
CANADA / JUDGMENT

E.B.G. v. S.M.B.

2015 BCSC 541

COURT

Supreme Court of British Columbia

DECIDED

13 April 2015

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2015 BCSC 541 E.B.G. v. S.M.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.B.G. v. S.M.B.,

2015 BCSC 541

Date: 20150413

Docket: 07-3121

Registry: Victoria

Between:

E.B.G.

Claimant

And

S.M.B.

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Claimant:

Kathryn A. Berge Q.C.

& Samantha J. de Wit

Counsel for the Respondent:

Robert C. Doell

& Michael S. Jakeman

Place and Date of Trial:

Victoria, B.C.

April 22-25;

June 23-25, 2014

Place and Date of Judgment:

Victoria, B.C.

April 13, 2015

INTRODUCTION

- [1] In this family law proceeding, the claimant, E.B.G., applies to vary the terms of the consent order pronounced by the Honourable Madam Justice Dorgan on January 14, 2010 (the "Consent Order"), relating to child support, spousal support and parenting arrangements for the two children of the marriage, M.S.B., born January 11, 1998, and A.B., born June 19, 2004.
- [2] The Consent Order incorporated the terms of a comprehensive agreement intended to resolve all outstanding differences between the parties, negotiated by the claimant and the respondent through their respective counsel. The claimant contends that material changes of circumstances since January 14, 2010 now justify extensive variations to the terms of the Consent Order.
- [3] The respondent, S.M.B., opposes the relief sought by the claimant. S.M.B. seeks an order dismissing E.B.G.'s claims and determining that the Consent Order continues in effect.
- [4] The claimant and the respondent were married on June 2, 1994, separated in August 2005 and were divorced by an order of this court made on July 23, 2009.
- [5] The claimant, who operates a home-based baking business and works part-time as a house cleaner and sales clerk, and the respondent, a commercial pilot, are each 47 years old.
- [6] The claimant and the respondent are both devoted to their son, M.S.B., who is now 17 years old, and to their daughter, A.B., a 10-year-old with special needs who requires 24-hour care.
- [7] The respondent remarried in 2011. S.M.B.'s spouse, M.P.S., and her three children all emigrated from Mexico, and reside with him in Victoria, British Columbia. The respondent's father and mother, S.B.B. and A.J.B., also live in Victoria, are attached to their grandchildren, and have provided some assistance with their care.

- [8] The central issues in this proceeding are whether there have been material changes in the circumstances of the children or the parties since January 14, 2010 that warrant any variation of the terms of the Consent Order concerning child support, spousal support or parenting arrangements, and if so, what variations are justified by any such change.

NATURE OF PROCEEDINGS AND EVIDENCE

- [9] At a Judicial Case Conference held on December 16, 2013, the Honourable Madam Justice Adair set this matter down for trial with deadlines for the filing and service of affidavit materials by the claimant and the respondent. Adair J. ordered that the affidavit material filed by each party would be their evidence in chief at trial, and that each party would have the opportunity to cross-examine on any affidavits filed, subject to the direction of the trial judge.
- [10] At the Trial Management Conference held on March 12, 2014, the Honourable Madam Justice Dorgan granted each party leave to bring an application to strike portions of the other party's affidavit material. Those applications came on for hearing before Dorgan J. on March 31, 2014. The court made an order by consent for the partial redaction of various affidavits filed on behalf of the claimant and the respondent. Madam Justice Dorgan's order further provided that at trial each party was free to object to the admissibility of un-redacted portions of the other party's affidavit material.
- [11] The claimant filed 18 affidavits in three volumes containing over 750 pages in total. For his part, the respondent answered with 14 affidavits, totalling 545 pages. The claimant and the respondent were each cross-examined on their affidavits. Two of E.B.G.'s deponents, Ms. Cara Sartorio, a caregiver for A.B. engaged by the claimant, and Ms. Linda Weiss, the claimant's accounting expert, also attended for cross-examination. The supporting witnesses for the respondent cross-examined on their affidavits were A.J.B. and M.P.S.
- [12] When this matter came on for trial, the claimant and the respondent each delivered written submissions identifying those portions of the opposing party's affidavit materials they contended were inadmissible, and the grounds for each objection.
- [13] Each party has objected to portions of the opposing party's affidavits on the grounds they constitute inadmissible argument, non-expert opinion evidence or hearsay. The parties have also identified portions of their opponent's affidavit materials which they submit are irrelevant or speculative. In addition, the respondent has objected to the irregular form of the claimant's affidavit number 6, which I address below.
- [14] Portions of affidavits may be expunged for hearsay, hearsay upon hearsay, irrelevance, inadmissible opinion, adjectival description, subjective descriptions of the deponent's reactions, opinions regarding motive, or argument: *C. (K.L.) v. C. (J.)*, 2000 BCSC 798 (B.C. Master) at para. 9; *Kennedy v. Kennedy*, 2006 BCSC 190 at paras. 3 - 7.

- [15] Here, portions of the affidavits filed on behalf of the claimant and the respondent incorporate these objectionable defects. A few examples from the affidavits of the claimant and the respondent will suffice:
- (a) "Given the Respondent's long-term aggressive campaign to best me financially in our legal proceedings, I believe he is artificially inflating his travel and accommodation expenses for the purpose of this support application."
 - (b) "After all of the countless investigations and trials of various options and my most passionate advocacy on A.B.'s behalf, it is my experience that the best and least costly option for the family, and society in general, is for me to have adequate child and spousal support and reasonable paid child care in the home when I need it for work while A.B. is not in school and the Respondent cannot personally take care of her."
 - (c) "The Claimant has refused to work sufficiently enough to uphold her financial responsibility and has relied mostly upon the agreed spousal support and support of her most recent live-in partners "
 - (d) "As can be seen, the Claimant has continual difficulty and needs extraordinary efforts in requiring other people to attend to our children while the claimant's free time and respite means are met."
 - (e) "The nurse said that the mother left orders not for me to see A.B."
- [16] Some of the objections made on behalf of the claimant and the respondent to non-expert opinion concern the views expressed by one or other parent regarding the parenting arrangements they believe would best serve the interests of the children. For example, the respondent objected to the following evidence of the claimant:

I also believe it is important that M.S.B. and A.B continue to stay together for the same days. They have a very strong bond between them and A.B. is much happier when M.S.B. is around.

- [17] In my view, the opinions of parents, based on their own observations, knowledge and experience of their children regarding the parenting arrangements they believe will best serve the interests of their children are generally not objectionable. In *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 49, McLachlin J., as she then was, for the majority, observed that "a court's inquiry into the best interests of the children does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect." Here, the parties are both custodial parents and both care deeply about the welfare of their children. If the court finds that the threshold for a variation is met, the court may consider the views of the parents, together with all of the other relevant and material evidence, in determining what variation of parenting arrangements is in the best interests of the children.

[18] I will now deal briefly with the objections raised by each party to the other's affidavit materials. I will identify those portions of the affidavits that I have determined to be inadmissible, on one or more of the grounds advanced by the parties in their respective written submissions.

[19] Turning first to the claimant's objections to the respondent's affidavits, the impugned portions of the following paragraphs of the respondent's affidavits are inadmissible argument, non-expert opinion, or hearsay:

Affidavit number 6 of respondent: paras. 39, 60, 84(a), 85(a), 92, 103, 108, 109, 110, 111, 112, 114, 119, 122, 125, 126, 127, 145, 146, 157, 161, 164, 179, 184, 185, 207, 213, 215, 220, 232, 233, 234, and 247;

Affidavit number 1 of M.P.S.: paras. 5, 12;

Affidavit number 1 of E.G.B.: para. 23;

Affidavit number 1 of Kali Garcia: para. 7;

Affidavit number 1 of George Konstantinov: paras. 21, 23 and 24;

Affidavit number 1 of Linda Birdsall: paras. 4, 7, 8, 10, 11, 15, 16, and 20.

[20] For his part, the respondent objects to the irregular form of the claimant's affidavit number 6. The claimant attached to that affidavit four schedules in which she outlined in numbered paragraphs facts concerning A.B.'s health and care requirements (Schedule A); problems with the Consent Order and agreement (Schedule B); examples of the respondent not providing reasonable notice of changes to the children's schedule (Schedule C); and "unilateral decisions by the respondent" (Schedule D). Each schedule is marked as an exhibit, and each has additional documents attached to it, marked as exhibits. In the body of her affidavit, the claimant has sworn to the truth of the facts set out in each schedule "on the same basis as if the facts had been incorporated into the body of this affidavit".

[21] Rule 10-4(2)(c) of the Supreme Court Family Rules provides that an affidavit must be divided into paragraphs numbered consecutively. The Rule requires that a deponent set out all of the facts in the body of the affidavit and swear or affirm the truth of those facts. The person before whom the affidavit is sworn or affirmed must identify each exhibit, and each page of the exhibits must be numbered sequentially.

[22] Schedules A through D of the claimant's affidavit number 6 set out additional facts which ought to have been included in the body of the affidavit. The result of marking each schedule as an exhibit, and then attaching various exhibits to each schedule is that there are exhibits to the exhibits.

[23] The claimant's affidavit number 6 contravenes the requirements of Rule 10-4. The practice adopted here of compartmentalizing portions of the deponent's evidence in separate schedules should not be followed.

[24] The court has discretion to permit the use of an affidavit that is defective as to form. Rule 10-4(14) provides:

With leave of the court, an affidavit may be used in evidence despite an irregularity in its form.

[25] The defect in the form of the claimant's affidavit number 6 could have been remedied by the claimant swearing an affidavit which incorporated in the main body of the affidavit all of the admissible portions of the claimant's evidence set out in Schedules A through D. Despite the irregularity as to form of the claimant's affidavit number 6, I have permitted it to be used in evidence in the interest of getting at the real substance of the dispute between these parties, subject to my ruling on the inadmissibility of portions of the affidavit.

[26] With respect to the claimant's affidavit number 6, the impugned portions of paras. 15 and 16.b are inadmissible argument and the provisions of paras. 19 and 29.b to which the respondent objects are inadmissible hearsay. Paragraph 30 contains inadmissible argument. The impugned portions of Schedule B, p. 97, paras. A.a, A.b and A.c are inadmissible hearsay and Schedule B, p. 99, para. C.c.i. is irrelevant.

[27] Turning to the claimant's affidavit number 7, the impugned portions of paragraphs 15, 17, 35, 36, 53, 60, 61, 66, 71, 88(a),(b) and (c) and 91 are inadmissible, either as argument, non-expert opinion, or hearsay.

[28] With respect to the claimant's affidavit number 8, the impugned portions of paragraphs 8 and 9 are, respectively, inadmissible hearsay and argument.

[29] The portion of paragraph 4 of the claimant's affidavit number 9 challenged by the respondent is inadmissible argument.

[30] By paragraph 13 of her affidavit number 10, the claimant purports to confirm the truth of certain statements contained in an unsworn affidavit of her former partner. The claimant's affidavit number 10 is tendered for use at trial. Under Rule 10-4(12), the affidavit may only state what the claimant would be permitted to state in evidence at trial. At paragraph 13, she purports to confirm the truth an unsworn out of court statement by her former partner. As such, paragraph 13 is inadmissible hearsay. Paragraph 17 is inadmissible as hearsay and paragraph 27 contains inadmissible non-expert opinion.

[31] I have disregarded those portions of the affidavit materials that are in the nature of argument, inadmissible non-expert opinion, hearsay, or are otherwise inadmissible or irrelevant to the matters in issue in this litigation.

BACKGROUND

History of Litigation

[32] Before turning to the Consent Order, it is necessary to briefly set out the history of this litigation.

- [33] On August 3, 2007, the claimant commenced these proceedings. The issues raised in her statement of claim included divorce, guardianship, custody, child and spousal support and the division of family assets.
- [34] The parties agreed to the equal division of family assets. During the marriage, the claimant and the respondent lived in Hong Kong and later Spain before they moved to Victoria in 2005. The parties acquired four properties in Hong Kong and Spain, which were sold in 2006 and 2007. The evidence of the total amount received by the claimant as her share of the net proceeds of sale of the four properties is unclear. However, the claimant has adduced evidence establishing that she received two payments in 2007 totalling about \$69,000. The claimant used those funds to buy a vehicle, to pay \$45,500 toward the purchase of the condominium where she now lives in Victoria, and to pay for repairs and renovations to that property. As I discuss below, the claimant later received additional payments from the respondent which she accepted in full and final settlement of her claim for the division of all assets, and for retroactive support to January 14, 2010.
- [35] In September 2007, the parties, who were each represented by counsel, made an interim support agreement. At the time, the respondent was employed by Dragonair, a Hong Kong based airline, and worked out of Manchester, England. The parties agreed that S.M.B.'s Guidelines income was \$225,000. That amount represented S.M.B.'s annual income, grossed up to take into account the fact that as a non-resident working overseas, the respondent was not required to pay Canadian income tax, and paid Hong Kong income tax at a lower rate. Based on the respondent's Guidelines income of \$225,000, and the claimant's Guidelines income of \$7,000, the parties agreed that S.M.B.'s monthly child support obligation, pursuant to the Federal Child Support Guidelines, SOR/97-175, as amended, was \$2,766, and that his monthly spousal support obligation was \$4,727.50, based on the mid-point under the Spousal Support Advisory Guidelines. By the interim support agreement, the parties agreed that the respondent would pay the claimant \$6,676 per month as child support and \$1 per month as spousal support. As the parties intended, the claimant benefitted by receiving her support payments tax free. The respondent also agreed to pay 100% of the children's special or extraordinary expenses.
- [36] In September 2008, the respondent transferred to Cathay Pacific, when that company acquired Dragonair. Although S.M.B.'s employment contract continued to be administered from Manchester, he was assigned to Cathay Pacific's New York base. As a result of his change in employment, S.M.B. was able to spend more time in Victoria.
- [37] With respect to spousal support and child support, the respondent requested changes to the September 7, 2007 interim agreement as a result of his 2008 change of employment. In March 2009, the respondent retained Ms. Andrea Duncan as his solicitor, to represent him in the negotiations with the claimant and her solicitor that ultimately culminated in the Consent Order. On March 10, 2009, Ms. Duncan wrote to the claimant's solicitor, Mr. Grant Smith, to advise that as a result of the respondent's change in employment he was available to spend approximately half of each month with the children, and that his increased time in

Canada also made him liable to pay income tax as a resident of Canada. On that basis, the respondent took the position that it was no longer possible for him to pay support at the level provided in the 2007 interim support agreement. He sought a variation of that agreement retroactive to January 2009, the date he asserted his residence for income tax purposes changed.

- [38] I find that from March 2009 through the making of the Consent Order, both parties negotiated on the basis that the respondent had become a resident of Canada for tax purposes, and would be liable to pay Canadian income tax in 2010.
- [39] The respondent also believed that the claimant was cohabiting with a new partner and wanted that individual's contribution to the claimant's household finances taken into account. The failure of the claimant or her new partner to provide that financial disclosure became a source of contention between the parties. The respondent also took the position that the claimant should be required to work towards achieving economic self-sufficiency.
- [40] At the Judicial Case Conference held on April 6, 2009, Metzger J. ordered that the parties have joint custody of the children.
- [41] On July 23, 2009, Macaulay J. granted the divorce and adjourned the remaining relief to July 30, 2009.
- [42] On July 30, 2009, based on Guidelines incomes of \$7,000 for the claimant and \$165,000 for the respondent, the Honourable Mr. Justice Punnett made an order by consent which provided for the respondent to pay the claimant monthly child support of \$2,244 and interim spousal support of \$2,000 per month. That order also provided for the respondent to pay the claimant \$2,750 in full and final settlement of all claims for special or extraordinary expenses previously incurred on behalf of the children, \$4,649 for the underpayment of spousal support between January and July 2009, and \$6,500 as an equalization payment for the division of family assets. The respondent paid the claimant all of the amounts due under the order of July 30, 2009.
- [43] All outstanding issues between the parties were referred to the trial list. The matter was set down for trial commencing January 11, 2010.
- [44] When the parties entered into the July 30, 2009 consent order, they agreed that the respondent's Guidelines income should be fixed in the amount of \$165,000. They did so after the respondent had disclosed, through correspondence from Ms. Duncan to the claimant's solicitor on May 7, 2009, that his annual salary inclusive of all allowances, was approximately \$200,000. In proposing a Guidelines income of \$165,000, the respondent maintained that his gross income should be reduced by one-twelfth to account for the fact that he would be without pay for one month in 2009. S.M.B. also proposed deduction of work-related travel and expense allowances totalling approximately \$8,500, and a further reduction of \$883 per month for 11 months to account for the fact that he was then paying tax in the United Kingdom. The claimant, with the benefit of legal advice, agreed to set the

respondent's Guidelines income in the amount of \$165,000. Based on that Guidelines income, the respondent agreed to pay basic child support to the claimant in the table amount of \$2,244 per month.

- [45] The parties based the claimant's Guidelines income of \$7000 on her income from her home baking enterprise. In light of unresolved issues about whether additional income should be imputed to the claimant due to underemployment, or whether the claimant was receiving financial support from a new partner, the parties agreed on interim spousal maintenance in the amount of \$2,000 per month commencing August 2009 and continuing until further order or agreement of the parties.

The January 14, 2010 Consent Order and Agreement

- [46] As the trial date approached, the parties and their solicitors continued their negotiations.
- [47] With the assistance of counsel, the parties negotiated the terms incorporated in the Consent Order to resolve all of their outstanding differences in this proceeding. The claimant and the respondent also signed an agreement made on January 14, 2010 (the "Agreement"), which they intended to be read with the Consent Order, and to serve as an aid to its interpretation.
- [48] The Agreement contained the following recitals:
- A. The parties are entering into a consent order in January, 2010 resolving all claims in their proceeding family law proceeding (File number 07 3121 issued out of the Victoria Registry of the Supreme Court of British Columbia) (the "Consent Order").
- B. Further clarification is required in relation to the terms of the Consent Order.
- C. The parties intend this Agreement to be read in conjunction with the Consent Order, and used:
- a. as an aid to interpreting the Consent Order; and
 - b. as an expression of their intentions when the Consent Order was entered.
- [49] The Consent Order imputed to the claimant an annual income of \$16,500 and set the respondent's Guidelines income at \$147,000 based on an exchange rate of 1.65 Canadian dollars per British pound, the currency in which the respondent was then paid.
- [50] The Consent Order provided for the parties to have joint guardianship of the children on a modified version of the Master Joyce model.
- [51] In the event that the parties were unable to agree on significant decisions relating to the health, education, religious instruction and general welfare of the children, paragraph 1(g) of the Consent Order provided they would "enlist the assistance of an agreed upon Parenting Coordinator (Trudi Brown Q.C.) to assist them in reaching an agreement."

[52] Paragraph 2 of the Consent Order provided that commencing in 2010 the children would spend not less than 160 days per year with the respondent. After the allocation of portions of that time to the respondent's scheduled vacation time, Easter and Christmas holidays, and other specified days throughout the year, sub-paragraphs 2(ix) through (xii) made the following provisions for the respondent's parenting time:

- ix. a minimum of 7 days of time with M.S.B. only each year, provided that the Plaintiff has the same number of one on one days with M.S.B. annually. These days may be scheduled during the Defendant's annual holidays or during regular days off, as the parties agree;
- x. the remainder of the Defendant's time will be spent with both the Children, on days off each month, to be determined as soon as possible after the Defendant gets his schedule, and in any event by the 20th of each month. In the event that there is any disagreement in relation to the allocation of days, the parties will seek the assistance of their parenting coordinator to resolve these issues.
- xi. Days spent by the Defendant with only one child shall count toward the 160 day minimum.
- xii. If the Defendant is away for training for periods in excess of two weeks then he shall have reasonable and generous access on the periods when he returns during training and his allotment of 160 days shall be reduced on pro rata basis based on the length of his training.

[53] With respect to child support, the Consent Order provided:

- 4. The Child support provisions in the order of Mr. Justice Punnett made on July 30, 2009 are hereby varied;
- 5. Subject to paragraph 11, the Defendant shall pay the Plaintiff support for the Children in the amount of \$1765 per month, which shall be paid on the first day of each month, commencing in February 1, 2010.
- 6. (1) Subject to paragraph 7 herein, any future special or extraordinary expenses shall only be incurred by agreement between the parties or by court order, and shall be shared by the parties in proportion to their incomes, with the Plaintiff to pay 10% and the Defendant to pay 90% all expenses.
(2) Each of parties shall contribute to the cost of the parenting coordinator in proportion to their incomes.

[54] Correspondence dated December 23, 2009 from Ms. Duncan to the claimant's solicitor sets out the basis upon which the parties agreed to fix the respondent's Guideline income in the amount of \$147,000, and the claimant's income in the amount of \$16,500 in the Consent Order:

Given that child support is paid in after tax dollars, and it is in our clients' mutual best interests to reduce their combined tax obligation, it is suggested that child support be reduced. As set out in [S.M.B.'s] most recent Financial Statement, his effective income is now approximately \$147,000.

The table amount payable based on that income is \$2,025 per month. We do not have [E.B.G.'s] updated Financial Statement. However, almost five years post-separation, it is certainly reasonable for income to be imputed to her at the equivalent of minimum wage, which in British Columbia is approximately \$16,500. The table amount of support based on that wage would be \$262. It is proposed that these two amounts be set off, and that [S.M.B.'s] child support be reduced to \$1,765 per month, plus 90% of agreed upon s. 7 expenses.

[55] Based on shared parenting of the two children for no less than 160 days per year, and the parties' respective Guidelines incomes of \$147,000 and \$16,500, the claimant and the respondent agreed that S.M.B. would pay monthly child support of \$1,765 per month.

[56] The Consent Order also addressed arrangements for A.B.'s care intended to assist the claimant in earning a living:

7. If A.B. requires care to enable the Plaintiff to be able to be available to earn a living, attend training or employment related education:
 - a. The Plaintiff will first seek the assistance of the Defendant to provide the required care (which will not be considered additional access to the Defendant);
 - b. The Plaintiff will secondly seek the assistance of extended family to provide the required care;
 - c. If neither of the above options is available, third party care will be provided for A.B. by an agreed upon caregiver; and
 - d. The Defendant will pay the cost of that care.
 - e. If the Parties are unable to agree to the level of third party care required for A.B. so the Plaintiff is fully able to be gainfully employed then the Parenting Coordinator will decide the level of care the Defendant is required to pay for A.B.

[57] By paragraph 7 of the Agreement, the parties agreed:

7. The parties will agree on alternate caregivers for A.B. as soon as possible, and in any event within three months of the date of this Agreement. They will revisit this not less than once per year thereafter, or as needed.

[58] By the Consent Order and para. 7 of the Agreement, the parties intended that the claimant would have sufficient assistance with A.B.'s care to enable her to earn a living or attend employment-related training or education. Before engaging a third-party caregiver, the claimant was required to first seek the assistance of the respondent. If the respondent was not available, the parties intended she would then seek the assistance of the respondent's extended family. At the time the parties entered into the Consent Order, they contemplated that the members of the respondent's extended family who would provide care for A.B. would be her grandparents, A.J.B. and S.B.B.

- [59] No provision of the Consent Order precluded the claimant from contacting A.J.B. and S.B.B. directly when she sought their assistance. Bearing in mind that the times when the claimant would most likely require that assistance were when the respondent was working as a commercial pilot away from Victoria, I interpret s. 7(b) of the Consent Order to mean that the claimant would communicate directly with the respondent's parents when she sought their assistance.
- [60] If neither the respondent nor his parents were available, then third-party care was to be provided by an agreed upon caregiver, at the respondent's cost. Paragraph 7 of the Agreement required the parties to agree on alternate caregivers for A.B. "as soon as possible, and in any event, within three months of the date of this Agreement". The agreement incorporated in the Consent Order contemplated that both parties would agree on the selection of third-party caregivers and that if A.B. required work-related care when neither the respondent nor his parents were available, the claimant would be able to use the agreed caregiver, with the respondent paying the cost of that care. The parties also intended that any disagreement concerning the level of third-party care required for A.B. to enable the claimant to be "fully able to be gainfully employed" would be resolved by the parenting coordinator.
- [61] Regarding spousal support, the Consent Order provided:
8. Subject to paragraph 11, the Defendant shall pay the Plaintiff spousal maintenance as follows:
 - a. He shall pay \$3,700 per month on the first day of each month, commencing on February 1, 2010, and continuing until December, 2011 inclusive;
 - b. He shall pay \$2,700 per month on the first day of each month, commencing on January 1, 2012, and continuing until December 2012 inclusive;
 - c. He shall pay \$1,500 per month on the first day of each month, commencing on January 1, 2013, and continuing until December 2013 inclusive;
 - d. In the event that the Plaintiff is in a relationship with [a named individual] or another relationship of at least two years duration as of December 2013 spousal support shall terminate as of December 31, 2013. If neither of those conditions are met then the Defendant will pay the Plaintiff \$1,500 per month spousal support from January 2014 until December 2014 inclusive;
 - e. Subject to paragraphs 9 and 10 herein, there shall be no spousal support payable after December 2014, regardless of any change in the parties' circumstances, however unforeseen or radical.

[Emphasis added.]

- [62] By paragraphs 2 and 3 of the Agreement, the claimant and the respondent agreed that \$42,000 of the monies characterized as spousal support in the Consent Order were in fact paid in full and final settlement of E.B.G.'s claims for retroactive support and division of all assets:
2. The amount of \$42,000 (represented as \$1,200 per month of spousal support for thirty five months in the Consent Order) is represented as spousal maintenance for tax purposes only. The parties agree that it in fact represents full and final settlement of E.B.G.'s claims for retroactive support and division of all assets. This amount:
 - a. is not subject to variation based on a change of circumstances;
 - b. will be excluded from any assessment of what S.M.B. has paid E.B.G. if there is a variation or review of spousal maintenance;
 3. In the event that S.M.B. is more than 15 days in default on any payment required toward the \$42,000 retroactive/property division payment as set out in the Consent Order, the entire balance remaining shall immediately become due and payable.
- [63] Paragraph 9 of the Consent Order provided that in the event that S.M.B. failed to pay the entire costs of A.B.'s additional care pursuant to paragraph 7 and the claimant's employment income or prospects were adversely affected, the amount of child support would be increased by the costs of the caregiver and would be fully enforceable against S.M.B., with interest as applied by the Family Maintenance Enforcement Program.
- [64] Under paragraph 10, if the claimant remarried prior to December 2012, spousal support would be reduced to \$1,200 per month, payable on the first day of each month after her remarriage until December 2012. If the claimant remarried after December 2012, and prior to December 2014, the respondent's obligation to pay spousal support would terminate immediately.
- [65] Neither of those events occurred.
- [66] Paragraph 11 provided for the annual adjustment of the support payable by the respondent:
11. The parties will review the exchange rate by January 15 annually, commencing in January 2011, for the year 2010, and shall adjust the amount of support payable by the Defendant as follows:
 - a. The parties will refer to the annual average rates published on the Bank of Canada website, to determine the annual exchange rate for the preceding year;
 - b. The Defendant's child support obligation shall be adjusted effective February 1 annually (commencing in 2011) by a percentage equal to the percentage change in the exchange rate for the prevailing rate when child support was last set.
- [67] By para. 13, all other claims made by either party were dismissed.

- [68] Aside from the annual adjustment of S.M.B.'s child support obligation to take into account changes in the exchange rate between the English pound and the Canadian dollar, the Consent Order contained no provision for review of its terms, and in particular, no provision for the annual adjustment of child support to reflect changes in the respondent's Guidelines income.
- [69] While the claimant signed an agreement to retain Ms. Trudi Brown, Q.C. as the parenting coordinator designated in the Consent Order, the respondent never did so. Despite having agreed to the appointment of the parenting coordinator, S.M.B. concluded that the cost of her services was not justified, particularly when he would have to bear 90% of those costs. Ms. Brown's services were limited to some initial discussions and a recommendation that the parties use Google calendar as a means of sharing information concerning their schedules and arrangements for the children's care. The parenting coordinator's services terminated by July 2010. The parties did not engage another parenting coordinator.
- [70] The Consent Order provided for the parenting coordinator to assist the parties in reaching agreement on significant decisions affecting the children and to resolve disputes concerning the level of A.B.'s third-party care for which the respondent was required to pay in order to enable the claimant to work. The failure of the parties to engage the parenting coordinator left them with no mechanism for resolving those disputes, other than by litigation.
- [71] Other relevant terms of the Agreement are as follows:
1. This Agreement shall be presented in the event that either party seeks to review or vary any portion of their Consent Order.
 8. S.M.B. will provide E.B.G. with his monthly work schedule forthwith upon his receipt thereof. E.B.G. will also keep S.M.B. at all times informed of her work schedule.
 14. If S.M.B. is away from Victoria for period of in excess of 30 days E.B.G. shall ensure that Children have reasonable contact with the paternal grandparents during the period of S.M.B.'s absence, with such contact to include visits not less than once every two weeks.
- [72] Ms. Duncan has sworn an affidavit in which she describes the various factors which the parties took into consideration during the negotiations leading to the Consent Order and Agreement. Ms. Duncan's evidence is largely uncontested and supports the following findings of fact:
- (a) One objective of the parties was to define how they would share parenting of the two children. The factors which complicated the negotiations, and which the parties took into account included the respondent's work schedule as a commercial airline pilot who spent considerable time away from Victoria; uncertainties about the claimant's work schedule as she endeavoured to become more self-sufficient; the differing needs of M.S.B. and A.B. and A.B.'s enrollment in full-time kindergarten classes in September 2009; the need for some third party care for A.B. by trained caregivers and the role of the respondent's parents in assisting with the care of A.B.

- (b) Because the respondent's schedule varied from month to month, the parties negotiated a parenting time schedule based on the respondent having the children not less than 160 days per year, and which permitted flexibility in the scheduling of his parenting time with the children.
- (c) By the time that the parties negotiated the Consent Order, some arrangements were already in place to assist the claimant in coping with her parenting responsibilities while she endeavoured to earn income. The respondent's parenting time with the children had increased. Both children were attending school from 9:00 a.m. to 3:00 p.m., although A.B.'s medical conditions resulted in absences from time to time, often on short notice. The respondent's parents assisted with A.B.'s care approximately one day a week. The claimant was able to take advantage of respite care for A.B. one weekend per month. The claimant also had some third party care for A.B.
- (d) Both parties anticipated that the claimant would increase her income after A.B. entered kindergarten full-time in September 2009 by developing her home-baking business and pursuing other employment opportunities.
- (e) The parties and counsel discussed the continued participation of the respondent's parents in the children's care. They agreed that the respondent's parents would continue to assist with the care of both the children. The respondent's parents were willing to do so.
- (f) Determining the respondent's income was complicated by a number of factors. S.M.B. continued to be paid in pounds sterling after his assignment to Cathay Pacific's New York base and was not taxed at source. The respondent had also recently changed employers; there was no current tax return and no full year of income since his change of employer on which to base support calculations.
- (g) By the time the parties entered into the Consent Order, the claimant had received spousal support in varying amounts from the respondent since the separation in August 2005. The amounts paid by S.M.B. to the claimant for her support before the September 2007 interim agreement are not in evidence.
- (h) The Consent Order was the product of extensive negotiations between the parties and their respective solicitors.

RELIEF SOUGHT

- [73] By her Amended Notices of Application filed January 14, 2014, the claimant applied for a review, or alternatively, variation of the child support and spousal support provisions of the Consent Order, and for variation of custody and parenting arrangements. In her review application, the claimant also sought a declaration that the contract between the parties concerning spousal and child support contained in the Consent Order and Agreement was void or voidable from mistake or misrepresentation concerning the respondent's status as a Canadian tax payer. On the commencement of the trial, the review application was

adjourned generally. This matter proceeded as a variation application pursuant to s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

- [74] The claimant seeks extensive variations to the Consent Order, including an order continuing spousal support beyond December 31, 2014 in such amount and for such duration as the court determines; an order increasing ongoing child support to the sum of \$2,462.50 per month, or such other amount as the court determines, and orders for retroactive child and spousal support for the years 2010 through 2014. In addition, E.B.G. applies for an order pursuant to s. 25 of the Federal Child Support Guidelines requiring the claimant and the respondent to exchange income tax returns, notices of assessment and re-assessment, and business or corporate financial statements annually. The claimant also applies for an order for the cancellation of the appointment of Trudy Brown Q.C. as parenting coordinator, or alternatively, an order for her replacement.
- [75] With respect to custody, access and parenting arrangements, the claimant applies pursuant to s. 17(1)(b) of the Divorce Act to vary the joint custody order pronounced by Metzger J. on April 6, 2009 so as to maintain joint custody of the children, but to provide that A.B.'s primary residence is with the claimant. In addition, E.B.G. applies for an order that in the event the parties are unable to reach agreement regarding any major decision concerning the children, the claimant will have the right to make the decision and the respondent will have the right under s. 45(1) of the Family Law Act, S.B.C. 2011, c. 25 to apply to the court for a review of any decision he considers to be contrary to the best interests of the children.
- [76] In response to S.M.B.'s announcement of his new plan to work as a commercial pilot trainer overseas in alternate months, and to remain in Victoria every second month, the claimant proposes that paragraph 2(a) of the January 14, 2010 Consent Order be varied to redefine the respondent's parenting time as comprising the first and third weeks of each alternate month that he is in Victoria. The claimant also seeks orders deleting and replacing the provisions of the Consent Order concerning the children's travel and A.B.'s care during the claimant's parenting times.
- [77] Regarding A.B.'s care when the claimant is at work, E.B.G. seeks variations that would enable her to make all care arrangements necessary when the respondent is not available to look after A.B. The claimant proposes that the respondent pay \$600 per month as his proportionate share of anticipated special and extraordinary expenses for third-party care of A.B. during the claimant's parenting time. Finally, the claimant proposes that the Consent Order be varied by defining certain special and extraordinary expenses for each of the children to be proportionally shared between the parties according to their respective Guidelines incomes.
- [78] The respondent contends that there has been no material change of circumstances that would warrant any of the variations sought by the claimant. Further, S.M.B. submits that no variation is required to accommodate his plan to work overseas in alternating months. The respondent says that members of his extended family are available to assist the claimant

with A.B.'s care when she is at work during the months he is away. The respondent says that when the parties made the Consent Order and agreement, they contemplated that his schedule as an international commercial pilot would vary, and therefore agreed on terms for his parenting time that are sufficiently flexible to permit shared parenting of A.B. by the claimant and the respondent on his proposed month on/month off alternating schedule.

- [79] The respondent submits that his Guidelines income was set in the Consent Order at \$147,000 following extensive negotiations between the parties, who were both represented by counsel. By providing that no spousal support would be payable after December 2014, regardless of any change in the parties' circumstances, the Consent Order was intended to be final. The respondent contends that the claimant failed to take advantage of the child care available to her from his extended family and made no effort to find employment until January 2012. The respondent says the Court should not interfere with the bargain made by the parties with respect to time-limited spousal support.
- [80] Regarding child support, as I understand his submission, the respondent maintains that the claimant has not established any material change in his Guidelines income from the amount stated in the Consent Order, and accordingly no variation is warranted.

DISCUSSION AND ANALYSIS

Applicable Legal Principles

- [81] Section 17(1) of the Divorce Act confers jurisdiction on the court to vary a support or custody order.
- [82] The factors for the court's consideration on an application to vary child support are set out in s. 17(4):
- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
- [83] The relevant provisions of s. 14 of the Federal Child Support Guidelines are as follows:
14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
- (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; .

[84] With respect to the variation of an order for spousal support, s. 17(4.1) provides:

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[85] If an applicant establishes a change of circumstances warranting the variation of a spousal support order, then the court must consider all of the objectives set out in s. 17(7):

(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[86] The factors for variation of a custody order are found in s. 17(5):

- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.

[87] Section 17(9) requires the court, in varying a custody order, to give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child.

[88] The threshold test for variation is whether there has been a material change in circumstances since the making of the prior order. The party seeking a variation bears the onus of establishing such a change.

[89] In *Willick v. Willick*, [1994] 3 S.C.R. 670, which dealt with a variation of a child support order, Sopinka J. at p. 688 described a material change of circumstances as "a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation." This threshold test applies whether or not, as

here, the order incorporates an agreement of the parties: *L.M.P. v. L.S.*, [2011] 3 S.C.R. 775 at para. 44.

- [90] A material change must have some degree of continuity. Other factors which may assist the court in determining whether a change is material include the subsequent conduct of the parties, which may indicate whether they consider the particular change to be material: *L.M.P.* at para. 35.
- [91] A material change must be "substantial, unforeseen, and of a continuing nature": *Carter v. Carter*, (1991), 58 B.C.L.R. (2d) 45 (B.C.C.A.).
- [92] In *L.M.P.* at paras. 36 to 42, *Abella and Rothstein JJ.*, for the majority of the Court, discussed the weight and effect to be given to an agreement incorporated in the order sought to be varied:
- [36] The threshold variation question is the same whether or not a spousal support order incorporates an agreement: Has a material change of circumstances occurred since the making of the order? (See *Willick; G. (L.); Leskun v. Leskun*, 2006 SCC25, [2006] 1 S.C.R. 920.)
- [37] This does not mean that the incorporated agreement is irrelevant. As *Sopinka J.* observed in *Willick*, "Where the agreement is embodied in the judgment of the court, it is necessary to consider what additional effect is to be accorded to this fact" (p. 687)
- [38] The agreement may address future circumstances and predetermine who will bear the risk of any changes that might occur. And it may well specifically provide that a contemplated future event will or will not amount to a material change.
- [39] Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the *Willick* question may well be found in the terms of the order itself. That is, the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the *Willick* inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the Divorce Act when the order was made.
- [40] Alternatively, an agreement incorporated into an order may include a general provision stating that it is subject to variation upon a material change of circumstances, such as the agreement and subsequent order in *Hickey v. Hickey*, [1999] 2 S.C.R. 518. In such a case, the

agreement incorporated into the s. 15.2 order does not expressly give the court any additional information as to whether a particular change would have resulted in different terms if known at the time of that order. The presence of such a provision will require a court to examine the terms of the s. 15.2 order and the circumstances of the parties at the time that order was entered into to determine what amounts to a material change.

- [41] Finally, an agreement incorporated into a s. 15.2 order may simply include a general term providing that it is final, or finality may be necessarily implied. But even where an agreement incorporated into an order includes a term providing that it is final, the court's jurisdiction under s. 17 cannot be ousted (Miglin; G. (L.); Leskun). A provision indicating that the order is final merely states the obvious: the order of the court is final subject to s. 17 of the Divorce Act. Courts will always apply the Willick inquiry to determine if a material change of circumstances exists.
- [42] Ultimately, courts are tasked with determining if a material change of circumstances has occurred so as to justify a variation of a s. 15.2 order under s. 17. The analysis is always grounded in the actual circumstances of the parties and the terms of the s. 15.2 order; what meaning a court will give any general statement of finality found in an order will be a question to be resolved on that basis. As we have explained, in some situations, the agreement incorporated into the order may help shape what is meant by a "material change of circumstances". Where a s. 15.2 order deals with a specific change, it assists courts by answering the Willick inquiry through its terms. Conversely, when the order is general, or simply purports to be final, these less specific terms provide less assistance to courts in answering the Willick inquiry. Sometimes, in such cases, the circumstances of the parties may be such that courts will give little weight to a general statement of finality and conclude that a material change exists. However, at other times, in such cases, the circumstances of the parties may also be such that the courts will give effect to a general statement of finality and conclude that a material change does not exist.
- [93] In determining whether there has been a material change in circumstances since the making of the original order, the court focuses on the actual circumstances of the parties at the time the order was made. The original order is assumed to be correct, and is not to be departed from lightly: Willick at 687; L.M.P. at para. 33. Where the court finds a material change, it then limits itself to making only the variation justified by that change: L.M.P. at para. 47.
- [94] In *Gordon v. Goertz*, [1996] 2 S.C.R. 27, McLachlin J. (as she then was), discussed the threshold requirement of material change on an application to vary custody or access at para. 12:

What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 1991 CanLII 839 (BC SC), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the

circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

[95] Before considering the merits of an application to vary a custody order, the court must be satisfied of:

1. a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child;
2. which materially affects the child; and
3. which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order: Gordon at para. 13.

[96] McLachlin J. summarized the applicable legal principles in Gordon at para. 49:

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 a 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 interest 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.

The Circumstances of the Claimant and the Respondent

[97] The claimant was born and raised in Spain. Her first and second languages are Swedish and Spanish. She is also proficient in English and speaks some German. The claimant has little post-secondary education. After completing one year at a tourism college in Spain, she was employed, until 1994, as a flight attendant.

[98] When the parties married in 1994, the claimant had just left her employment as a flight attendant for Gulf Air, an airline operating out of Bahrain. The respondent was employed as a pilot for one of Air Canada's regional carriers. Anticipating that she and the respondent would be living in Canada, the claimant secured a position as a flight attendant with Air Canada. However, before she commenced her employment with Air Canada the respondent

was offered a position with Dragonair in Hong Kong. The parties decided to move to Hong Kong to enable the respondent to pursue employment with Dragonair. As a result, the claimant gave up her opportunity for employment with Air Canada.

- [99] From 1996 to 2001, the claimant and the respondent resided in Hong Kong. In 1996, the claimant found employment as a facial therapist at a spa in Hong Kong. She resigned from that position when she became pregnant in 1997 and did not work outside the home again until two years after the birth of M.S.B. in January 1998. In February 2000, the claimant sought and obtained employment with Oregon Scientific as a translator of documents from English to Spanish. The claimant resigned from that position eight months later when the respondent accepted a new position with Dragonair flying cargo out of Manchester, England. When the respondent obtained that position, the parties relocated to Malaga in Spain in 2001.
- [100] After the birth of A.B. in June 2004, the parties decided to move from Spain to Victoria to take advantage of the medical care that would be available to her in Canada, and the assistance and support of the respondent's extended family. The claimant, the respondent and the children moved to Victoria in July 2005. The parties separated in August 2005.
- [101] The claimant's parents reside in Europe. Since her move to Canada, E.B.G. has not had the support or assistance of any member of her extended family in caring for the children.
- [102] After the claimant and the respondent moved from Spain to Canada in 2005, the claimant obtained her permanent residence card on November 7, 2007 and then found casual employment at a baking school, where she worked until January 1, 2009. The claimant then began a home-based baking business which she was operating at the time of the Consent Order and which she hoped would provide her with an income while permitting her the flexibility to care for the children. However, she has not yet earned a profit from the business. The claimant devotes between 13 and 18 hours a week to her baking enterprise. She recognizes that the business, which has consistently operated at loss, has not been a success. At the time of trial, she was contemplating shutting down her baking business.
- [103] In February 2012, the claimant obtained employment as a retail salesclerk at a women's clothing boutique. Her shifts range from four to six hours during the week to seven to eight hours on weekends. The claimant works at the boutique between 12 to 16 hours per week during the school year and 18 to 22 hours per week over the summer months. Her current wage is \$14 per hour. The claimant's gross earnings from the boutique average between to \$500 to \$600 per month.
- [104] The claimant also works as a housecleaner at an hourly rate of \$20. At the time of trial, she was working eight hours per month for a monthly gross income from cleaning of about \$160.
- [105] At the time of trial, the claimant was working approximately 34 hours per week and earning pre-tax income averaging about \$800 per month.

- [106] When the parties entered into the Consent Order, the claimant hoped that her home-based baking enterprise would enable her to become economically self-sufficient. Both she and the respondent anticipated that with assistance from S.M.B. and his parents in caring for A.B., the claimant would be able to acquire further training and take advantage of additional job opportunities. However, the claimant had not made any specific plans about the type of work she might obtain.
- [107] Throughout the marriage, and since its breakdown, the respondent has worked as a commercial pilot. From 1995 to 2001, he flew out of Hong Kong for Dragonair. The parties moved to Malaga in 2001, after S.M.B. was transferred to Dragonair's Manchester base.
- [108] A.B. was born in Malaga in July, 2004. At birth, she suffered from pulmonary hypertension, was kept alive on a respirator, and spent the first month of her life in the hospital's intensive care unit. The respondent took three and half months off work, initially to urge the medical staff to do everything possible to ensure A.B.'s survival, and later to assist with A.B.'s care.
- [109] After the parties and the children moved to Victoria, British Columbia in 2005, the respondent continued his career with Dragonair, commuting from Victoria to Manchester.
- [110] In July 2008, the respondent transferred to Cathay Pacific Airlines. He was assigned to that airline's New York base until June 2011.
- [111] In April 2011, S.M.B. requested a transfer on compassionate grounds to Cathay Pacific's Vancouver base, to assist him in meeting his responsibilities for A.B.'s care. His employer was unable to accommodate that request.
- [112] From June 2011 until September 2013, the respondent was based out of Hong Kong. He commuted there from Victoria, usually twice a month, for his assigned flights. The respondent found it increasingly challenging to meet both the demands of his employment as a commercial airline pilot and his commitment to care for A.B. up to 160 days each year while working in a position that required an intercontinental commute.
- [113] Effective September 30, 2013, S.M.B. resigned from Cathay Pacific. The respondent incorporated his own company, through which he provides commercial pilot training services as a contractor. When he resigned from Cathay Pacific, the respondent informed the claimant that commencing January 2014, he anticipated that he would be working away from Victoria every second month and proposed that the claimant and the respondent share parenting of the children on a month on/month off basis.

The Children

- [114] M.S.B. is a healthy 17-year-old who, at the time of trial, was enrolled in Grade 11 at his local high school. He is a capable student and a particularly talented soccer player. M.S.B. has a close bond with his sister.

- [115] A.B. requires constant care for her special needs. Following her birth, she was diagnosed with a genetic syndrome that resulted in both physical and cognitive developmental disabilities. A.B. is not able to speak and has limited mobility. She is unable to eat without assistance and obtains much of her nutrition through a gastronomy feeding tube or "G-tube". Her caregivers must have particular knowledge and training about the use and functioning of the G-tube. A.B. also suffers from gastrointestinal problems, and requires constant monitoring of her bowel movements.
- [116] A.B. has also been diagnosed with a chromosomal anomaly causing developmental delay and neurological effects, including spastic paraplegia. She has suffered from multiple seizures and has undergone various operations, including two heart surgeries and a gastroenterostomy to provide access to her stomach for feeding.
- [117] A.B. has experienced some improvement to her mobility. She is able to stand independently using a walker and is able to walk with assistance.
- [118] Since September 2009, A.B. has attended the Victor School, a school for special needs children, where she receives support from educational assistants, occupational therapists, physiotherapists and speech therapists. During the school term, A.B. attends from 9am to 3pm, Monday through Friday. She also attends the Victoria Conservatory of Music for an hour of music therapy each week and participates in weekly horseback riding as part of her occupational therapy.
- [119] In 2012, A.B. began a gradual introduction to her local elementary school, where, with the assistance of an educational assistant, she attends a regular education program several times per month.
- [120] A.B. requires assistance with all aspects of her personal care. She sleeps poorly, often waking as many as six times during the night. When she wakes, she requires comforting before she returns to sleep.
- [121] As a result of A.B.'s fragile health and multiple medical conditions, the claimant has devoted much of her time and energy since A.B.'s birth to her care. The claimant has also borne the primary responsibility for arranging for and taking A.B. to her appointments with doctors, therapists, dieticians, and educational assistants. I accept that the respondent has attended many of A.B.'s medical appointments, and has taken a keen interest in her welfare and education, both at home and through his participation in the Victor School Parents Advisory Council. The respondent has also championed A.B.'s use of a walker to increase her mobility. However, the respondent's work has frequently taken him away from Victoria. I find that the claimant has taken the lead role in arranging medical and therapeutic care that A.B. requires, and in monitoring her health and diet.

- [122] On various occasions, the claimant has had to cancel work shifts when A.B. was ill or had to be taken to the hospital for a medical emergency. One such occasion occurred on April 16, 2013 when the claimant cancelled work in order to take A.B. to the emergency ward for treatment to an infection of her G-tube stoma, the hole in her stomach to which her feeding tube is connected.
- [123] A.B. will require full-time care throughout her life.
- [124] The Ministry of Children and Family Development provides the claimant with a subsidy of \$448 per month for daytime respite care for A.B. That amount funds about 8.5 hours per week of respite care. In addition, the Ministry pays for overnight care one weekend per month from 3:00 p.m. on Friday afternoon to 9:00 a.m. Monday at Mimi's House, a pediatric respite care facility. The claimant also receives \$300 from Community Options Victoria, which covers 23 hours of respite care for A.B. each summer. The Ministry and Community Options Victoria provide funding for respite care for the purpose of enabling parents of special needs children to have a break from their roles as caregivers and to attend to other personal and family needs. Funding for respite care is not intended to be used to pay for a child's care while the parent is at work.
- [125] The claimant has deposed that she uses the majority of the respite care funding she receives from the Province to cover costs of third-party care while she is at work. She says that costs for third-party care over and above the funding provided by the Ministry average \$200 to \$250 per month during the summer and \$80 per day when A.B. is home from school due to illness or professional development days. The claimant estimates that if she were using all of the respite funding for its intended purpose, her costs for work-related, third-party care would average approximately \$600 per month.
- [126] The claimant's principal care provider at the time of trial was Ms. Cara Sartorio. She usually worked four days per week for the claimant for three hours a day providing after school care between 3:00 and 6:00 p.m. Ms. Sartorio has deposed that for much of that time E.G.B. is at home and uses the time for cooking, running errands or cleaning.
- [127] The claimant usually works a 9:30 a.m. to 2:00 p.m. shift at the boutique during the week so that she is available to take A.B. home after school and be home with her for the balance of the day.
- [128] Ms. Sartorio's evidence, which I accept, indicates that the claimant actually uses much of the funding she receives for respite care for its intended purpose, rather than to pay for third-party care while she is at work. The claimant has not established on a balance of probabilities that her costs of work-related third party care would average \$600 per month. The cost of that care is likely to vary significantly from month to month, depending on the availability of the respondent or members of his family to assist with A.B.'s care, and the hours worked by the claimant.

- [129] The question of when the respondent must pay for third-party care for A.B. is a significant source of conflict between the parties. The respondent maintains that E.B.G. should only have recourse to third-party care when neither he, nor members of his family are available. He understands that the Consent Order and agreement require him to pay for third-party care when the claimant is away from her home at work, and neither he nor his family are available to care for A.B. The respondent submits that he should not have to pay for additional respite care when the claimant is at home. From 2010 through to the time of trial, the respondent refused to pay amounts totalling \$2,916 claimed by E.B.G. as special or extraordinary expenses for A.B.'s childcare, on the ground that he was not satisfied those expenses were work-related and properly incurred under the Consent Order.
- [130] In her affidavit number 7 sworn September 20, 2013 but not filed until April 15, 2014, the claimant swore that she also expected to receive six months' funding from the Ministry for once weekly, overnight respite care for A.B. She did not state in her subsequent affidavits whether she received that assistance, or whether she used that funding for respite care.

Claimant's and Respondent's Financial Circumstances at time of Consent Order and time of Trial

The Claimant

- [131] By her financial statement sworn April 6, 2009, the claimant declared annual employment income of \$7,000. The claimant listed monthly expenses totalling \$7510.21. Those expenses included mortgage payments of \$1,936.48, strata fees of \$207.49, \$781 per month for respite care, and an unexplained entry of \$1,000 per month for "furnishings and equipment". Her assets consisted of her condominium, valued at \$379,000, a 2004 Hyundai vehicle valued at \$8,000 and a MacKenzie Financial account valued at \$7,330.74, for a total of \$394,330.74. The claimant's debts totalled \$374,568.88, consisting of the mortgage on the condominium in the amount of \$364,743, and an additional \$9,825 of unsecured credit card debt.
- [132] Before the parties negotiated the agreement incorporated in the Consent Order on January 14, 2010, the claimant's principal sources of income were the \$2,244 in child support and \$2,000 in interim spousal support she received each month from the respondent pursuant to the consent order of Punnett J. pronounced July 30, 2009. In short, the claimant had little equity in her home, no significant financial reserves, was endeavouring to build her home-baking business while caring for the children, and depended upon financial support from the respondent.
- [133] In her 2013 T1 General Tax Return, the claimant declared line 150 total income of \$25,697.06. Her 2013 employment income from the boutique totalled \$8,603.66. The claimant declared a net loss of \$906.60 on her home-baking business. The balance of her line 150 income consisted of spousal support payments in the amount of \$18,000 paid by the respondent pursuant to the Consent Order.

- [134] In her most recent financial statement, sworn December 16, 2013, the claimant reported monthly expenses totalling \$5,348.37 including mortgage payments of \$1,469.54, strata fees of \$344.14 and property taxes of \$151.25. I find that all of the monthly expenses claimed in the December 16, 2013 financial statement are reasonable. At the time of trial, the claimant was not paying property taxes because she did not have the funds available to do so.
- [135] The claimant's assets consisted of her condominium, valued at \$416,000 and a 2012 Dodge Caravan van adapted for A.B.'s special needs, and provided to her by the Province, valued at \$38,000. The claimant had no savings and no pension or RRSP funds. Her secured debts consisted of the mortgage charging her condominium in the amount of \$345,223.19 and District of Saanich property taxes in the amount of \$2,074.83. In addition, the claimant owed unsecured credit card debt totalling \$9,978.32. While the claimant had equity of approximately \$70,000 in her condominium, her employment income had not increased significantly since January 2010, she had no savings, and economic self-sufficiency remained an elusive goal.

The Respondent

- [136] Shortly before the parties entered into the Consent Order, the respondent swore a financial statement on December 7, 2009 by which he disclosed employment income of \$174,928. At that time, S.M.B. was employed by Cathay Pacific and was assigned to its New York base. After deduction of \$4,000 for union and professional dues and \$24,000 for travel to and from work, the respondent reported a Guidelines income of \$146,928. The respondent listed monthly expenses totalling \$10,651. Those expenses included \$3,000 a month for income tax, although the jurisdiction in which the tax was payable is not identified in this financial statement.
- [137] With respect to assets, the respondent valued his residence at \$572,000 and a 2008 Nissan vehicle at \$26,000. His only financial asset of any value was a Hong Kong bank account with \$2,000 on deposit. The respondent listed the value of his pension plan as "unknown".
- [138] The respondent's debts consisted of the Coast Capital mortgage charging his residence in the amount of \$450,000, and unsecured debt of \$20,000. At the time the parties entered into the Consent Order, the respondent had equity of approximately \$122,000 in his home but held no financial assets of any significant value.
- [139] By his most recent Form 8 financial statement, sworn June 18, 2014, the respondent estimated his annual Guidelines income for 2014 in the amount of \$130,853.53. Because 2014 was the first year of operation for the respondent's new company, he was only able to provide a projection of his anticipated self-employment income for that year.
- [140] In addition to his obligations to the claimant, M.S.B. and A.B., the respondent now also supports his new wife and her three children. In Part 2 of his financial statement, the respondent lists monthly expenses of \$19,821.65, and total annual expenses of \$237,859.80. Those expenses include \$1,902 for income tax, \$3,000 for mortgage payments, \$1,500 for

food, and \$3,194 for child and spousal support payments. The expenses claimed, which also include \$906 for meals outside the home, \$500 a month for vacations, and \$350 a month for personal clothing, reveal that the respondent continues to enjoy a standard of living substantially higher than the lifestyle the claimant is able to provide to the children while they are in her care.

- [141] In his June 2014 financial statement the respondent lists the value of his home as \$575,000. He owns a Ford SUV valued at \$38,900. With respect to financial assets, when S.M.B. swore his financial statement he had cash totalling approximately \$7,500 in two bank accounts, but had overdrawn his HSBC Canada chequing account in the amount of \$20,429. The respondent held RRSPs and pensions totalling \$32,524.77. The total value of his assets was \$633,476.82.
- [142] The respondent's secured debts, as listed in his June 2014 financial statement, consisted of his HSBC mortgage with an outstanding balance of \$400,519.15 and a second mortgage, in the amount of \$52,902.92 granted to his solicitors to secure their fees and disbursements for this litigation.
- [143] In addition, the respondent's unsecured debt had increased from \$20,000 in December 2009 to almost \$146,000 in June 2014. The value of the respondent's assets exceeded his debts by only \$34,000. The respondent's HSBC Premier line of credit was almost fully extended. At the time of trial, the respondent had drawn down \$101,500 on that account, against an authorized credit limit of \$104,756. I find that by the time of trial, the respondent relied upon his lines of credit and credit card debt to finance a significant portion of his living expenses.

Variation of Custody and Parenting Arrangements

Has the claimant established that a variation of the terms of the Consent Order relating to parenting arrangements is justified?

- [144] The claimant has identified three significant changes which she submits meet the threshold for a variation of custody and parenting arrangements.
- [145] First, the claimant says that the respondent's new venture, by which he plans to provide training to commercial pilots at locations outside Canada in alternate months, will fundamentally affect A.B.'s care. Second, the claimant says that the inability of the parties to co-parent as contemplated by the Consent Order constitutes a material change of circumstances. The third material change alleged by the claimant is the failure of the arrangements set out in the Consent Order for the respondent's extended family to assist with A.B.'s care.

The respondent's new business and month on/month off schedule

- [146] The respondent proposes that he and the claimant share parenting of A.B. on an alternating month on/month off schedule. The claimant contends that the respondent's proposal fails to recognize A.B.'s needs, and her level of development, and that it is contrary to her interests that she be separated from the claimant for lengthy periods. Further, by the time of trial, M.S.B., at age 16, had chosen to live most of the time with his mother. The claimant says that it would be contrary to the interests of both M.S.B. and A.B. to separate them in alternate months.
- [147] The respondent disclosed his new business venture in the fall of 2013. He announced his plan to work away from Victoria in alternating months, commencing in January 2014. However, apart from four days away in each of January and March, S.M.B. remained in Victoria for the first six months of 2014. By the time the trial concluded S.M.B. had not implemented his new schedule, but still professed his intention to do so.
- [148] S.M.B.'s plan to provide flight training services abroad for a month at a time in alternating months and to accommodate his new work by shared parenting with the claimant on a month on /month off basis would significantly change the parenting arrangements in effect since the parties made the Consent Order. As a commercial pilot flying international routes, the respondent was typically away from Victoria twice each month for periods of up to six days. During his time in Victoria, the respondent shared in the care of the children but generally did not have A.B. in his care for more than six or seven consecutive nights. Occasionally, the respondent has cared for the children for longer periods, ranging from 10 consecutive days at his home to up to 21 days when his parenting time has included vacation time with both children.
- [149] During 2014, the parties shared A.B.'s care, on a week on/week off schedule while M.S.B. lived almost full-time with the claimant.
- [150] In my view, the respondent's proposal for month on/month off parenting would fundamentally alter the ability of the parents to meet A.B.'s needs, and as such, constitutes a material change of circumstances. While I have no doubt that S.M.B. is devoted to his daughter and is capable of providing her with much of the care she requires, she is accustomed to and benefits from regular and frequent parenting time with her mother. Further, the claimant monitors A.B.'s health and therapies, and requires regular and frequent parenting time with A,B. in order to do so effectively.

Inability of parties to co-parent

- [151] The claimant asserts that the inability of the parties to co-parent as contemplated by the Consent Order constitutes a second material change. The claimant maintains that the difficulties the parties have encountered became more pronounced after she gave notice on December 28, 2012 that she was seeking a review of spousal and child support. E.B.G. asserts that the respondent has made unilateral decisions concerning the children, has

breached paragraph 8 of the Agreement by failing to provide her with copies of his work schedule, has been less than candid about his whereabouts, and has, on occasion, concealed his presence in Victoria.

- [152] The claimant says that the respondent did not disclose to her that he was in Singapore during his six weeks of training for his new position in October and November 2013 until he delivered his affidavit number 6 on December 31, 2013.
- [153] At paragraph 243 of his affidavit number 6, S.M.B. swore that at the four-way meeting of the parties and their counsel on August 14, 2013, he advised the claimant that he would be away for training in Singapore until approximately November 22, 2013. The claimant did not dispute that evidence in her affidavit number 10 filed January 15, 2014, by which she replied in detail to the respondent's affidavit evidence. I accept the respondent's evidence on this point.
- [154] The respondent's departure for six weeks' training abroad was a significant event affecting the parties' child care arrangements. It is most consistent with the probabilities of the situation that at the meeting of the parties and their respective counsel, S.M.B. would discuss both the time he would be away for training and where the training would take place.
- [155] E.B.G. asserts that at the time she entered into the Consent Order and agreement, she relied on the respondent's assurance that he, with the support of his family, would cooperatively co-parent their children. She maintains that the parties' inability to effectively communicate about the children is a significant and unforeseen change in circumstances.
- [156] Neither party has fully complied with the parenting provisions of the Consent Order and Agreement. While he was employed as a commercial airline pilot, the respondent, contrary to paragraph 8 of the Agreement, rather than providing the claimant with his monthly work schedule, provided her with the dates when he maintained he was available to care for the children in Victoria. The claimant has established that there were occasions when the respondent was in Victoria and available to assist with the care of the children on days other than those he had listed from month to month. For example, in August 2013, the claimant, after declining a shift at the boutique in order to take A.B. to a medical appointment on a day when she thought the respondent had left Victoria for Hong Kong, learned that S.M.B. was still in Victoria. For his part, the respondent says he delayed his return to Hong Kong for medical reasons, and that the claimant, contrary to the Consent Order, had not informed him of A.B.'s medical appointment. The respondent was unaware the claimant required care for A.B., and received no request for assistance. In my view, this is an example of the failure of both parties to keep each other informed of their respective work schedules and changes to those schedules.

- [157] I have no doubt that on occasion changes on short notice to the respondent's schedule and travel delays on his return from Hong Kong to Victoria have resulted in the claimant having to cancel work, and in disruptions to the parties' child care arrangements.
- [158] For her part, the claimant thought it was unnecessary to consult with the respondent before she engaged caregivers for A.B., notwithstanding paragraph 7(c) of the Consent Order, which calls for the provision of third-party care to A.B. "by an agreed upon caregiver". Further, paragraph 7 of the Agreement requires the parties to agree on alternate caregivers for A.B. as soon as possible, and in any event, within three months of the date of the Agreement, and to revisit the matter not less than once per year thereafter, or as needed. When the claimant unilaterally selected caregivers for A.B., she did so in breach of paragraph 7 of the Consent Order.
- [159] The claimant's failure to keep the respondent informed of her work schedule, contrary to paragraph 8 of the Agreement, exacerbated the dispute between the parties over the respondent's obligation to pay for third party care. Prompt and regular disclosure of her work schedule would have provided a ready means of verifying when the claimant required third party care for A.B. to enable her to work.
- [160] The parties have also had difficulty in communicating about significant decisions affecting their son. M.S.B. is an exceptionally talented soccer player who has the potential to play professionally. In the spring of 2013, after one of his soccer coaches had raised the possibility of M.S.B. attending a soccer academy in Italy, the respondent and the claimant began to discuss that opportunity. The claimant made some inquiries about another soccer school in Spain. Between July 25 and August 2, 2013, the respondent took M.S.B. to Italy to visit the soccer academy.
- [161] While the claimant knew in advance that the respondent and M.S.B. would be visiting the school, she was understandably surprised and concerned when, upon his return, M.S.B., who was then 15 years old, announced that he would be attending the Italian school starting in September 2013. The respondent took the position that the claimant should make her own inquiries about the Italian soccer school and that she should waive all child support for M.S.B. in order to enable the respondent to pay for M.S.B.'s tuition and travel. The claimant says she was concerned about M.S.B. attending a school she knew little about in a foreign country. She also thought he was too young to spend a year abroad. When the respondent indicated that he intended to renew M.S.B.'s Spanish passport and to send him to the school in Italy despite her concerns, she placed M.S.B.'s expired passport with her lawyers for safekeeping and notified the Spanish consulate that the child's passport was not to be renewed without her consent.
- [162] Ultimately, the parties and their counsel met to discuss M.S.B.'s attendance at the Italian soccer academy. They decided he would not go to Italy for the 2013 - 2014 school year, but that they would keep open the possibility of his attending in the future. The respondent was not able to pay the fees for the soccer academy unless the claimant waived payment of child

support for M.S.B., which she was not prepared to do. In addition, without more information about the school and its program, the claimant was not prepared to consent to M.S.B.'s attendance. M.S.B. returned from Italy believing that he would be attending the soccer academy. He was undoubtedly disappointed to learn that he would not immediately have that opportunity.

- [163] The dispute over M.S.B.'s attendance at the Italian soccer school resulted from the failure of the parties to clearly communicate with each other on an important matter affecting M.S.B.'s education. However, in my view, the difficulties that the claimant and the respondent have encountered in some of their communications concerning the care of the children do not constitute a material change of circumstances that has either altered the children's needs, or the ability of the parties to meet those needs. The inability of the claimant and the respondent to consistently co-parent the children effectively and without rancour is a product of conflict which has persisted from before the making of the Consent Order and Agreement and has been exacerbated by the failure, at times, of each party to comply with the Consent Order. The claimant has not established that the parties' inability, at times, to co-parent in the manner required by the Consent Order and Agreement constitutes a material change of circumstances that would support a variation of custody or parenting arrangements.

Failure of extended family care for A.B.

- [164] The third significant change alleged by the claimant is the failure of the arrangements set out in the Consent Order for the respondent's extended family to assist with A.B.'s care. The claimant says that while the Consent Order and Agreement contemplated that the respondent's parents would be available to provide back-up care for A.B., they are often unavailable to the claimant when she requires assistance, have aged and can no longer readily lift and carry A.B. The claimant submits that it is unrealistic to expect that the respondent's parents will be available to assist with A.B.'s care when she needs them.
- [165] The respondent now proposes that his new spouse, M.P.S. and her 20-year-old daughter, V., will also assist with A.B.'s care. While V. is prepared to do so, she is a full-time student and holds a part-time job. Her availability is limited to weekends and some Tuesdays.
- [166] The claimant submits that M.P.S. is unsuited to A.B.'s care. At trial, M.P.S. admitted that when S.M.B. is away, she does all of the driving, and that she drives A.B. while caring for her. M.P.S. acknowledged that she drove A.B. without a valid British Columbia driver's licence, and after having failed her British Columbia driver's test. The claimant is understandably concerned that M.P.S. has acted irresponsibly in transporting A.B. without a valid British Columbia driver's licence, and while she is uninsured.

- [167] The claimant says that the respondent has insisted that she may only have recourse to third-party care after she has contacted him and he has determined that neither he nor any members of his extended family are available. E.B.G. says this is impractical, particularly when the respondent is working abroad and may be difficult to contact, and is also disruptive to both her and A.B.
- [168] In order to enable E.B.G. to work when he is not available to care for A.B., the respondent proposes that his parents, his wife M.P.S., and her daughter V., would all assist. The respondent says that if the claimant provides her work schedule two weeks in advance, members of his extended family could generally arrange to be available to assist with A.B.'s care. The respondent has a strong preference for A.B. to be cared for by members of his extended family. In cross-examination, the respondent confirmed that he was prepared to pay for third-party care when necessary, but thought that he and the claimant should jointly decide who would provide that care and when it was needed.
- [169] On week days, the claimant frequently opens the boutique at 9:30 a.m. and works a 10:00 a.m. to 2:00 p.m. shift. When she does so, she is able to care for A.B. after school. The respondent proposes that if the claimant is working an afternoon shift, then A.B. would be transported by the Victor School's bus service to either his or his parents' home where members of his family would look after A.B. until the claimant picked her up after work.
- [170] In cross-examination, the respondent agreed that the claimant and M.P.S. have had their differences and "don't really interact a lot". I find that the claimant distrusts M.P.S. and is reluctant to have her involved in A.B.'s care.
- [171] On the other hand, the claimant recognizes that the respondent's parents are devoted to their grandchildren, believes A.B. loves her grandparents and acknowledges that A.J.B., in particular, takes care of A.B.'s dietary and other personal needs. A.J.B. who is 70 years old, testified that she and S.B.B., who is now 74, are prepared to help with A.B.'s care for as long as they are able to do so. At the time the parties made the Consent Order and agreement, the respondent's parents regularly cared for A.B. about once per week. Since then, they have continued to assist with A.B.'s care, although usually during the respondent's parenting time, rather than when A.B. is in the care of her mother. A.J.B. testified that she had recovered from a recent minor heart problem and that both she and S.B.B. were in good health at the time of trial. While A.J.B. can lift and carry A.B. for a short distance, she relies on her husband to lift A.B.'s wheelchair into and out of the trunk of their vehicle.
- [172] A.J.B. testified that if E.B.G. were working mornings, she and S.B.B. could come to the claimant's home, pick up A.B. and take her either to their home or to her school. However, she expressed a preference that the claimant bring A.B. to her grandparents' home, and pick her up there at the end of her work day. The Ministry of Children and Family Development has provided the claimant with a van equipped with a wheelchair ramp to facilitate A.B.'s transportation. The claimant has suggested that she and the respondent's parents trade vehicles on occasions when she works and they assist with A.B.'s care. The

respondent and A.J.B. are prepared to take up this offer.

- [173] In cross-examination, A.J.B. was asked to estimate the amount of time that she and S.B.B. could realistically devote to A.B.'s care when the claimant was working. She responded that from her perspective probably three days a week maximum would be best, preferably from noon to 8:30 p.m. A.J.B. also thought that she and S.B.B. could look after A.B. for up to 10 hours a day, if necessary.
- [174] On some occasions when the claimant has requested A.J.B.'s assistance, she has not been available. For example, on April 15, 2013, when A.B. was in the claimant's care and the respondent was away flying out of Hong Kong, E.B.G. asked A.J.B. if she could take A.B. to the Victoria General Hospital the following day. The claimant was scheduled to work that day and did not want to cancel her shift. A.J.B. had conflicting commitments and was not able, on short notice, to transport A.B. In the result, the claimant cancelled her shift at the boutique in order to drive A.B. to the hospital.
- [175] Conversely, on several occasions during the spring and summer of 2013, A.J.B. and S.B.B. assisted with A.B.'s care on short notice. On May 29, 2013, the claimant was scheduled to pick up both children from the respondent, and to have them in her care. She failed to do so. The respondent has sworn that the claimant informed him later that day that she was on the way to Tofino and would be returning in two days. E.B.G. does not contest that evidence. The respondent's parents assisted him with the care of both children overnight. On this occasion, it was the respondent who had to cancel work in order to care for the children during the claimant's absence.
- [176] On June 24, 2013, the respondent's parents transported A.B. to and from school, and on August 18, 2013 they picked up A.B. and cared for her while the claimant attended a hospital appointment.
- [177] In cross-examination, A.J.B. said that if necessary, she or S.B.B. were willing to come over to the claimant's home in the mornings to get A.B. ready for school or to take her home in the evenings and put her to bed. I accept that the respondent's parents are prepared to assist with A.B.'s care to the extent that they can. However, they are aging, have their own commitments and activities, and have never previously had A.B. in their care to the extent now proposed by the respondent. It is unlikely they would be available more than three days a week at best, or that they would regularly attend at the claimant's home for early morning pick-ups of A. B. when they have never done so in the past. A.J.B. has also expressed a preference to care for A.B. in the afternoons. While the respondent's parents will no doubt be available to provide some care to A.B. when the claimant is working, the claimant will also require the assistance of third-party caregivers on a regular basis, particularly if she finds full-time employment outside the home.
- [178] I find that members of the respondent's extended family have not been available to provide care for A.B. to the extent contemplated by the parties when they entered into the Consent Order. The failure of the arrangements for the provision of care for A.B. to enable the

claimant to work constitutes a material change of circumstances. When the claimant and the respondent entered into the Consent Order, they anticipated that S.M.B. or his parents would be available on a regular basis to assist with A.B.'s care when the claimant was scheduled to work. That has not proven to be the case. Further, if the respondent is away from Victoria in alternate months, the claimant's dependence on third-party caregivers will likely increase.

- [179] I have also found that the respondent's month on/month off schedule is a material change of circumstances affecting the care of A.B. At the time the parties entered into the Consent Order, A.B. was five years old. Her medical condition was complex, and at times precarious. While the parties contemplated and made provision for the possibility that the respondent might occasionally be away for 30 days or more for his own flight training, they did not contemplate they would each have A.B. in their care for a month at a time in alternating months. Since 2005, the respondent's work as an international commercial pilot required him to be away from Victoria for a few days at a time, typically twice a month. Had the claimant known in January 2010 that the respondent intended to use the flexible terms of his parenting time under the Consent Order to implement a month on/month off shared parenting arrangement, it is most unlikely that she would have agreed to those terms.
- [180] Having found material changes of circumstances I must now embark on a fresh enquiry into the best interests of the child, taking into account A.B.'s needs and circumstances and the ability of each parent to meet those needs. I start by making no presumption in favour of either parent. Here, the views of each parent, where both are engaged in the care of A.B. and share her custody, are entitled to considerable respect. However, the court is concerned only with the best interests of the child, rather than the interests or rights of either parent.
- [181] Each parent loves A.B. deeply, and has demonstrated that they are capable of caring for her. Each has much to contribute to A.B.'s care and well-being.
- [182] A.B.'s medical condition continues to be complex. Her health and diet continue to require close and consistent monitoring.
- [183] Although A.B. is now 10 years old, her cognitive development is delayed. At the time of trial she had the benefit of consistent and frequent contact with each parent under the week on week off parenting arrangements then in effect. It is important that she continue to have the maximum contact with each parent that is consistent with her best interests.
- [184] I have found that the claimant takes the lead role in monitoring A.B.'s health. As a 10-year-old child with multiple and complex special needs, it is in A.B.'s best interests that she continues to have regular care from her mother without lengthy interruptions to that care. Further, if and when the respondent works away from Victoria for a month at a time, as a practical matter, it will be the claimant who will be responsible for arranging A.B.'s medical appointments and overseeing her diet as A.B.'s primary care provider.

- [185] In light of the respondent's plan to work away from Victoria for a month at a time in alternating months, it is in A.B.'s best interest that her mother, as her primary care provider, also has her principal residence.
- [186] The parties will continue to have joint custody of A.B., however the order of Metzger J., pronounced April 6, 2009 will be varied to provide that A.B.'s principal residence will be with the claimant.
- [187] M.S.B. was 16 years old at the time of trial and had made his own choice to reside primarily with his mother. He is now of an age where he will make his own choices concerning living arrangements with his parents.
- [188] The claimant and the respondent will continue to have joint custody of M.S.B., who will make his own decisions about when he resides with the claimant or the respondent.
- [189] Paragraph 2(a) of the Consent Order will be varied to provide that the respondent will have parenting time with A.B. during those alternate full weeks when the respondent is in Victoria and is available to care for her personally.
- [190] The respondent will have such additional parenting time with A.B. as may be agreed between the parties.
- [191] The Consent Order will also be varied to provide that the claimant will have parenting time with the children except during the respondent's defined parenting time, which, when the respondent is working his month on/month off schedule, will be determined according to the following:
- i. during the respondent's month off from work every second month the respondent will have parenting time with A.B. on the first and third full weeks of that alternating month, subject to the following;
 - ii. the first week of the respondent's parenting time pursuant to this order will commence on Monday, April 20, 2015, or otherwise as may be agreed between the parties, and will end one week later, and continue thereafter on alternating weeks every second month;
 - iii. A.B.'s transitions between the parties' homes will take place on Mondays at 7:00 p.m. at the beginning of the respondent's parenting time if A.B. is not in school, or after school on Mondays if they are attending school. The respondent's parenting time will end at 7:00 p.m. one week later if A.B. is not in school, or at the commencement of the school day if she is in school;
 - iv. in order to exercise his parenting time, the respondent must be in Victoria to personally care for A.B.;
 - v. the respondent or a designated member of his family holding a valid British Columbia driver's license will be responsible for picking A.B. up from the claimant's residence or A.B.'s school at the commencement of his parenting time;

- vi. unless she is working, the claimant will be responsible for picking up A.B. from the respondent's residence or her school at the end of the respondent's parenting time. If the claimant is working, the respondent will be responsible for picking up A.B. at school and transporting her back to the respondent's residence;
- vii. the respondent is entitled to a separate period of a minimum of seven days alone with M.S.B. each year, with the claimant providing care for A.B. during this period. These periods may be scheduled during the respondent's annual holiday or regular days off, as the parties may agree;
- viii. each party will forthwith upon receipt, provide the other with an e-mailed copy of his or her work schedule on the first day of each month and the 15th day of each month;
- ix. each party will keep the other advised in a timely fashion regarding his or her absences from Victoria for any reason and contact information, including dates of travel, telephone number, e-mail and location of where the party is staying during their absence.

[192] The respondent will continue to have parenting time with the children on the days and times specified in paras. 2(a)(i) through (viii) of the Consent Order.

[193] The claimant also seeks a variation of paragraph 2(b)(viii) of the Consent Order. Under that provision, the claimant and the respondent are each entitled to a minimum of seven days of time with M.S.B. only each year, with the respondent's exclusive time with M.S.B. to be scheduled during annual holidays or during regular days off, as the parties agree.

[194] The claimant proposes that the existing provision be deleted and replaced with a new order providing that the claimant and the respondent will each be entitled to two separate periods of a minimum of seven days each of individual parenting time with M.S.B. each year.

[195] The claimant has not shown any material change of circumstances that would warrant this variation of the Consent Order. M.S.B. is now 17, and as a practical matter, will have a say in when, and for how long he stays with each parent. Further, despite their disagreement over M.S.B.'s attendance at the Italian soccer academy, since the Consent Order came into force the parties have by and large successfully negotiated their respective parenting times with M.S.B. The proposed variation of exclusive parenting time with M.S.B. is neither necessary nor justified.

[196] Paragraph 2 of the Consent Order will be varied by the addition of the following term:

2(c) The parties may agree in writing to amendments to their respective parenting times.

[197] Since January 14, 2010 the parties have adjusted their parenting times with the children from time to time to accommodate changes in their schedules. This variation ensures they retain that flexibility in the future.

A.B.'s care during the claimant's parenting times

[198] Paragraph 7 of the Consent Order will be deleted and replaced with the following:

7. If A.B. requires care to enable the claimant to be available to earn a living, attend training or employment-related education ("A.B.'s employment care"), the following will apply:
 - (a) the claimant will first seek the assistance of the respondent to provide A.B.'s employment care (which will not be considered additional access to the respondent);
 - (b) on the 15th day of each month the claimant will request the respondent's commitment to provide A.B.'s employment care in the following month, provided he can do so personally during the claimant's scheduled parenting time;
 - (c) the respondent will respond to the claimant's request for A.B.'s employment care within 48 hours of the request being made and will ensure that the care is provided, including A.B.'s transportation to and from the claimant's residence at the designated hours;
 - (d) if the respondent is not available to provide A.B.'s employment care or does not respond to a request from the complainant within 48 hours of the request being made by her, the claimant will seek the assistance of the respondent's extended family to provide the required care;
 - (e) if neither the respondent nor members of his extended family are available to provide A.B.'s employment care the claimant will ensure third-party care for A.B. by an agreed upon care provider (third-party care);
 - (f) the cost of third-party care incurred by the claimant for A.B.'s employment care constitutes a special and extraordinary expense which the parties will share in proportion to their respective incomes;
 - (g) the claimant will use any respite allowance that she receives from government agencies for A.B.'s care for respite care for herself.

[199] To be clear, under paragraph 7 of the Consent Order as varied, the claimant will first seek the assistance of the respondent for A.B.'s employment care. If the respondent is not available, the claimant will then contact members of the respondent's extended family directly for assistance. The claimant is under no obligation to seek the assistance of M.P.S. while she is without a valid British Columbia driver's license. If neither the respondent nor members of his extended family are available to assist with A.B.'s employment care, the claimant will engage a third party care provider to provide A.B.'s employment care. That care provider will be one agreed upon by the parties under paragraph 7 of the Agreement, which remains in effect.

Deletion or replacement of Parenting Coordinator

[200] The claimant applies for an order deleting paragraph 1.g of the Consent Order, which provides for the parties to use the services of Ms. Trudy Brown, Q.C., as their agreed parenting coordinator to assist them in reaching agreement on significant decisions

concerning the children. The claimant submits that provision should be replaced with an order under sections 45(1) and 47(1) of the Family Law Act allocating to her the responsibility to make those decisions, subject to the respondent's right to apply to the court for a review if he believes a decision is contrary to the children's best interests. Alternatively, the claimant seeks an order for the replacement of the parenting coordinator.

- [201] The claimant argues that as a result of the respondent's failure to sign the retainer agreement for the parenting coordinator designated in the Consent Order, the parties have been left without any decision-making mechanism to assist them in resolving their differences concerning the best interests of the children. E.B.G. submits that she, as the primary care parent, should have the preliminary decision-making authority, subject to the respondent's right to apply to the court for a review. The claimant says this variation of the Consent Order will serve the children's best interests by reducing uncertainty and conflict and by ensuring that an effective decision-making mechanism is in place, particularly when the respondent is away from Victoria for a month at a time.
- [202] The respondent opposes this variation. He submits that the Court should order the appointment of an alternate parenting coordinator. The respondent also contends that the claimant ought not to be allocated decision-making authority when she has demonstrated she either fails to understand the terms of the Consent Order, or has breached its terms - for example by unilaterally selecting A.B.'s third party care providers.
- [203] When the parties entered into the Consent Order, they and the Court contemplated that they would have the assistance of a parenting coordinator in reaching agreements on major decisions affecting the children, and on such matters as the level of third party care for A.B. required to enable the claimant to work. Without the parenting coordinator, the differences between the parties concerning third party care for A.B. became a continuing source of conflict. The parties would also have benefited from the assistance of a parenting coordinator in resolving their dispute concerning M.S.B.'s attendance at an international soccer academy.
- [204] The failed appointment of the parties' agreed parenting coordinator was a significant, continuing and unforeseen change of circumstances that warrants a variation of paragraph 1.g of the Consent Order.
- [205] The respondent now takes the position that the parties would be assisted by a parenting coordinator and urges the Court to direct the appointment of a replacement parenting coordinator. One factor I must take into consideration is that the parties were left without the benefit of the assistance of their designated parenting coordinator as a result of the respondent's unwillingness to pay for her services. I also bear in mind that for four years the parties took no steps to appoint a replacement parenting coordinator. Given the claimant's modest income and all of the existing demands on the respondent's finances, the costs of the parenting coordinator could be a significant burden for both parties. The Consent Order provides for each party to contribute to the cost of the parenting

coordinator in proportion to their incomes. The discrepancy between the parties' incomes is such that the respondent would bear most of the cost of a replacement parenting coordinator's services.

[206] On the side of the ledger, the appointment of a replacement parenting coordinator would provide the parties with the timely assistance of an expert in family dispute resolution. That assistance is likely to reduce the conflict between these parties. Further, the allocation of preliminary decision-making authority to one parent on all major decisions affecting the children, subject to the right of the other to apply to the court for a review, is likely a recipe for further litigation, particularly in circumstances where each party has disregarded the Consent Order in the past. The early intervention of the parenting coordinator would assist the parties in reaching agreement on decisions affecting the children before disputes escalate to the point of impasse and litigation. Both parties recognize the need for some means of resolving their differences on important matters affecting the children. I accept the representation of the respondent, through his counsel, that he is now prepared to engage a parenting coordinator. While the claimant would prefer that she be granted preliminary decision-making authority, she has applied, in the alternative, for a replacement parenting coordinator.

[207] Taking into account all of these considerations, I conclude that, on balance, it is in the best interests of the children, and particularly A.B., that the parties have the assistance of a parenting coordinator to help them in reaching agreement on major decisions concerning the children, and thereby reducing the level of conflict between the parents.

[208] In *Fleetwood v. Percival*, 2014 BCCA 502, the Court of Appeal discussed the provisions of the FLA concerning parenting coordination agreements and orders.

[209] Section 224(1)(a) of the FLA provides that a court may make an order to require the parties to participate in family dispute resolution. Under s. 1, "Family Dispute Resolution" includes the services of a parenting coordinator.

[210] Section 15(2) of the FLA provides:

15 (1) In this Division, "parenting coordination agreement or order" means a written agreement or an order to use a parenting coordinator.

(2) A parenting coordinator may assist only

(a) if there is a parenting coordination agreement or order in place, and

(b) for the purpose of implementing an agreement or order respecting parenting arrangements, contact with a child or other prescribed matters.

[211] In *Fleetwood*, Groberman J.A., with Neilson J.A. concurring, observed at para. 52:

As I read the statute, it is not intended that courts will order parties to enter into agreements to engage parental coordinators. Rather, parental coordinators are to be put in place either by court order or by agreement.

[212] Here, the Court is not making an original order requiring the parties to enter into an agreement to engage a parenting coordinator. Rather, the Court is varying a Consent Order by which the parties have already agreed to use parenting coordination as their preferred means of dispute resolution. An order that the parties engage a replacement parenting coordinator will give effect to the method of dispute resolution they selected when they entered into the Consent Order.

[213] Paragraph 1.g of the Consent Order will be varied as follows:

In the event that the parties are unable to reach an agreement relating to the significant decisions referred to in paragraph (f), they will enlist the assistance of an agreed upon parenting coordinator to assist them in reaching an agreement. The parties will forthwith retain a member in good standing of the Roster of the British Columbia Parenting Coordinators' Roster Society as parenting coordinator for a minimum term of 12 months to assist them as provided in this Order. The parenting coordinator will be agreed upon by the parties no later than May 15, 2015, with liberty to apply to this Court failing agreement.

[214] Paragraph 2.a.x., which provides for the parties to seek the assistance of the parenting coordinator in the event of any disagreement concerning the allocation of the respondent's parenting time, and paragraph 6(2) which provides for each party to contribute to the cost of the parenting coordinator in proportion to their income, remain in effect.

Children's Travel, Citizenship Cards and Passports

[215] When the parties made the Consent Order, M.S.B. was 11 years old and A.B. was five. The claimant and the respondent did not foresee circumstances arising where one parent might have reasonable grounds to refuse the other's request to travel outside Canada with one or more of the children. Paragraph 3 of the Consent Order contemplated that each parent would consent to the other travelling outside of Canada with the children. The Consent Order provides that if either of the parties seeks to travel outside of Canada with either or both of the children:

- a. the other parent shall sign all required documentation to ensure that the Children have passports;
- b. the other parent shall deliver the children's passports to the travelling parent;
- c. the other parent shall sign all required documentation to facilitate the other party's proposed travel plans; and
- d. the parent seeking to travel shall provide the other parent with their itinerary.

- [216] If one parent fails to comply with those arrangements, and the parent seeking to travel is unable to do so, then the other parent is obliged to reimburse the parent for all expenses incurred, including legal fees incurred in seeking to enforce the provisions of paragraph 3.
- [217] After the respondent announced his intention to renew M.S.B.'s passport to enable him to travel to and attend the Italian soccer school in the fall of 2013, the claimant intervened to prevent the renewal of M.S.B.'s passport without her permission. The claimant's withholding of parental consent to M.S.B.'s travel abroad became a significant source of conflict between the parties in the late summer of 2013. That conflict only abated when the parties agreed that M.S.B. would not attend the Italian soccer academy for the 2013-2014 school year.
- [218] At trial, the claimant acknowledged in cross-examination that she and the respondent had not had any recent problems regarding the children's passports. However, the claimant's refusal to consent to M.S.B.'s travel and attendance at the Italian soccer academy remained a contentious issue between the parties.
- [219] In my view, the dispute between the parties in the summer of 2013 concerning the renewal and use of M.S.B.'s passport constituted a substantial and unforeseen change of circumstances. Despite the parties' recent cooperation, disputes concerning the children's travel may well reoccur. I am satisfied that a variation of the Consent Order as it relates to arrangements for the children's travel outside of Canada is justified.
- [220] Accordingly, paragraph 3 of the Consent Order will be deleted and replaced with the following:
- a. Neither party will travel outside of Canada with either or both of the children during their parenting time without the consent of the other party, which consent will not be unreasonably withheld.
 - b. The travelling party will provide 21 days written notice of their intention to do so.
 - c. The party proposing the child's travel will provide to the other parent either concurrently with the request for the other party's permission, or forthwith upon making it:
 - (i) a copy of the child's proposed itinerary;
 - (ii) planned accommodation reservations, including addresses and telephone numbers;
 - (iii) emergency contact information for the travelling parent;
 - (iv) a list of travelling companions, if any;

- (v) the travelling parent will provide to the non-travelling parent written confirmation that the child or children is or are covered by medical travel insurance, which must cover medical care or treatment outside of Canada and transportation back to Victoria B.C. and the travelling parent will be responsible for all health care expenses during travel not covered by the insurance.

("The Travel Information")

- d. Within seven days of receiving notice of the other party's travel information, the non-travelling party will have the opportunity to provide written consent and all required documentation to facilitate the child's proposed travel plans, which consent will not be unreasonably withheld.
- e. Upon request, a party will sign all required documentation to ensure that the children have valid passports.
- f. The claimant will hold the children's passports in safekeeping and provide them to the respondent if he has her written permission to take either or both children on a trip for which passport identification is required. Upon his return, he will return the passport to the claimant forthwith.

Medical Appointment Coordination

[221] The claimant requests a variation of the Consent Order to provide her with exclusive authority to coordinate all of A.B.'s medical appointments. E.B.G. submits that A.B. has been exposed to unnecessary risk when the respondent has cancelled specialists' consultations for the child. The claimant points to a single incident in November 2013 when the respondent cancelled and rescheduled a pediatrician's appointment for a time when the claimant was working, and unable to attend. The claimant has not shown that A.B. suffered any risk of harm as a result of this incident. I have found that the claimant has taken the lead in scheduling medical appointments and that the respondent has frequently attended those appointments with the claimant. There have also been occasions when the respondent has arranged medical or therapeutic appointments for A.B. Both parents take a close interest in A.B.'s health and well-being.

[222] The Consent Order requires each parent to provide the other with advance notice of scheduled medical appointments so that the other parent can attend; acknowledges the right of each parent to obtain information concerning the children directly for medical professionals and others; and imposes an obligation on each parent to discuss with the other parent any significant decisions concerning the children's health (except emergency decisions). For the most part, the parties have communicated effectively concerning A.B.'s medical appointments, and have often attended those appointments together. As I have already noted, as a practical matter, the claimant will continue to take the lead in coordinating A.B.'s medical and therapeutic appointments, particularly when the respondent is away from Victoria for a month at a time. However, it continues to be in A.B.'s

best interests that both of her parents remain closely involved in arrangements for her medical and therapeutic care. The Consent Order achieves that objective. The claimant has not shown that the variation sought is warranted.

Variation of Child and Spousal Support

Has the claimant established that variations of the child support and spousal support provisions of the Consent Order are justified?

- [223] On a variation application, the court must accept that the amount of support awarded in the original order was correct at the time that order was pronounced and must consider the extent to which the circumstances of the parties have changed since the original was granted: *McMurchy v. McMurchy*, 2002 BCCA 629 at para. 19.
- [224] In respect of both the child support and spousal support provisions of the Consent Order, the claimant asserts the following circumstances constitute material changes:
- (a) the disclosure that contrary to the expectations of the parties at the time of the Consent Order and Agreement, the respondent did not begin paying income tax in Canada in 2010, and has paid no Canadian income tax for the years 2010 through 2014; and
 - (b) the claimant's inability to become self-sufficient.

Change in respondent's anticipated status as Canadian taxpayer

- [225] One of the factors the parties took into account when they made the Consent Order was their understanding that the respondent had become a resident of Canada for tax purposes, and that he would pay Canadian income tax in 2010. As I have previously noted, because the respondent had only transferred to Cathay Pacific's New York base in 2009, when the parties entered into the Consent Order they had no tax return of the respondent, and no full year of earnings on which to calculate child and spousal support.
- [226] In June 2011, Cathay Pacific transferred the respondent to its Hong Kong base. The respondent continued to work out of Hong Kong until he resigned from Cathay Pacific in September 2013.
- [227] The respondent has not produced a Canadian T1 General Income Tax return for any of the years in question. There is no evidence that up to the time of trial, the respondent had paid any Canadian income tax for 2010, 2011, 2012 or 2013.
- [228] In order to meet the objectives of establishing a fair standard of support for children and ensuring the consistent treatment of spouses and children who are in similar circumstances, the Federal Child Support Guidelines assume that the payor spouse is a Canadian resident paying income tax in Canada. Where that is not the case, the Guidelines permit the imputation of income under sections 19 and 20.

- [229] Section 19 of the Guidelines confers a broad discretion on the court to impute income to a spouse, and provides a non-exhaustive list of circumstances where income may be imputed: *Ouellette v. Ouellette*, 2012 BCCA 15 at para. 66.
- [230] Section 19(1)(a) of the Guidelines permits the court to impute income where a spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child. Section 19(1)(b) permits the court to impute income where the spouse is exempt from paying federal or provincial income tax. Under s. 19(1)(c), the court may impute income where the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada. Under s. 19(1)(f), the court may impute income to a spouse where a spouse has failed to provide income information when under a legal obligation to do so. Section 19(1)(g) permits the court to impute income where the spouse unreasonably deducts expenses from income.
- [231] Section 20 of the Guidelines provides:
- (1) Subject to subsection (2), where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.
 - (2) Where a spouse is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly higher than those applicable in the province in which the other spouse ordinarily resides, the spouse's annual income is the amount that the court determines to be appropriate taking those rates into consideration.
- [232] A party seeking to impute income bears the onus of establishing on a balance of probabilities that income should be imputed on a rational and evidentiary basis: *Windle v. Windle*, 2010 BCSC 18.
- [233] In *Gonabady-Namadon v. Mohammadzadeh*, 2009 BCCA 448, where the payor father lived in Iran and the recipient mother and her child resided in Canada, the Court stated at para. 34:

Thus, while the starting point in determining the Guideline income of a non-resident payor like Mr. Mohammadzadeh will be calculating his gross income in Canadian funds pursuant to s. 20(1), the court retains a discretion under ss. 19(1)(c) or 20(2) to adjust his Guideline income if he pays income tax at a significantly lower or higher rate than that in the Canadian province where the payee resides. The ultimate objective is to ensure consistency in the relationship between Guideline child support and the after-tax income available to payors.

[234] The Court of Appeal went on to explain in *Gonabady-Namadon* at para. 36:

When a non-resident payor's tax rate is significantly different than Canadian tax rates, the usual practice under ss. 19(1)(c) and 20 of the Guidelines is to convert his or her gross foreign income to Canadian dollars at a fair exchange rate, then look to the evidence of the applicable foreign tax rate to calculate his net income, and then determine what gross income would be required to yield the same net income at Canadian tax rates. Finally, it may be necessary to examine the

"bundle of services" that both governments provide in exchange for the tax dollars paid. These matters are often the subject of expert evidence: *Patrick v. Patrick*, [1999] B.C.J. No. 1245 (S.C.) at paras. 12-19, *Ward v. Ward*, 2001 BCSC 847, 19 R.F.L. (5th) 232 at paras. 34-40, *Watson v. Watson*, 2006 BCSC 256, [2006] B.C.J. No. 329 at paras. 22-29.

[235] The Court of Appeal held that the trial judge had erred by imputing income to a non-resident father at a level that failed to account adequately for Canadian tax liability and therefore significantly underestimated the payor's gross income.

[236] The respondent has produced evidence that he paid income tax in Hong Kong for the 2012 tax year (April 1, 2011 to March 31, 2012) in the amount of \$44,916.95. He attached a copy of his Hong Kong salaries tax statement to his Form 8 Financial Statement sworn June 17, 2013, showing payment of Hong Kong tax in that amount. In addition, the respondent listed in compulsory deductions for Hong Kong income tax of \$3,743.08 per month in his June 17, 2013 Financial Statement. That evidence is consistent with the respondent being a resident of Hong Kong, rather than Canada, for tax purposes while he was based there.

[237] Hong Kong income tax rates are significantly lower than those in Canada. The Hong Kong tax rate is 2% on the first 40,000 Hong Kong Dollars ("HKD"), (approximately \$5,444 Canadian); 7% on the next \$40,000 HKD, 12% on the next \$40,000 HKD and 17% on the remainder of the tax payor's income.

[238] The task of determining whether there has been a change of circumstances warranting a variation of the child support provisions of the Consent Order under s. 17(4) of the Divorce Act and s. 14(a) of the Guidelines is complicated by the limited nature of the respondent's financial disclosure.

[239] The claimant first requested financial disclosure on December 28, 2012 when she gave notice of her intention to apply for a review of spousal and child support.

[240] The claimant brought an application to compel production of documents relating to the respondent's income and employment expenses. That application was set down for hearing on June 18, 2013. On June 17, 2013, on the eve of the hearing, the respondent delivered a Form 8 Financial Statement in which he confirmed that he was employed by Cathay Pacific Airlines at its Hong Kong base, and swore that he earned an annual base salary of \$185,076. He also earned other employment income including a bonus, housing allowance, statutory holiday pay and overtime in the aggregate amount of \$63,783, for a total of \$248,859. After deducting union dues of \$832 and employment expenses claimed under Schedule III of the Child Support Guidelines for the costs of his travel to and from Hong Kong and his accommodation there, in the amount of \$107,376, the respondent swore to a Guidelines income for basic child support of \$140,651.

- [241] On June 18, 2013, the Honourable Mr. Justice Gaul ordered the respondent to deliver to the claimant documents confirming his income from Cathay Pacific for the period January 2010 through June 2011 and documents substantiating his claim to employment expenses for each of the previous years in which any deductions were claimed under Schedule III of the Guidelines.
- [242] The respondent subsequently produced additional documents, including Hong Kong tax summaries for 2012 and 2013, pay slips for housing in Hong Kong and pay slips for numerous Cathay Pacific flights. While the respondent maintained that the bulk of the flight charges related to expenses he incurred while travelling to and from Hong Kong for his employment, he acknowledged through counsel that some of the flight charges might be for unrelated personal or holiday travel.
- [243] The respondent has not produced any Hong Kong tax returns.
- [244] The respondent submits that the Court should give little weight to the calculations of the respondent's income made by Ms. Linda Weiss, the claimant's accountant. Counsel for the claimant asked Ms. Weiss to make a number of calculations, including calculations of the respondent's net income for the years 2010 through 2013 based on gross employment income in amounts specified by claimant's counsel. Ms. Weiss was asked to make the calculations as if the respondent was required to pay taxes in Canada in each year.
- [245] In cross-examination, Ms. Weiss agreed that she made no determination of the respondent's actual gross income but rather based her calculations on the gross income figures supplied by claimant's counsel. Further, her calculations did not adjust for the respondent's business and travel expenses or include any adjustment for spousal support he paid to the claimant. Nor did her calculations include any foreign income tax paid by the respondent that he might be entitled to credit against the Canadian income tax payable. Ms. Weiss candidly acknowledged that she had not looked at the respondent's particular situation but rather had made various calculations based on the assumptions provided to her by counsel. Because Ms. Weiss' calculations make no adjustment for spousal support, Hong Kong tax, or all employment-related travel and accommodation expenses paid by the respondent, I find they are of limited assistance.
- [246] The claimant has produced other calculations for each of the years 2010 through 2013 that convert the respondent's gross foreign income to Canadian dollars, purport to show his post-foreign tax and expense income, and what gross income would be required to yield the same net income at Canadian tax rates. In making those calculations, the claimant has included only one-third of the respondent's claimed business travel expenses for each year, and has made no adjustment for any foreign tax credit that might be available to the respondent for 2012 or any other year in which he may have paid Hong Kong tax. Nor is it apparent whether the gross-up for Canadian tax takes into account any deduction for spousal support to which the respondent would have been entitled if he were paying Canadian tax.

[247] I am not confident that the evidence adduced at trial is sufficient to enable the Court to make a fair determination of whether there is any material difference between the income available to the respondent for paying support based on grossing up his foreign income for Canadian tax and the respondent's Guidelines income under the Consent Order.

[248] I have reluctantly concluded that I require further submissions from counsel before determining whether or not there should be any variation of the Consent Order for retroactive child and spousal support. The particular issues on which I request further submissions are as follows:

- (a) If all of the travel expenses claimed by the respondent each year were allowed, what would be the respondent's post-tax and expenses income in each year and what gross income would be required to yield the same income at Canadian tax rates?
- (b) If the respondent paid Hong Kong income tax in any year, would he be entitled to a foreign tax credit, and has that credit been taken into account in the claimant's calculations of the respondent's grossed-up income?
- (c) Do the gross-up calculations include any adjustment for spousal support paid by the respondent to the claimant, and if not, should they?

[249] Counsel may address these issues by submissions in writing or, if they prefer, by an oral submission at a hearing set for no more than two hours. I am prepared to receive further accounting evidence addressing these issues from each party. After receiving submissions, the Court will deliver supplemental reasons addressing the claim for retroactive child and spousal support.

The Respondent's 2014 Guidelines Income

[250] Under s. 14(a) of the Guidelines, a change in the income of the payor spouse constitutes a change of circumstances warranting a variation of child support under s. 17(4) of the Divorce Act.

[251] For 2014, the determination of the respondent's Guidelines income is relatively straightforward. The respondent had resigned from his employment with Cathay Pacific, was based in Victoria and was self-employed as a commercial pilot trainer. During the first six months of 2014, he was away from Victoria for work for only eight days. In his June 19, 2014 Financial Statement, the respondent's listed expenses included compulsory deductions for Canada Pension Plan contributions and income tax. I find that for 2014 the respondent was a resident in Canada for tax purposes.

- [252] In his most recent Financial Statement sworn June 18, 2014, the respondent provided an estimate of his projected income for 2014 from his new commercial pilot training business. The respondent estimated his 2014 gross income in the amount of \$165,106.53, and his net income at \$131,826.53. After deduction of professional dues and employment expenses, the respondent estimated his 2014 Guidelines income for basic child support in the amount of \$130,853.53.
- [253] Aside from projected automobile expenses of \$1,000 and office expenses of \$3,500 (both of which I find to be reasonable), the principal business expense claimed by the respondent is for salary and benefits paid to M.P.S. The respondent, through his corporation, pays M.P.S. a monthly salary of \$2,083.
- [254] Section 18(2) of the Guidelines provides that "In determining the pre-tax income of a corporation all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, in or on behalf of persons with whom the corporation does not deal at arms' length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances."
- [255] The Guidelines aim to strike a balance between incurring reasonable expenses and the use of those funds for child support. Section 19(2) of the Guidelines recognizes that for the purposes of s. 19(1)(g), the reasonableness of an expense deduction is not solely determined by whether the deduction is permitted under the Income Tax Act: *Needham v. Needham* (1998), 36 R.F.L. (4th) 295 (B.C.S.C.) at para. 14.
- [256] Here, M.P.S. gave evidence that although she moved to Canada in August 2011 and became a Canadian resident for immigration purposes in 2012, she only began to work when the respondent launched his company in October 2013. M.P.S. claims that she works 25 hours a week "officially", providing accounting and administrative services to the respondent's company. However, in cross-examination she acknowledged that the respondent continues to use the services of a Certified General Accountant, Mr. Giesbrecht, for his business accounting documents. The respondent's company is the vehicle through which he offers his personal services to prospective clients. While he may require some bookkeeping and administrative assistance, particularly during times when he is away from Victoria, I am not persuaded that the full amount of wages and expenses paid to his new wife is a reasonable deduction from the pre-tax income of his corporation for the purposes of determining child support under the Guidelines. The total amount claimed for M.P.S.'s salary and benefits is \$28,080. Of that amount, \$14,000 will be included in calculating the respondent's 2014 Guideline income. I determine the respondent's 2014 Guideline income in the amount of \$144,853.53 (\$130,853.53 plus \$14,000).
- [257] The table amount payable by the respondent to the claimant for the two children based on his 2014 Guidelines income of \$144,853.53 is \$2,042.

- [258] Although the claimant has not yet realized the annual income of \$16,500 imputed to her in the Consent Order, in my view she has the capacity, with time, to do so. Accordingly, I do not propose to vary her Guidelines income for 2014.
- [259] If the claimant and the respondent shared custody during 2014 such that the respondent had the children in his care not less than 40% of the time over the course of the year, then the table amount of support payable by the claimant to the respondent, based on her Guidelines income of \$16,500 would be \$272. The result would be that the respondent would pay child support to the claimant in the amount \$1,770 per month.
- [260] Even if the respondent established shared custody for 2014, I would not be inclined to order child support in the set-off amount.
- [261] I have no doubt that since the Consent Order the claimant and the respondent, while maintaining separate households, have each incurred additional costs in order to provide the care A.B. requires for her multiple special needs. Elsewhere in these Reasons, I have discussed the conditions, means, needs and other circumstances of each of the parties. The respondent earns a considerable income but has incurred significant debt in order to maintain the standard of living he provides to both the children of the marriage and his new family. For her part, the claimant is unable to meet her monthly expenses and is struggling to maintain her home. An order for the set-off of the table amounts of support would only increase the disparity between the standards of living available to the children in the two households and lead to a further decline in the children's standard of living when in the care of their mother.
- [262] Accordingly, I fix the amount of basic child support payable monthly by the respondent to the claimant for 2014 in the amount of \$2,042.
- [263] The respondent may set-off against any arrears of basic child support owed to the claimant for 2014 the \$1,500 payment he made to the claimant pursuant to the order of Madam Justice Humphries of November 5, 2013.
- [264] For 2015, pending the annual review and adjustment of child support I address later in these reasons, the respondent will pay basic child support to the claimant for the children in the amount of \$2,042 on the first day of each and every month.
- [265] For both 2014 and 2015, the amounts of basic child support already paid by the respondent to the claimant pursuant to the Consent Order will be credited against the respondent's obligation to pay monthly child support in the amount of \$2,042.

Claimant's inability to achieve self-sufficiency

- [266] The claimant contends that one of the fundamental assumptions upon which the Consent Order and Agreement were based was that she would have sufficient assistance with child care to allow her to work or re-train on a full-time basis. By the time of trial, she was housecleaning on an average of two hours per week, held a part-time retail sales position and also devoted between 13 to 18 hours per week on her home baking enterprise, which operated at a loss.
- [267] The claimant says that despite her best efforts, she has been unable to become self-sufficient due to circumstances over which she has no control. She refers to her lack of post-secondary educational or vocational qualifications and her inability to find lucrative employment other than her part-time cleaning work at \$20 per hour. E.B.G. contends that she lacks both the financial resources and the time for further training. The claimant also says that her role as the primary caregiver for the children, and S.M.B.'s working time away from Victoria have limited the hours available to her for work outside her home.
- [268] E.B.G. submits that when the parties entered into the Consent Order and Agreement they unrealistically assumed that she, as a recent immigrant to Canada without professional skills or education, and with the primary responsibility for the care of two children, would nonetheless be able to find full-time employment that would enable her to become financially self-sufficient by December 2014.
- [269] The claimant has been unable to do so. Although she devotes about 34 hours a week to baking, house cleaning and her part-time sales position, she is unable to support her household or to earn income at a level that would permit her to hire the care for A.B. she needs in order to work full-time outside the home.
- [270] The claimant submits that her failure to become self-supporting within five years is a significant change in the condition, means and circumstances of the parties that meets the threshold for variation of the Consent Order.
- [271] For his part, the respondent submits that the spousal support provisions of the Consent Order were the product of a careful negotiation by which the parties reached a compromise intended to avoid a lengthy trial. While the parties could have incorporated in the Consent Order terms for the review or variation of spousal support, they did not do so. Instead, by para. 8(e) of the Consent Order, they opted for finality by providing "there shall be no spousal support payable after December 2014, regardless of any change in the parties' circumstances, however unforeseen or radical."
- [272] The respondent contends that he relied upon the terms of the Consent Order concerning spousal support and child support in organizing his affairs and in taking on new obligations for the support of M.P.S. and her children.

- [273] Notwithstanding the statement of finality in paragraph 8(e) of the Consent Order, I must consider whether there has been a material change in the condition, means, needs or other circumstances of either spouse since January 2010 that would warrant a variation of spousal support.
- [274] The failure of a spouse to achieve self-sufficiency before the expiry of a time-limited spousal support order can amount to a material change of circumstances justifying a variation where it was anticipated at the time of the order that the spouse would become self-sufficient within the time limited: *Morgan v. Morgan*, 2001 BCSC 874. There, by the agreement that formed the basis for the consent support order, the recipient spouse acknowledged that she would be self-supporting by the end of the time specified for payment of spousal support. On the particular facts before it, the court in *Morgan* found the parties had agreed that the wife's waiver of any claim for further support was conditional upon her achieving self-sufficiency within the time limited for payment of spousal support.
- [275] Neither the Consent Order nor the Agreement expressly provide for the claimant to become self-sufficient within the time limited for spousal support.
- [276] However, at the time of the Consent Order, the claimant was optimistic that she would be able to earn a sufficient income to support herself, either through her home-baking business or by finding alternate full-time employment. At paragraph 175 of his affidavit, the respondent has sworn that he agreed to "spousal support on a declining amount that would allow the claimant to have time to establish her required financial independence". I find that the respondent expected that the claimant would be able to support herself by the expiry of the time limited for payment of spousal support, and that the claimant shared that expectation.
- [277] Paragraph 7 of the Consent Order was intended to ensure that the claimant would have sufficient assistance with A.B.'s care from the defendant, his parents or third party caregivers to enable her to earn an income or re-train. The time-limited spousal support provided in paragraph 8, payable in reducing amounts over a five-year term, was an incentive for the claimant to achieve economic self-sufficiency before spousal support ceased. I find that when the parties entered into the Consent Order they contemplated that by the time spousal support terminated in December 2014 the claimant would achieve self-sufficiency.
- [278] Unfortunately, what the parties contemplated was not realistic. The claimant's lack of post-secondary education or professional qualifications restricted the work available to her. Her continuing role as the children's primary caregiver, the care required for A.B.'s special needs, the respondent's time away from Victoria for work and the failure of the arrangements for assistance to the claimant with A.B.'s care from the respondent and his extended family all impose constraints on the claimant's availability for work outside her home.

- [279] The respondent contends that the claimant has failed to make reasonable efforts to find remunerative employment. He suggests that based on her prior employment experience, she ought to have sought employment as a spa worker or a flight attendant. The claimant's experience in the spa industry was limited to approximately one year of employment in Hong Kong during 1996-1997, where she was trained in the use of a single device then used for facial therapy. The claimant has not worked as a flight attendant since 1994. More significantly, as a flight attendant, she would travel for her work. If the claimant had to travel for her work, she would not be able to provide A.B. with the care she requires. The claimant has made inquiries about flight operations, reservations and ticketing positions with both Air Canada and Westjet. Hours of work are subject to change on short notice, depending on the volume of traffic going through the airport at any given time. As the claimant explained in her affidavit evidence, that would only complicate arrangements for A.B.'s care. Further, when the claimant did an on-line search for positions, none were available with either airline in Victoria. Working from a base in another city is not a practical option for the claimant.
- [280] The claimant has inquired about employment as a teacher's aide assisting children with special needs, but would require several years of re-training before qualifying for that work. She has also inquired about employment as a health care assistant, but would need to re-train for that position, at a cost of \$4,000 to \$4,500. She lacks the funds to do so.
- [281] The respondent argues that the claimant acted unreasonably by not seeking employment to supplement her small income from her home-baking business until January 2012. During 2010, A.B. underwent two heart surgeries. The claimant was focused for much of that year on the care of her daughter. Although the claimant may be faulted for not recognizing earlier that her home-baking enterprise would not generate a living for her, since early 2012 she has supplemented her income through her employment at the boutique and her housecleaning work.
- [282] Bearing in mind the claimant's continuing responsibilities for A.B.'s care and her limited marketable skills, I find that, overall, the claimant has made reasonable efforts to become self-supporting since the Consent Order, but has not succeeded in doing so.
- [283] I find that the claimant's inability to become financially self-supporting within the five years contemplated by the parties at the time they entered into the Consent Order is a significant and continuing change in the condition, means and circumstances of the parties that warrants a variation of the Consent Order.
- [284] I turn next to a consideration of the four objectives for variation of a spousal support order set out in s. 17(7) of the Divorce Act.
- (a) Economic advantages or disadvantages to the former spouse arising from the marriage or its breakdown

- [285] Except for eight months of employment in 2000, the claimant remained at home to care for the children following the birth of M.S.B. in January 1998. Early in the marriage, the claimant declined employment as a flight attendant with Air Canada in order to accompany the respondent to Hong Kong when he began his career as an international airline pilot. By caring for the children and maintaining the home, the claimant enabled the respondent to pursue his career. However, upon the breakdown of the marriage she had been out of the workplace for the better part of 11 years and experienced a substantial reduction in her standard of living. The Consent Order was intended to compensate the claimant for the economic disadvantage she suffered as a result of the breakdown of the marriage.
- (b) Apportioning between the former spouses any financial consequences arising from the care of any child of the marriage or above any obligation for the support of any child of the marriage
- [286] Since the parties entered into the Consent Order, A.B.'s significant care requirements and the claimant's role as her primary caregiver have imposed limits on the claimant's availability for work. Particularly when the respondent is absent from Victoria for his work, there are times when the claimant must attend medical appointments or cancel work and stay at home to care for A.B. when she is ill. Although para. 7 of the Consent Order as varied should assist the claimant in obtaining the care for A. B. she requires in order to work, there will be times when the claimant will continue to bear the financial consequences of caring for a child with special needs.
- (c) Relief of any economic hardship of the former spouses arising from the breakdown of the marriage
- [287] The Consent Order provided the claimant with some relief on a time-limited basis from the economic hardship she experienced as a result of the breakdown of the marriage. I also bear in mind that before the parties entered into the Consent Order the respondent had provided financial support to the claimant, including the maintenance he paid under the interim support agreement of September, 2007 and the July 30, 2009 order of Punnett, J. Nonetheless, as the support payable under the Consent Order declined in the later years of its five year term, the claimant has been unable to meet her monthly expenses and to pay her property taxes. At the time of trial, while she had equity of approximately \$70,000 in her home, she had no savings or other financial assets to draw upon.
- (d) Insofar as practicable promote the economic self-sufficiency of each former spouse within a reasonable period of time
- [288] Taking into account the demands on the claimant's time to care for two children, one of whom requires extensive care for her special needs, and the claimant's lack of professional qualifications, I find that the five-year limit on spousal support has failed to promote the economic self-sufficiency of the claimant within a reasonable period of time. When the parties made the Consent Order, they did not anticipate the difficulties the claimant faced in achieving self-sufficiency as a result of her limited qualifications, the demands of caring

for A.B., and the problems she encountered in obtaining the assistance with A. B.'s care necessary to enable her to support herself.

- [289] The claimant has a continuing entitlement to spousal support based on both compensatory grounds and need.
- [290] I find that a variation of both the duration and amount of spousal support is warranted in the circumstances of this case. The claimant has an obligation to make reasonable efforts to achieve self-sufficiency. With regular and predictable assistance with A.B.'s employment care, the claimant should be able to increase her hours of work, and to use the time formerly devoted to her home baking business for more remunerative employment. However the extent to which the claimant will be able to increase her income, and the time it will take her to do so, remain uncertain at this stage.
- [291] In considering the quantum and duration of a variation of spousal support, the means and circumstances of the respondent cannot be ignored. The respondent now has a second family to support. The responsibility to support a second family does not relieve the payor spouse of his obligation to support his first family: *Earle v. Earle*, [1999] B.C.J. No. 383 (S.C.) at para. 46. However, the respondent's capacity to pay is finite. I have found the respondent's 2014 Guideline income to be \$144,853. The income he generates from self-employment as a commercial pilot trainer is the only fund available to satisfy his obligation to pay spousal support and to meet all of his other financial obligations. The respondent has no significant savings or other financial assets to draw upon. The claimant argued that the respondent may have as much as \$150,000 available under his HSBC line of credit, which is secured by a mortgage registered in April, 2010 against his home in the principal amount of \$690,000. However, at the time of trial the respondent's authorized credit limit on his HSBC line of credit was \$104,000. That amount only slightly exceeded his outstanding debt of \$101,500 on the line of credit.
- [292] Based on the parties' 11 years of cohabitation, the respondent's Guideline income of \$144,853, and the claimant's Guideline income of \$16,500, the support payable under the "With Child Support" formula of the Spousal Support Advisory Guidelines ("SSAG") ranges from \$2,258 at the low end, to \$2786 at the midpoint, and \$3169 at the high end of the range. Under SSAG, that range of support would be payable for a period of unspecified duration, but with a minimum of 5.5 years, and a maximum of 11 years from the date of separation.
- [293] In *Benninger v. Benninger*, 2007 BCCA 619, the Court held that the SSAG should be approached with caution on variation applications. As the Court explained, the SSAG are not designed to address various issues arising on such applications, including the impact of remarriage or second families.

- [294] Taking into account all of these factors, and weighing both the claimant's entitlement to further spousal support and the respondent's capacity to pay that support, I have concluded that the appropriate variation is to extend spousal support beyond December 31, 2014 for an indefinite period, in an amount slightly less than the low end of the SSAG range, subject to review of entitlement and quantum after December 31, 2015.
- [295] Paragraph 8(e) of the Consent Order is vacated and replaced with the following provision.
- [296] The respondent will pay to the claimant for her support the sum of \$2100 per month commencing on January 1, 2015, and continuing on the first day of each month thereafter until the review hereinafter provided for is concluded.
- [297] The question of what support, if any, will be payable by the respondent to the claimant will be reviewed upon application of either party any time after December 31, 2015.

Extraordinary Expenses

- [298] Paragraph 7 of the Consent Order provided for the respondent to pay 100% of the cost of third-party care for A.B. in order to enable the claimant to earn a living or train for employment when neither the respondent nor members of his extended family were available to provide the required care. Under paragraph 6(1), other special or extraordinary expenses were to be shared by the parties in proportion to their respective incomes.
- [299] Paragraph 16 of the Agreement provides:
- 16 In relation to paragraph 6 of the Consent Order, the parties agree that:
- a. they must reach an agreement as to both the nature and amount of the extraordinary expenses before such expenses are incurred;
 - b. if either party is seeking a contribution to extraordinary expenses incurred for the children, they shall submit proof of payment to the other party for reimbursement within 60 days of such expense being incurred. If this is not complied with, then the party incurring the expense shall bear the entire cost of the expense.
- [300] The parties clearly intended that extraordinary expenses, other than the costs for third-party care for A. B. addressed in para. 7 of the Consent Order, would be agreed in advance and then shared in proportion to their respective incomes.
- [301] When the claimant filed her amended application, she claimed unpaid extraordinary expenses totalling \$3,211.58. In addition to modest amounts claimed for the children's prescriptions, M.S.B.'s monthly bus pass and school physical education expenses, E.B.G. claimed for unpaid third-party care costs for A.B. in the amounts of \$429 for 2010, \$865 for 2011, \$776 for 2012, and \$819 for 2013. By the time of trial, E.B.G. claimed a total of \$3,680.89 for unpaid extraordinary expenses. Before the trial concluded, the respondent paid that amount in full.

- [302] While the parties disagree on the level of third-party care the claimant requires for A.B., they do agree that all special or extraordinary expenses should be shared by the parties in proportion to their respective incomes.
- [303] The claimant argues that the definition of special or extraordinary expenses for each child would assist in reducing future conflict concerning the sharing of s. 7 expenses. However, I must be satisfied that there has been a material change of circumstances since the making of the Consent Order that would justify this variation.
- [304] The essence of E.B.G.'s complaint is not that there has been a change of circumstances, but rather that until May 2014, the respondent failed to pay extraordinary expenses for which he was responsible under the terms of the Consent Order.
- [305] Again, on a variation application, the court does not review the original order for correctness. The claimant has not established a change in the circumstances of the children or the parents which, if known at the time the Consent Order was made, would likely have resulted in different terms in paragraph 6(1), relating to the payment of extraordinary expenses. Accordingly, there will be no variation to paragraph 6(1) of the Consent Order, beyond the adjustment, from time to time, of the percentage of those expenses borne by each party in proportion to their respective Guidelines incomes.

Variation of Consent Order for annual review of child support

- [306] In light of the difficulties which have arisen between the parties concerning the determination of their Guidelines incomes, it is in the children's best interests that the Consent Order be varied to provide for the annual exchange and review of financial information necessary to ensure that they receive child support commensurate with their parents' means to pay that support. The Consent Order will be varied by the addition of the following provision for the annual review of child support.
- [307] The child support payable annually will be reviewed annually according to the following process:
- (a) by June 30 of each year in which the obligation to pay child support continues, the claimant and respondent will provide the other with:
 - i. a copy of their most recent personal income tax return, and as applicable, their most recent corporate income tax return, together with copies of all supporting documents filed with those returns;
 - ii. a copy of any notice of assessment or re-assessment, if received;
 - iii. any contract of employment or for services to be provided by a party or a corporation in which he or she is a shareholder (a party's "Employment"), including the specifics of any agreement concerning the reimbursement of expenses associated with the Employment;

- iv. copies, including receipts, for all travel or accommodation expenses incurred in relation to the fulfillment of Employment duties;
 - v. details of child tax benefits or other similar benefits received in the previous year and anticipated in the coming year, if known;
 - vi. particulars of the children's special or extraordinary expenses anticipated for the coming year;
 - vii. the most recent annual statement of earnings, including overtime;
 - viii. any other relevant information required to facilitate determination of the adjustment, if any, of child support payable; and
 - ix. any information that a party must provide to the other party that is not available by the required date must be delivered to the other party within 7 days of the information being received.
- (b) No later than July 21 of each year, the parties will meet to confer regarding any revision of child support, and will agree in writing regarding any change. If the parties are not able to agree to such a change, they will be at liberty to apply to the court for determination of child support payable by either of them to the other.

Costs

[308] Counsel requested leave to address costs following delivery of reasons for judgment. In light of my directions for further submissions on the issue of variation of child or spousal support for the years 2010, 2011, 2012 and 2013, submissions on costs will be deferred pending judgment on that issue.

"PEARLMAN J."

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