
CANADA / JUDGMENT

G.K.G. v. S.S.G.

2010 BCSC 20

COURT

Supreme Court of British Columbia

DECIDED

11 January 2010

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2010 BCSC 20 G.K.G. v. S.S.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.K.G. v. S.S.G.,

2010 BCSC 20

Date: 20100111

Docket: E090673

Registry: Vancouver

Between:

G.K.G aka G.G.

Plaintiff

And

S.S.G.

Defendant

Before: The Honourable Madam Justice Sinclair Prowse

Reasons for Judgment

Counsel for the Plaintiff:

S.G. Label

Counsel for Defendant:

G.W. Abrams

Place and Date of Trial:

Vancouver, B.C.

October 13 - 16, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2010

(I) NATURE OF THE PROCEEDING AND THE ISSUES RAISED

- [1] This is a family law action. At the time of the trial, the parties had been married for 17 years. They separated on July 1, 2008. They have a daughter who is 10 years old.
- [2] As the evidence disclosed, throughout their marriage the parties' relationship has been marked by contradiction. Although they have been married for a long time and have always been able to agree on some fundamental matters, they have never developed an effective mechanism to resolve matters on which they disagree. On a few occasions this difficulty has escalated to the point wherein the police have intervened; restraining orders have been imposed; and the parties have separated for a period of time.
- [3] In keeping with the contradictory nature of their relationship, at the beginning of this proceeding the parties made the rather unusual application of requesting that the trial proceed with all claims except for divorce. They claimed they did not want an order for divorce because they were considering reconciliation.
- [4] Given their request and the fact that the Court must be satisfied that there is no hope of reconciliation before an order for divorce can be granted, the claim for divorce is adjourned.
- [5] Although there are a number of issues raised in this trial, the primary ones are:
 - (a) whether the Child should be in the sole custody of the Mother or in the joint custody of the parties;
 - (b) whether the parties' interests in the family residence should be re-apportioned in the Mother's favour or equally divided; and
 - (c) whether the expenses associated with the Child's continued attendance at private school are allowable as s. 7 special and extraordinary expenses.
- [6] Pivotal to the resolution of all of the issues is the credibility of the parties and in particular the reliability of each of their recollections regarding events during their marriage.

- [7] I found the Mother to be a credible witness. Her demeanour when testifying was straightforward and balanced. She appeared to be endeavouring to give her answers as clearly, candidly and fairly as possible. She refrained from exaggerating and clarified if she could remember a matter clearly, only vaguely, or not at all. Her testimony was internally consistent and consistent with her own conduct and the other evidence.
- [8] On the other hand, I did not find the Father to be a credible witness. His demeanour on the stand was evasive, he was obtuse on material matters and argumentative from time to time. His testimony was internally inconsistent and inconsistent with his own conduct and the other evidence.
- [9] As a result, where evidence of the Mother conflicts with that of the Father on a material issue, I relied upon the evidence of the Mother.

(II) BACKGROUND CIRCUMSTANCES

- [10] The Mother is 40 years old and the Father is 51 years old.
- [11] Both of the parties were born and raised in India. They were married in India in February 1993, shortly after they met.
- [12] Some years before their marriage the Father had immigrated to Canada. He attended university in Canada, obtaining his Bachelor of Engineering, a degree in Business Administration, and his Masters of Engineering.
- [13] In the meantime, the Mother was living with her parents in India. Although she had taken some university courses, she was primarily working as a flight attendant with Saudi Arabian Airlines.
- [14] Within months of their marriage the Father sponsored the Mother to immigrate to Canada. They are now both Canadian citizens and are well settled in British Columbia.
- [15] Throughout their marriage, the Father has been employed as an engineer. His job requires him to periodically travel for days to weeks at a time. This travel rarely extends for months, but he was away in South America for an 11-month period extending from the fall of 2007 through the late summer of 2008, broken up by visits home every 6 weeks or so.
- [16] Starting in November 1994, the Mother has been employed as a flight attendant with Air Canada. At the time of the Child's birth in August 1999, she was working at this employment full time and had risen to the position of a flight attendant on international flights.
- [17] From the outset, the Mother has been the primary caregiver to the Child. As the Father testified, the care of the Child has always been the Mother's responsibility. Although the Father clearly loves the Child, he has never participated in the direct care of the Child. At times when the Mother could not care for the Child because she was working, it was her responsibility to make the arrangements for the Child's care while she was away.

- [18] Unfortunately, being a flight attendant (whether it be on international or on domestic flights) is ill-suited to be being the primary caregiver of a child. Working as an international flight attendant entails being away for days at a time while working as a domestic flight attendant entails long days and occasionally working overnight and on weekends.
- [19] Arranging for the care of the Child and maintaining the Mother's employment has been an ongoing problem for the parties. Since the birth of the Child, the Mother has taken a number of leaves of absence which, when totalled, are close to half of the time the Child has been alive. For the most part, these leaves were due to the stress arising from the incompatibility of the demands of her job and her role as the primary caregiver to the Child.
- [20] As the evidence disclosed and as the Father confirmed in his final submissions, during their marriage he encouraged the Mother to put the Child first and to take leave whenever she felt the need. (Although the Father also testified that as of the spring of 2008 he changed his mind about this and wanted the Mother to return to the work force, as is set out subsequently in the Judgment this testimony was not supported by the evidence. To the contrary, the evidence proved that his position remained the same - namely that the Mother put the Child first and take leaves whenever she felt the need.)
- [21] The most satisfactory arrangement while the Mother worked was leaving the Child in the care of her parents - the Child's maternal grandparents. Although they live in India, throughout the Child's life they have come and stayed with the parties for extended periods of time. During those visits, they looked after the Child. This assistance enabled the Mother to work. Unfortunately the Child's maternal grandparents have reached an age where they are not be physically able to travel to Canada and provide these child care services. The Child's paternal grandparents have both died and there are no other family members available to help with the child care.
- [22] The parties did explore other child care options but concluded that they were not suitable. They looked into hiring caregivers periodically to stay with the Child but discovered that because the Mother's schedule varied it was difficult to find someone who was available on an on-call basis. In addition to these difficulties, the parties ultimately realized that they did not want the Child to be cared for by anyone other than the Mother.
- [23] In March 2008 it did not appear that the Mother would be permitted to arrange another leave of absence. To say the least, this presented a significant problem. The Father's solution was that she should resign from this employment and devote all of her time to the care of the Child. To this end, the Father drafted a resignation letter for the Mother to send to her employer. In the end, the Mother did not resign because she was able to secure a further leave of absence.
- [24] Although during the trial, the Father testified that he opposed the Mother resigning from her job and further that he did not support her taking the leave of absence commencing in May 2008 that she had arranged, the evidence does not support this testimony. In particular with respect to the resignation letter, there is no dispute that he wrote the letter. It was his

evidence that he was simply acting as her secretary - that he never intended it to be acted upon. However, this explanation does not make any sense as the Mother is well-educated and capable of composing her own letters. More significantly to assist by writing the letter is inconsistent with him with being opposed to her resigning from her job.

- [25] As far as being opposed to taking the leave of absence which commenced in May 2008, this testimony is inconsistent with the email that he sent from South America at the time. Specifically he wrote, "I realize AC is a job but you need to focus on priorities and #1 is [the Child] at the present time. Job will sacrifice this and I will fully support you on this."
- [26] It was during this rather difficult time in the spring of 2008 that the parties were having renovations done to their home. In the midst of them, the Father requested that the Mother put them on hold until he returned (he made this request because of the stress that they were causing her). The Mother continued the renovations primarily because they were then underway and to put them on hold would create more rather than less chaos in their household.
- [27] In any event, towards the end of June when the Father came home on one of his periodic leaves, he became angry about the fact that the renovations had continued (they were almost finished by that point) and at the cost (although the costs were consistent with the estimates that he had done).
- [28] As a result of this the Father withdrew the funds from the parties' joint bank account and opened a bank account in his own name, an account into which he deposited the withdrawn funds. It was into this account that he subsequently deposited all of his employment income. To pay the outstanding invoices for the renovations, the Mother borrowed \$25,000 from the Child's maternal parents.
- [29] After the parties separated, they continued to live in the family residence for 7 months. The Father's work in South America finished in the early fall of 2008, and with the exception of the odd short business trip, he resumed living full time in the family residence with the Mother and the Child until February 2009 when he moved out and began to rent a room in the home of a neighbour. He still resides in that neighbour's home.
- [30] The Mother and the Child have remained in the family home. With the assistance of some of her family members, the Mother intends to purchase the Father's interest in the home so that she and the Child can continue to reside there.
- [31] In October 2008, the parties attended mediation during which an agreement was made by the parties that the Father would pay the Mother \$2,250 per month in total for Child and Spousal Maintenance.
- [32] Also in October 2008, due to the economic downturn Air Canada offered its employees the option of taking a 3-year unpaid leave of absence to avoid being laid-off. In three years, when hopefully the economy has improved, they would have the option of returning to their former employment. Although separated, the Mother consulted the Father as to whether she

should elect to take this leave. She testified that she did consult him both during and outside of mediation and that he did not oppose it. As a consequence, in November 2008, the Mother elected to take the leave option. She is now on an unpaid leave of absence until November 2011.

- [33] Although the Father initially attested that he was not consulted nor did he consent to the leave, he conceded during cross-examination that he was consulted and that he did not oppose it. In final submissions, the Father's counsel argued that even if the Father consented to the leave during mediation, the Court should ignore this consent because it occurred during mediation and therefore was privileged. No authority was presented to support this argument and as far as I am aware none exists.
- [34] Regardless of the circumstances, the issue was whether the Father was consulted about this option and whether he opposed her taking the leave. The evidence proves that both during and outside mediation he was consulted and that he did not oppose it. It is not open to the Father to now take the position that he is not bound by that conduct because it took place during mediation. Moreover, agreeing to the Mother taking this leave of absence is consistent with the conduct of the Father throughout the marriage - namely, that he encouraged her to put the Child first and take leaves of absence when she felt the need.
- [35] The Father argued that regardless of whether he consented the Mother should cancel her leave of absence and resume her employment as a flight attendant. Setting aside for the moment the ever-present child care problem, the evidence showed that it is unlikely that she can arrange to resume her employment prior to the expiration of her leave of absence, particularly as the reason for granting this option was to avoid lay-offs. In any event, this employment may not be open to the Mother as she has developed a problem with her eyes that may preclude her from flying on a regular basis.
- [36] The Father then submitted that even if she could not secure her employment as a flight attendant she could secure employment in another capacity with Air Canada (for example as part of the ground crew). The evidence did not support this submission. Apart from the difficulty of cancelling the leave of absence, the evidence showed that it is far from certain that she would be able to secure such alternate employment and, in any event, also appears to be ill-suited to her role as the primary caregiver to the Child.
- [37] As far as securing the employment is concerned, the different departments of Air Canada are treated as independent businesses. That is, there are no internal transfers between departments. Rather, to be hired as part of the ground crew, she would have to apply in the same manner as people who had never worked for Air Canada. As far as seniority is concerned, it is not transferrable and she would start at the bottom.

- [38] More significantly, it is questionable whether this type of employment would be suitable in any event as it involves shift work. Employees bid upon shifts, the selection being made in order of seniority. As she would have no seniority, she would be vulnerable to the least desirable shifts. This in turn would probably mean that she would be working evenings and weekends. At the very least she would be subject to an ever-changing schedule which, in turn, would be problematic from a child care perspective.
- [39] Given all of these circumstances, the Mother has decided that returning to her job at Air Canada as a flight attendant or in any other capacity at the conclusion of the 3-year leave of absence, is probably not a viable option given the incompatibility of the demands of that employment (whether as a flight attendant or member of the ground crew) and her role as the primary caregiver to the Child.
- [40] Although some air flight attendants and some ground crew are able to perform this work and raise children, they have support resources available to them to help with the care of their children, resources that are not available to the Mother, particularly now that the Child's maternal grandparents are no longer available.
- [41] There is no dispute that the Father is not available to provide assistance. He proposed these child care needs could be met through the Child staying with friends while the Mother is away working or, alternatively, with ladies in the neighbourhood who provide day care. Unfortunately, his investigation of these possible resources did not go so far as to determine whether any of these resources were available - let alone available for overnight care.
- [42] In any event, these arrangements would result in the Child being transplanted into other people's homes for periods of time. Such arrangements would not be in her best interests.
- [43] Given the incompatibility of her present employment with her role as the Child's primary care provider, the Mother has concluded, and the evidence supports, that she must acquire the necessary credentials to secure employment that is compatible to being the Child's primary caregiver. She has decided that being a teacher would best suit her child care responsibilities as her schedule would be in keeping with the Child's schedule.
- [44] To this end, the Mother enrolled in university in January 2009. Since then she has been attending university on a full time basis. By going to school full time, she anticipated acquiring the necessary teaching credentials by September 2013. She further attested that she expects that in the first year that she will earn \$41,000 with an increase each year thereafter.
- [45] By the time she graduates, she will be 44 years old. She has consulted with counsellors at school and has been advised that her age will probably not be an impediment to securing employment as a teacher. She will have 21 years to work in this career. She is also fluent in Hindi and Punjabi which she contends will make her more marketable in that field.

- [46] In any event, whether it is to become a teacher or to train for some other type of employment, the Mother intends to use the next few years to acquire the necessary credentials to secure employment that will enable her to become economically self-sufficient while at the same time allowing her to fulfill her role as the primary caregiver of the Child. The evidence proves that this is necessary and in the Child's best interests.
- [47] As far as the Child's particular circumstances are concerned, she is presently and has throughout her schooling attended private school. Securing a good education is important to both of the parties. It is for that reason that after careful consideration, they enrolled her in a private school. She has attended this school from kindergarten to the present (she is now in Grade 5). The costs of this school total about \$15,000 per year. To finance this expense, the parties lived frugally and were able to do it without going into debt.
- [48] Although the Child's attendance at this school was a priority for both of the parties at the beginning, over the last few years the Father has become more concerned about whether it is a luxury that they can no longer afford and whether it provides her a better academic education than public school.
- [49] The Child has remained in private school to the present. Although there was some dispute between the parties just after they separated regarding the payment of the tuition for the upcoming year, it was ultimately paid. The first payment for the present year's tuition was paid after the Mother made an application and the Court ordered that it be done.

(III) CHILD CUSTODY AND GUARDIANSHIP

- [50] The only dispute with respect to these claims is whether the Child should be in the sole custody of the Mother (the position of the Mother) or whether she should be placed in the joint custody of both of the parties (the position of the Father).
- [51] Regardless of which of these orders is made, the parties agree that the Child should live primarily with the Mother and that she should be in their joint guardianship, the form of that order to be the Master Joyce model. This model provides a mechanism which ensures that both parents have the opportunity to participate in the making of decisions regarding significant aspects of their Child's life. It also provides a means by which decisions can proceed and be reviewed should the parents, despite their best efforts, be unable to reach and agreement.
- [52] Specifically, in this case the parties have agreed that if they were unable to agree on a matter despite their best efforts, the Mother would have the final decision-making power and the Father would have the right to bring an application to have that decision reviewed and set aside by the Court pursuant to s. 32 of the Family Relations Act, R.S.B.C. 1996, c. 128.
- [53] Joint custody and guardianship orders are best suited to situations in which the parties are able to communicate and co-operate with each other.

- [54] Sole custody and joint guardianship orders are suited to situations in which the parties are not able to communicate and co-operate fully but nevertheless it is in the child's best interests that the non-custodial parent has the opportunity to contribute to the child's upbringing by participating in the making of significant decisions pertaining to the child.
- [55] As was recognized in *Lennox v. Frender* (1990), 27 R.F.L. (3d) 181 (B.C.C.A.), a sole custody and joint guardianship order reserves part of the bundle of rights/responsibilities for the custodial and non-custodial parents to share.
- [56] A review of the evidence in this case proves that a joint custody order is not in the best interests of the Child. In particular, the Father has demonstrated a pattern of behaviour in which he is unwilling to communicate effectively and/or to co-operate with the Mother. In some situations, he has conducted himself in this manner even though it is apparent that his behaviour is not in the best interests of the Child. These behaviours appeared to be driven by a need on his part to prove that he is in control.
- [57] As far as an unwillingness to communicate effectively is concerned, this is demonstrated through his mercurial attitude to decision making. As the Mother attested (and as the evidence proved), on a number of occasions during their marriage the Father would advise the Mother that he agreed to a particular course of conduct, only to change his mind later and deny that he ever consented. The Mother attested that this conduct happened with sufficient frequency during their marriage that at some point she began to retain documents that confirmed his position on a particular matter.
- [58] The problem with this tendency is that it is difficult to know what the Father's decision is on matters because he will subsequently change his mind and then be evasive and obtuse about the initial decision as well as his present position.
- [59] His position on the renovations was an example of this type of behaviour - namely, agreeing to the renovations and the probable cost (he did the planning and developed the cost estimates) and then subsequently when those renovations were well underway withdrawing his consent as well the monies in their bank account that were to be applied to the outstanding costs.
- [60] Many illustrations of this behaviour occurred during the trial. For example, he attested that he opposed the Mother's possible resignation from her employment, her taking a leave of absence in May 2008, and her taking the 3-year unpaid leave in November 2011. The evidence, on the other hand provided, that at the time that they occurred, he did not oppose any of them.
- [61] Furthermore, with respect to the Father's unwillingness to communicate effectively, the evidence proved that at times the Father is not sincere in his communications. That is, he will take positions with no intent of following through. For example, last summer the Father insisted that he be permitted to take the Child on a two-week holiday. The Mother agreed. The Father did not take the Child on this holiday. He attested that he had to cancel his

holiday plans because he could not afford it. The evidence proved, however, that he never made any arrangements in the first place.

- [62] The evidence also did not support his contention that he could not afford to take a holiday. Rather, the evidence showed that although his financial resources have decreased as a result of the separation, he has been able to accumulate savings. Furthermore, because of their family situation, he could have taken a holiday out of town at little cost. Specifically, transportation could be financed at minimal costs because of the airline passes that were available to him through the Mother's employment with Air Canada and accommodation could have been probably have been provided by his brothers who live in Quebec and in Arizona respectively.
- [63] In any event, even if the Father could not afford to take the Child away on a holiday, this purported shortage of funds does not explain why he did not spend this holiday time here on inexpensive outings with the Child - outings such as taking the bus to the beach and having a picnic, et cetera. However, he chose to exercise little, if any, access to the Child during that period.
- [64] An example of his unwillingness to co-operate even though it may be in the Child's best interests is demonstrated through his attitude to evening weekday access. By agreement, the Father exercises access to the Child two evenings a week for one to two hours.
- [65] The Mother has endeavoured in the past to have the Father select particular days for the weekday access (for example every Tuesday or Wednesday, et cetera) so that the Child could then plan her activities to accommodate this schedule. The Father refuses to do this.
- [66] As became apparent during his testimony, there is no reason for this refusal other than he prefers to have the flexibility of being able to exercise this access when he feels like it. Although he is periodically away on a business trip and therefore not available on a weekday evening, generally speaking he is available every evening during the week. That is, he does not work during the evening nor does he have other commitments that would prevent him from setting up a fixed access schedule during the week.
- [67] Another example of his unwillingness to co-operate was shown in his conduct regarding the renewal of the insurance for the family vehicle late last spring.
- [68] By agreement, the Mother had possession of the family vehicle because she needed it to drive the Child to and from school. When the insurance became due, the Mother offered to pay it but she needed the Father's co-operation because the vehicle was in his name.
- [69] The Father refused to provide this co-operation unless the Mother paid out his interest in the vehicle. In addition to the fact that the Mother considered the Father's valuation too high (it was \$3,000 more than the valuation they agreed to in this proceeding), the Mother could not afford to pay him out at the time in any event and the Father had to be aware of that fact. She tried to persuade him to postpone the pay-out until the trial (which was then about 6 months away), but the Father refused. Finally, the Mother has to apply to Court to have the

Father co-operate in re-insuring the vehicle. In the meantime, she has to rent a vehicle to drive the Child back and forth to school.

- [70] These incidents are examples of conduct of the Father which demonstrate his unwillingness to communicate effectively and/or to co-operate with the Mother on a consistent basis. It is not an exhaustive list.
- [71] Given this pattern of conduct, a joint custody order would not be in the best interests of the Child. To the contrary, such an order would add uncertainty, stress and disruption to the Child's life.
- [72] A sole custody order, on the other hand, would permit the Mother to make the day-to-day decisions regarding the Child. Furthermore, it will avoid unnecessary disagreements between the parties, disagreements that are driven by the Father's unwillingness to communicate effectively and/or to co-operate.
- [73] Although a joint custody is inappropriate, I am satisfied that it is in the Child's best interests that the Father be a joint guardian with the Mother of the Child, provided that the terms of that guardianship order follow the Master Joyce model.
- [74] The evidence showed that the Father does love the Child and that when he does choose to communicate effectively and to co-operate he can make a meaningful contribution to the Child's life. The Master Joyce model enables the Father to make this type of contribution, but it also provides safeguards that protect the Child against the destructive type of conduct referred to earlier.
- [75] I am further satisfied that the Mother will comply with the terms of this guardianship order and will consult with the Father about the Child's upbringing in a meaningful manner. The evidence showed that she did so during the marriage and continued to do so post-separation.
- [76] In keeping with the Master Joyce model, the guardianship order in the present case will include the following provisions:
- (a) the parents are to be joint guardians of the estate of the Child;
 - (b) in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the Child;
 - (c) the Mother, who has the primary responsibility for the day-to-day care of the Child, will have the obligation to advise the Father of any matters of a significant nature affecting the Child;

- (d) the Mother will have the obligation to discuss with the Father any significant decisions which have to be made with respect to the Child, including significant decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the Child, and the Father will have the obligation to discuss these issues with the Mother, and each parent will have the obligation to try to reach agreement with respect to those major decisions;
 - (e) in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts, the Mother will have the right to make such decision, and the Father will have the right, under s. 32 of the Family Relations Act, to seek a review of any decision which that parent considers contrary to the best interests of the Child;
 - (f) the Mother shall advise the Father of the name of the Child's medical and dental practitioners; and
 - (g) each parent will have the right to obtain information concerning the Child directly from third parties, including teachers, counsellors, medical professionals and third-party caregivers.
- [77] To summarize, because it is in the Child's best interests, she will be placed in the sole custody of the Mother and in the joint guardianship of the parties, that guardianship to follow the Master Joyce model and to include the terms set out above.

(IV) ACCESS

- [78] The parties are agreed that the Father will have access to the child every Sunday between 11:00 a.m. to 6:00 p.m. with flexibility to change the times and/or change the day to Saturday on occasion.
- [79] Furthermore, they have agreed that the Father is to have access to the Child two evenings during the week, the length of that access to extend one to two hours at a time.
- [80] I am satisfied that it is in the Child's best interests that she sees the Father on a regular basis. The agreed upon terms ensure that this happens because it is a schedule that works for the Father in particular and because the Child and Mother are agreeable to it.

(A) Travel Restrictions

- [81] Although the parties agree that the Child should be permitted to travel with the other parent from time to time, there is a dispute as to the length of time that each of the parties is permitted to travel with the Child and the amount of notice of the travel to the other parent.
- [82] As far as the length of time for which a parent would be permitted to travel with the Child, the Mother is of the view that they should provide each other with a blanket authorization to travel with the Child. Moreover, although she contends that there should not be restriction on the amount of travel per year, she submits that each trip should be no longer than 24 days. The rationale for this length of time is that the trip would be for 3 weeks but the extra 3

days provides some travel flexibility as they will be using her airline passes which require them to fly stand-by.

- [83] The Father, on the other hand, contends that neither of them should be permitted to travel with the Child for more than 21 days in total each year.
- [84] All of the Child's extended family lives outside of British Columbia therefore to see them the Child will have to travel.
- [85] On her Mother's side, the Child's maternal grandparents live in India and are no longer capable of travelling to Canada. The Mother's two siblings live in England and in California, respectively.
- [86] On her Father's side, his two siblings live in Arizona and in Quebec. The Child's paternal grandparents have died.
- [87] To say the least, it is in the Child's best interests to establish relationships with the extended members of family as well as to spend extended periods of time with each of her parents.
- [88] Given all of these circumstances and, in particular, the places where these relatives reside, I have concluded that it is in the Child's best interests that there not be restrictions regarding travel with the Child other than that no single trip is to be longer than 24 days unless agreed to by the other parent and that agreement is reduced to writing.
- [89] As far as notice is concerned, the parties are to provide the other with as much notice as possible: at least 1-month's notice for trips with the Child of 2 weeks or longer; at least 2 weeks for trips more than 1 week but less than 2 weeks; and at least 2 days for trips of less than 1 week.
- [90] To avoid possible conflicts with scheduling in the summer, unless the parties agree otherwise and that agreement is reduced to writing, the Father is to plan any summer holiday trips with the Child in July while the Mother is to plan any holiday trips with the Child in August.
- [91] Further, as it was agreed to by the parties and as it is in the Child's best interests, the parent who is travelling with the Child will provide the other parent with an itinerary of the trip, including contact numbers and the place where the Child will be staying. This information will be provided to the other parent as early as possible: at least 2 weeks before a trip of 2 weeks or longer; 1 week before a trip of 1 week but less than 2 weeks; and 1 day before a trip of less than 1 week.
- [92] If all of these terms have been met, the other parent is to provide the travelling parent with written authorization to travel with the Child. This authorization is to be provided to the other parent when the itinerary is provided.

(B) Cell Phone Use

- [93] The Child has a cell phone. During the trial, the Father testified that he was seeking an order that the Child should not be permitted to use the cell phone (particularly to call the Mother) when she is on access visits with him.
- [94] In my view, this order is not in the best interests of the Child. Just as there will not be an order that the Child not call the Father when she is with the Mother, there will not be an order that she not call the Mother when she is with the Father.
- [95] To order that the Child not be permitted to contact the Mother when she is with the Father regardless of the circumstances is not in her best interests and would no doubt impact adversely on her relationship with the Father.
- [96] If, on occasion, the Child uses her cell phone in the hope of playing one parent off against the other, the parties should take steps to discourage that behaviour as they would have done before they separated. In other words, the parents should communicate with one another and tell the Child that they will not permit her to play them off against each other - whether she is endeavouring to do it by cell phone or some other means.
- [97] This end can be accomplished through the joint efforts of the parties, not by the requested order regarding cell phone use.
- [98] This application is dismissed.

(V) DIVISION OF FAMILY ASSETS

- [99] As with all claims pertaining to the division of family assets, the questions to be addressed are: the identification of those assets; the identification of family debts; the valuation of them; the appropriate apportionment (that is, the division to be made); and the distribution of them.
- [100] As a preliminary matter, to date there has been no order made pursuant to s. 57 of the Family Relations Act. In the course of her submissions, counsel for the Mother asked that this order be made in this case. Counsel for the Father, in passing, also mentioned that such an order be made.
- [101] Unfortunately, in the unusual circumstances of this case, there are not the grounds for such an order. An essential element of a s. 57 order is that there is no hope of reconciliation between the parties. As was set out at the beginning of these Reasons for Judgment, the parties requested that the claim for divorce be adjourned generally because they were considering reconciliation. In other words, although they nevertheless wanted to proceed with the other claims, they had not yet reached the point in their relationship of there being no hope of reconciliation.

[102] Although this circumstance does not preclude them from proceeding with the other claims, it does preclude the making of a s. 57 order. Therefore, this application is dismissed. In my view, this situation does not make a practical difference in the resolution of these claims in any event.

(A) Identification of Family Assets

[103] As far as the identification of the family assets, there is no dispute that the family residence, the Mother's Air Canada Pension, the Father's CIBC and Standard Life RRSPs, the 2005 Hyundai Tucson and the household items are all family assets.

[104] There is a dispute however as to whether the \$26,000 paid to the Father by his employer following separation and the \$8,000 paid to the Mother after separation by her employer in a long term disability payment are family assets.

[105] There was also an issue as to whether the Father had non-family assets and in particular whether he had an inheritance from his father's estate. As was clarified in her submissions, the Mother did not contend that this asset was a family asset but, rather, that it existed and was therefore a consideration when determining the division of the family assets.

[106] For reasons that follow, I am satisfied that both of the payments are family assets and that the Father has inherited property and other assets from his father.

[107] With respect to the \$26,000 paid to the Father, this money was deposited into the account that the Father opened in his own name shortly before separation. This payment was to reimburse the Father for expenses that he had incurred in the course of his employment prior to separation.

[108] Throughout their marriage, the parties had pooled their monies. The evidence proved that these expenses had been paid from bank accounts that were used for family purposes. In other words, these expenses were paid with family monies. Consequently, the reimbursement of these monies constitutes a family asset.

[109] Similarly, the \$8,000 payment made to the Mother was a retroactive benefit payment of disability benefits. These disability payments were made after separation but her entitlement to it arose prior to separation. If these payments had been made at the time they arose, they would have been a family asset as following their usual pattern these monies would have been pooled with the other family monies and would have been used for a family purpose.

[110] Given all of these circumstances I am satisfied that these monies are a family asset.

- [111] As far as the Father's inheritance is concerned, his evidence with respect to the existence of it was initially evasive and intentionally obtuse. After a series of contradictory answers, the Father did finally concede that he had inherited 1/3 of his father's estate and that this estate included a 1/3 interest in various properties in India. The other remaining interests in the estate are owned by his two brothers, each of whom have a 1/3 interest.
- [112] In addition to these properties, the evidence further proved that this inheritance includes a 1/3 interest in at least one bank account, the location of which was not clarified during the trial (the evidence disclosed that one of his siblings in his role as executor of the estate sought the Father's permission before making a withdrawal from this bank account).
- [113] Although the Father's father died a number of years ago and although he left his estate to his three children in equal parts, the distribution of this estate has been postponed because the Father's father left the Father's mother a life interest in some of the property in the estate. The Father's mother just died a few years ago.
- [114] The Father testified at trial that he did not know the value of his interest in his father's estate. During the marriage, he advised the Mother that it was in the range of \$300,000 to \$400,000. At his examination for discovery, he testified that he thought that the property in India was probably worth about \$250,000 to \$300,000.
- [115] Because it was provided at a happier time in their relationship, I am satisfied that, of these two estimates, the one provided during their marriage is probably the more trustworthy and reliable one. Therefore I am valuing his inheritance as being in the range of \$300,000 to \$400,000.
- [116] It may be that this valuation is too high which is unfortunate for the Father but he is the author of his own misfortune. He had the ability to ascertain its value and he chose not to do it.
- [117] As far as whether this inheritance is a family asset, the evidence supports the position of the parties that it is not. Although the Father's interest in these assets occurred before the parties' separation, the evidence falls short of proving that they ever became family assets. The evidence went no further in this case than that the parties may have discussed this inheritance as a source of income in the future. That is not sufficient to render this inheritance as a family asset: *Lamb v. Lamb* (2007), 44 R.F.L. (6th) 78 (B.C.S.C.) and *Hefti v. Hefti* (1998), 57 B.C.L.R. (3d) 171 (C.A.)
- [118] To summarize, the family assets in this case are: the family residence; the Mother's Air Canada Pension; the Father's CIBC and Standard Life RRSPs; the 2005 Hyundai Tucson; the Household items; the Father's retroactive expense payment of \$26,000; and the Mother's retroactive benefit payment of \$8,000.
- [119] The Father has other assets (namely, a 1/3 interest in his father's estate), having a value a value of \$300,000 to \$400,000 which is a matter to be considered in the division.

(B) Identification of Family Debts

[120] As far as family debts are concerned, there are two matters to be addressed: the \$25,000 loan made by the Mother's parents and the purported loan of \$60,000 made by the Father's father (now owed to his estate as the Father's father has died).

(1) The \$25,000 Loan Made by the Mother's Parents

[121] As far as this debt is concerned, during the trial both parties took the position that these monies were paid by the Mother's parents and that they were a loan. The issue was whether this loan is a "family" debt or a debt of the Mother alone.

[122] In his submissions, the Father appears to have resiled that position and is now contending that the evidence does not prove these monies were ever paid by the Mother's parents.

[123] To put this debt in context, as has been touched upon earlier, at the end of June 2008 the Father withdrew all the funds from the parties' bank account and opened a new account in his name alone. At the time this occurred, the parties had just completed renovations on their home. The evidence proved that the total cost of these renovations was \$65,000. It is also proved that at the time that the Father opened the new account, \$40,000 of these costs had been paid.

[124] The evidence proved that the remaining balance of \$25,000 was paid and that it was paid by the Mother. With respect to whether the evidence proved that the the maternal grandparents (the Mother's parents) had ever made this loan, given that at trial the Father took the position that the maternal grandparents had provided these monies and that these monies were a loan, it is not surprising that the Mother did not anticipate the need to prove it.

[125] In any event, I am satisfied that the evidence proves that these monies were paid by the maternal grandparents and that it was a loan. The Mother had no other sources from which to secure these monies. She had no income or resources of her own other than her parents. As far as it being a loan, I accept her evidence that it was a loan. From the outset this has been her position and until final submissions this was also the position of the Father.

[126] As to whether this loan constitutes a family debt, the Father contends that he should not bear any responsibility for the repayment of this loan because he did not agree to the renovations - that is, he did not agree as to when the renovations were to be done or to the extent of them.

[127] As was set out previously, the evidence does not support the Father's contention. To the contrary, the evidence showed that he did support the renovations (he did much of the planning and was present when they were first started) and that as far as the costs were concerned, he did the original estimates and the actual costs were in keeping with those estimates.

- [128] At most the Father asked the Mother to suspend finishing the renovations until he returned home because of the stress they were causing her. He withdrew the monies from the account not because he disagreed with the renovations or because of their cost but, rather, to prove that he was in control.
- [129] In any event, whether the Father agreed to incur this debt or not makes no practical difference in this case. The evidence proves that these renovations and hence the expenditure enhanced the value of a family residence.
- [130] Given these circumstances, if the incursion of the debt is to be attributed solely to the Mother, then that contribution, in fairness, should be recognized in the division of the family asset for which it was incurred, resulting in her being apportioned a greater interest than the Father.
- [131] Having reached all of these conclusions, I am satisfied that the \$25,000 debt owed to the Mother's parents is a family debt.
- (2) The Purported Loan of \$60,000 by the Father's Father
- [132] As a housekeeping matter, it is the Father's position that although the quantum of this loan was \$60,000, the amount to be repaid is now \$40,000 because his father has died and he (the Father) is the beneficiary of 1/3 of the estate. In other words, if the \$60,000 loan was repaid, he would receive \$20,000 of it as a result of his inheritance. He submits that the quantum of the debt should consequently be reduced by that amount.
- [133] Although relevant to repayment, this submission does not pertain to the substantive issue of the purported loan. Rather, the substantive issues are whether this loan ever existed and, if so, whether it is a "family" debt or a debt of the Father alone.
- [134] In 2003, the Father's father provided the parties with the amount of monies necessary to pay out their mortgage - namely, \$56,871.35 (the outstanding balance of their mortgage being \$55,867.46 and \$1,003.89 being the early repayment penalty and administration fees).
- [135] The Mother contends that this payment was a gift initiated by the Father's father while he was staying with the parties during a visit. As the Father's father explained at the time, he wanted to give the parties these monies because they had not had a big wedding, he had not given them a wedding present, he had made comparable gifts to the Father's siblings and he could not take the money with him.
- [136] The Father does not deny any of this. However, he contends that although his father offered this money as a gift he (the Father) declined it as unneeded and as unduly generous. He therefore arranged to repay these monies by entering into a Promissory Note with his father. The Mother did not sign the Promissory Note and, in fact, did not know about it until these proceedings.

- [137] As far as the Promissory Note is concerned, on September 23, 2003 (approximately 2 months after these funds were provided to the parties and the mortgage paid), a Promissory Note was drawn up between the Father's father as the Lender and the Father as the Borrower.
- [138] Included in the terms of this Promissory Note was: the provision that the principal amount of the loan was \$60,000; that the rate of interest was 8% per annum calculated monthly; that the family home was to be collateral for this loan; and that it was to be repaid upon demand but no later than 2 years from the date of the Promissory Note.
- [139] The Mother submits that this Promissory Note does not accurately reflect the nature of the transaction. However, it is her submission that the Father and the Father's father retroactively tried to change the nature of the transaction because of intervening events and in particular because they were angry with her at the time.
- [140] Five days prior to the making of the Promissory Note, there was an altercation between the Mother, the Father and the Father's father which ultimately resulted in the Father and the Father's father being removed from the family residence and in Court orders restraining them from re-entering the residence.
- [141] For reasons that follow, I am satisfied that the evidence proves the payment of the Father's father was a gift. Further, I am satisfied that the Promissory Note does not accurately reflect the nature of the transaction.
- [142] The suggestion that the parties would accept loan monies in the terms set out in the Promissory Note is inconsistent with the surrounding circumstances, including their conduct throughout their marriage.
- [143] Specifically, a hallmark of the parties' marriage is that they are both good money managers. It is inconsistent that they would enter into Promissory Note in which the terms included: a term that they repay more than the principal amount (namely, that they would repay \$60,000 which was \$3,128.65 more money than the \$56,871.35 had been given); that they pay a higher interest rate (namely, the Promissory Note had an interest rate of 8% while their mortgage had an interest rate of 4.5%); and that they be liable to repay the loan on demand of the lender rather than at the end of term.
- [144] At the time the Father's father provided these monies to the parties, they had no debts other than their mortgage. They were not having any difficulty meeting the terms of this mortgage. Furthermore, there was no indication that they would be encountering any difficulties in the future. Their payments were \$600 per month.
- [145] Further, the immediate circumstances surrounding the making of the Promissory Note are inconsistent with it being an accurate reflection of the nature of the transaction.

- [146] For instance, it was made 2 months after the transaction rather than at the time that the funds were provided. Moreover the Mother was not a signatory to this Promissory Note although she was a joint owner of the family residence.
- [147] Furthermore, I am satisfied that the evidence proves that the Mother had no real knowledge of this document until these proceedings, although during there had been a passing reference in a letter from one of the Father's brothers to something in relation to the estate, when the Mother asked the Father for clarification of this comment the Father responded that it was nothing and that he would take care of it.
- [148] The Father's father died within a few months of making the Promissory Note. Although he never mentioned to the Mother the making of the Promissory Note, before his death he did apologize for his conduct at the time of the estrangement.
- [149] Upon considering all of these circumstances, I am satisfied that regardless of the Promissory Note there never was a loan of \$60,000 or any other amount made by the Father's father to the parties. Rather, the payment made by the Father's father to the parties was a gift. It could not be retroactively converted into a loan between the Father's father and the Father.
- [150] If the legal effect of the Promissory Note is that it creates a debt, that debt goes no further than a debt between the Father and his father. It is not a family debt.

(C) Valuation of Family Assets

- [151] With respect to the valuation the family assets, the only dispute pertains to the valuation of the family residence.
- [152] As the evidence proved, the parties agreed that the appraised market value of this family asset was \$635,000 (inclusive of a real estate commission of 7% on the first \$100,000 and 2.5% on the balance, plus GST). The net value of this family asset is \$613,607 when the real estate commission is subtracted.
- [153] For some time the Mother has indicated that she intends (with the assistance of family members) to buy out the interest of the Father in the house. During the trial, the Father indicated that he intends to buy the Mother's interest out should she for whatever reason decide not to buy him out. In either case, as this asset will not be placed on the open market, it will not be necessary to employ the services of a real estate agent. Therefore, it will not be necessary to pay the real estate commission.
- [154] Given these circumstances, the issue is whether this family asset should be valued at its market value (inclusive of the real estate commission) or whether it should be valued net of the real estate commission.

- [155] The Mother contends that the value of this asset should be the market value minus the real estate commission. That is, the Mother submits that the quantum of each of their interests should be calculated as if the property was listed and sold to a third party. The Mother argues that a deduction of these monies is appropriate as the parties would receive them if the sale was made in the ordinary course.
- [156] The Father, on the other hand, submits that the calculation of the buy-out should be based on the market value.
- [157] The division of family assets is founded on principles of fairness. In keeping with that principle, I am satisfied that, given that one party is going to buy out the other, the valuation of this family asset should be calculated on the basis of the net value of this family asset (that is the market value minus the real estate commission) as that valuation more accurately reflects the actual value of this family asset to the parties.
- [158] To require the inclusion of the real estate commission creates an unfair benefit to the party being paid out and an unfair detriment to the party making the pay-out. It results in the party receiving a higher amount than they would otherwise have received and the party making the pay-out receiving a lesser interest than they would otherwise have received.
- [159] Given these circumstances, for reasons of fairness, I am satisfied that the value of this family asset for purposes of this division is set at \$613,607.
- [160] As far as the valuation of the remaining family assets is concerned, there is no dispute that: the value of the Mother's Air Canada Pension is \$35,800 before tax; the Mother's RRSP is \$19,320; the Father's CIBC and Standard Life RRSPs are \$272,647; the 2005 Hyundai Tucson is \$7,000; the Father's retroactive expense payment is \$26,000; and the Mother's retroactive benefit payment is \$8,000.
- [161] Therefore, the total value of the parties' family assets is \$982,374 gross and \$957,374 net of the repayment of the family debt of \$25,000 to the Mother's parents.

(D) Division of Family Assets

- [162] The only issue with respect to the appropriate division or apportionment of the parties' interests in their family assets was whether it was unfair to equally divide their interests in the family residence.
- [163] The parties agree that it is not unfair to equally divide their interests in the Mother's Air Canada Pension, the Mother's RRSP, the Father's CIBC and Standard Life RRSPs, the 2005 Hyundai Tucson, and their household items.

- [164] Neither of the parties addressed the division of the Father's retroactive expense payment and the Mother's retroactive benefit payment in their submissions. As the unfairness arguments were directed solely to the division of the family residence and as the Father's retroactive expense payment and the Mother's retroactive benefit payment are similar in kind to the family assets that the parties agreed should be divided equally, I have concluded that these two family assets should also be divided equally.
- [165] With respect to the division of the parties' interests in the family residence, the Mother contends that there should be a re-apportionment in her favour. The Father, on the other hand, argues that he is entitled to a re-apportionment in his favour but that he will agree to an equal division.
- [166] As far as the governing legal principles are concerned, there is no dispute that family assets should be divided equally unless, having regard to the factors set out under s.65 (1) of the Family Relations Act, such a division would be unfair: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367.
- [167] Applying these principles to the circumstances of this case and in particular having regard to subsections (e) and (f) of s. 65(1) of the Family Relations Act, I am satisfied that an equal division would be unfair and that the parties' interests should be re-apportioned in the Mother's favour. The Mother has suffered and will continue to suffer an economic disadvantage as the result of her role in the marriage.
- [168] With respect to s. 65(1)(e) of the Family Relations Act, an equal division would be unfair having regard to the fact that the Mother will require a greater share of the family assets to fulfill her need to become or remain economically independent and self-sufficient.
- [169] As the evidence disclosed, with the consent of the Father, the Mother withdrew from the workforce as a result of her role as the primary caregiver to the Child. Because of this role, the Mother has lost income as well as pension benefits. In the meantime, the Father has received a significant benefit from her role in that it has left him free to pursue his work without encumbrances. Through the experience and skills that he has been able to develop over this period, he is now able to generate more income than the Mother will ever be able to generate.
- [170] As result of her role as the primary caregiver, the Mother's return to the work force will be delayed until she can acquire the necessary credentials to secure employment that is suited to this role - namely as a teacher. This retraining is going to take her 4 years.
- [171] Although the Father contends that retraining is not necessary and that she can work as a flight attendant or in some other capacity with Air Canada, as was set out previously in this Judgment, the evidence does not support these contentions.

- [172] Even though the working life of the Mother is longer than that of the Father (she is 40 years old and he is 51 years old), she will probably never be able to generate the level of income that the Father has achieved or the level of income that she would likely have achieved had she not taken on the role as the primary caregiver to the Child.
- [173] With respect to s. 65(1)(f) of the Family Relations Act, an equal division of this family asset is unfair because of "any other circumstances relating to the liabilities of a spouse".
- [174] Because of her continuing role as the primary caregiver of the Child, the Mother also now has the responsibility of providing and maintaining a home for the Child. This circumstance is a liability that can be considered under s. 65(1)(f): *Lanaway v. Lanaway* (1983), 37 R.F.L. (2d) 214 (B.C.C.A.).
- [175] The Father submitted that rather than s-s. (f) (or s. 65(1)(e)) supporting a re-apportionment in the Mother's favour, they supported a re-apportionment in his favour.
- [176] Specifically, he argues that it was as a result of his financial contributions they were able to acquire and maintain the family residence. Section 65(1)(f) also includes a consideration of "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property".
- [177] These circumstances do not support re-apportionment in the Father's favour but rather support a re-apportionment in the Mother's favour. As was set out in the consideration of s. 65(1)(e), he was able to gain this financial advantage and make these financial contributions because of the contributions made by the Mother - namely her contribution of managing the household and of providing the primary care for the Child: *Toth v. Toth* (1995), 17 R.F.L. (4th) 55 (B.C.C.A.).
- [178] Somewhat connected to this point and another factor to be considered under this subsection is the fact that the Father has a higher income earning capacity than the Mother: *Armistead v. Armistead*, 1994 CarswellBC 1595. He will probably always have a higher income producing capacity.
- [179] Traditionally the Father has received a raise every year. Although this is not certain, given the historical pattern, it is likely to continue to happen. In other words, the Father's role in the marriage allowed him to participate fully in the workforce, resulting in him now having the capacity to employment that generates a good income that increases each year.
- [180] Lastly another consideration that supports the Mother's argument for a re-apportionment in her favour is the fact that the Father has other assets - namely, a 1/3 interest in his father's estate which I have valued at \$300,000 to \$400,000: *Hefti v. Hefti*, supra.
- [181] Having regard to all of these circumstances and to s. 65(1)(e) and (f), I am satisfied an equal division would be unfair. Rather, I have concluded that the family residence should be re-apportioned in the Mother's favour.

[182] As far as the degree of that re-apportionment is concerned, I have concluded that the Mother should receive a 65% interest and that the Father should receive a 35% interest. Although the Mother argues that this family asset should be re-apportioned granting her a 70% interest, I concluded that that would be too high. The main consideration against it is the fact that the Father has a shorter working life than the Mother. At 51 years old, the Father's working life will probably be 14 years - that is until he is 65 years old. The Mother is presently 40 years old. She will be 44 years old when she graduates. Assuming she works until she is 65, she will have a 21-year working life.

(E) Distribution of Family Assets

[183] As was touched upon earlier, the total value of the parties' family assets is \$982,374 gross and \$957,374 net after the repayment of the \$25,000 loan to the Mother's parents.

[184] Setting aside the amount owed to the Mother's parents for the time being, the value of the Mother's interest in the family assets is \$583,228.05: \$184,383.50 (which is the total for her 50% interest in her Air Canada Pension; her RRSP; the Father's RRSPs; the 2005 Hyundai Tucson; the \$26,000 retroactive expense payment; the \$8,000 retroactive benefit payment); and \$398,844.55 for her 65% interest in the family residence.

[185] With respect to the Father, setting aside the debt owed to the Mother's parents the value of his interest in the family assets is \$399,145.95: \$184,383.50 (being for his 50% interest in the Mother's Air Canada Pension; the Mother's RRSP; his RRSPs; the 2005 Hyundai Tucson; the \$26,000 retroactive expense payment; the \$8,000 retroactive benefit payment); and \$214,762.45 for his 35% interest in the family residence.

[186] As far as the distribution of their interests in these family assets are concerned, the parties agree that to the extent possible each party is to retain their own RRSPs and that the Mother is to retain her Air Canada pension and the 2005 Hyundai Tucson.

[187] Therefore pursuant to this agreement, the Mother's Air Canada pension, her RRSP, and the 2005 Hyundai Tucson are distributed to her and the Father's RRSPs are distributed to him. In addition, as the Mother has already received the \$8,000 retroactive benefit payment, the distribution of that family asset has been made to her. Similarly, as the Father has already received the \$26,000 retroactive expense payment, the distribution of that family asset has been made to him.

[188] As a result of these distributions the Mother has received \$70,102 of the \$583,228.05 that she is owed for her interest in the family assets (the total of \$70,102 is the total of \$35,800 for her Air Canada Pension, \$19,320 for her RRSP, \$7,000 for the 2005 Hyundai Tucson and \$8,000 for the retroactive benefit payment). The balance owing to the Mother for her interest in the family assets after these distributions is \$513,126.05.

- [189] The Father, on the other hand, has received as a result of these distributions \$298,647 of the \$399,145.95 that he is owed for his interest in the family assets (the total of \$298,647 is the total of \$272,647 for his RRSPs and \$26,000 for the retroactive expense payment). The balance owing to him for his interest in the family assets is \$100,498.95.
- [190] The Mother intends to purchase the family residence. The amount required to accomplish that purchase is \$100,498.95, the balance owing to the Father for his interest in the division of the family assets.
- [191] However, the debt owed to the Mother's parents has not yet been addressed. Each of the parties will be responsible for the repayment of one half of that debt. That is, they will both be required to repay her parents \$12,500.
- [192] To ensure that this debt is repaid, I am ordering that the Father pay the Mother his portion of this repayment and that she, in turn, forward that repayment as well as the repayment of her portion of this debt to her parents.
- [193] To facilitate this process, the Father's portion of this debt will be deducted from the amount required to pay out his interest in the family assets. In other words, the amount required to pay out his interest will be \$87,998.95 (being \$100,498.95 minus \$12,500.00).
- [194] Unless otherwise agreed by the parties in writing, the Mother will have until 5:00 p.m. on March 1, 2010, to purchase the Father's interest.
- [195] If she is not able to buy him out by that time (and he does not agree to give her an extension) or if she decides that she does want to buy out his interest, the Father will have the option of buying out her interest, the value of her interest being \$500,626.05 (\$513,126.05 minus \$12,500 which is owed to the maternal grandparents).
- [196] However, as I have ordered that the Mother is to ensure that the parties' loan of \$25,000 is repaid to the maternal grandparents, the amount paid to her by the Father should include his portion of the repayment of that loan - namely, \$12,500. Therefore, he should pay the Mother a total of \$513,126.05 (\$500,626.05 of this being for the Mother's interest in the family assets and \$12,500 being for the loan to the maternal grandparents). The Mother, in turn, will pay the Father's portion of \$12,500 to the maternal grandparents along with her contribution of \$12,500.
- [197] Unless otherwise agreed by the parties in writing, the Father will have until 5:00 p.m. on May 1, 2010, to buy out her interest. In the meantime, the Mother and the Child may continue to reside in the family residence should they chose to do so.
- [198] If neither of the parties decides to buy out the other, the family residence is to be put on the market. The parties will have joint conduct of the sale. Although the parties' proportionate interest in the net proceeds of this sale will remain at 65% and 35%, the monetary value of that interest may vary because the property is being sold on the open market.

[199] As far as the distribution of their household items is concerned, the parties agree that they will arrange that distribution between themselves.

(VI) SPOUSAL MAINTENANCE

[200] As far as this claim is concerned, the parties agree that the Mother is entitled to spousal maintenance. The issues pertain to the quantum and duration of those maintenance payments.

[201] Since June 2009, as the result of a Court order the Father has been paying the Mother \$2,435 per month. This amount is the middle of the range suggested by the Spousal Support Guidelines, having regard to the Father's present income of \$96,699.20 and child maintenance payments of \$878 (the amount payable on the income under the Federal Child Support Guidelines).

[202] The Mother contends that the spousal maintenance payment should continue in the amount of \$2,435 per month.

[203] The Father, on the other hand, contends that the quantum of this payment should be reduced to \$1,200 on the basis that an income of \$40,000 be imputed to the Mother.

[204] I do not agree with the Father's contention.

[205] In addition to the findings that have been set out earlier that the Mother probably does not have the option of returning to her employment with Air Canada, the only time that the Mother earned as much as \$40,000 was before the Child was born. Since the Child's birth, her earnings have been: \$22,016.04 in 2000; \$12,777.53 in 2001; \$5,885.36 in 2002, \$137.62 in 2003; \$1223.11 in 2004; \$30,911.38 in 2005; \$22,665 in 2006; and \$26,165.71 in 2007.

[206] Most significantly however, I am satisfied that to fulfill her role as the primary caregiver to the Child and to become and maintain economic independence and self-sufficiency, the Mother is going to have to retrain.

[207] To achieve this end she is presently attending school full time. Between this situation and providing primary care to the Child, the Mother does not have the time to secure employment of any kind.

[208] Given all of these findings, I am satisfied that it would inappropriate to impute any income to the Mother. As far as the quantum is concerned, I am satisfied that the amount of \$2,435 per month (the mid-range amount) is appropriate, particularly as she has received 65% interest in the family residence.

[209] With respect to the duration of these payments, the Father submits that they should be no longer than 7 years. The Mother, on the other hand, was silent with respect to the overall duration but argued that at the very least the payments should remain in the current amount until for 4 years - that is until the Mother has acquired her teaching credentials.

- [210] Given all of the circumstances of this case including the Mother's need to retrain, the length of the parties' marriage (17 years), and the young age of the Child (10 years), I am satisfied that on both compensatory and non-compensatory grounds the duration of these payments should be indefinite at least for the time-being.
- [211] At the end of January 2014, the Father may make an application for a review of this order but such an application is not to be made before that time. This intervening period will provide the Mother with the opportunity to acquire her teaching credentials and to begin to establish herself in that profession or, if she chooses, not to pursue a teaching career and to acquire the credentials in another field and to begin to be established in it.
- [212] The opportunity for the Father to seek a review of this order at the end of January 2014 should not to be interpreted as meaning that spousal maintenance will cease at that time. Rather, it will be up to the Court to decide what, if any, changes should be made to the present order.
- [213] With respect to the system of payment to be employed, the payments of \$2,435 are to be made on the first of each and every month, commencing on the 1st of January 2010.
- [214] As will be seen in the Child Maintenance section of this Judgment, those payments are to be made with post-dated cheques, provided a year at a time commencing on July 1st and finishing on June 30th of each year. This schedule is to accommodate any changes that are to be made in the quantum of the upcoming years' child maintenance payment as a result of changes in income as shown on that year's Income Tax Return and Notice of Assessment.
- [215] To simplify the whole procedure, the Father will also provide post-dated cheques for spousal maintenance at the same that he is providing the child maintenance cheques - namely, the 1st of July of each year commencing on July 1, 2010.
- [216] In the intervening time, the Father is to forthwith provide the Mother with cheques for January through June 2010. If he has already made the payment for January, the cheques will then be for February through June 2010.

(VII) CHILD MAINTENANCE

- [217] The issue with respect to this claim pertains to extraordinary and special expenses and, in particular, as to whether the financial circumstances of the parties are sufficient to sustain the expense of the Child's continued attendance at private school.
- [218] As a preliminary matter, the Mother contends that I should use the Father's likely income in 2010 - namely, \$101,533.00 after a 5% raise - rather than his current income of \$96,699.20. She submits that this is appropriate as the Father regularly receives a bonus each year. Specifically, his income in 2006 was \$73,559.84; in 2007 it was \$80,625.50; in 2008 it was \$115,152 (\$92,102.40 being his base salary and the balance of \$23,049.50 being a bonus); and in 2009 it was \$96,699.20.

- [219] Although historically he has received a raise each year, I have concluded that it would be inappropriate to impute a higher income to the Father as it is not certain that he will receive this increase. Though the likelihood of his income increasing in the future was considered by me as a factor supporting a re-apportionment of the family residence in the Mother's favour, that consideration was a likelihood over time, not the conclusion that he would definitely receive a raise this year. If the Father does receive raises, the Child will eventually benefit from that as the quantum of the child maintenance payment will increase to correspond with the amount payable under the Federal Child Support Guidelines and the amount of his proportionate share of the extraordinary and special expenses will increase.
- [220] With respect to the manner of payment of child maintenance and special and extraordinary expenses, because the quantum of the child maintenance payment will change annually in accordance with the Federal Child Support Guidelines as the income of the Father changes and as the proportionate of the parties to the special and extraordinary expenses will change as the incomes of the parties change, on or before the 1st of July of each and every year commencing with July 1, 2010, the Father will supply the Mother with 12 post-dated monthly cheques for child maintenance and for his proportionate contribution for annual extraordinary and special expenses respectively. As far as the special and extraordinary expenses, these payments will pertain to the expenses that the parties are able to identify in advance - that is, activities in which the Child participates on an annual basis. Payments for the Father's contribution for isolated special or extraordinary expenses (for example, a school outing) will be made at the time that it is incurred.
- [221] To prepare for this exchange and any changes that need to be made to the amounts of the payments made, on or before May 31 of each year commencing on May 31, 2010, each of the parties provide the other with a copy of their Income Tax Return and Notice of Assessment for that year. For example, on or before May 31, 2010, each of the parties will provide the other with a copy of their Income Tax Return and Notice of Assessment for 2009.
- [222] Following that exchange, the parties are then to determine the amount of child maintenance payable in accordance with the Federal Child Support Guidelines, the Father's annual income for the upcoming year being the amount set out in those documents. In addition, the parties are to determine the special and extraordinary activities in which the Child will participate in the upcoming year (as much as they are able to make that determination at this time), the cost of those activities, and their proportionate contribution to them.

- [223] In ordering this system, I recognize that these payments are based on the Father's income for the previous year, an income that may be lower than his current income or that may be higher than his current income. However, given the communication problems that the parties have encountered, this system provides a mechanism wherein the quantum of the payments can be calculated in a straightforward and orderly manner, based on reliable documentation.
- [224] In the meantime, the Father is to forthwith provide the Mother with post-dated cheques to cover the child maintenance payments and the special and extraordinary expense payments until July 1, 2010. That is, if the payment has already been made for January 2010, the Father will provide post-dated cheques for February through June. If he has not made the January payment, the payments for that month will also be provided.
- [225] In addition, at the time of trial, the Father had not paid his contribution to the agreed-upon special and extraordinary expenses. If those payments have not yet been made, they are to be made forthwith.
- [226] As far as the timing of these payments is concerned, the child maintenance payments and the special and extraordinary expense payments are payable on the first of each and every month, commencing on January 1, 2010.

(A) Quantum of Child Maintenance

- [227] With respect to the quantum of Father's income, for the reasons set out earlier in this Judgment, it will be set at \$96,699.20 which was the quantum of his income at the time of the trial.
- [228] Pursuant to the Federal Child Support Guidelines, the amount of child is \$878.00 per month. This is the amount that the Father has been paying pursuant to a Court order made in June 2009. The Father will continue to pay this amount per month for the support of the Child.

(B) Special and Extraordinary Expenses

- [229] As far as extraordinary and special expenses are concerned, the parties agree that for purposes of calculating their respective contributions that the Father's contribution should be based on an annual income of \$67,479.20 (that is, his annual income of \$96,699.20 minus \$29,220; the annual amount he is paying in spousal maintenance with monthly payments of \$2,435).
- [230] The Mother's contribution should be based on an income of \$29,220.
- [231] Their proportionate contributions are 69.8% (the Father) and 30.2% (the Mother).

- [232] Although there is a dispute with respect to the Child's continued attendance at private school, there is no dispute that her participation in her Kumon, piano lessons, and ballet classes should be allowed as special and extraordinary expenses. In my view, the evidence supports this agreement and therefore an order will be made allowing these expenses.
- [233] With respect to whether the Child's continued attendance at private school should be allowed as a special and extraordinary expense, to succeed in this application the Mother must establish that this expense is a special or extraordinary expense (that is, it must be an unusual, out of the ordinary, exceptional expense); that it is necessary given the Child's best interests; and that it is reasonable given the means of the parents and the family's spending pattern prior to separation: *McLaughlin v. McLaughlin* (1998), 57 B.C.L.R. (3d) 186 (B.C.C.A.)
- [234] When making the determination as to whether these requirements have been met, the Court must also be mindful of the fact that "[w]here parents have agreed to private schooling while together, absent any change that would indicate the expense is unnecessary or unreasonable, such expenses are payable": see also *A.D.N. v. G.A.N.*, 2005 BCSC 1557 at para. 27; *Van Deventer v. Van Deventer*, 2000 BCCA 9.
- [235] There is no dispute that this expense is extraordinary and special.
- [236] With respect to private schools, the Mother submits that it is necessary as it ensures that the Child receives a first class academic education; it is a place where she is comfortable and flourishing having attended it since kindergarten; and it is the place where most, if not all of her friends go.
- [237] The Mother further submits that the incursion of this expense is still financially reasonable and within the means of the parties as the Father's income is greater than it was during the marriage and they were able to finance the expense then as well as being able to set aside monies for the renovations. Since separation, the Father has still been able to accumulate some savings and put monies into RRSPs (for example about \$8,000 in 2008).
- [238] The Father, on the other hand, contends that it is not necessary and certainly not in the Child's best interests as it is elitist and the commute reduces the time available for him to spend with the Child. Furthermore, he argues that prior to separation it was difficult financially to maintain the Child's attendance at this school. He contends that for some time he tried to persuade the Mother that they should withdraw the Child. In any event, he submits that now there are two households both being supported on his income it is no longer affordable.
- [239] Upon considering these submissions and the applicable legal principles, I have concluded that the pivotal issue is whether given the parties' present means this expense is still affordable. Put another way, the issue is whether the separation of the parties constitutes, in the circumstances of this case, a change that renders this expense unreasonable.

- [240] I have concluded that this expense is no longer reasonable.
- [241] The cost of the private school is \$15,000 per year or apportioned over the year \$1,250 per month. The Father's net disposal income after the payment of child support, spousal maintenance, and income tax is in the range of \$2,995 to \$2,457 (the variation being the amount of income payable).
- [242] In either case, the incursion of this expense is not reasonable - it is not affordable.
- [243] There has been a significant change in the parties' circumstances as a result of their separation. Specifically, the Father's income is now supporting two households rather than one.
- [244] Although his present income may be greater than it was during the marriage when the parties were able to send the Child to private school, as well as over the years accumulate some savings, it is not sufficient to finance this expense as well as the additional expenses that have arisen because of the breakdown of their marriage.
- [245] Although the Father may have been able to incur some savings in the last year, he has been able to do this because he has been living in minimal conditions pending the resolution of the property issues raised in this trial. That is, he has been paying a neighbour \$600 a month which provides him with a room in their home and one meal a day.
- [246] Now that the property issues have been resolved, he hopes to acquire more appropriate accommodation - accommodation that is large enough so that the Child can stay overnight. In other words, it is inappropriate to determine the affordability of this expense on the basis of the Father's present circumstances. They are artificially low. In any event, even if his expenses were to remain as they presently are, the private school expense is no longer affordable.
- [247] The parties have already recognized that they cannot afford the pre-separation lifestyle. They have reduced the number of activities in which the Child is involved.
- [248] Furthermore, the parties' overall income is less than it was during the marriage.
- [249] As has been addressed earlier in this Judgment, the Mother is now in the process of acquiring the necessary credentials to become a teacher. To do this as quickly as possible means that she will not be generating any income for the next 4 years as she will be attending school.
- [250] Although she was only able to work intermittently during the marriage because of her child care responsibilities, she did generate income, income that was used to pay family expenses such as the Child's private school fees. For example in 2005 she earned \$30,911.35; in 2006 she earned \$22,665; and in 2007 she earned \$26,165.71.

[251] I have concluded that as a result of the change in the means of the parties after the breakdown of their marriage, the incursion of the expense of the Child's continuation in private school is no longer affordable. As a consequence, this application is dismissed.

(VIII) COSTS

[252] Costs were not addressed during this trial.

[253] In the event that either party wishes to apply for an order for costs, I am not seized of the matter. Rather, that application may be heard by any judge on this Court.

(IX) CONCLUSION

[254] To summarize, the Child is placed in the sole custody of her Mother and in the joint guardianship of both parties, the form of that guardianship order to follow the Master Joyce model. Access will be on the terms as agreed by the parties.

[255] As far as the division of family assets is concerned, all of the family assets save and except the family residence will be divided equally. The family residence will be re-apportioned; the interest of the Mother being 65% and the interest of the Father being 35%.

[256] Spousal maintenance is set at \$2,435 per month, the Father being granted liberty to bring an application for review after the end of January 2014. Child maintenance is set in the amount of \$878 per month. The expenses incurred for the Child's participation in Kumon, ballet classes, and piano lessons are allowed as special and extraordinary expenses. The application that the payment incurred for the Child's continued attendance at private school be allowed as a special and extraordinary expense is dismissed.

"SINCLAIR PROWSE, J."

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Prepared on 29 October 2026 · Esheria