice of Motion applying for orders that the plaintiff be cross-examined on her affidavits, and requisitioning a report on the views of the children concerning the plaintiff's proposed move to Prince Edward Island. The defendant further raised concerns about hearing the mobility application together with the other applications, and also about recent developments with the parties' elder daughter, A.M., which I will discuss in more detail hereunder.
- [65] In the circumstances, I dismissed the application for cross-examination of the plaintiff on her affidavits, and for a further report. I directed that the applications for contempt, variation and mobility should all be heard together, and I granted the defendant an adjournment for the purpose of preparing appropriate evidence and dealing further with his concerns. I directed the parties to return on October 21, 2009, at which time I set dates for the service of materials, and directed that the hearing of the three applications be set for the week of December 14, 2009.
- [66] The defendant then brought on an application requesting that I recuse myself from further involvement in this matter on the ground of a reasonable apprehension of bias. I heard this application on December 4, 2009. It was based principally on the proposition that the plaintiff had wrongfully put into evidence the three sets of Reasons for Judgment of Warren J., concerning the trial, the costs hearing, and the contempt penalty hearing respectively. It was argued that the plaintiff was attempting to use those Reasons for Judgment as similar fact evidence, and that they were inadmissible as such. Since it appeared that I had read those Reasons for Judgment (which I indeed had), it was submitted that I had thereby become contaminated by inadmissible evidence which reasonably would be expected to give rise to a bias against the defendant, given all of the findings made against him.

- [67] I dismissed that application, which I found devoid of merit, and declined to recuse myself. Apart from anything else, I found it difficult to understand how the defendant could expect me to consider whether orders previously made against him required variation, without knowing the basis upon which those orders were made. As I saw it, the issue of similar fact evidence simply did not arise.
- [68] This is, perhaps, an opportune place to discuss the effect of the findings made by Warren J. in the trial. As I explained to the parties, I took the view that, pursuant to the doctrines of res judicata and issue estoppel, all of his findings of fact were binding on them with respect to all issues litigated between them - see, for instance, *British Columbia (Attorney General) v. Malik*, 2009 BCCA 201. It was not open to me, for instance, to find that Mr. G.'s income at the time of trial was less than \$275,000, or that the children did not have special needs arising from learning disabilities or that Mr. G. did not lie under oath at that time, or that some different sort of regime should have been preferred. What was before me was not an appeal, and this was not an exercise in historical revisionism. All that I could determine was whether what has taken place since the trial justifies a further finding of contempt of court, and/or new orders governing (1) the spousal and child support to be paid by the defendant to the plaintiff, (2) whether accumulated arrears should be cancelled, and (3) where the plaintiff and the children might reside.

DISCUSSION

A. Contempt, Variation and Arrears

1. Payments ordered and payments made

- [69] As we have seen, Mr. Justice Warren ordered the defendant to pay to the plaintiff child support, including extraordinary expenses, in the amount of \$8,551 per month, and spousal support in the amount of \$2,500 per month, for a total of \$11,051 per month, commencing December 1, 2007, and payable on the first of each month thereafter.
- [70] On the evidence, the defendant forwarded payments to the plaintiff usually two or three times per month, the last of the payments often being made in the first week of the following month. This is contrary to the order for payment on the first of each month. The defendant deposed that he is obliged to pay in this manner because of the timing of his receipt of his biweekly paycheques. The totals actually paid per month have been as follows:

December, 2007 \$7,060

January, 2008 \$7,000

February, 2008 \$7,000

March, 2008 \$6,500

[Trial Judgment rendered March 31, 2008]

April, 2008 \$4,600

May, 2008 \$7,000

June, 2008 \$5,850

July, 2008 \$4,150

August, 2008 \$3,750

September, 2008 \$3,950

October, 2008 \$4,050

November, 2008 \$3,050

December, 2008 \$3,200

January, 2009 \$3,400

February, 2009 \$4,150

March, 2009 \$1,600

April, 2009 nil

May, 2009 \$3,650

June, 2009 \$3,750

July, 2009 \$3,600

August, 2009 \$4,350

September, 2009 \$2,250

October, 2009 \$4,500

November, 2009 \$4,600

[71] It is thus clear that the amounts paid by the defendant have fallen well short of what he was ordered to pay. Mr. G. has pointed to some additional sums of money he has paid from time to time either directly to the children, or for their activities. Ms. L. argues, correctly in my view, that his obligation is to pay child support to the plaintiff, who is the custodial parent. It is not open to him to decide unilaterally to discharge some of that obligation by payment directly to the children instead. That must come after he had satisfied his court-ordered obligation.

- [72] I should also note that until January of 2009, Mr. G. purported to be satisfying his spousal support obligations while falling short of his child support obligations, for the purpose (he deposed) of satisfying at least one of the orders, rather than being in breach of both. Attributing his payments in this way would give rise, of course, to a tax deduction for him, and to a tax liability for Ms. L. that would only add to her burden given that the overall support was well short of what had been ordered.
- [73] Not surprisingly, Ms. L.'s solicitor wrote to Mr. G.'s solicitor on May 28, 2008, and again on June 24, 2008, to point out that child support had priority over spousal support, and that until the child support had been paid, it was not open to the defendant to attribute his payments to spousal support. It was made clear that Ms. L. would not accept the tax consequences of his unilateral decision.
- [74] Notwithstanding these letters, the defendant deposed in his unnumbered affidavit sworn January 29, 2009, that he had been unaware that child support payments took precedence over spousal support payments, but changed his approach after speaking to the plaintiff about it on January 23, 2009. He did not explain why it took him that long to correct the error that had been pointed out to his solicitor many months before.

2. Contempt allegations

- [75] As has been demonstrated, there is no doubt that Mr. G. has not paid to the plaintiff the support ordered by Warren J.
- [76] As will be discussed in more detail below, counsel for the defendant argues that his client's admitted failure to pay the sums ordered by way of child and spousal support does not constitute contempt, because the defendant has had no choice. He simply has not earned and does not earn an income that can support such a regime. Mr. G. has, he says, done his best to pay what he can.
- [77] Counsel for the plaintiff asserts that all of the arguments raised by Mr. G. as to his income were made at trial, and were rejected. Moreover, she submits, it is clear on the evidence that the defendant has not only failed to pay what he was ordered to pay, he has not even paid what the Guidelines would require for the income he admits to earning. His approach, she asserts, continues to be to pay to the plaintiff what is left over after he has looked after his own expenses, instead of paying all that he possibly can. Counsel submits that, in the circumstances, the following acts or omissions on the part of Mr. G. constitute contempt of court:
- a) failure to pay the amounts ordered;
 - b) if his income is truly what he says, failure to pay even the Guideline amounts for that income;
 - c) choosing how much to pay each month after covering his expenses, including discretionary expenses and personal savings, instead of paying the maximum possible amount;

- d) transferring the shares in MD Analytics and Kermode to his counsel four days after the trial judgment was rendered, and transferring his interest in the boat to his business partner, instead of using his assets to assist in paying his obligations;
- e) selling his shares in Gotham back to the company to satisfy his liability to that company, instead of looking after his liability to the plaintiff.

3. Contempt defences

- [78] As indicated, Mr. G. has defended himself against the contempt allegations by submitting affidavit evidence indicating that his current income, which is purely employment income, is no more than \$150,000 per year, which state has existed since September of 2008. He maintained that before that, his income was never more than \$178,000, and certainly did not approach the amount found by Warren J. It is true that in the past, he received bonuses and cash advances, but the company is no longer in a position to pay these, and he is no longer entitled to receive them as he is no longer an officer and shareholder. In any event, those advances usually constituted debt to be paid back, rather than income.
- [79] Moreover, the defendant maintained that he and the plaintiff were in what was essentially a shared parenting situation where the children were with him at least 40% of the time. As such, he argued, the amount of spousal and child support owing when properly calculated fell below what he in fact had paid. This argument rested in part upon an imputed income to the plaintiff based on what the defendant maintained she was more than capable of earning.
- [80] The defendant's position is that he and his partner, Ms. W., live as frugally as possible, and that he has been doing his best to pay as much as he can. The plaintiff, on the other hand, has held on to an expensive lifestyle in the Dunbar neighbourhood which is simply unaffordable.
- [81] These same arguments, of course, support the defendant's position that reality requires the support orders pronounced by Warren J. on March 31, 2008, to be varied, and the arrears cancelled. Although the arguments are the same, the onus of proof and standard of proof are different. In the circumstances, I propose to consider the evidence first in relation to whether the defendant has established a material change in his circumstances so as to justify a variation of the support orders.

4. Change in circumstances

- [82] Section 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 14 of the Federal Child Support Guidelines, SOR/97-175, and s. 96 of the Family Relations Act, R.S.B.C. 1996, c. 128, govern the variation of orders for spousal support and child support. A party seeking to vary a child support order must establish a change in circumstances occurring since the order was made that would result in a different child support order. As has been often noted in the courts, before a judge can change a maintenance order, there must be not just a change in circumstances, but a material change, of the kind that if known by the judge when the last order was made, would have resulted in a different order. The change must be significant

and long-lasting. This is to avoid uncertainty, which is not in the best interests of children, and to permit parents and children to be in a position to organize their financial affairs and plan for the future. See, for instance, *Hamilton v. Pearce*, 2001 BCSC 1092 at paras. 7-17, and cases therein cited.

- [83] The plaintiff argued that the defendant has raised nothing new, and that his arguments have already been rejected at trial.
- [84] It is not, of course, open to me to revisit the findings made at trial. If, as the defendant strenuously argues, Warren J.'s imputation of an annual income of \$275,000 was simply wrong, then his course was to appeal it. He did not. It is therefore binding upon him. I should add that even if that finding was erroneous, the defendant can have no one to blame for it but himself given the deficiencies in his disclosure - the consequences of which were first brought to his attention by Pitfield J. on October 30, 2006.
- [85] It nevertheless remained open to the defendant to argue, as he did, that circumstances arising since the judgment constitute a material change in the circumstances found by Warren J. so as to justify a variation of his orders. The onus was on him to establish such circumstances and their materiality on a balance of probabilities. The circumstances to which the defendant pointed were the change in his employment status in April, 2008, the effect upon his employer of the current economic downturn, and the reduction of his income in September of 2008.
- [86] In this regard, I found the quality of the evidence to be somewhat frustrating. Mr. G. produced little evidence of any value concerning his purported bankruptcy notwithstanding the obvious relevance of such evidence to his position. His statements concerning the difficulties he alleged that his principal employer, MD Analytics, has had in the present economic downturn were largely supported not by appropriate financial documentation from the company, but rather by Internet articles discussing difficulties affecting the industry as a whole.
- [87] Mr. G. complained that he had repeatedly offered to the plaintiff the opportunity to audit his companies (which would, incidentally, have involved great expense), maintaining that such an audit would prove the truth of what he has been saying about his income. The onus, of course, was on him to establish the state of affairs upon which he relies, not on the plaintiff. The specific kind of documentation one would expect to have been disclosed from his companies to prove his assertions was largely absent. Instead, the defendant filed a remarkable affidavit from his business associate and friend, Tyler Hassman. It will be recalled that Warren J. found the defendant to have engaged in a "rearrangement of corporate finances" to transfer income to Mr. Hassman.
- [88] In his affidavit, sworn January 27, 2009, Mr. Hassman rather unhelpfully deposed as follows:

7. The ongoing requests for documents, financial and otherwise, from the company has [sic] been a source of major impedance to the company's productivity and ability to perform. The time demanded from the company's staff to produce the documents, including my time to complete this affidavit, is time taken away from selling and performing the services to our clients which the company desperately need [sic] right now just to survive. Furthermore, the most damaging aspect is the Defendant's continued absence and inability to focus on doing his job that is a direct result of his attendance and preparation for these proceedings, plus the stresses from the impossible financial orders put upon him by the court.
8. Despite the numerous documents that have been prepared for this court showing that the company are [sic] financially unstable, there seems to be difficulty in getting the plaintiff and the court to understand the true financial situation of the companies' [sic]. As such, I am prepared to allow the appointment of a 3rd party auditor (preferably one of the top 5 accounting firms) at the sole expense of the Plaintiff to conduct a financial audit of the company. Beyond this offer, all further requests for financial information about the company must now be made directly to me since the Defendant is no longer a shareholder in the company and has no rights or entitlements to any information other than that of what [sic] any ordinary employee would be privy too [sic]. It will be my sole decision going forward to supply any such information requested, unless otherwise dictated by the law or order of the Court.
- [89] One begins to understand the long struggle for disclosure that the plaintiff has had to endure in this proceeding. As Warren J. put it, "The plaintiff has a right to be suspicious of the defendant's nondisclosure."
- [90] Notwithstanding the deficiencies in the defendant's evidence and the suspicions that arise, I find on the whole of the evidence that, on a balance of probabilities, there has been a significant change in his circumstances. In this regard, because of the weaknesses in the defendant's evidence as outlined above, I rely on his assertions only to the extent that they are corroborated by what documentary accounting evidence he has adduced, by the evidence of his frugal lifestyle, and by the way in which his actions have been consistent with the income level to which he has attested.
- [91] I accept that as of September 1, 2008, the defendant's annual income was set at \$150,000, that it has remained at that level since, without any bonuses, and that this will remain the case for the foreseeable future, pending a substantial upturn in the company's fortunes.
- [92] I accept that his actual gross salary for calendar 2008 was \$171,017.50. His total deemed income for that year included the redemption of his Gotham shares in payment of his debt. This payment constituted a dividend of \$145,078.93, which dividend was grossed up for tax purposes to yield a total income for 2008 of \$363,666.00.

- [93] The plaintiff argued that, in accordance with s. 16 of the Federal Child Support Guidelines, this total income of \$363,666 is what must be taken into account for the purpose of calculating child support, and pointed out that this is greater than the income found by Warren J., not less.
- [94] On the evidence before me, I disagree. I am satisfied that the dividend attributed to Mr. G. for tax purposes did not in fact constitute any money in his hands from which he could pay support. Rather, it was an accounting entry to deal with the redemption of his shares by Gotham to satisfy his outstanding debt to that company. In short, the benefit of the dividend of \$145,000 had accrued to him well before 2008. In my view, the defendant's ongoing liability for child and spousal support ought to be based on financial reality, rather than on artificial accounting reconciliations.
- [95] What happened on September 1, 2008, I find, was a change in corporate salary structure that affected not only Mr. G., but the other employees of the company and Mr. Hassman as well. On all of the evidence, I find it probable that even if Mr. G. had remained a shareholder and officer, he would have met with the same change in circumstances.
- [96] Notwithstanding the defendant's evidence concerning his income level in the latter part of 2007 and the first eight months of 2008, I do not find that evidence sufficiently complete or trustworthy to convince me of a material change before September 1, 2008, even though I have found that his actual gross salary for 2008 was just over \$170,000. Mr. G.'s 2008 tax return demonstrates that significant benefits accrued in prior years, which must be taken into account. Moreover, Mr. G. was himself the author of the changes that occurred on April 4, 2008, that affected his employment status and ability to receive additional compensation. This was not so with the changes that occurred as of September 1. Finally, I note that Mr. G. deposed in April of 2008 that he fully accepted and agreed with the court orders and would make every best effort to meet his financial obligations. Overall, I conclude that the defendant has failed to meet the requisite onus of establishing on a balance of probabilities that a sufficiently material change in his circumstances occurred in relation to the period before September 1, 2008.
- [97] I turn next to consider the defendant's argument that the custodial situation has evolved into one of shared parenting covered by s. 9 of the Federal Child Support Guidelines. That section provides as follows:
9. **SHARED CUSTODY** - Where a spouse exercise a right of access to, or has physical custody of, a child for not less than 40% of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[98] The plaintiff argued that s. 9 is not applicable in the circumstances of this case, because the original custody order has not been challenged; that order granted sole custody to the plaintiff with less than 40% access to the defendant; and the child support order that the defendant is seeking to vary was made pursuant to s. 3 of the Guidelines, not s. 9.

[99] After carefully reviewing the affidavit evidence, I conclude that I do not need to decide the question of whether it is open to the defendant to raise changes in access and physical custody in this context of attempting to demonstrate a material change in circumstances that would justify a variation of the child support order. This is because I find that the defendant has not discharged the onus on him of establishing that he in fact has had physical custody of the children for 40% or more of the time.

[100] The question is not whether the defendant has had a physical custody for over 40% of the time in any one particular period, but whether that has been the case "over the course of a year". The relevant time is the time that the children are in the care and control of the parent, not whether they are physically with him or her: *McAfee v. McAfee*, 1998 CanLII 5579 (B.C.S.C.) at para. 24.

[101] The calculations in the defendant's affidavits are replete with errors, such as counting the summer months twice in one year, and counting an 18 month period that happens to include two springs and summers when the defendant's access is at its highest, but only one fall and winter when it is at its lowest. I do not find his evidence reliable in this regard. Rather, I accept the plaintiff's evidence on this issue, and find that s. 9 of the Federal Child Support Guidelines has no application to the circumstances of this case.

5. Variation

[102] On the findings I have made, I conclude that the defendant's application for an order varying the orders of Warren J. for child and spousal support and contribution to extraordinary expenses should be allowed, to provide for payments in accordance with the applicable Guidelines based on an ongoing annual income of \$150,000, retroactive to September 1, 2008.

[103] I reject the submission of the plaintiff that, if I accept the defendant's evidence concerning his current income, then at a bare minimum his current salary of \$150,000 should be 'averaged up' to something in the range of \$180,000 - \$200,000 pursuant to s. 17 of the Federal Child Support Guidelines, based on the findings at trial. In all of the circumstances, I do not find that fairness requires me to have regard to Mr. G.'s previous three years of income to find an amount that is fair and reasonable. Given my rejection of any material change prior to September 1, 2008, and my findings concerning Mr. G.'s current state, I conclude that it is fair to set his annual income at \$150,000 as of that date.

- [104] I reject the submission of the defendant that in considering the support payments, and in particular s. 7 expenses, I should impute income to the plaintiff in excess of her actual income in the range of \$27,584 per annum. I will have more to say about the plaintiff's current circumstances below, but I note two important aspects at this point. First, the trial judgment anticipated that the plaintiff would not be earning any income for a period of time and therefore directed a review in three years. Second, as Warren J. noted in the passage I quoted above from para. 424 of his judgment, he expected that, "... after the turmoil of the separation and the end of litigation, she should be able to put her talents and training to good use". I am of the same view. The difficulty is that neither the turmoil nor the litigation has come to an end by any stretch of the imagination.
- [105] In these circumstances, I accept that for the purpose of calculating the appropriate amounts of spousal support, child support and contribution to special expenses in the period from September 1, 2008, to the present and ongoing, it is appropriate to fix the plaintiff's income at its current level of \$27,584 per annum. I would expect this to change within two years or so, but that will be a matter for the future.
- [106] The plaintiff then claims extraordinary expenses pursuant to s. 7 of the Guidelines totalling \$25,270.92. On this basis, she asserts that if the income of the defendant is set at \$150,000, then the proper amount of child support for four children living in British Columbia is \$3,165 per month, the defendant's contribution to extraordinary expenses comes to \$1,723 per month, and the appropriate range of spousal support amounts to \$402 per month. This comes to a total of \$5,290 per month. The plaintiff points out that the defendant's payments have not reached this amount in any month since September 1, 2008, or indeed, since June of 2008.
- [107] In my view, the areas of extraordinary expenses and spousal support, which are interdependent, must be revisited in view of the findings I have made concerning income since September 1, 2008. Given the principal focus of the debate, this issue was not adequately canvassed in the hearing before me.
- [108] I therefore direct that by May 3, 2010, the plaintiff provide me with an outline, supported by any necessary affidavit evidence, detailing the specific extraordinary expenses she claims over the period from September 1, 2008, to the present, together with expected ongoing extraordinary expenses taking into account all of the findings and rulings contained in this judgment. She should also set out all payments received from the defendant from November, 2009, through April, 2010, and provide the appropriate calculations as to apportionment of the expenses and spousal support at the mid-range. I direct the defendant to respond by May 13, 2010, setting out his position on whether the claimed expenses (past and projected) properly come within s. 7 of the Guidelines, and any other response to the plaintiff's position. The plaintiff will then have until May 18, 2010, to reply in writing.

6. Arrears

- [109] Under the orders made by Warren J., the defendant's arrears accumulating from December 1, 2007, through August 31, 2008, come to \$53,049. This is in addition to the arrears found at trial of \$115,950. The amount of the defendant's arrears accumulating from September 1, 2008, to date, taking into account the variation I have directed above, must await a final determination of the appropriate amount of extraordinary expenses and spousal support owing.
- [110] I may reduce or cancel the defendant's arrears accumulating under a divorce order to the point of variation only if I am satisfied that it would cause serious hardship or unfairness to the defendant if I did not. The burden of establishing this falls upon the applicant (in this case, the defendant). I conclude that the defendant has failed to do so. On the contrary, I find that it would be unfair to the plaintiff if these arrears were cancelled. This is particularly so if, as the defendant has suggested (but not demonstrated), bankruptcy proceedings have eliminated his liabilities to the plaintiff for special costs and the foreclosure costs, totalling nearly \$450,000 exclusive of interest. But whether or not that is the case, my conclusion remains the same. The plaintiff has had to consume capital from assets awarded to her under the divorce order in order to make up the defendant's shortfall. It is entirely appropriate that the arrears be paid in order to replace at least some of that lost capital.
- [111] In his Reasons for Judgment following the parties' trial, Warren J. declined to cancel the arrears that had by then accumulated under the interim orders of Pitfield J. and Ross J., finding that the defendant had the means to pay them. The defendant did not appeal from that judgment, and brought no application to vary the orders or cancel the continuing arrears until nearly a year later.
- [112] It is not open to me to revisit the findings of Warren J., and I see nothing in what has transpired since that would make it unfair to the defendant not to relieve him of those liabilities. On the findings I have made, the material change in the defendant's circumstances did not occur until September 1, 2008. Moreover, the defendant has deposed on more than one occasion that he hoped to be in a position to make up all of the support payments that were ordered from bonuses that he anticipated in the future. That, indeed, seems to be the nature of his business. His income has been extremely high in some years due to bonuses and cash advances that he has been able to withdraw. He is not in that position now, but there is no reason to suppose he will not again be in that position in the coming years.
- [113] The defendant's application for an order cancelling his arrears of spousal and child support is accordingly dismissed. Those arrears are fixed as follows:

To December 1, 2007 (fixed at trial): \$115,950

December 1, 2007 - August 31, 2008: \$53,049

Total: \$168,999

September 1, 2008 - present: to be determined

plus pre- and post-judgment interest.

7. Contempt

[114] As I noted above, the onus is on the defendant to establish a material change in circumstances justifying a variation of the previous support orders, and to establish that it would be unfair not to reduce or cancel his arrears. The standard of proof that the defendant had to meet was proof on a balance of probabilities.

[115] When we come to the question of contempt, however, the onus shifts away from the defendant. He does not have to prove anything. Moreover, the standard of proof changes. For me to find Mr. G. guilty of civil contempt, which is what is alleged, I must be satisfied of his guilt beyond a reasonable doubt. I must also bear in mind the general principle that the contempt power is to be exercised cautiously and sparingly.

[116] A party's failure to pay support in accordance with a court order does not, in and of itself, establish contempt. As the Court of Appeal noted in *Swann v. Swann*, 2009 BCCA 335, at para. 10:

There are four elements that must be established: that the debtor had notice of the order, that he or she did not comply with the order, that the non-compliance was "wilful" (i.e., deliberate, as opposed to accidental or unintentional), and that the debtor was, in fact, capable of complying with the order (i.e., that he or she had the means to make the required payments).

[117] In this case, the first three elements have been clearly established. The issue is whether I am satisfied beyond a reasonable doubt that Mr. G. was capable of complying with the order, i.e., that he had the means to make the required payments.

[118] As I have already noted, the evidence has not satisfied me, on a balance of probabilities, that there had been a material change in Mr. G.'s circumstances prior to September of 2008, or that it would be grossly unfair not to reduce or cancel his arrears. When I view the evidence from the perspective of the different onus and standard of proof that contempt allegations require, however, I am not satisfied beyond a reasonable doubt that Mr. G. was in fact capable of paying the full amount owing up to the time of his change in circumstances in September of 2008.

[119] The evidence of financial complications and difficulties led by Mr. G., while not enough to persuade me to relieve him of his obligation to make up the arrears, was nevertheless sufficient, in my opinion, to raise a reasonable doubt that the accumulation of those arrears was the result of wilful disobedience.

[120] In addition, I am not satisfied beyond a reasonable doubt that either the transfers of his shares to his solicitor, or the repayment of his debt to Gotham, instead of using these assets to pay his arrears to the plaintiff, constituted wilful disobedience of the court support orders on the part of the defendant. Mr. G.'s shares were not specifically the subject of any

court order other than the order giving him a sole interest in them, which normally would entitle him to deal with them as he chooses. The issue of any potential fraudulent preference has not been raised. The evidence before me does not establish any value to the shares in question, or that there was any practicable way for Mr. G. to use them instead to help fund his liabilities to Ms. L. In the result, I am unable to find that Mr. G. was doing anything other than trying to organize his affairs and preserve his legal representation in a way that did not, in his mind, jeopardize any further his ability to pay the support that was ordered.

- [121] I next turn to consider the manner in which the defendant has purported to do his best to comply with court orders following his change in circumstances in September of 2008. This raises concern. Although the amounts paid by the defendant since August of 2008 exceed in all but three months the Guideline amount of child support that I have found payable (\$3,165), it is extremely unlikely that the payments he has made were sufficient to cover all of his obligations even when calculated on the basis of his varied income.
- [122] Given that I have found that due to a material change in his circumstances effective September 1, 2008, Mr. G. could not meet the ongoing support obligations arising from the trial orders of Warren J., what, then, was his obligation? As I apprehend it, his obligation was to bring the matter before the court as soon as possible, and in the meantime, to pay as much as he possibly could, to at least the Guideline amounts.
- [123] The evidence indicates that Mr. G. did not always do this. For instance, the monthly income and expense forms he submitted in connection with his bankruptcy disclose that in August of 2009, he listed among his personal expenses \$144 for gifts/allowances, \$450 as savings for Christmas, and \$600.35 for children's entertainment/sports.
- [124] I agree with the submission of counsel for the plaintiff that Mr. G.'s obligations required him to do more than that. Rather than put aside money for his own savings or for Christmas gifts, he should have first used all available resources to satisfy as best he could his obligation to pay spousal and child support. Yet the evidence does not establish that Mr. G. did anything more in this period after September 1, 2008, than cover his own basic expenses plus some modest extras intended to benefit his children.
- [125] Mr. G.'s materials implied that it was unfair to expect him to do more than he did. He contrasted his own lifestyle, working as hard as he can, living in rooms rented in the east Vancouver house owned by Ms. W.'s parents, to the plaintiff's lifestyle, living with the children in a house in the Dunbar neighbourhood, and working very little. Rather, he suggested, it is Ms. L. who should be changing her lifestyle to accommodate his ability to pay.

- [126] That he in fact paid less than was possible constitutes, in my view, yet another reason why it is not unfair to refuse to reduce or cancel the defendant's arrears. When it comes to civil contempt of court however, I must bear in mind that the onus is not upon Mr. G. to prove that he was not in contempt in making the payments he did. I must be satisfied on the evidence, beyond a reasonable doubt, that in acting as he did, he was wilfully disobeying the court orders that were in place.
- [127] Once again, I find myself unable to come to that conclusion, although I view Mr. G.'s actions as coming perilously close. The fact is that Mr. G. found himself in a difficult situation. His income had been reduced to \$150,000 per year. He had numerous debts. It was clearly not possible for him to pay what he was ordered to pay. In that sense, the fourth element is not satisfied. The path he chose to take in the circumstances was not the correct one. But in all of the circumstances, I cannot conclude with the necessary degree of certainty that the defendant's choice constituted wilful disobedience as opposed to a misguided attempt to comply in the difficult circumstances in which he found himself.
- [128] Accordingly, I dismiss the application for an order finding the defendant in contempt of the support orders pronounced by Warren J. on March 31, 2008. I should add, however, that I can find no basis whatsoever for criticizing the plaintiff for bringing on her contempt application. As Warren J. found, and I agree, Ms. L. has had ample reason to distrust the defendant's evidence and disclosure, and had no alternative means of attempting to enforce the legitimate and unappealed orders of this court.

B. Mobility

1. The plaintiff's plan

- [129] Contrary to the defendant's fixed belief, it is clear to me, as it was to Warren J., that the plaintiff's continuing desire to move with the children to Prince Edward Island is not motivated by some kind of desire to punish the defendant. Rather, it is motivated by a very natural wish to provide for herself and her children the best she possibly can in the new circumstances in which they find themselves.
- [130] Prince Edward Island is her choice not because it is far away from the defendant, but because it is the plaintiff's home, where her parents, siblings and many nephews and nieces continue to reside. She has no family in Vancouver. Accordingly, PEI is the place where she has the roots, the opportunities and the support network best calculated to enhance her chances for success.
- [131] This issue was, of course, canvassed at the trial. For ease of reference, I set out again what Warren J. said in dismissing the plaintiff's request to be allowed to move with the children to PEI:
- [420] The evidence of the plaintiff leads me to conclude that she believes that the children would much prefer to remain in Vancouver and her primary, if not only reason for moving is to achieve a level of material and financial security that has not been available here since the

autumn of 2006. Although the children love visiting PEI, it is my view that their home is in Vancouver and I share Dr. Koopman's that removing one parent from the children's daily lives can be very detrimental to them. Further, on the evidence of the plaintiff, the children are well settled into their school and they have many friends in the area. Their therapist is near, as is their family Dr. Although the children have an attachment to PEI and their extended family there, it is as a place to visit rather than to live. In my view, the disruption from their school and present environment would not be in their best interests, and only the lure of a reliable financial base motivates the plaintiff. By the orders I make in this case, I intend to provide that base.

- [132] The plaintiff pointed out that the financial base the judge intended to provide has not materialized. The same is true of the award of special costs, which has not been paid. It will be recalled that Warren J. considered this award an important factor in maintaining the balance he had sought to achieve. In the absence of these payments, the plaintiff submitted that she is now obliged to move with the children away from their present environment in Dunbar as they can no longer afford to live on the west side of Vancouver. The disruption that Warren J. sought to avoid has thus become inevitable. The children must change their school and move away from their friends and the centre of their community activities, and Ms. L. must move away from the network of support (local friends and neighbours) that has allowed her to maintain the children's lifestyle as best she can.
- [133] In these circumstances, she asserted, the factors that led Warren J. to dismiss her mobility application at trial have disappeared. We are left with what Dr. Koopman described as the "second-best alternative in order to sustain herself and the children", the 'best' alternative having proved illusory.
- [134] Ms. L. started working as a registered nurse working on a part time part-time (casual) basis at Vancouver General Hospital on May 12, 2008. She also enrolled in a two-year online master's degree program in healthcare studies with Royal Roads University. She started this in October of 2008 and was scheduled to complete it in approximately December of 2010. It will cost over \$20,000 to complete, and she has so far paid approximately \$11,500 towards the program.
- [135] Due to stress that she attributed to this litigation and Mr. G.'s behaviour towards her, the plaintiff is currently on sick leave from her employment and is receiving unemployment benefits. If she were working at this time, she would be earning \$29.02 per hour, working a 0.57 full-time equivalent position. She has only \$15,000 left of the capital that came out of the sale of the matrimonial home, and is presently paying mortgage payments and taxes that exceed \$3,000 per month. Her extraordinary expenses include a recent remediation program for her daughter, D.M., that cost \$3,300. She has been advised that to cover her children's post-secondary education, she needs to secure a sum of approximately \$240,000. The plaintiff pointed out that the capital she had that would have gone far in covering this has now been spent on living expenses, including legal expenses, in the absence of the defendant's payment of court order support, arrears and costs.

- [136] In PEI, she demonstrated, she can afford to house herself and the children comfortably without a mortgage. She deposed that she will have the opportunity to obtain employment with on-the-job training as a registered nurse at Queen Elizabeth Hospital in Charlottetown at close to the income available in British Columbia, but with a much lower cost of living. This employment would also allow her to work 7 days out of 14, leaving her with a considerable amount of flexibility in terms of devoting time to the children and to earning her master's degree, with her family assisting with childcare whenever necessary at no cost. She will thus be in a better position to complete her master's degree in nursing, improving her qualifications, her income earning capacity and her employability, while still maintaining an appropriate parenting role for the benefit of the children.
- [137] Ms. L. asserted that this would not be possible in Vancouver if she were obliged to move elsewhere in the Lower Mainland, where she would have to work full time to cover her family's expenses and still have to use up her capital. She would have no network of friends or family to assist her, and would have to spend a considerable amount on childcare. This would leave her family both financially strapped and enjoying less hands-on parental support.
- [138] In the meantime, while a move to Prince Edward Island would indeed require the children to move much further away than a move to the suburbs of Vancouver, they would at least be moving to an area that has been long familiar to them, and where they have extensive family. In this sense, the plaintiff submitted, they will be better off than moving to Burnaby or Richmond where neither she nor the children know anyone.
- [139] Moreover, asserted the plaintiff, in PEI she will be in a position not just to survive, but to thrive. She will not have to use up all her remaining capital, pay a mortgage or pay child care costs. She will more quickly achieve economic independence, and she will be in a position to put money aside for the children's post-secondary education and for their and her future no matter what the defendant chooses to do in terms of living up to his obligations.
- [140] As far as access by the defendant is concerned, Ms. L. has deposed that she is prepared to do all that she can to support this, including facilitating lengthy holiday visits by the children to Vancouver, and trips by the defendant to PEI if he is unable or unwilling to move closer. In her Form 98, she has provided for a significant contribution to the travel expenses that would be incurred in this regard.

2. The defendant's plan

- [141] Mr. G., of course, did not dispute that current financial reality requires a change. That a material change in circumstances had occurred was at the core of his position. He maintained, however, that an appropriate and satisfactory lifestyle can be achieved for the family without the need to deprive the children of regular access to their father.

- [142] He pointed out that upon marriage breakdown, it is frequently necessary for both parties to accept a reduction in their lifestyle. The "Dunbar dream" they enjoyed, complete with private school and club memberships, is obviously no longer feasible.
- [143] What is feasible, the defendant said, is for the plaintiff to take more responsibility for proper financial management and to lower her expectations. When the plaintiff sold the matrimonial home, realizing a significant amount of capital, she chose to buy another home in the Dunbar area, albeit a smaller home on a through street. She could have bought something much less expensive elsewhere, preserving a good deal more capital. She would not then be in the position she now finds herself.
- [144] But even as it is, the defendant submitted, the principle of Occam's Razor should be applied. This meta-theoretical principle, more fully stated as *entia non sunt multiplicanda praeter necessitatem*, comes down to this: the simplest solution is usually the correct one. In this case, asserted the defendant, "the simplest solution to the financial problems facing the Plaintiff is that she has to tighten her belt and make a go of things in a less expensive neighbourhood and get back to working full time."
- [145] This, the defendant argued, is something the plaintiff has never tried to do. If she were to go back to work full time, sell the cottage on Prince Edward Island, sell her current Dunbar residence, relocate to a neighbourhood and a home with a mortgage that match her ability to pay, place the children in public schools, move their extracurricular activities to less expensive facilities and programs, undertake counselling, and learn to work and be comfortable with the defendant and his common-law spouse, Ms. W., then things will work in Vancouver. Ms. L. would also have the benefit of the defendant's child support payments, which are tax-free to the plaintiff, and as far as her master's degree program is concerned, it is designed for people who are working full time.
- [146] While this plan would obviously require a change of school, neighbourhood and community, the defendant noted, the children could still easily travel across the city to visit friends and relatives, and Mr. G. would of course be available to assist. While a change in environment is unavoidable, the children would at least have continued regular access to both parents, which, it was submitted, was considered to be in their best interest by Warren J., and remains in their best interest. In the meantime, the change in their environment would be less than if they move to the opposite coast. If the plaintiff would only manage her affairs properly, the financial impetus for the move would become of much less significance. In fact, the defendant argues, it is really a self-created situation that the plaintiff is trying to use to justify depriving the children of regular access to a parent to whom they have been found to have bonded, and with whom they wish to maintain close contact. As the defendant deposed in his affidavit #23 sworn November 6, 2009:
51. The plaintiff fails to provide any back up whatsoever with respect to her claimed Financial assets and RRSPs for any period let alone the 24 months post-trial. In the face of my financial limits and ability to pay the court ordered support levels the plaintiff has chosen to

spend unwisely and recklessly the wealth she realized from the divorce order and has overextended herself by spending what capital she had, incurred credit card debt, ran up a line of credit debt and has borrowed money to initiate additional court motions. The plaintiff has not saved any funds towards her well being or the children's education and reserve funds for unplanned events. Using the self-created situation as grounds to rip the children from all that they are familiar with, including their father, is wrongful.

3. The view of the child(ren)

[147] The defendant argued strenuously that a 'views of the child' report of some kind should be obtained concerning the mobility issue, particularly with reference to the eldest child, A.M., who has just turned 14, and who has experienced considerable difficulty since the separation. The other children are B.H. (son), born 1997; D.M. (daughter), born 1999; and Z.K. (daughter), born 2000.

[148] The plaintiff objected to this proposal. Ms. L. pointed out that these issues were canvassed extensively at trial, where expert evidence was obtained from Dr. Koopman in the form of a s. 15 report, from Ms. Tredger and from Dr. Posthuma. All that the process suggested by the defendant would accomplish would be to increase expense and cause delay. Ms. L. deposed that the elder daughter, A.M., made it very clear to her that she does not want to be involved in the ongoing litigation between her parents, and wants the adults to make the adult decisions. It would not be right or healthy, submitted the plaintiff, to burden A.M. or any of the children with having to make a choice between their parents given the circumstances of this case.

[149] According to Mr. G., A.M. did want her voice to be heard. He deposed as follows in his affidavit #23, sworn November 6, 2009:

153. On Wednesday, November 4, 2009, the children overnighted with us. The subject of her mothers [sic] wish to move came up. [A.M.] restated her desire not to move. [A.M.] said to me why the judge did not ask the kids what they wanted. I asked her if she still wanted to write a letter to the judge. She really wanted too [sic]. [A.M.] went to her room and about 30 minutes later came down and handed me her "Dear Judge" letter. It is attached as Exhibit "XX".

[150] Not surprisingly, the plaintiff objected to the admissibility of this letter. With respect to A.M., the question is of some importance. Ms. L. is concerned that the letter was written under the defendant's influence.

[151] Some further background is in order. At the Case Management Conference of October 15, 2009, held shortly after the plaintiff filed her mobility application, I was advised by counsel for the defendant that A.M. had been taken to British Columbia's Children's Hospital after having expressed thoughts of harming herself at school, and that the defendant had only just discovered that A.M. had had a similar episode during summer camp when she actually had tried to harm herself. This information, it was said, had been withheld from the

defendant.

- [152] Among other things, I ordered that the records of BCCH be produced concerning A.M.'s admission.
- [153] Then, during the hearing of these applications in December, I was advised by defendant's counsel that A.M. had not come home after school on the previous day (a day when she was residing at the plaintiff's house), and that they had spent all night looking for her. It turned out that she had spent part of the night riding a bus by herself, and had slept the rest of the night in the ATM anteroom of a local bank. She then returned to school where she told a police officer (who had quickly attended) that she had not wanted to go home to either parent. This was all related by counsel. There was no evidence about what had occurred.
- [154] I was also told by Mr. Linde that A.M. had scratched the letters "FML" into her arm with a knife, which letters stood for "fuck my life". An affidavit sworn by Ms. W. was proffered that exhibited a photograph of A.M.'s arm, but I refused to admit it as it was clear that A.M. was unaware that the photograph was intended to be used as evidence, and I considered it to be an invasion of her privacy.
- [155] In all of these circumstances, I advised counsel during the hearing of this matter that I was prepared to speak to A.M. with their clients' consent, under certain conditions. I insisted that it be arranged for a particular neighbour, who was a neutral person, to pick A.M. up from school that very day without either parent having had an opportunity to speak to her first. This person was to advise A.M. that if she wanted to come downtown and speak to the judge hearing her parents' case, she would be welcome to do so. At the same time, it was to be made clear to A.M. that she was under no obligation to do so whatsoever, and was free to decline. If she did meet with me, she would be asked only one question: was there anything she would like to tell the court? She was to be assured that anything she said would be kept confidential, and not disclosed to either parent without her consent.
- [156] Because of the seriousness of the circumstances, I made this suggestion notwithstanding my belief that the view apparently expressed by A.M. to her mother, that the adults should make the adult decisions, was correct, and notwithstanding the plaintiff's expressed concern that involving A.M. in this litigation would be detrimental to her.
- [157] After the parties were given time to consider their positions, I was advised, somewhat to my surprise, that the plaintiff would reluctantly consent to this procedure, but the defendant, on reflection, would not. I therefore did not proceed with the interview.
- [158] In explaining why his client did not consent to the interview, counsel for the defendant mentioned that his client thought the question I proposed to ask was too broad, instead of focusing specifically on the proposed move to Prince Edward Island.
- [159] I pointed out that I would be stunned if any of the children indicated that they did want to move to Prince Edward Island. I am sure that they would also prefer not to move to Richmond or Burnaby. But that is not really the point. This is an adult decision. In the

unfortunate circumstances they face, they are going to have to move somewhere. I am sure what the children would like most of all is to return to the matrimonial home with both parents together and content. No one can give them that. No one can protect them from all of the consequences of marriage breakdown. All one can do is try to do what is best for them in the conditions they face.

[160] In this regard, the records that have been produced concerning the difficulties experienced by A.M. are instructive, particularly because they were prepared by neutral parties without the influence of either parent. What these records made clear is that what has been most damaging to A.M. (and doubtless to the other children as well) is the constant fighting and endless discord between her parents.

[161] On A.M.'s BCCH admission, the Emergency Psychiatric Nursing Assessment form listed as her Chief Complaint: "Parents divorced for 3 years, parents fight a lot about everything". Under Precipitating Factors was noted "Parents fighting". The Psych Assessment report recorded the following reference to what had occurred:

Lives at above address with the mother ... and three siblings, brother 12yr, two sisters aged 9 yr & 10yr.

At fall-in at school today there were a group of people giving a talk on Depression and Psychosis, some of what they were [saying] resonated and prompted [A.M.] to seek out her School Youth Counselor (believes she is depressed).

Parents co-parent.....spends every Wednesday and every 2nd W/E with Dad ..., it's ok at Dad's. Spend rest of time at home with Mom. Some ambivalence re: relationship with parents, some serious legal problems with parents at present and all four kids are finding it difficult to deal with.

[162] Regrettably, these parents have been unable to come together even over a child in crisis.

[163] While both parents are guilty of contributing towards this lamentable state of affairs, I find on all of the evidence before me that the defendant's contribution is the greater. He has amply demonstrated that he is absolutely unwilling to give the plaintiff the benefit of any doubt. The plaintiff has shown a similar attitude towards the defendant, but to a less vitriolic extent, and justified at least in part by her past experience of the defendant's documented lies and his ongoing failure to comply with his disclosure obligations.

[164] The incident that took A.M. to BCCH is a prime example of the defendant's attitude. Ms. L. was called by the school Grade 8 counsellor, who stated that A.M. had reported deep feelings of sadness and thoughts of harming herself. The counsellor requested the plaintiff's immediate attendance. When Ms. L. arrived at the school and spoke to the counsellor, she learned for the first time that her daughter had had an experience while at summer camp the previous August, when she walked into the water and felt like she should just keep on walking. Ms. L. and the counsellor were naturally concerned to get A.M. to the hospital immediately. They agreed that the counsellor would telephone Mr. G. to let him

know what happened and tell him where his daughter was.

- [165] Predictably, Mr. G. assumed the worst and used this as an example of Ms. L.'s perfidy in keeping information from him. He suggested that she had purposely neglected to inform him of what had happened at camp in August, as though she had known about it all along, and that she had deliberately left him out of the loop when the crisis occurred at school, so that he had to learn about it from the school counsellor. Moreover, he accused her of neglect in failing to arrange for therapy for A.M. following the August incident, stating, "If the children are permitted to move to PEI it is obvious that I will be cut off completely from knowing how their mental and physical health is" [affidavit #23, para. 26]. All of these suppositions and accusations were incorrect.
- [166] Similarly, the defendant relied on evidence from his partner, Ms. W., who deposed in her affidavit #3 sworn November 6, 2009, that the G. children told her on April 8, 2009, that their mother had showed them Warren J.'s reasons for their father's incarceration. This was one of a long list of accusations of allegedly improper communication between mother and children. The difficulty is that, as pointed out by plaintiff's counsel, Warren J.'s reasons were delivered orally on April 3, 2009, and would not have been available to the plaintiff in the time frame alleged. Once again, information was misconstrued to the detriment of the plaintiff.
- [167] I have already mentioned the defendant's repeated blaming of the plaintiff for the consequences of his own actions, and his inability to take any responsibility for his own behaviour.
- [168] The defendant has also demonstrated, in my view, a refusal to accept the reality of his position as a parent that follows from the breakdown of his marriage and the awarding of sole custody of the children to the plaintiff. In his affidavit #13 sworn January 16, 2009, Mr. G. offered as an example of the plaintiff's failure to keep him advised of his children's medical appointments, an e-mail she had sent him on the evening of Sunday, December 7, advising of their son's appointment with a dermatologist the following morning at 8:00 AM. He deposed that a booking with the dermatologist must have been planned well ahead of time, and that as it was, he did not read his e-mail until the next day and so was deprived of the opportunity to attend the appointment with his son, if he had wanted to do so. The children were living with Ms. L. at the time.
- [169] Once again, the defendant cast blame upon the plaintiff for a situation for which she is not responsible. In fact, as the children's sole custodian she had no obligation to inform him of the appointment.

- [170] Nevertheless, the evidence is full of examples of Ms. L. doing her best to keep Mr. G. advised of such things, and I am satisfied that she has done her best. The evidence is also full of examples of Mr. G. taking unwarranted offence at 'not being kept in the loop' where Ms. L. has failed to communicate minor events in a timely fashion. The many instances of Ms. L. going beyond the call of duty to keep Mr. G. informed and involved were ignored.
- [171] Yet another example of hypersensitivity can be found in Ms. W.'s affidavit #3, where she exhibits an exchange of e-mails between her and Ms. L. on September 18, 2009, as an example of the plaintiff's resistance to open communication between them. In an e-mail to Ms. L., Ms. W. referred her to a reference book on communication between parents, and set out 11 tips from the book which she suggested should be followed by both Ms. L. and Mr. G. These included several that Ms. W. saw fit to put in bold type, with one in very large bold type - a very aggressive approach in electronic communication. Ms. G. responded by noting that Ms. W. had no place in her life, stating,
- [H] may need or request your assistance. Certainly you must be able to appreciate this is not your role in my life.
- I have asked respectfully many times for you to stop--yet you continue to cross the boundary!
- Please stop!
- [172] In my view, the position taken by Ms. L. in that exchange was perfectly reasonable. It was Ms. W. who overstepped the bounds of appropriate communication, on that occasion and on others.
- [173] The reality is that Mr. G. wants to be involved in his children's day-to-day lives to the same extent as he was when they all lived together, if not more. What he does not seem able to accept is that this is no longer practicable. That is the inevitable result of the breakdown of their marriage, and the fact that custody of the children was awarded to the plaintiff. He does not appear to understand that carrying on in this way only adds unnecessary stress to the lives of everyone in the family including his own. The joint guardianship that he enjoys requires the plaintiff as custodial parent to discuss with them any "significant decisions which have to be made concerning the Children". It does not entitle him to be informed in advance of every appointment and event, although it is clear that the plaintiff has attempted to do so.
- [174] Moreover, the defendant has demonstrated a fixation on the prospect of his children moving to Prince Edward Island that, as found by Warren J., is focused on his own 'rights' as a father rather than what is best for his children. Mr. G. deposed that when he arrived at BCCH to see his daughter, the first thing he asked her was "if she was stressed out because of her mother's refusal to cooperate and bring her homework over to our house the previous evening...". The second thing he asked her was whether it was "because of her mother's conversation about moving the children to Prince Edward Island, and having to sell the home...". In short, rather than simply asking his daughter what was bothering her,

he chose to cross-examine her by suggesting the answers he hoped to hear to the questions he asked, both of which involved blaming her mother.

- [175] In suggesting that the children did not want to move to Prince Edward Island, the defendant attached to his affidavit #23 a copy of his cell phone statement of account for August of 2009, when the children were in Prince Edward Island. He deposed that his daughter D.M. 'sneaked' calls into him on four dates noted on the account to tell him that her mother was "pushing PEI" on them as a place to live. The bill demonstrated, however, that all four calls had been placed by Mr. G., not by D.M. (behind her mother's back or otherwise). The defendant went on to say that his daughter told him that she missed him and her friends in Vancouver, which would be expected.
- [176] To me, this demonstrates, as does other evidence, that the defendant is more concerned about securing and enhancing his role as a father at the expense of the mother, than he is about the welfare of the children, although I expect that he sees no difference between these two issues. Thus, in his argument, he characterizes the mobility issue as to whether it is "in the best interests of [A.M.] and the other children to abandon their father", again focusing the issue on him instead of on the children. In these circumstances, I do not find his evidence on this mobility issue, which consists largely of opinions, arguments and concerns, particularly probative.
- [177] Furthermore, I am not inclined to accept at face value what either parent says about their children's wishes concerning the move, in so far as it supports either parent's position. My concern is not that either of them is necessarily being untruthful about what their children have said, but rather that I cannot be sure that their children are saying anything other than what they think each parent wants to hear. The one exception is the report of the plaintiff that A.M. did not want to be involved in the legal fight between her parents. That is supported by the BCCH records. It follows that A.M.'s "Dear Judge letter", which I admit into evidence, is of very little assistance, although as I have indicated, there is nothing about it that I find surprising in so far as the proposed move to Prince Edward Island is concerned.
- [178] I accept the position of the plaintiff that the issues were thoroughly canvassed at trial. The children are indeed older now, but the question of what will provide the best opportunity for these children to thrive in the difficult circumstances in which the family now finds itself still depends largely on adult factors, including the family's precarious finances and the significant stress under which this family continues to labour. As in all families, this type of decision is one that must be made by the adults, bearing the best interests of the children in mind, rather than the children's wishes. In this case, the court is obliged to step in to make the decision for them.
- [179] Given these factors, together with the defendant's refusal to consent to an interview with A.M. that would have been free of parental influence, I see no benefit to be gained from the further expense and delay that would be required to obtain an expert report concerning the views of A.M. towards the proposed move. Most importantly, I am satisfied that neither

A.M. nor any of the other children should be put in the position of feeling like they are expected to choose between parents by providing their 'views' to an expert to report to the court.

4. Cross-examination and evidentiary issues

- [180] Counsel for the defendant went through the plaintiff's affidavits relating to the mobility question and pointed a number of areas where he criticized the quality and admissibility of the evidence. The grounds of complaint were that the plaintiff's evidence frequently consisted of expressions of opinion, argument in the guise of fact, speculation, and hearsay. I noted that the defendant's materials were subject to the same complaints to such an extent (see, for instance, the paragraph quoted from the defendant's affidavit #23, *supra* at para. 146) that if I applied them equally to both parties, there would be very little left of the defendant's evidence, let alone the plaintiff's.
- [181] Counsel further pointed to a number of assertions made by the plaintiff in her materials which he submitted ought to be subjected to cross-examination. He pointed to one particular factual question involving an unkind comment about the defendant that the plaintiff had posted on her Facebook page. According to the plaintiff, she quickly recognized that she had acted wrongly, and removed the reference within a few hours.
- [182] The defendant attached to an affidavit a printout of the plaintiff's Facebook page off the Internet which bore a time that suggested that the plaintiff's evidence as to the timing of her removal of the comment was wrong, and that it had remained on her Facebook page for considerably longer. Counsel for the defendant cited from Roman law the maxim *falsus in uno, falsus in omnibus* [false in one thing, false in all things] in arguing that because of this 'proof' of the plaintiff's lack of honesty on this point, the plaintiff's evidence in general simply could not and should not be believed.
- [183] This was perhaps not the wisest position to take on behalf of a party who has been found to have lied under oath, and whose credibility was found wholly lacking after five weeks of trial. I, at any rate, was unimpressed. Apart from anything else, I find it impossible to rely upon any printout from the Internet as proof of anything other than the fact of its contents having been posted on the Internet. It is certainly not admissible for the truth of any aspect of what was shown. Times are notoriously inaccurate and can easily be manipulated, and the issue was of relatively minor importance. While noting that both parties have demonstrated a capacity for less than courteous conduct, I find that in any of the areas that matter, the plaintiff's credibility has not been impeached.
- [184] I am unable to agree that in the circumstances of this case, the interests of justice will be served by subjecting either party to further cross examination after they have already been through five weeks of trial on much the same issues. I therefore decline to allow it. It is seems to me that the defendant is simply trying to prolong and exacerbate the conflict that exists between the parties. I further note that both parties have descended into the realm of minutiae in their criticism of each other. This issue will not turn on those details. I am

satisfied that both parties, taken individually, are competent and loving parents who are motivated by what they believe to be the best interests of their children. They remain poles apart, however, and so the court must decide this issue for them.

[185] Suffice it to say that in considering this matter, I have disregarded evidence that is really argument, I have given no weight to speculation, I have ignored unsupported accusation, and I have eschewed hearsay put forward for the truth of its contents without any foundation.

5. Analysis

[186] The law on the issue of mobility must begin with the decision of the Supreme Court of Canada in *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 49, where Justice (now Chief Justice) McLachlin summarized the law as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with the legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interests of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, *inter alia*:
 - (a) the existing custody arrangements and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child.

[187] At para. 50, McLachlin J. went on to say this:

In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all of the circumstances, old as well as new?

[188] Also of great assistance is the decision of the Honourable Mr. Justice Burnyeat of this Court in *One v. One*, 2000 BCSC 1584, 81 B.C.L.R. (3d) 315, where His Lordship set out 12 relevant factors and cited the authorities in which each is discussed. Omitting the citations, Burnyeat J. said this at para. 24:

When reviewing requests for changes in custody and access and in reviewing the question of whether the children should be moved where such a move may make access more difficult, courts in British Columbia have looked at a multitude of issues in determining what is in the best interests of the children:

- (a) parenting capabilities of and children's relationship with parents and new partners...
- (b) employment security and prospects of each spouse and, where appropriate, their partner...
- (c) access to and support of the extended family...
- (d) difficulty of exercising proposed access and quality of proposed access if moved is allowed...
- (e) effect upon children's academic situation...
- (f) psychological/emotional well-being of children...
- (g) disruption of children's existing social and community support and routines...
- (h) desirability of proposed new family unit for children...
- (i) relative parenting capabilities of either parent and perspectives ability to discharge their parenting responsibilities...
- (j) child's relationship with both parents...
- (k) separation of siblings...
- (l) retraining/educational opportunities for moving parent....

[189] Notwithstanding these factors, there is, of course, no precise formula, and each case must turn on its own particular facts: *S.S.L. v. J.W.W.*, 2010 BCCA 55. The fundamental concern is the best interests of the children. In the case at bar, the issue of a change in custody does not arise. The defendant's access, however, will clearly be affected should the plaintiff and the children move to PEI.

[190] I note that the plaintiff has clearly satisfied the threshold requirement of demonstrating a material change in the circumstances. The entire support and costs regime designed by Warren J. to permit the plaintiff to remain in Vancouver, in place of the "second-best

alternative" of moving with the children to PEI, has come to naught. The support has not been paid. The arrears have not been paid. The costs have not been paid. The goal of keeping the plaintiff and the four children in their existing environment and neighbourhood, which was considered in their best interests, can no longer be sustained. Change and disruption cannot be avoided; they must move. The question is, where?

- [191] The defendant blames the financial straits on the plaintiff, for failing to be frugal and for continuing to live in Dunbar when she could have moved elsewhere. But the plaintiff and the children continuing to live in Dunbar is precisely what the trial judge intended to accomplish. The plaintiff was entitled to rely on the support that the trial judge ordered. It is not her fault that it has not been forthcoming. It is the defendant who has failed to live up to his obligations, not the plaintiff.
- [192] In all of the circumstances, I conclude, as did Dr. Koopman and Dr. Posthuma, that in the absence of sustainable support at a level sufficient to maintain the children in their existing environment, the best interests of the children would best be met by Ms. L. being permitted to move with them to Prince Edward Island. In arriving at this conclusion, I take into account the following.
- [193] Contrary to what the trial judge anticipated, the litigation between the parents has not come to an end, and their relationship has remained toxic. This has clearly had a very negative impact on the children, particularly A.M. The present situation, in short, is intolerable, and clearly not in the best interests of the children.
- [194] Although it is not necessary for the plaintiff to move to PEI in order to pursue appropriate professional employment, I am satisfied that from an occupational point of view, her future prospects will be much brighter in PEI than they would be in Vancouver, taking into account the relative cost of living, her ability to pursue further education, and the wide network of family support available in PEI.
- [195] I am also satisfied that the enhancement of the plaintiff's financial security and independence, which the move to PEI would accomplish, would be in the best interests of the children. I say this for several reasons. First, the plaintiff will be in a position, finally, not only to support herself, but to build up savings for the benefit of the children. This is something that neither she nor the defendant is able to do presently, and which the plaintiff would not likely be able to accomplish in the future should she remain in Vancouver. Second, with the support of her family, the plaintiff as custodial parent will be in a position to maintain a strong relationship with her children in a manner that would not be open to her were she to remain in Vancouver, where she would be obliged to move away from her present support network yet work full-time outside the home. Third, the well-being of the children will benefit from the plaintiff's enhanced ability to become a well-adjusted and productive individual. Fourth, financial independence on the part of the plaintiff is likely to reduce the stress arising from her ongoing parenting relationship with the defendant, which stress is so hard on the children.

- [196] While a move to PEI will require the children to leave behind their present neighbourhood and schools, something the trial judge sought to avoid, they are going to have to do that in any event. In fact, the neighbourhoods and schools of suburban Vancouver are likely to be stranger to them than those of Prince Edward Island, a place they have visited annually throughout their lives, where they have an established network of relatives whom they already know well.
- [197] While some of the activities in which the children have participated in the past will not be available to them in PEI, such as skiing, the reality is that they can no longer afford those activities in any event, as the defendant has pointed out. Otherwise, the quality of education and activities available to them in PEI will be at least as good as that available in suburban Vancouver.
- [198] It is, of course, true that "maximum contact with both parents is generally in the best interest of the child": Gordon at para. 25; Falvai v. Falvai, 2008 BCCA 503 at para. 22. This is, however, but one relevant factor in determining what the overall best interests of the children should dictate, and as the courts noted in both Gordon and Falvai, "considerable weight, or 'great respect', is given to the custodial parent's views for wanting to move with a child" (Falgai at para. 22; see also Gordon at para. 25).
- [199] In this case, the principle of maximum contact is the only factor that would weigh in favour of denying the mobility application. Keeping the family in Vancouver, however, has been a demonstrable failure. As I have indicated above, while Mr. G. has demonstrated that he is indeed a loving parent who has a deep bond with his children, he has also demonstrated an inability to distinguish between their best interests and his own, a resistance to accepting responsibility for his own actions, and an unhealthy tendency to take unwarranted offence in his relations with his former wife.
- [200] I have no difficulty in accepting the plaintiff's assurance that if permitted to move to Prince Edward Island she will do her best to promote access between the children and their father. The defendant does not believe this, but in my view he is blinded by his insistence on always assuming the worst.
- [201] In these circumstances, I conclude that the maximization of contact principle is outweighed by what I find to be the many positive effects of moving as discussed above (see, for instance, Carmichael v. Douglas, 2003 BCSC 611, Cousens v. Ruddy, 2002 BCSC 20, and M.J.S. v. L.S., 2001 BCSC 820, where similar conclusions were reached, although of course each case must depend on its own facts).
- [202] In opposing the move, the defendant relied on the decision of S.S.L. v. J.W.W., 2009 BCSC 924. There, the trial judge concluded that in the circumstances before him, it would not be in the children's best interests to move with their mother to Ontario and disrupt the close relationship with their father and their friends. That was a situation of joint custody. That decision was appealed, however, and the Court of Appeal's judgment was released after the argument in this case. The Court of Appeal considered that the trial judge had fallen into

"what is an easy error in difficult parental mobility cases, to prefer what is seen as the status quo ..." (2010 BCCA 55 at para. 12), which, the court noted, is "ephemeral in any family". A new trial was accordingly directed. In my view, the circumstances of that case were markedly different from those before me.

- [203] The defendant's submissions were full of references to the psychological and emotional harm that it was said the children will suffer from "the loss of the life-long relationship all four children have had with their father". I do not see it that way. The children are suffering psychological and emotional harm right now from the consequences of their parents' breakup. The extent to which further harm might occur as a result of the impact of the family's move on the children's relationship with their father is, in my view, largely in the hands of the defendant. There need be no loss of a life-long relationship. There will, however, be a change. The defendant can contribute to making this a very positive change, working to maximize the quality of his ongoing relationship with his children in the circumstances, or he can make things very difficult and unpleasant for them.
- [204] Mr. G. will be in a position to exercise meaningful access, both by visiting the children in PEI, and more importantly, by hosting them in Vancouver during holidays. If he is able to undertake this in an adult way, if he can demonstrate that he is capable of supporting his children in this move by helping them in their best interests to embrace it, instead of taking it as a personal slight and trying to turn them against it, then there is every reason to suppose that his relationship with them will be a loving, close and healthy one. Indeed, nothing is permanent. In the future, one or more of the children might in fact return west to live with him.
- [205] The flipside is that if he demonstrates the opposite, if he is unable to change his attitude, either with professional help or otherwise, then his fear of isolation from his family will likely become a self-fulfilling prophecy. For the sake of his children, it is to be hoped that he finds himself able to take the high road in preference to the low.

C. Prohibition of Further Applications

- [206] In applying for an order that the defendant be prohibited from bringing any further applications in this proceeding without leave of the court, the plaintiff relies upon s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, which provides as follows:

Vexatious proceedings

18. If, on application by any person, the court is satisfied that the person has habitually, persistently and without reasonable grounds, instituted a vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons, the court may, after hearing that person are giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court.

- [207] The plaintiff points out that the defendant has served numerous Notices of Motion following the trial, relating to such matters as contempt and reopening the trial, all of which required the plaintiff to incur the time and expense of preparation. With none of these did the defendant proceed. Others, the plaintiff argues, were brought and heard, but were utterly lacking in merit. The plaintiff points to the application for an order that I recuse myself.
- [208] The plaintiff further submits that costs have proven to be of no value in terms of either compensating the plaintiff or deterring the defendant. The defendant does not seem to be incurring any further legal expenses, having transferred his shares in his companies to his solicitor, and has no assets to satisfy an award of costs. The same is not true of the plaintiff, who must pay her counsel for all of this ongoing litigation. Moreover, the plaintiff points to the findings already made by Warren J. that the litigation was extended by the defendant's refusal to come to grips with issues in a timely fashion, and his by his failure of disclosure.
- [209] The plaintiff relied upon the principles discussed in *Re Lang Michener et al. v. Fabian et al.* (1987), 57 O.R. (2d) 353, 37 D.L.R. (4th) 685 (H.Ct.), as adopted and applied in cases such as *Koyama v. Leigh*, 2001 BCSC 164, and *Bryfogle v. School District No. 49*, 2007 BCSC 457 (appeal dismissed, 2009 BCCA 256).
- [210] The *Koyama* case, like this one, was a family law proceeding. There, the Honourable Mr. Justice Bauman (as he then was), began his judgment with the following observation: "This family litigation is out of control. The responsibility for that rests entirely with David Leigh [the respondent]." Mr. Justice Bauman granted a s. 18 order against Mr. Leigh restraining him from instituting any further legal proceedings against the petitioner (his former wife), her solicitor, and his own former solicitor.
- [211] As was noted there and in other cases, an order under s. 18 is a drastic measure, and a power to be exercised with great caution. While I have considerable sympathy for the plaintiff's position, I am not persuaded that this case justifies the exercise of such a power at this stage, particularly where I am making orders that significantly alter the existing circumstances. While I am concerned that the defendant's contempt applications may have been brought more for the purpose of harassment and oppression than the assertion of legitimate rights, the same cannot be said concerning his applications for variation of the support orders. And while his failure to pay the costs of unsuccessful proceedings is one factor to be considered, it is not determinative of the issue of whether his further applications should be considered vexatious.
- [212] In all of the circumstances, I decline to grant a s. 18 order at this time. The plaintiff's application in this regard is accordingly dismissed, with leave to the plaintiff to renew the application should circumstances warrant it.

CONCLUSION

[213] The following is a summary of my orders in this matter:

1. The orders of Warren J. for the payment of child and spousal support, including extraordinary expenses, are varied retroactive to September 1, 2008. From that point, the parties' incomes are set at \$150,000 for the defendant and \$27,584 for the plaintiff.
2. The amount to be paid by the defendant to the plaintiff for child support from and after September 1, 2008, is \$3,165 per month unless and until the plaintiff and the children move to Prince Edward Island, at which point the amount shall become \$2,952 per month.
3. The amount to be paid by the defendant to the plaintiff for the children's extraordinary expenses and for spousal support from September 1, 2008, and ongoing, remains to be finalized. The plaintiff is to file further materials in this regard as directed in paragraph 108 of these reasons by May 3, 2010. The defendant is to file his response by May 13, 2010, with the plaintiff's reply to be filed by May 18, 2010.
6. The defendant's application for an order cancelling the arrears of child and spousal support is dismissed. Those arrears are set as follows:

To December 1, 2007 (fixed at trial): \$115,950

December 1, 2007 - August 31, 2008: \$53,049

Total: \$168,999

September 1, 2008 - present: to be determined

plus pre- and post-judgment interest.

7. The plaintiff's application for an order finding the defendant in contempt of the trial orders of Warren J. is dismissed.
8. The plaintiff's mobility application is allowed. The plaintiff has leave to move with the four children of the marriage to Prince Edward Island.
9. The plaintiff's application for an order restraining the defendant from bringing further proceedings in this matter pursuant to s. 18 of the Supreme Court Act is dismissed, with leave to the plaintiff to renew that application should she determine that future circumstances warrant it.

[214] The parties are at liberty to speak to costs. In the hope that it may be of assistance and avoid unnecessary expense, I will state that my present view is that the costs of these applications should be awarded to the plaintiff on a party and party basis, to be assessed at Scale B (rather than the special costs requested). I say this notwithstanding that success has been divided. I continue to be of the view that apart from the mobility application, in which the plaintiff succeeded, most of this proceeding could have been avoided had the defendant been forthcoming and truthful, instead of ignoring his disclosure obligations to the point

where the plaintiff was justified in not trusting the information he gave. I would also apportion 75% of the claimable costs to matters arising from claims for child and spousal support.

[215] Apart from dealing with matters relating to this judgment, such as the finalization of spousal support and extraordinary expenses, costs and any necessary clarification, I will no longer be seized of these proceedings.

"GRAUER J."

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Prepared on 26 October 2026 · Esheria