
CANADA / JUDGMENT

G.W.Z. v. S.M.Z.

2004 BCSC 1494

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

G.W.Z. v. S.M.Z.,

2004 BCSC 1494

Date: 20041117

Docket: 35982

Registry: Kamloops

Between:

G.W.Z.

Plaintiff

And

S.M.Z. also known as S.M.B.

Defendant

Before: The Honourable Mr. Justice Powers

Reasons for Judgment

Counsel for the plaintiff

S. Soll

Counsel for the defendant

C.M. Sauter

Date and Place of Trial/Hearing:

October 18, 19, 20, 21 and 22, November 2 and 3, 2004

Kamloops, B.C.

- [1] Mr. G.W.Z. and Ms. S.M.B. are the parents of two children, C.L.Z. and S.R.Z., both born [], 1996. The parties were married June 23, 1990, and separated August 1, 1996. They entered into a separation agreement April 30, 1997, and were divorced January 20, 1998.
- [2] The separation agreement provided that the parties would have joint custody and guardianship of the children, with the primary residence to be with Ms. S.M.B., and Mr. G.W.Z. to have liberal and generous access. The agreement also provided for child support in the amount of \$1,000.00 per month, and spousal support in the amount of \$200.00 per month. The parties abided by this agreement, and it was filed with the Provincial Court in W. [], British Columbia, and with the Supreme Court in Kamloops, British Columbia. The children resided with Ms. S.M.B. until September of 2003, when they came to live with Mr. G.W.Z. and his present wife, N.V., in Kamloops, British Columbia.
- [3] The pleadings refer to the Divorce Act and the Family Relations Act, but the parties have advised me that they are proceeding pursuant to the Divorce Act. The issues raised in this trial are:
1. The primary residence or day to day care of the children. The parties agree that they should continue to be joint custodians and guardians and that guardianship should be prescribed in the form of the "Master Joyce" Order.
 2. If Mr. G.W.Z. has the primary residence of the children, should there be a retroactive adjustment or credit to Mr. G.W.Z. for the child support paid by him since September 2003, and if so, how should it be adjusted.
 3. Should Ms. S.M.B. be entitled to spousal support and if so, in what amount. Should that be time limited, subject to review or step down over time?
 4. If Mr. G.W.Z. has the primary residence of the children, what is Ms. S.M.B.'s child support obligation?
 5. Costs.

Background

- [4] Mr. G.W.Z. is 43 years of age and a Senior Fisheries Technician employed by the Department of Fisheries and Oceans. He presently works out of Kamloops, British Columbia. He married N.V. on February 14, 1999. She is 35 years of age and self-employed as a Certified Financial Planner working in Kamloops and in Langley, British Columbia.

- [5] They lived together beginning in 1997 in Langley, British Columbia and approximately three years ago moved to Kamloops. They reside on a three acre parcel of land which has been described as a hobby farm. They have a four bedroom home. They have shelter for horses and sheep. They also have a cow and seven sheep dogs.
- [6] Ms. S.M.B. is 36 years of age and lives at T.[], British Columbia. She lives on a ten acre parcel of land, which was subdivided from her parent's ranch. She and the children resided in that home from approximately May of 1999, to the summer of 2003 when the children came to live in Kamloops.
- [7] Mr. G.W.Z. and Ms. S.M.B. lived in Chilliwack after they were married. Mr. G.W.Z. was working for the Department of Fisheries and Oceans and Ms. S.M.B. worked as an artist in a business that they formed, as well she worked for a print shop for two or three years before the children were born. The parties were living in their own home in Chilliwack when the children were born in [] of 1996. The parties separated in August of 1996, but continued to reside in the home until it was sold in March of 1997. While they both resided in the home, Mr. G.W.Z. helped with care of the children when he was not working. When the home sold, Ms. S.M.B. and the children moved to W.[]. Initially, Mr. G.W.Z. did not see the children a great deal, although within a year, I am satisfied, that he was seeing the children approximately 30 percent of the time or more. The parties do not agree on the exact amount of time, but I am satisfied that it was significant. Mr. G.W.Z. was more than simply an alternate weekend father.
- [8] The parties had agreed in their separation agreement that Mr. G.W.Z. would have liberal and generous access and that the access would accommodate his work schedule and give him the most access possible in the children's best interest. Ms. S.M.B. acted according to the spirit of the agreement and was extremely generous with regard to access. To their credit, the parties were able to work out a pick up and drop off location for the exchange of the children, to reduce the amount of travelling each of them had to do. Due to Mr. G.W.Z.'s work schedule, which involved busy times of the year usually in the spring and summer and in the fall, he was able to accumulate time off. Ms. S.M.B. facilitated access for extended periods of time. There were occasions when this amounted to almost a two week on two week off schedule of access. N.V., Mr. G.W.Z.'s wife, has been involved in the children's lives since they were infants and actively involved in their care.
- [9] Mr. G.W.Z. enrolled the children in a M.[] school in Langley in the fall of 2000. This was a pre-school program. The children would attend while they were with Mr. G.W.Z., but, of course, not be able to attend when they were back at T.[] with their mother. Mr. G.W.Z. believed it would be in the children's best interest if they could attend full-time and obtained a letter from the teachers at the school supporting his position that it would benefit the children to attend the school on a full-time basis. Understandably, Ms. S.M.B. did not wish to give the children up on a full-time basis. Her position was that they were attending pre-school one half day a week at T.[] and it was not necessary for them to attend the M.[] school full-time.

- [10] The children entered kindergarten at T.[] in the fall of 2001. The fall session involves attending school two days a week, a Tuesday and Thursday. In the spring session of 2002, this was increased to three days a week.
- [11] The children's second and third term progress reports indicate that the children were not progressing as would normally be expected in the areas of reading and writing and communication. S.R.Z.'s writing did meet the expectations for a child at her level. A daily home reading program was recommended for both of them and it was recommended that they continue to use materials provided by the school district speech specialist.
- [12] Their third term reports indicate that they had missed a total of 13.5 days of school that year. C.L.Z.'s report indicated that she had improved in her language arts, but it was suggested that the parent's continue to work with her on her spoken language and number recognition throughout the summer. S.R.Z. was having more difficulty with reading and again, it was suggested that she continue to work at home. C.L.Z. did have the benefit of a speech and language evaluation and progress report in the fall of 2002.
- [13] The children entered grade one in the fall of 2002. Their teacher was the same teacher they had in kindergarten. T.[] is a small school and their teacher teaches a class from kindergarten to grade three. Their first progress report in December of 2002, indicates that they had each missed 14 days of school at that point. For the most part, C.L.Z.'s language arts, reading and writing, were minimally meeting the expectations. The comments indicate that her achievement was satisfactory in most areas, except math and language arts which required additional support. It suggested that she continue to receive regular learning assistance in oral language and additional practice with letter sounds and sight word recognition as needed. The notes indicate that materials would be provided for home practice.
- [14] S.R.Z.'s report as well indicates that she was having difficulty with reading and some aspects of her mathematics. The comments indicate that she had outstanding artistic skills and imagination, but math and language arts required additional support. The report indicates that she will receive regular learning assistance in language to improve her enunciation grammar and understanding of language concepts. Materials would be provided for home practice of letter sounds and sight words.
- [15] The March 2003 report indicates that C.L.Z. appeared to be doing better than S.R.Z. in reading and mathematics. S.R.Z. was not meeting the expectations in either reading or most of the mathematics. The comments indicate that C.L.Z. was making slow but satisfactory progress and needs additional practice in sight words and in recognizing and printing numbers. The report suggests that as S.R.Z.'s needs develop in language arts, she should be supported through a home reading program. It was suggested that sight words be practiced at home on a regular basis and that she needed additional practice in recognizing and printing numbers 2 through 10. The comments indicate that S.R.Z. will continue to receive 30 minutes learning assistance in math and language arts three times a week. S.R.Z.'s

teacher prepared and Ms. S.M.B. signed, a request for support services relating to S.R.Z.. The teacher referred S.R.Z. to a school psychologist because of the slow progress she was making in understanding basic language and math concepts. The request indicates that she was significantly below grade level and the teacher was seeking suggestions for alternate teaching strategies. The speech and language evaluation report dated June 12, 2003, indicated that in the areas of understanding basic concepts, her scores were well below average, indicating a one to one and one-half year delay in concept development. The recommendations indicated that a weekly intervention by a speech language pathologist was not possible in the rural location and a language program needed to be followed diligently at home and at school.

- [16] The children's third term reports dated June 26, 2003, indicate that during grade one, C.L.Z. missed 39 days of school and S.R.Z. missed 43.5 days of school. Ms. S.M.B. does not believe that the records are entirely accurate, but it is clear that they did miss a significant amount of time. C.L.Z.'s report indicates that she was fully meeting the expectations for a child at her level in reading and writing and for most of the mathematics portion. The comments indicate that her language arts and mathematics were satisfactory for her grade level, but recommended that additional regular reading opportunities in the summer. She was assigned to grade two. S.R.Z.'s report indicated that she was still having difficulties with reading and that she did not yet meet the expectations for her grade level, and mathematics was also a weak portion of her academic performance. The comments indicate that in language arts and mathematics she continued to be significantly below grade level and that it may be necessary to develop an individual educational plan for her in those areas. Again, regular work over the summer was recommended and she was assigned to a modified grade two program.
- [17] Ms. S.M.B. was attempting to improve her financial situation and her employment situation. When the children were younger, she simply did not have the time to pursue meaningful employment. However, now that the children were in school, she began pursuing employment in the forest industry doing slash burning and grass seeding. She did some work on road construction. She obtained work in the summer of 2003 working for a fire suppression crew and working in an office position on a fire suppression unit. There was a great deal of work in forest fire fighting that summer through August and into the fall. She had an opportunity to pursue work away from T.[], British Columbia. She felt it was a good opportunity for her to get ahead and perhaps would provide her an opening for further employment in the future.
- [18] Ms. S.M.B. had always been very generous with regard to access to the children for Mr. G.W.Z. and gave him the first opportunity to care for the children when it arose. She knew that pursuing these career opportunities would take her away from home and she therefore approached Mr. G.W.Z. about taking the children to Kamloops and enrolling them in school in the fall of 2003. Mr. G.W.Z. and his wife, Ms. N.V., were very close to the children and were pleased to be able to have the children reside with them full-time. Ms. S.M.B.'s position is

that the move was only to be temporary, that the children would be returning to her residence. Mr. G.W.Z.'s evidence is that the children were to come to reside with him and that they would return to Ms. S.M.B. if they did not adjust well.

- [19] Mr. G.W.Z. enrolled the children in grade 2 in the elementary school near their home. Their school teacher and the learning assistant immediately became concerned about the children's inability to read. C.L.Z. was slightly better than S.R.Z., but essentially they were both described as non-readers. The teachers met with Mr. G.W.Z. and Ms. N.V. in the first week of September 2003. Notes of that meeting indicate that both children were delightful and receptive and happy to be in school. That they appear to be listening, but they are not, that they find any reading activities difficult. Socially and emotionally, they were more grade two than grade one. A plan was put in place to assist the children.
- [20] A further meeting was held in October 2003 and indicated that both girls had progressed and were working hard. The notes of the meeting indicate concerns about their vision and that math is difficult for both of them. Notes indicate that the children are happy to be there and wish to stay. The children were referred to an optometrist and their home reading program was continued. A peer helper in learning was involved at the school and a further meeting was scheduled. The children did see an optometrist and through that both children were referred to a special reading program called the Vantage Reading/Bonding Education Center operated by Ms. Alice Ross. Ms. Ross recommended a vision therapy program and a specialized reading course for S.R.Z.. This was implemented with the assistance of Ms. Ross and Mr. G.W.Z. and Ms. N.V.. Ms. Ross indicates in her assessment of October 29, 2003, that they worked faithfully on this six week therapy program. Ms. Ross indicated that S.R.Z.'s vision skills were now normal and that her ability to store words had improved, but that she would continue to need work because of the poor level of reading skills at the original time of her assessment.
- [21] Mr. G.W.Z. and Ms. N.V. met with the teachers again in December. The children had progressed a long way although continuing work was necessary. The plan was to continue working with Alice Ross and the home reading program and work on math when time was available.
- [22] Their school teacher, Ms. C., wrote a letter February 16, 2004, that indicated that by that time C.L.Z. was performing at very early grade 1 level in language arts and math, but S.R.Z. was somewhat further behind and operating at the kindergarten level. The letter indicates that they had minimum absenteeism to that point. The letter confirms that both children had made significant improvements. The letter confirms that Mr. G.W.Z. and Ms. N.V. have been vigilant in wanting to know how to best help both girls and have followed up with any recommendations.
- [23] The children were receiving thirty minutes of learning assistance per day since their arrival at their new school and were working with Mr. G.W.Z. and Ms. N.V. at home on a regular basis with the programs prescribed for them. Both children successfully completed their

grade two year. C.L.Z. developed a keen interest in reading a variety of materials. S.R.Z. made a great deal of improvement, although not quite to the same level as C.L.Z.. Her teacher concluded that although she was not quite at the level considered adequate for grade two, she was very close to it. It was suggested that she receive continuing learning assistance. Math was still a concern for both of the children. It was recommended that the children be placed in separate classes, although both in grade three, during the next year. This was to help S.R.Z. become more independent and self sufficient.

- [24] The children have been registered in grade three in Kamloops and continue to reside with Mr. G.W.Z. and Ms. N.V.. They continue to receive extra assistance at school and Mr. G.W.Z. and Ms. N.V. continue to work with the children at home.
- [25] Ms. S.M.B.'s position is that the move to Kamloops was only temporary and that the children should be returned to live with her in T.[], B.C. She says that this is the home they have known most of their life and that it is in their best interest to return to that home. Her evidence is that the children miss their home and are always happy to return when they visit her for access. Mr. G.W.Z.'s position is that the children's best interests would be served if they remained in his home in Kamloops and continued with their present school program. He is concerned that if they return to T.[], they will again fall behind in their schooling, that it will not be in their best interest. His position is that the children have adjusted well to living in Kamloops and have not expressed any distress over the change in their primary residence.
- [26] Both of these parents love their children a great deal. They both have a lot to offer their children. Both T.[] and Kamloops have a lot to offer the children. In T.[], they are close to Ms. S.M.B.'s parents and are friends with two young children that her parents have adopted. They enjoy a rural lifestyle and all of the amenities of a small community. The resources available to the school are not as extensive as some of the resources available in Kamloops, although there may be some advantages to a small, multi-grade class.
- [27] The children are very comfortable in Mr. G.W.Z.'s home and have an excellent relationship with Mr. G.W.Z. and Ms. N.V.. They have friends in their new neighbourhood and have settled well in school. They have the advantage of continuing to work with those people who have assisted them in the last year in improving their language and math skills. They require continuing assistance in both of those areas. Mr. G.W.Z. and Ms. N.V. have both demonstrated that they are able and willing to work with the children and the schools to ensure that the children continue to improve.
- [28] There was a great deal of evidence about the children's absenteeism in kindergarten and grade one and the reason for that. Their grade one teacher indicated that they had a "huge" amount of absenteeism in grade one. Ms. S.M.B.'s evidence is that she believed the separation agreement required her to facilitate as much access as was reasonable and to accommodate Mr. G.W.Z.'s working schedule. She always offered to allow him to care for the children when she was unable to do so. She was aware that the children were having some

problems at school, but was working with them and believed that they were achieving an adequate level of reading. Mr. G.W.Z.'s position is that he was initially concerned about the children missing school in kindergarten and that this caused some stress between himself and Ms. S.M.B. over access. He sought legal advice and was advised that he should take the children when they were offered to him and get any homework that would be provided to ensure that the children's schooling was kept up. Ms. S.M.B. argues that this was simply a part of his plan to obtain full custody or to obtain primary residence of the children and that if he had the best interest of the children at heart and was concerned about their education, he would not have taken them on the occasions he did. Mr. G.W.Z.'s evidence is that he did not know the children were doing as badly as they were and had only received one report card with regard to the children.

- [29] I find he did not make reasonable efforts to follow-up on or communicate with the school with regard to the children's progress. I find that both parents have made errors in judgment with regard to the importance of the children's schooling, but Mr. G.W.Z. was more concerned about their schooling than Ms. S.M.B.. When the children were in grade one, Ms. S.M.B. left them with Mr. G.W.Z. for approximately 12 to 13 days in May, while she travelled to Halifax with her then boyfriend. This was clearly not in the children's interest, given their difficulties at school. Mr. G.W.Z. did make inquiries about homework for the children and did obtain materials to help provide some assistance to the children while they were in his care. He obtained a number of these materials on his own.
- [30] When the children were residing with Mr. G.W.Z., there were some periods of time in the early fall when Ms. S.M.B. was extremely busy working in fire suppression and did not have an opportunity to visit the children regularly. However, there were also two occasions in early 2004, one in February, of about four weeks and a later period of three weeks, when she had no communication with the children by telephone or otherwise. She was having some difficulties because of an accident with her vehicle and her father was ill. However, it does seem odd that she did not communicate with the children by phone during that period.
- [31] Mr. G.W.Z. was critical of Ms. S.M.B.'s interest in snowmobile racing. She was obviously active and successful in snowmobile racing and had been for a number of years before the children were born. Certainly she continued to be interested after the children were born and on a number of occasions, it was convenient for her to deliver the children to Mr. G.W.Z. while she attended snowmobile races. This was a benefit to both of them and allowed the opportunity for the children to see their father. This does not indicate a lack of interest in the well-being of the children. It must be remembered that she was providing the day to day care for the children. There were some occasions when the children missed school as a result of her snowmobile activities, but that was not the primary reason for their absenteeism.

- [32] While the children were in Ms. S.M.B.'s care, as I have said, she was always generous with regard to access. The parties were able to work out a generous access schedule and arrangements that were convenient to both of them for the exchange of the children.
- [33] When the children were in Mr. G.W.Z.'s care, there were a couple of occasions when there were problems with communication in arranging access with Ms. S.M.B.. On at least one of those occasions, I am satisfied that it was merely a problem with communication, but one in which Mr. G.W.Z. could have made greater efforts. However, there was one occasion after this litigation started and just at the beginning of the trial, when Ms. S.M.B. wished to visit the children. She contacted Mr. G.W.Z. the day before in order to see the children the following evening. She was told that the interim order, which had been made required that she give 24 hours notice and she had only given 22 hours notice. Mr. G.W.Z. would not agree to the access the day Ms. S.M.B. originally requested. They did agree on access the day after. I find that this was a petty approach for Mr. G.W.Z. to take. It may have been partially as a result of earlier conflict between the parties when Ms. S.M.B. had threatened to come and take the children from their school. That occurred before the interim orders were made. However, Mr. G.W.Z. must understand that approach to access is not in the children's best interest. Mr. G.W.Z.'s evidence is that he is prepared if the children are to reside primarily with him to facilitate access.
- [34] Mr. G.W.Z.'s evidence is that the children are happy and well adjusted in his home. They have a close relationship with his parents and with Ms. N.V.'s parents. They participate in Brownies, skating and swimming lessons, and C.L.Z. enjoys soccer. They enjoy the animals on the hobby farm and have chores which they participate in each day.
- [35] The children have a close relationship with Ms. N.V.'s sister who also lives in Kamloops.
- [36] Ms. S.M.B.'s grandmother is a member of the C. [] First Nations and her grandfather is a member of the Coeur d'Alene Band. Ms. S.M.B.'s evidence is that the children have participated in some First Nations gatherings and that it is important to her that they learn about their heritage through their relatives. Mr. G.W.Z.'s evidence is that he and Ms. S.M.B. did not participate to a great extent in any First Nations activities. He agrees that the children are close to her parents. His position is that he is prepared to ensure that the children are aware of their First Nations heritage and that they will have ample opportunity to pursue that heritage if they have reasonable and generous access with their mother. I agree that it is important the children be familiar with their family background, that includes the First Nations heritage through their grandfather. However, the children's heritage also includes that of their father and his family.
- [37] The Divorce Act s.16 provides as follows:

Factors

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

Past conduct

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

Maximum contact

(10) In making an order under this section, the court shall give effect to the principal that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Primary Residence

[38] I have heard a great deal of evidence with regard to the best interests of these children, including the evidence from Mr. G.W.Z. and Ms. N.V., their school teachers and learning assistance in Kamloops, Alice Ross, the person who has been giving them special reading assistance, Ms. N.V.'s mother and sister, and a neighbour who has children who are friends of S.R.Z. and C.L.Z.. I have heard evidence from the children's kindergarten and grade one teacher from T.[], B.C., a neighbour from T.[] who has children that are friends of S.R.Z. and C.L.Z., a friend of Ms. S.M.B.'s who assists her with the snowmobile racing and Ms. S.M.B.'s mother and Ms. S.M.B. herself.

[39] I have concluded that both of these parents and their respective communities offer a great deal to these children. However, I have also considered that at this time in their lives, these children also have specific educational needs. If those needs are not met, it may negatively affect them for the rest of their lives. Ms. S.M.B. never intended to give the children up for an extended period of time when they came to live with their father in September of 2003. However, it became apparent when they did come to Kamloops that they had significant educational needs that had not been met to that point in time. I am satisfied that through the diligent efforts of Mr. G.W.Z. and Ms. N.V. and the education providers, that those needs are now being met and the children are progressing well. However, this is not a situation where a temporary problem has been solved and they are no longer in need of this special attention which they have and continue to receive. I find that the children are happy and well adjusted children and that is a credit to the care and affection that their mother has provided to them and their relationship with their father. It is also a credit to the ability that these two adults have had in cooperating with each other for the sake of their children and

the relationship of the children to each parent. However, the children's ongoing needs for special assistance in school will be best met if they continue to reside with their father.

- [40] Therefore, I order that the children's primary residence be with their father. There will be an order for joint custody and guardianship, guardianship being in the terms of the "Master Joyce" Order.
- [41] There will also be reasonable and generous access. I will give the parties an opportunity to discuss the terms of that access and to attempt to agree on what that access will include. They are at liberty to address that issue if necessary. It may assist the parties if I indicate that, in my opinion, access must be generous to ensure that the children maintain a meaningful relationship with their mother and spend a reasonable period of time in her care and in the T.[] community. This may mean that they miss some school, provided that does not interfere with their ongoing educational needs. That will require that Ms. S.M.B. follow through with the after school programs that have been put in place for the children. It also means that Mr. G.W.Z. will cooperate with any reasonable efforts to make sure the children are aware of and are able to participate in their First Nations heritage or any programs that assist them with their knowing about their First Nations heritage.

Retroactive Adjustment or Credit for Child Support since September 2003

- [42] Mr. G.W.Z. says that he has been paying child support since the children came to him in 2003. This was \$1000.00 per month, pursuant to the terms of the separation agreement. He suggests that he should be given credit against any obligation for spousal support for the amounts he has paid since then. When the children came to live with him, he and Ms. S.M.B. agreed that he would continue to pay the \$1000.00 per month child support and the \$200.00 per month spousal support. She required this money in order to maintain the home which she had established for the children in T.[] B.C. Mr. G.W.Z. was in agreement with this. It would be wrong to allow him to renege from that agreement at this time. In submissions, it was Ms. S.M.B.'s counsel suggestion that if there was any adjustment, there should be no adjustment for the time period before June of 2004, when the issue of the children's residence came to a head. I find that there should be no adjustment whatsoever, up to and including November of 2004. The issue of the children's residence was outstanding until this decision. The only reason the children had not been returned to Ms. S.M.B., was because Mr. G.W.Z. believed it was in their best interest not to do so. Ms. S.M.B.'s needs have not changed simply because that issue arose and, in fact, her needs may well have become more pressing as a result of litigation. The application to vary the child support retroactively is dismissed.
- [43] There is also a real question about whether there is any jurisdiction in this court to vary the terms of the separation agreement which were filed in the Supreme Court. This issue was mentioned, but not argued, and therefore, I make no determination on this issue.

Spousal Support

- [44] Mr. G.W.Z. argues that he should no longer be required to pay spousal support to Ms. S.M.B. or there should be some time limit placed on any spousal support order. The separation agreement provides for spousal support in the amount of \$200.00 per month and that the order may be varied on application to a court of competent jurisdiction. The agreement provides that the court should first be satisfied that there has been a change in the conditions, needs, means, and circumstances, or other circumstances of either the husband or the wife since the making of the agreement (¶16). The agreement also provides that Ms. S.M.B. would make her best effort to obtain such employment as is reasonable in the circumstances, giving consideration to her obligation to maintain herself and to contribute to the maintenance of the children and to the necessity of her devoting a reasonably adequate amount of time to the care of the children (¶18).
- [45] Clearly, Ms. S.M.B. was not able to pursue her career while she was caring for two young children. Even when the children entered school, they still required a great deal of her time. She chose to live in T.[] B.C., to be near her parents. This allowed her to obtain a home for herself and the children and to provide them with a reasonable lifestyle. This may have affected her ability to pursue other employment, but was not unreasonable in the circumstances. She has pursued work in the forestry industry and road construction. She has also provided for herself and the children by assisting her parents with their ranch and in return, receiving the 10 acre parcel that their home is constructed on. I find that these decisions were all reasonable in the circumstances.
- [46] The reason she asked Mr. G.W.Z. to take care of the children in 2003, was so that she could pursue job opportunities which may lead to a more regular income. She is continuing to pursue those opportunities and hopes to obtain regular seasonal employment from April until September or October in each year with the Ministry of Forests. In the circumstances, I am satisfied that those are reasonable steps for her to take. She has suffered a disadvantage as a result of the break-up of the marriage and has also suffered financial consequences arising from the care of the children.
- [47] Her Property and Financial Statement is tab 5 of the Trial Record. Ms. S.M.B. estimated her income was \$16,360.00 from sources other than spousal and child support. Her evidence is that was based on 2003, which was an exceptional year for her. In 2001, her taxable income, excluding support, was \$3,768.82, in 2002, it was \$3,636.59, in 2003, it was \$16,360.08. During that year, she earned \$21,704.54 from the Ministry of Forests. I also note that in each of those years, she had a business loss as a result of a business she operates. In 2001, it was \$816.54, in 2002, it was \$2,566.89, and in 2003, it was \$10,145.30. These losses included a significant amount for capital cost allowance. In 2003, she replaced her motor vehicle and included automobile expenses, including leases of almost \$5,600.00. Some of those expenses are included in her claimed expenses in her Property and Financial Statement.

- [48] It is difficult to know what her income will be for 2004. To date, it has not been very much. She estimates about \$7,000.00 for income this year and her income next year is uncertain.
- [49] Her expenses, excluding automobile expenses, are approximately \$1,500.00 per month. These are certainly reasonable. She is obviously still in need of spousal in the amount and excess of that provided by the agreement.
- [50] Mr. G.W.Z.'s Property and Financial Statement is at tab 4 of the Trial Record. His income is approximately \$62,000.00 per annum. His wife, Ms. N.V., earns approximately \$50,000.00 per annum. He estimates that their combined monthly expenses are \$8,700.00 per month, including the \$1,200.00 support obligation. This also includes all payroll deductions. They have a significant mortgage on their residence, which requires them to pay \$1,700.00 per month. The balance of the expenses do not appear to be unreasonable, although I also note they have a \$1,000.00 per month lease payment on a motor vehicle and contribute to an investment loan.
- [51] I find that Mr. G.W.Z. is able to contribute to Ms. S.M.B.'s support and she is in need at this time. I fix the amount of spousal support at \$1,000.00 per month, commencing the 1st of December 2004, and continuing the first of each and every month thereafter. The present Income Tax Rules allow Mr. G.W.Z. to deduct this amount from his income and require Ms. S.M.B. to include it in her income for tax purposes. This amount will be reviewed at the end of two years. In the interim, Mr. G.W.Z. and Ms. S.M.B. will each deliver to the other, true copies of their completed income tax returns immediately upon receipt of the same, including any Notices of Assessment received from Revenue Canada. They will also provide true copies of any T4 or T5 statements they receive.

Child Support

- [52] There will be no order for Ms. S.M.B. to pay child support at this time. I would estimate her income at this time to be \$7,000.00 per year. The amount she would be required to pay pursuant to the Child Support Guidelines based on that income is nominal and more than offset by the costs of access that she will experience. Should there be a change in her financial circumstances, Mr. G.W.Z. will become aware of it when he receives her income tax returns and can consider whether an application should be made for child support at that time. This is not an appropriate case to impute income. Ms. S.M.B. is not acting inappropriately by continuing to maintain the home in T.[], and seek employment in that area. She has been prepared to travel from her home to pursue employment in the past, and I expect she will do so in the future.

Costs

- [53] Each party seeks costs if they are successful. Mr. G.W.Z. refers to the decision *Mack v. Taks* (2003) B.C.S.C.1034. The court said at ¶5:

The ordinary rule is that costs follow the event unless the court otherwise orders. Since *Gold v. Gold* (1993)82 B.C.L.R. (2d) 180(B.C. C.A.) it has been clear that this rule applies in family cases. The submission of the defendant is essentially that it would be a financial hardship to award costs against her. In *Robinson v. Lakner*, [1998] B.C.J. No.1047 (B.C. C.A.), Madam Justice Prowse of the Court of Appeal observed that "financial hardship in itself is not a sound basis for departing from the usual rule with respect to costs".

- [54] I appreciate that this litigation has been costly to both of the parties. I also find that both of the parties were motivated by what they believed to be in the best interests of the children. This was certainly not a case where the outcome was clear or where either of the parties were unreasonable in pursuing primary residence of these children. They have both suffered financially and an order for costs would be financially devastating to Ms. S.M.B.. It is true that financial hardship alone is not a reason to decline to order costs. However, in this case, I am satisfied that if Ms. S.M.B. were required to pay costs, that would greatly threaten her ability to maintain the home in T.[] that she has provided for the children in the past. It would also eliminate or harm or limit her ability to continue to provide a home for those children when she has access to those children. I find it is more important to allow her to maintain the home and lifestyle for the children when she has access to them, than it is to order costs. This is a case where something more than simply financial hardship that is involved. An order for costs would be devastating to Ms. S.M.B. and have a negative impact on the children because of the effect on her ability to maintain what has been the children's home to this date.
- [55] The children's primary residence at present is with their father in Kamloops. This may not always be the case, and it is possible that they may return to their mother's care in the future. It would be harmful to the children if their mother was not able to maintain their home for the purposes of access, and as a potential residence if circumstances change in the future.
- [56] These children have two homes, one with their father and that with their mother. It is important that both of those homes be preserved to the extent possible.
- [57] I also decline to make an order for costs because in this case there has been limited success on both parties. Mr. G.W.Z. has obtained an order for the primary residence of the children and Ms. S.M.B. has obtained an order for ongoing spousal support and is not, at this time, required to pay child support.
- [58] I have considered that the majority of the trial process was occupied with the issue of primary residence, but keeping that in mind, I still find that it is appropriate in this case that each party bear their own costs.

"R.E. Powers, J."

The Honourable Mr. Justice R.E. Powers

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