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CANADA / JUDGMENT

## Gaita v. Gaita

2008 BCSC 1111

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COURT

Supreme Court of British Columbia

DECIDED

18 August 2008

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2008 BCSC 1111 Gaita v. Gaita

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gaita v. Gaita,

2008 BCSC 1111

Date: 20080818

Docket: E063089

Registry: Vancouver

Between:

Lisa Marie Gaita

also known as Lisa Marie Di Marco

Plaintiff

And:

Remo Domenic Gaita

also known as Remo Domenico Gaita

Defendant

Before: The Honourable Madam Justice Gray

Reasons for Judgment

The Plaintiff, In Person:

L. Di Marco

The Defendant, In Person:

R. Gaita

Date and Place of Trial:

April 7-11, 21-23

and April 25, 2008

Vancouver, B.C.

## Introduction

- [1] The parties to this divorce proceeding were married on August 10, 1991 and separated about 15 years later, on August 14, 2006. They have one child, Dylan, who is 11 years old.
- [2] The plaintiff wife is presently using the name Ms. Di Marco and I will refer to her in that way in these reasons for judgment. She is a secondary school French teacher. She has had serious health problems resulting in significant absences from work. At the time of trial, she was employed at 82 per cent of full time and hoped to be able to work 100 per cent full time commencing in September 2008.
- [3] The defendant husband is an accountant, although he does not have a professional qualification. He is self-employed in private practice through Gaita R. & Associates Inc., which I will refer to as the "Company". Mr. Gaita is living in the former matrimonial home, which I term the 'Coquitlam Property'.
- [4] For 15 of the 20 months of separation before trial, Dylan lived about the same amount of time with each parent. For five months of the period of separation, he lived with his mother, and saw his father one day each week.
- [5] Both parties acted in person at this trial. Both are intelligent and articulate and made their points clearly. However, they were not familiar with the legal process and as a result the evidence was not organized in the usual way. The evidence consisted of testimony from both parties and evidence from Mr. Freydenlund on behalf of Mr. Gaita. In addition, there were numerous documents. Many of them were produced by Mr. Gaita for the first time during the course of the trial, despite a number of court orders requiring him to provide documents earlier.
- [6] The questions for the court were as follows:
  - (a) should the parties be divorced and Ms. Di Marco's name changed?
  - (b) what should be the parenting arrangements for Dylan?
  - (c) what, if any, payment should be ordered for child support, both on an ongoing basis and for the period prior to trial?

- (d) what are the family assets, how should they be valued, should they be divided equally or unequally, and how should they be distributed?
- (e) what order, if any, should be made for payment of ongoing and past spousal support?
- (f) what order should be made regarding the costs of this lawsuit?

## Chronology

- [7] The parties were married on August 10, 1991. Ms. Di Marco started teaching French as a second language at high school in Coquitlam that fall.
- [8] Mr. Gaita was employed as an accountant. Mr. Gaita began his own consulting enterprise in 1992, providing assistance in tax and other matters. He worked from the Coquitlam Property.
- [9] Mr. Gaita reported an operating loss for the first few years of the consulting business. Starting in 1994, Mr. Gaita reported gross incomes of about \$50,000 per year and net incomes of less than \$7,000 per year.
- [10] Dylan was born in March 1997.
- [11] In 1997, Ms. Di Marco completed her master's degree. Also that year, the Company was incorporated and Mr. Gaita started providing his accounting consulting services through it.
- [12] Ms. Di Marco was treated for cancer in the period 2001 through 2002. The treatment was aggressive. She received a bone marrow transplant requiring her to be in isolation for six and one half weeks. She also received chemotherapy.
- [13] In 2001, when Dylan was four years old, he began studying Tae Kwon Do at the Yuen Institute.
- [14] Mr. Gaita liked to hunt and shoot as a hobby and acquired several firearms which he kept at the Coquitlam Property.
- [15] For the year 2004, Ms. Di Marco's line 150 income reported on her income tax return was about \$10,000. Mr. Gaita's was about \$39,500.
- [16] Mr. Gaita was responsible for filing his own income tax returns as well as the Company's. He agreed to file Ms. Di Marco's returns at the same time. Mr. Gaita told Ms. Di Marco that he would look after the taxes as soon as he could, but he did not do this in a timely way.
- [17] In June 2005, the Canada Customs and Revenue Agency ("CRA") demanded that the Company provide its tax returns for the eight-year period 1997 through 2004.
- [18] For the Company's fiscal year ending August 31, 2005, the Company recorded revenue of over \$212,000 but net income of only \$177. Essentially, the income was entirely devoted to Company expenses and Mr. Gaita's salary.

- [19] In November 2005, Mr. Gaita pleaded guilty and was convicted of not filing his personal income tax returns for the six years 1998 through 2003. He was fined \$6,000. A report of his conviction and sentence was published in a local Coquitlam newspaper.
- [20] Ms. Di Marco's line 150 income in 2005 was about \$17,000. Mr. Gaita's income was \$146,500. Mr. Gaita did not set aside funds to pay the taxes accruing on his 2005 income. Mr. Gaita did not tell Ms. Di Marco until 2006 that he owed about \$50,000 for his 2005 personal taxes.
- [21] In May 2006, Dylan achieved a junior black belt in Tae Kwon Do.
- [22] In June 2006, the parties refinanced the Coquitlam Property and obtained about \$170,000. They intended to use the extra mortgage proceeds to repay a debt they owed to Mr. Gaita's parents, to pay CRA, and to pay for renovations to the Coquitlam Property. They took out a mortgage for almost \$400,000, requiring payments of \$1,637.33 twice each month.
- [23] The funds were disbursed to repay Mr. Gaita's parents, and credit card debt, but not to pay CRA. Mr. Gaita testified that he "did not get around" to paying CRA. A balance of about \$65,000 remained in the joint account, from which the bank routinely withdrew mortgage payments.
- [24] On July 1, 2006, Ms. Di Marco commenced a one-year medical leave of absence.
- [25] During the time the parties lived together, Ms. Di Marco paid most of the bills and had access to all of the family and Company accounts.
- [26] The parties separated on August 14, 2006. On that date, Ms. Di Marco asked the bank to ensure that Mr. Gaita did not use the funds in the joint account for any major expenditure other than to CRA. The bank froze the account.
- [27] Also on that day, Ms. Di Marco withdrew \$2,300 from a credit card. She was incorrectly advised that all but that amount had been advanced under the credit card, when in fact there was only a modest balance. She looked for funds in the Coquitlam Property and found U.S. cash with a converted value of \$690 Canadian, and took that money. She also found a handgun. Ms. Di Marco left the Coquitlam Property with Dylan on August 14, 2006, and she has not lived there since.
- [28] Ms. Di Marco was concerned that Mr. Gaita would become angry when he learned that she had taken steps resulting in the freezing of the joint account. She telephoned the RCMP and provided the handgun to them. The RCMP went to the Coquitlam Property, spoke to Mr. Gaita, and removed the firearms and a hunting crossbow and retained them for a few months.
- [29] On August 18, 2006, Ms. Di Marco proposed that she would return to the Coquitlam Property and that the parties would live separate while under the same roof. Mr. Gaita declined.

- [30] In September 2006, Ms. Di Marco removed some household furnishings and items and belongings for Dylan from the matrimonial home. She also obtained most of her clothing and personal items, although Mr. Gaita did not give her much access to the Coquitlam Property. Dylan objected when Ms. Di Marco took items from his Coquitlam Property bedroom, wanting to keep it intact.
- [31] Ms. Di Marco commenced the divorce lawsuit on September 6, 2006. Among other things, she claimed child and spousal support.
- [32] By an agreement evidenced in an exchange of letters between their lawyers (dated September 9, 2006 and October 24, 2006), the parties agreed that Ms. Di Marco could purchase a Sears bedroom set for Dylan, using funds from the joint account. Ms. Di Marco paid \$2,300 from her own funds for bedroom furniture for Dylan for her home.
- [33] On October 30, 2006, at a judicial case conference, by consent, Groberman J. (as he then was) made what I term the "Groberman Order". This order declared that there was no reasonable prospect of reconciliation between the parties. It also ordered Mr. Gaita to provide Ms. Di Marco with specified documents on or before September 7, 2006, and that Mr. Gaita would have exclusive occupancy of the Coquitlam Property.
- [34] In December 2006, negotiating through lawyers, the parties agreed that Dylan would be with his father for the first half of the Christmas holiday period in 2006. Written documentation suggests that they also agreed that Dylan would be with his mother for the first half of the 2007 holiday period, and they would continue to alternate who had Dylan first each Christmas holiday period. In the course of this correspondence, Mr. Gaita declined to provide certain items of Dylan's snowboard clothing unless Dylan requested them.
- [35] In December 2006, Dylan won the Yuen Institute's award for most outstanding junior student.
- [36] Mr. Gaita's line 150 income for 2006 was reported at \$5,400. Ms. Di Marco's was reported at \$24,000.
- [37] On January 3, 2007, CRA demanded that Ms. Di Marco pay about \$6,400 in respect of arrears of personal income tax for the years 1996, 1997, and 2003 through 2005.
- [38] During the period from separation on August 14, 2006 until January 17, 2007, Dylan spent roughly equal time with each parent on an alternating schedule of 2/2/3 day periods with each parent. On January 17, 2007 Kelleher J. made an order by consent at another judicial case conference. This order included the term that the then current parenting schedule would be suspended, and that Mr. Gaita would have access to Dylan each week from 10:00 a.m. Saturday until 10:00 a.m. Sunday, until such time as he completed the production of documents as ordered in paragraph 8 of the Groberman Order. Dylan was to spend the other six days a week with his mother. The parties apparently hoped that by temporarily reducing Mr. Gaita's responsibility for Dylan, Mr. Gaita would find time to catch up on the paperwork necessary to comply with the Groberman Order.

- [39] On February 8, 2007, Ms. Di Marco's lawyer wrote Mr. Gaita's lawyer seeking child support of \$739 per month for the period that Dylan was spending most of his time with his mother. Ms. Di Marco's notice of motion dated March 2, 2007, sought both child support and spousal support.
- [40] In May 2007, Ms. Di Marco made some suggestions to Mr. Gaita about arrangements for Dylan's summer. Mr. Gaita did not respond to those suggestions in a timely way.
- [41] On May 18, 2007, Ralph J. ordered Mr. Gaita to pay child support of \$561 per month commencing May 1, 2007 and continuing until he complied with the Groberman Order, and to pay 70 per cent of Dylan's 2007 summer camp fees. This order also provided that the quantum of child support was on a without prejudice basis, and either party was at liberty to argue that a different figure was appropriate for child support.
- [42] Around June 14, 2007, Mr. Gaita completed providing the items required by the Groberman Order, and Dylan resumed spending roughly equal time with each parent on a 2/2/3 day schedule. That schedule continued to trial.
- [43] In 2007, Dylan was in Grade 4 French Immersion and his report card was mostly A's and B's.
- [44] In July 2007, the family dog, Buddy, passed away at age 14.
- [45] By July 2007, Dylan had been attending Tae Kwon Do classes at the Yuen Institute for approximately six years. He regularly attended classes on the afternoons of Mondays, Wednesdays and Fridays. Dylan's achievements in Tae Kwon Do were remarkable.
- [46] Mr. Gaita was concerned that he was not receiving all information about Tae Kwon Do from Ms. Di Marco. He contacted the Yuen Institute seeking further information about Dylan's classes, but was advised that parents should check the website because the operators did not have time to repeat everything for separated parents.
- [47] After July 31, 2007, Mr. Gaita refused to take Dylan to Tae Kwon Do classes at the Yuen Institute. Mr. Gaita recognizes that Dylan was very happy at the Yuen Institute and enjoyed his Tae Kwon Do classes. However, Mr. Gaita felt personally uncomfortable at the Yuen Institute and declined to go there or to arrange for someone else to take Dylan there when he was staying with his father.
- [48] By July 27, 2007, Ms. Di Marco had paid in full her \$6,400 outstanding debt to CRA.
- [49] In the period of roughly August 15 to December 15, 2007, Mr. Gaita let several friends occupy parts of the basement of the Coquitlam Property. One paid him \$2,000 for four months' occupation, another paid \$500 for one month of occupation, and a third did not pay anything for two months of occupation.

- [50] H. Holmes J. made two orders on November 2, 2007. One order provided that Mr. Gaita could buy the Coquitlam Property for \$570,000, with each party to receive \$20,000 without prejudice to the claims by the parties for the reapportionment of family assets, and with the balance of the net sale proceeds to be held in Robert J. King's trust account pending agreement of the parties or further court order, with liberty to the parties to apply. Mr. King is a lawyer who was acting for Mr. Gaita at that time.
- [51] Madam Justice Holmes also ordered as follows:
7. The defendant shall make reasonable and careful efforts to locate and shall return, forthwith, as he is able to locate them, whether now or in the future, personal items and photos to the plaintiff as itemized in the plaintiff's affidavit sworn October 9, 2007;
  8. The family photos in the defendant's possession as at January 10, 2008 will be duplicated at the equally shared expense of the parties and each of the parties shall have either the original or duplicate by February 15, 2008. Where a photograph bears the plaintiff's handwriting, the original of said photograph shall go to the plaintiff, by consent, given on January 10, 2008 on the settling of this order.
- [52] On December 7, 2007, Mr. Gaita became the registered owner of the Coquitlam Property. His parents lent him \$200,000 to complete the purchase. The \$570,000 sale proceeds were distributed such that each party received \$20,000 on a without prejudice basis, and the balance of \$156,721.76 in net sale proceeds was invested by Mr. King in a one-year cashable guaranteed income certificate.
- [53] On December 10, 2007, Mr. Gaita paid about \$28,500 to CRA regarding his outstanding indebtedness for personal taxes. About \$14,800 remained outstanding on his personal account.
- [54] In December 2007, Ms. Di Marco believed that the parties had agreed the previous year that Dylan should be with her for the first half of the holiday period in 2007. Mr. Gaita believed that the parties had agreed in a mediation that Dylan would spend the first half of the holiday period with him.
- [55] Ms. Di Marco made arrangements for a friend to pick Dylan up after school on Friday, December 21, 2007, and to take Dylan with her to Merritt to visit her parents. Mr. Gaita learned of this, possibly as late as December 20, 2007, and sent Ms. Di Marco an email in the early hours of December 21, 2007. Ms. Di Marco did not see the email at the time. Mr. Gaita's email stated his view that Dylan should be with him for the first part of that holiday period.
- [56] Mr. Gaita took Dylan to school on December 21 and learned that arrangements had been made for Ms. Di Marco's friend to pick up Dylan. Mr. Gaita then took Dylan away from school.

- [57] After learning that Dylan had been taken from the school, Ms. Di Marco quickly applied for a court order, acting on her own behalf and without notice to Mr. Gaita. Later on December 21, 2007, Leask J. ordered that Ms. Di Marco would have possession of Dylan, and the police should assist.
- [58] The RCMP contacted Mr. Gaita that evening and told him about the court order. Mr. Gaita asked to see a copy, so that Mr. Frydenlund, a friend who was a lawyer, could check whether it was in order. The RCMP were willing to provide a copy, but gave priority to other matters, and did not deal with it that evening or the next day. Dylan stayed with Mr. Gaita while Mr. Gaita waited for Mr. Frydenlund to see the entered court order.
- [59] On Sunday morning, December 23, 2007, Ms. Di Marco sent a broadcast email to a number of people asking if they knew the whereabouts of Dylan and stating that he had been missing since December 21, 2007.
- [60] Later that Sunday morning, the RCMP provided Mr. Gaita with a copy of the entered order of December 21, 2007 and he delivered Dylan to Ms. Di Marco.
- [61] On December 24, 2007, Master Donaldson made an order with notice providing that Dylan would be with his mother until noon on December 31, 2007.
- [62] In January 2008, there was a reassessment of the GST owing by the Company. It was reassessed so that there was a total outstanding of about \$58,500. Also in January 2008, Mr. Gaita acquired a new puppy named Max.
- [63] In January 2008, Ms. Di Marco was suffering severe cataracts, a complication from her prior treatments. She underwent cataract removal surgery in February and March. Her family doctor did not expect her to be able to resume working until the middle or end of April 2008.
- [64] In February 2008, Ms. Di Marco communicated with Mr. Gaita about whether he would attend an orthodontic appointment with Dylan. Mr. Gaita was non-responsive. Ms. Di Marco also wrote requesting Mr. Gaita's co-operation in Ms. Di Marco obtaining an assessment of the Company by a certified general accountant named Mr. Hawes. She also asked Mr. Gaita to provide all supporting documentation regarding the Company's expenses in the years 2002 through 2006. Mr. Gaita did not respond to these requests.
- [65] In March 2008, the Yuen Institute concluded that Dylan was no longer eligible to take tests in Tae Kwon Do due to his frequent absences from class.
- [66] On March 11, 2008, Gill J. ordered that Mr. Gaita provide a complete updated list of documents including documents in respect of the Company and a complete sworn Form 89 financial statement by March 20, 2008. Mr. Gaita did not provide the list by that date, and in fact did not provide his complete sworn Form 89 financial statement until the second day of trial.
- [67] Dylan's grades on his March 2008 Grade 5 report card were mostly B's and C's.

- [68] On April 7, 2008, on the first day of trial, Mr. Gaita presented nine documents, which were personal and Company tax documents. Most of them were documents that he had not previously provided to Ms. Di Marco. They were marked exhibits for identification, and later became exhibits at trial.
- [69] On the second day of trial, Mr. Gaita provided his Form 89 financial statement sworn that day.
- [70] During the period of the trial, Mr. Gaita received a letter from one of the Company's clients, Intuit Canada Limited, dated April 10, 2008, the fourth day of trial. The letter stated that it was notice of termination of Intuit's regional trainer arrangement with the Company.
- [71] Mr. Gaita testified that he inquired about the reason for the termination and was advised that Intuit was unhappy that the Company was slow in providing invoices. The Company has taken six months and more to send invoices to Intuit.
- [72] During a break between trial days, Mr. Gaita obtained further documents. He provided an appraisal of household and office furnishings by Gail Pirie Appraisals dated April 15, 2008, and a handwritten valuation of Mr. Gaita's firearms prepared by Lock Stock & Barrel on April 18, 2008. Ms. Di Marco objected to either document being admitted into evidence, on the basis of their late delivery and her inability to obtain corresponding reports arising from Mr. Gaita's failure to provide documents to her. Both documents were admitted into evidence on the basis that the delay and Ms. Di Marco's inability to obtain corresponding reports would be considered in assessing whether the documents should be given any weight, and if so, how much weight.
- [73] At the time of trial, Ms. Di Marco was 40 years old and Mr. Gaita was 42 years old. Dylan continued to spend about equal time with each parent on an alternating 2/2/3 day schedule.
- [74] Mr. Gaita was living in the Coquitlam Property and operating the Company's business from there. The Coquitlam Property is a 3,300 square foot home. The basement is arranged so that it can be used for the Company's purposes. For example, it has a boardroom table, although it can be converted into a pool table by removing the top. It has a room for seminars, although it has not been used for seminars since 2006.
- [75] Ms. Di Marco was living in a two-bedroom basement suite that was within a ten-minute drive of both Dylan's school and the Coquitlam Property. Dylan was reluctant to refer to his bedroom at Ms. Di Marco's as "his bedroom".
- [76] Dylan told his mother that he likes the transitions in the 2/2/3 day parenting schedule, although he agreed that sometimes there is a problem with Dylan not having all the books and other items that he needs.
- [77] Ms. Di Marco has 15 years of service to her employer, and hopes to become a school principal.

- [78] The Company's primary business is providing business setup consulting. The fees for these services are in the \$85 to \$95 per hour range. Most clients are one-time clients. The Company also provides Mr. Gaita's services as a trainer. The fees for this work are about \$1,500 per day. The Company formerly did a significant amount of work preparing and filing corporate and personal income tax returns for clients, but presently does little of that work. As at trial, Mr. Gaita estimated the Company's receivables at about \$60,000, consisting of about \$45,000 for training services and about \$15,000 for other services.
- [79] Mr. Gaita owes his parents \$300,000 including the funds he borrowed to purchase the Coquitlam Property.

## Analysis

### (a) Divorce and name change

- [80] The parties have lived separate and apart since August 14, 2006. There are no bars to the divorce. Reasonable arrangements will be made for the support of Dylan through the parenting and child support orders which follow. As a result, subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the parties are divorced effective on the 31st day after the date these reasons for judgment are released.

- [81] Ms. Di Marco seeks to change her last name to Di Marco. She is entitled to that order.

### (b) Parenting arrangements

- [82] Ms. Di Marco seeks sole custody of Dylan and wants him to be primarily resident with her. She argued that Dylan should be in her care except to stay with his father overnight on Thursdays, on alternating weekends from 10:00 a.m. Saturday until school begins on Monday morning, and on professional days until 3:30 p.m.
- [83] Mr. Gaita seeks joint guardianship and joint custody, with the parties spending equal time parenting Dylan. He proposes a schedule of alternating weeks.
- [84] Dylan is an active young boy. He enjoys playing video games and cards. He particularly enjoys Tae Kwon Do and is very upset that his father is not taking him to Tae Kwon Do classes. Dylan likes the 2/2/3 parenting schedule. He likes the Coquitlam Property and wants to keep his bedroom there intact.
- [85] Both parents love Dylan, and he loves them. Both parents have a lot to offer him. Both are intelligent, articulate, thoughtful and concerned.
- [86] Mr. Gaita has a very serious problem with procrastination. This problem is so severe that he was convicted for failure to file six years of personal tax returns in a timely way. It also led to Mr. Gaita seeing Dylan only 24 hours a week, rather than half of the time, during a period of almost five months, while Mr. Gaita complied with a court order to produce certain documentation. It may have cost the Company a very significant client, Intuit. It led Mr. Gaita to proceed to trial without complying with either the Rules of Court or a series of court

orders regarding document production. Whether because of procrastination or other reasons, Mr. Gaita has been unresponsive or slow to respond in making arrangements for Dylan's appointments and events like summer camps.

- [87] Ms. Di Marco is a particularly well-organized person. She is adept at looking after Dylan's needs to attend medical, dental, orthodontic, counselling and other appointments.
- [88] The court and police involvement with the family on December 21-23, 2007 arose from a genuine misunderstanding about the parenting arrangements for Dylan during the holiday period. It is unfortunate that the level of communication between the parties was so poor. However, the parenting arrangements should be clarified sufficiently by these reasons for judgment that similar problems should not occur in the future.
- [89] Mr. Gaita refuses to take Dylan to Tae Kwon Do at the Yuen Institute. Dylan loves Tae Kwon Do and has been studying it at the Yuen Institute for the seven years since he was four years old. Mr. Gaita's only explanation for refusing to take Dylan to his Tae Kwon Do classes was that Mr. Gaita felt personally uncomfortable on the premises, and that he did not think he was fully advised about Dylan's progress.
- [90] Mr. Gaita's failure to take Dylan to Tae Kwon Do classes or to find a way to get Dylan to those classes was a failure to put Dylan's needs ahead of his own. Mr. Gaita's failure to respond in a timely way regarding appointments and activities for Dylan is probably more attributable to procrastination, but it too deprives Dylan of what is best for him.
- [91] Mr. Gaita refused in December 2006 to permit Ms. Di Marco to take certain items of Dylan's snowboard clothing unless Dylan specifically requested it. Dylan was nine years old at the time. A child of that age cannot be expected to request the necessary clothing. While Mr. Gaita's intention may have been to avoid upsetting Dylan by removing anything from his bedroom, it was inappropriate for him to defer to Dylan in choosing clothing items that Dylan needed when with his mother. Adults should decide what a child of Dylan's age needs for various activities.
- [92] These concerns suggest that Mr. Gaita might benefit from further education in parenting. However, the concerns are not of such a nature as to suggest that Mr. Gaita's contact with Dylan should be limited.
- [93] In the circumstances of these parents and this child, a parenting arrangement that provides for both parents to have roughly equal contact with Dylan is appropriate. However, the appropriate parenting schedule will ensure that Dylan can attend Tae Kwon Do classes and do so at the Yuen Institute. It will also ensure that Dylan can attend all appropriate medical, dental and other appointments.

- [94] Ms. Di Marco is prepared to take Dylan from his father's home to such activities and appointments. Because she works as a school teacher, her work schedule enables her to take Dylan to after-school appointments with relative ease. In light of Ms. Di Marco's ability to make arrangements for appointments for Dylan, which is demonstrably better than Mr. Gaita's, she should continue to do so.
- [95] If all of Dylan's appointments occur during periods that Dylan is scheduled to be with Ms. Di Marco, she may have little time with Dylan apart from appointments. The appropriate solution is to provide that Ms. Di Marco may make all the appointments on the basis that the time spent in those appointments is shared equally from the time that Dylan would otherwise be with each parent.
- [96] Mr. Gaita suggested that the parties should have an ordinary schedule providing that Dylan would spend one entire week with each parent alternatively. Mr. Gaita argued that this would be more flexible and make his work arrangements easier.
- [97] It is not clear whether Dylan is old enough to be comfortable spending an entire week away from each parent on a regular basis, but when he is old enough, that will be the appropriate schedule. As a result, the present 2/2/3 day parenting arrangement will continue until the summer of 2010, at which time it will change to alternating weeks. If both parties agree that it is in Dylan's best interests to change earlier, the schedule will change on their agreement.
- [98] Ms. Di Marco is to schedule Dylan's appointments and non-holiday activities on the basis that approximately equal time will be spent during each parent's time with Dylan for such scheduled appointments. In addition, because Ms. Di Marco works until 3:30 p.m. on school professional development days, Dylan will be with his father until 3:30 p.m. on such days even if they fall on a day Dylan would otherwise be with his mother. The parties will equally share holiday periods with Dylan.
- [99] Ms. Di Marco expressed the hope that she might take Dylan on a month-long trip in the summer, such as to Europe. The parties should co-operate to enable Dylan to benefit from longer trips, but the ordinary summers should involve Dylan staying with each parent for alternating two week periods.
- [100] The parties have not had any serious disagreements over decisions regarding Dylan, except whether Dylan should go to the Yuen Institute for Tae Kwon Do. The other disagreements have arisen from misunderstandings, from different views of what information should be communicated from third parties like the school and the Yuen Institute, and from Mr. Gaita's procrastination.

[101] Mr. Gaita argued that in the event of disagreement, a counsellor should decide the issue. The parties cannot realistically afford such a counsellor and Ms. Di Marco was not sure she was willing to leave decisions to a counsellor. Mr. Gaita's habit of procrastinating may result in Dylan losing good opportunities. In these circumstances, the appropriate order is that in the event of disagreement, Ms. Di Marco may make the decision, subject to review by the court.

[102] As a result, the parties will share joint custody and joint guardianship of Dylan on the following basis:

- (a) the parties will be the joint guardians of Dylan's estate and person;
- (b) in the event of the death of either party, the other parent will be the sole guardian of Dylan and will make his or her best efforts to ensure that Dylan maintains a relationship that is as meaningful as possible with the extended family of the deceased parent;
- (c) each party will advise the other party of any matters of a significant nature affecting Dylan;
- (d) each party will discuss with or correspond by email or letter to the other party about any significant decisions that have to be made concerning Dylan, including significant decisions concerning the health (except emergency decisions), education, religious instruction, extracurricular activities and general welfare of Dylan, and each party will attempt to reach agreement on major issues;
- (e) in the event that the parties cannot reach agreement upon those decisions, Ms. Di Marco will be entitled to make those decisions, subject to Mr. Gaita's right to seek a review by the court on the basis that the decision is not in Dylan's best interests;
- (f) each party will be entitled to contact Dylan's medical and dental practitioners to obtain records;
- (g) each party will be entitled to attend events at Dylan's school, and be entitled to deal directly with the school concerning events and other matters;
- (h) each party will have the right to obtain information concerning Dylan directly from third parties, including but not limited to teachers, counsellors, coaches, medical professionals, and third party care givers;
- (i) the ordinary parenting schedule until the summer of 2010 will be the parents will alternate their time with Dylan on a 2/2/3 day basis, unless the parties agree to change it prior to the summer of 2010, and when it changes, it will become a schedule of alternating weeks with each parent delivering Dylan to school or the other parent on Monday mornings. In addition, Dylan will be with his father until 3:30 p.m. on school professional days;
- (j) If Mr. Gaita chooses to take Dylan to Tae Kwon Do at the Yuen Institute, or arrange for someone else to do so, he may, but if not, Ms. Di Marco is entitled to pick Dylan up at his father's and take him to Tae Kwon Do and return him to his father's even during those times

Dylan would otherwise be with his father. Ms. Di Marco will arrange Dylan's medical, dental, orthodontic, and other necessary appointments, such that about equal time will be spent on such appointments during Dylan's time with each parent. If Mr. Gaita does not confirm to Ms. Di Marco 24 hours before an appointment scheduled for a time that Dylan would otherwise be with his father that Mr. Gaita will take Dylan, Ms. Di Marco may pick Dylan up at his father's and take him to the appointment, and return Dylan to his father's afterwards;

- (k) the ordinary schedule will be suspended during Dylan's summer, winter and spring school holidays and replaced by the following:
  - (i) unless the parties otherwise agree, each party will be entitled to have two periods of two consecutive weeks with Dylan during the summer, with Ms. Di Marco having Dylan for the first two weeks of July and August and Mr. Gaita having Dylan for the last two weeks of July and August;
  - (ii) the parties will share Dylan's winter school holiday equally, and the parties will alternate having Dylan for Christmas Eve and Day and for New Year's Eve and Day, such that in 2008, Mr. Gaita will have Dylan on Christmas Eve and Day and Ms. Di Marco will have Dylan on New Year's Eve and Day;
  - (iii) each party will have Dylan for the whole of his spring school holiday in alternating years, with Mr. Gaita having Dylan for his 2009 spring holiday;
  - (iv) the parties will alternate having Dylan for the Easter weekend, with Ms. Di Marco having Dylan for the 2009 Easter weekend, except that if the Easter weekend coincides with Dylan's spring holiday in a particular year, the parent having Dylan for his spring school holiday that year will also have Dylan for the Easter weekend;
- (l) regardless of which parent has Dylan according to the parenting schedule, each party will have Dylan on each of their birthdays and Father's Day and Mother's Day, respectively. On these four days of the year, Dylan will go to the respective parent who is celebrating that day on the night before the event date, and will be dropped off at school or to the other parent the day after the event by 8:45 a.m.;
- (m) Dylan's birthday in each year will be shared by the parents. If it falls on a school day, the parent who does not have Dylan that day will pick him up from school and drop him off to the other parent by 6:30 p.m. If it falls on a Saturday, Sunday or a holiday which is not the day of his party, the parent who does not have Dylan on the applicable day will pick up Dylan at 10:00 a.m. on his birthday and drop him off back to the scheduled parent by 4:00 p.m. the same day. If his birthday falls on a Saturday, Sunday or a holiday and that is also the day of his party, the parents will share Dylan during the time of his party and the parent who does not have Dylan will pick Dylan up at 10:00 a.m. on the day before or after his party and drop him off at the scheduled parent by 4:00 p.m. the same day.

(c) Child support

[103] Ms. Di Marco seeks ongoing and retroactive child support on the basis that an income of \$250,000 per year should be imputed to Mr. Gaita. Mr. Gaita argues that his income is lower than Ms. Di Marco's and that he should not pay any ongoing or retroactive child support.

[104] The Federal Child Support Guidelines, SOR/97-175 provide as follows:

17.(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

...

19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

...

(e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

...

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

(i) Mr. Gaita's income

[105] During the 16-year period of 1990 through 2006, Mr. Gaita's reported net income was equal to or in excess of \$30,000 only in these four years: 1991, 1999, 2004, and 2005.

[106] In 2004, Mr. Gaita reported line 150 income of about \$40,000, but in 2005 he reported \$146,500. In 2006, his income plummeted to \$5,400.

[107] The year 2005 was an extraordinary year for Mr. Gaita. It is unlikely that he can achieve such a high income in a future year. His low income of 2006 should be disregarded for the purposes of assessing his income. While there is no medical evidence that he was depressed, the period 2006 includes the period just after the separation. A person who is self-employed would usually suffer some diminution of earnings immediately following separation, and so that period is not representative of Mr. Gaita's income-earning ability.

- [108] Mr. Gaita recognizes that he has a need to achieve more income. He argued that he is currently earning about \$50,000 and he projects that he could earn \$80,000 to \$100,000 per year in taxable income.
- [109] Ms. Di Marco argued that Mr. Gaita could achieve a significant income by billing a regular hourly rate for a certain number of hours per year.
- [110] Mr. Gaita's severe problem with procrastination gives rise to a concern about his earning prospects. It may be that, despite the benefits of a home-based business, Mr. Gaita would be wise to work in a position where someone else organizes the work and Mr. Gaita achieves a regular salary. However, Mr. Gaita is motivated, and he has the intellectual ability run his business profitably.
- [111] By working from home, Mr. Gaita enjoys the benefit of the Company making a contribution to costs of the Coquitlam Property, including mortgage, tax and utility costs. The documentation did not enable a precise determination of the amount of this benefit, but for the purposes of this child support analysis, it is probably worth about \$15,000.
- [112] The Coquitlam Property has a basement area that Mr. Gaita could rent out. It appears that a market rental would be in the range of at least \$500 per month. Accordingly, Mr. Gaita has an asset that he could reasonably use to achieve \$6,000 a year.
- [113] Taking into account the benefits that Mr. Gaita achieves from his home-based business, his ability to rent the basement of the Coquitlam Property, and bearing in mind his earning history, it is fair to impute earnings to Mr. Gaita for the period after the trial of \$80,000 per year. For the period from separation until trial, being approximately August 2006 to April 2008, a fair assessment of his income-earning ability was \$60,000 per year.

(ii) Ms. Di Marco's income

- [114] Ms. Di Marco's income has fluctuated dramatically in the recent past because of her health problems. She reported income for 2006 at line 150 of about \$24,000. For the 2007 and 2008 period, the best assessment available on the evidence is that she is likely to have earned about \$46,500 after deducting professional dues.
- [115] Although Ms. Di Marco has health concerns, it appears likely that she will be able to return to work full-time. Her salary commencing September 1, 2008 is likely to be about \$74,000 per year.

(iii) On-going child support

- [116] This is a case in which the parenting arrangements provide that each parent will have Dylan for at least 40 per cent of the time. As a result, s. 9 of the Federal Child Support Guidelines applies. It is as follows:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
  - (b) the increased costs of shared custody arrangements; and
  - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[117] This section was considered by the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217. There the court suggested that the simple set-off amount was a preferable starting point for the s. 9 analysis, but must be followed by examination of the continuing ability of the recipient parent to meet the needs of the child, especially in light of the fact that many costs are fixed.

[118] In this case, the ongoing incomes of the parents are sufficiently close that a set-off amount is the appropriate way to determine the ongoing child support. On the basis that Mr. Gaita's imputed income is \$80,000 per year, he would be expected to pay under the Guidelines a minimum of \$739 per month. On Ms. Di Marco's income of \$74,000 per year, she would be expected to pay \$689 per month. The difference is \$50.

[119] As a result, on an ongoing basis, Mr. Gaita is required to pay Ms. Di Marco \$50 per month commencing September 1, 2008 for child support so long as Dylan remains a child of the marriage as defined in the Divorce Act. The parties shall provide each other with copy of his or her filed income tax return no later than August 1 of each year for the tax year ending on the previous December 31. If there is a material change in circumstances and the parties are unable to agree on the appropriate amount of child support, they can apply to the court to revise the order regarding child support.

[120] Using the figures of \$80,000 for Mr. Gaita and \$74,000 for Ms. Di Marco, Mr. Gaita earns 52 per cent of the total family income. For ease of calculations, and because the figures are so close, it is appropriate that the parties share any special or extraordinary expenses on an equal basis.

[121] On an on-going basis, Mr. Gaita is to contribute 50 per cent of the costs of Dylan's expenses for Tae Kwon Do, summer camp and the like. Mr. Gaita is required to contribute even if he does not agree with the activity, because if there is disagreement, Ms. Di Marco is entitled to make the decision about such activities, subject to review by the court.

(iv) Retroactive child support

[122] Ms. Di Marco, through her counsel, demanded child support in February 2007. On May 18, 2007, Ralph J. ordered Mr. Gaita to pay child support of \$561 per month until he complied with the Groberman Order, on the basis that the quantum of child support was made on a without prejudice basis, and either party was at liberty to argue for a different figure. Mr. Gaita complied with the Groberman Order on June 14, 2007. It is appropriate to consider retroactive child support for the period commencing January 1, 2007.

[123] For the five-month period of mid-January to mid-June 2007, Dylan lived entirely with his mother, although he was seeing his father for 24 hours a week. At the imputed income for Mr. Gaita for that period of \$60,000 per year, he should have been paying \$561 per month for those five months. That is a total of \$2,805. In fact, he paid \$822, which is about \$2,000 less. As a result, Mr. Gaita is required to pay Ms. Di Marco retroactive child support for that period of \$2,000.

[124] For the other ten months between June 2007 and trial in April 2008, when the parties were sharing custody of Dylan roughly equally, it is appropriate to consider a set-off amount. During most of this period, Ms. Di Marco had income in the range of \$46,700 and would ordinarily have been required to pay \$433 per month under the Guidelines. That is \$128 per month less than what Mr. Gaita would have paid based on his imputed income of \$60,000. Accordingly, for the ten months in question, Ms. Di Marco is entitled to an order for retroactive child support of \$1,280.

[125] Ms. Di Marco paid \$2,350 for medical and Tae Kwon Do expenses for Dylan. Mr. Gaita should pay one half those costs, being \$1,175. Ordinarily, the calculation of special expenses would include comparison of respective incomes after payment and receipt of spousal support. Here, where Mr. Gaita's income has been imputed and Ms. Di Marco's has fluctuated significantly, an equal division is appropriate.

[126] As a result, Mr. Gaita is required to pay Ms. Di Marco \$4,455 (being \$2,000 + \$1,280 + \$1,175) in retroactive child support.

(d) Assets

(i) Determination of family assets

[127] The parties agree that the following are family assets:

- a) proceeds of sale of the Coquitlam Property, consisting of the monies held in trust by Mr. King and the monies already distributed;
- b) an amount regarding Mr. Gaita's occupation of the Coquitlam Property from the August 2006 separation until his purchase of the property in December 2007. I will term this "notional occupational rent";
- c) bank accounts at Vancity;
- d) U.S. cash that Ms. Di Marco took from the home safe;

- e) a cash advance Ms. Di Marco took from a Visa credit card;
- f) the Company;
- g) Mr. Gaita's 1997 BMW 540i automobile;
- h) Mr. Gaita's firearms;
- i) household furniture;
- j) pensions, being Canada Pension Plans ("CPP") for both parties and Ms. Di Marco's teacher's pension;
- k) Aeroplan points;
- l) Clarica life insurance plans; and
- m) photographs and mementos.

[128] It was contentious whether the parties' jewellery and child tax benefits are family assets. Mr. Gaita argued that they were.

[129] The use of jewellery is usually personal in nature, and therefore jewellery is typically not a family asset. (See *Verdant v. Verdant* (1985), 46 R.F.L. (2d) 385 at para. 3 (B.C.C.A.) and *Leduc v. Bales*, 2005 BCCA 98, 15 R.F.L. (6th) 322 at para. 14.) The evidence at trial was consistent with the parties' jewellery being used personally. As a result, the jewellery is not a family asset.

[130] With respect to child tax benefits, these are not capital in nature and are not a family asset. They are considered as part of a spouse's income for purposes of considering a spousal support claim.

(ii) Valuation of family assets

[131] The parties either agreed or did not appear to dispute the following values of the family assets:

- a) the net sale proceeds of the Coquitlam Property consisting of \$156,721.76 plus interest held by Mr. King, plus the \$40,000 already distributed to the parties on a without prejudice basis;
- b) the Vancity bank accounts in the total amount of \$10,607.52;
- c) the U.S. cash Ms. Di Marco took from the safe, which was equivalent to \$690 (Cdn.);
- d) the cash advance Ms. Di Marco took from the Visa card in the amount of \$2,300;
- e) the pensions with CPP and Ms. Di Marco's defined benefit teacher's pension plan to which she had contributed about \$38,800 up to December 31, 2006;
- f) the life insurance policy for each party with Clarica, both of which were in the approximate amount of \$8,300; and

- g) photos and mementos, having no market value but significant sentimental value.

[132] The parties disputed the values of the following family assets:

- a) notional occupational rent;
- b) the Company;
- c) the car;
- d) Mr. Gaita's firearms;
- e) the household furniture; and
- f) the Aeroplan points.

[133] I will consider the value of each of those family assets in order.

- a) notional occupational rent

[134] With respect to the notional occupational rent, Mr. Gaita suggested that the market rent for the Coquitlam Property would be about \$1,700 per month, and for 16 months it would be \$27,200. He made that estimate in part on the basis that the renovations to the home were incomplete.

[135] Ms. Di Marco argued that \$55,730 was withdrawn from the parties' joint account to pay the mortgage for 17 months at \$3,278.66 per month. She also argued that Mr. Gaita obtained \$2,500 income from renting out the basement of the Coquitlam Property. She also asked the court to take into account that she paid rent of \$18,400 during this period.

[136] The mortgage for the period commencing July 1, 2006 was in the principal amount of \$399,750 with interest at 5.62% and an amortization length of 180 months. On my calculations, of the payments totalling about \$56,000, roughly \$25,000 was applied to principal and \$31,000 to interest. To the extent that the mortgage proceeds were applied to principal, both parties benefitted by the increase in the net value of the Coquitlam Property before it was sold to Mr. Gaita at market value.

[137] On the basis of the evidence available to me, the best assessment is that the occupation value of the Coquitlam Property during the 16-month period from August 2006 to December 2007 was \$2,000 per month, being \$32,000. In addition, Mr. Gaita received \$2,500 for rental of the basement. As a result, the total notional occupational value that Mr. Gaita received for the Coquitlam Property was \$34,500.

- b) the Company

- [138] Ms. Di Marco argued that the Company should be valued at \$60,000. She referred to her inability to obtain a valuation of the business owing to Mr. Gaita's non-compliance with court orders regarding production of Company documents. Mr. Gaita argued that the Company is worth nothing. He argued that it is just a personal service business with a small amount of furniture, and that the outstanding GST debt exceeds any value in the business.
- [139] The Company documents produced by Mr. Gaita were incomplete and in some instances contradictory. The Company delays in sending invoices, and Mr. Gaita testified that it was taking the Company six months and longer to invoice Intuit for training services. A fair valuation is difficult on the available evidence. The Company has receivables of about \$60,000, and GST debt of about \$58,500. It also owns some office furniture.
- [140] The Company enables Mr. Gaita to claim various expenses through the Company on his income tax. As a result, it has some value beyond Mr. Gaita's personal services.
- [141] In all the circumstances, a fair valuation of the Company is \$20,000, and Mr. Gaita has possession of that asset.
- c) the car
- [142] Mr. Gaita argued that his 1997 BMW 540i car is worth \$12,000. Ms. Di Marco argued that it was worth \$13,800. She referred to the fact that Mr. Gaita purchased the vehicle in March 2005 for \$22,800, including tax. She also referred to a listing in the Buy-n-Sell for a similar vehicle for \$13,800.
- [143] On the evidence available to me, the fair value for the car is \$13,500. This recognizes that there has been some depreciation in the value in the three years since Mr. Gaita purchased it. This also recognizes that the price listed in the Buy'n Sell is an asking price, and the ultimate sale price may be lower.
- d) Mr. Gaita's firearms
- [144] Mr. Gaita argued that his firearms are worth about \$2,900. He referred to a handwritten quotation in about that amount prepared by Lock, Stock, & Barrel dated April 18, 2008. Ms. Di Marco argued that the appropriate valuation was \$20,000. She referred to advertisements available on the internet. She also referred to the fact that Mr. Gaita had not provided the firearms appraisal in a timely way before trial.
- [145] On the evidence available at trial, the appropriate valuation of Mr. Gaita's firearms is \$5,000.
- e) the household furniture
- [146] Mr. Gaita argued that he has \$2,300 in furnishings at the Coquitlam Property and that he estimated that Ms. Di Marco has \$3,000 worth of home furnishings. He referred to the appraisal by Gail Pirie dated April 15, 2008, which values his home furnishings at about \$2,300 and the Company's furnishings at about \$2,200.

[147] Ms. Di Marco argued that Mr. Gaita has \$15,000 in household furnishings. She also argued that she should be entitled to \$2,300 for replacing Dylan's bedroom furniture. There was an agreement by exchange of letters between the parties' lawyers that such cost would be paid from the joint account.

[148] The relevant cost of household furnishings is generally far higher than the resale cost. Mr. Gaita has retained a significant amount of household furnishings. Mr. Gaita also has use of office furniture, which is in the home and used by the Company.

[149] On the evidence available to me, the best assessment is that Mr. Gaita retained \$6,000 more in family household furnishings than Ms. Di Marco. In addition, Mr. Gaita should have paid one half of Ms. Di Marco's \$2,300 expenses for replacing Dylan's furniture.

f) the Aeroplan points

[150] Mr. Gaita has about 250,000 Aeroplan points. He argues that they are worth about \$2,000. Ms. Di Marco considered the value of the points if applied to flights in the summer to Rome. On that basis, she said they were worth \$7,200.

[151] This is a difficult asset to value. It is not clear how easy it will be to obtain flights at suitable times using these points. On the basis of the available evidence, an appropriate assessment is \$4,000.

(iii) Determination of family debts

[152] The Family Relations Act, R.S.B.C. 1996, c. 128 refers specifically to allocating assets between the spouses and not to allocating debt. However, the court can take into account debt in considering the reapportionment of assets. The parties disagree about which of the alleged debts should be taken into account on distribution of assets.

[153] Mr. Gaita argued that the following debts should be taken into account:

- (a) tax debts of about \$136,000 for the parties' individual personal income tax, and the GST reassessment for the Company;
  - (b) the \$6,000 fine relating to Mr. Gaita's conviction for late filing of his personal income tax returns;
  - (c) credit card debt, which Mr. Gaita said was about \$5,300 on separation;
  - (d) renovation debt, which Mr. Gaita says was \$4,300; and
  - (e) home insurance, which Mr. Gaita paid for the Coquitlam Property.
- a) tax debt

- [154] Mr. Gaita ought to have prepared and filed income tax returns for himself, Ms. Di Marco, and the Company in a timely way. Ms. Di Marco understood that he was looking after all the necessary filings and the payment of taxes. Given Mr. Gaita's expertise in tax accounting, it is natural that she would expect him to look after this. Mr. Gaita's failure to file tax returns and pay taxes in a timely way, and his failure to reserve the necessary amount to pay the taxes relating to his unusually large income in 2005, has resulted in a significant expense.
- [155] Generally, an income tax debt owing at the triggering event is to be equally apportioned between the parties. That is because the money that should have been paid to CRA was instead expended for family purposes. However, different considerations may arise regarding interest and penalties.
- [156] The taxes outstanding at the triggering event of October 30, 2006 included some taxes that have now been paid. Ms. Di Marco paid about \$6,400 regarding her personal taxes by July 27, 2007. Mr. Gaita paid about \$28,500 in December 2007 of his outstanding personal taxes. These amounts were family debts.
- [157] Mr. Gaita did not provide copies of all the relevant tax documentation to Ms. Di Marco until the first day of trial, and so she had little opportunity to consider it. The documentation itself is not entirely clear. It appears that Mr. Gaita's outstanding personal taxes are about \$101,000, even after the December 2007 payment of \$28,500. Of the amount outstanding, the penalties are about \$25,600 and there is very roughly \$20,000 in interest. The penalties include about \$23,300 for 2005, being 46 per cent of the unpaid tax.
- [158] Ms. Di Marco wanted the taxes to be paid in a timely way. Mr. Gaita did not cooperate with payment to CRA even when the funds became available in June 2006. Instead, he remained in the Coquitlam Property, allowing the funds held in the joint account to be applied to the mortgage.
- [159] In certain circumstances, it is unfair that both parties equally share the burden of a tax debt. See for example *Hicks v. Hicks*, [1996] B.C.J. No. 2688 (Q.L.)(S.C.) at paras. 44-49.
- [160] Mr. Gaita must assume the responsibility for the entirety of the tax penalties and interest regarding his personal taxes. Ms. Di Marco was powerless to avoid those debts, and did not benefit from them. As a result, of the outstanding \$101,000, \$50,000 can be considered family debt.
- [161] The Company owes about \$58,500 for unpaid GST. The evidence was not clear regarding what portion related to penalties and interest, owing to Mr. Gaita's failure to produce all related documentation. The most recent statements suggest that about \$1,500 arises from penalties for non-compliance with tax reporting, and about \$1,500 for interest. The Company is primarily responsible for this debt, and it has receivables of about \$60,000, which is enough to pay this debt. Having taken the GST debt into account in valuing the Company, it would ordinarily be inappropriate to take it into account again as a credit for Mr. Gaita.

[162] However, in this case, income has been imputed to Mr. Gaita on the basis of what he could earn for his personal services provided through the Company. He will not properly be able to obtain income until the Company pays its GST debt, which arose when the Company paid Mr. Gaita instead of paying GST. Such payments diverted to family use funds that should have been paid for GST. Mr. Gaita is responsible to pay this debt if the Company fails to do so, because he is the sole director. Bearing in mind the magnitude of personal tax penalties and interest for which Mr. Gaita will remain wholly responsible, it is appropriate in this case to consider \$55,000 of the outstanding GST debt to be a family debt.

[163] The tax debt to be considered family debt therefore consists of the following:

- (a) \$6,400 in respect of Ms. Di Marco's personal debt, which she has paid;
- (b) \$28,500 in respect of the portion of Mr. Gaita's personal debt that he has paid;
- (c) \$50,000 of Mr. Gaita's outstanding personal tax debt; and
- (d) \$55,000 of the Company's outstanding GST debt, for which Mr. Gaita is liable to CRA.

[164] That is \$139,900 in total, of which \$6,400 has been paid by Ms. Di Marco and \$133,500 has either been paid by or remains the responsibility of Mr. Gaita. The net effect is that asset division should take into account that Mr. Gaita is responsible for \$127,100 more in family tax debt than Ms. Di Marco.

b) Mr. Gaita's fine

[165] With respect to the fine for Mr. Gaita's late filing of his personal income tax return, this debt is entirely a matter for Mr. Gaita. The fine is a penalty for his conduct. It does not arise from money owing for taxes being diverted for a family purpose. This fine cannot be considered as a family debt for the purpose of allocating assets.

c) credit card

[166] The evidence did not disclose the amount of any credit card debt, and if paid, who paid it from what funds. As a result, it cannot be taken into account on allocation of family assets.

d) renovation debt

[167] With respect to the alleged renovation debt, Mr. Gaita argued that about \$4,300 was owing to contractors who worked on renovations of the Coquitlam Property. Ms. Di Marco argued that she should not have to share in this debt. Among other things, she argued that in the vendor's statement of adjustments on the sale of the Coquitlam Property to Mr. Gaita alone, Mr. Gaita represented that there was nothing outstanding to subcontractors.

[168] Mr. Gaita purchased the family home in December 2007. He ought to have dealt with any debts relating to renovations prior to that time. There was no evidence that these debts have been paid or are likely to be paid. The alleged renovation debts are not matters to be taken into account as family debts.

- e) home insurance

[169] With respect to home insurance, Mr. Gaita argued that he paid \$750 per year for insurance of the Coquitlam Property for the period before he bought it. This was an expense related to his occupation of the Coquitlam Property. This does not amount to a debt that ought to be taken into account as a family debt.

(iv) Summary of Family Assets and Debts

[170] In summary, the family assets and debts are as follows:

- a) the net sale proceeds of the Coquitlam Property consisting of about \$156,700 plus interest held by Mr. King, plus the \$40,000 distributed to the parties;
- b) the Vancity bank accounts in the total amount of about \$10,600;
- c) the U.S. cash Ms. Di Marco took from the safe, which was equivalent to \$690 (Cdn.);
- d) the cash advance Ms. Di Marco took from the Visa card in the amount of \$2,300;
- e) the pensions with CPP and Ms. Di Marco's teacher's pension;
- f) the life insurance policies with Clarica, both of which were in the approximate amount of \$8,300;
- g) notional occupational rent of \$32,500;
- h) the Company shares worth \$20,000;
- i) the car worth \$13,500;
- j) Mr. Gaita's firearms worth \$5,000;
- k) the household furniture, of which Mr. Gaita has \$6,000 more than Ms. Di Marco, and in respect of Dylan's furniture, Mr. Gaita should have paid \$1,150 to Ms. Di Marco;
- l) the Aeroplan points worth \$4,000; and
- m) photos and mementos, having no market value but significant sentimental value.

[171] In respect of family debts, Mr. Gaita owes or has paid \$127,100 more than Ms. Di Marco for family debt.

(vi) Reapportionment of family assets

[172] Ms. Di Marco argued that she should receive more than 50 per cent of the family assets. She referred to Mr. Gaita living rent-free in the Coquitlam Property. She also argued that she needed her teacher's pension and CPP pension for her future security.

[173] The court can take into account the factors set out in s. 65 of the Family Relations Act, which are as follows:

65(1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[174] In this case, the relevant circumstances are as follows:

- (a) the parties cohabited during 15 years of marriage;
- (b) the parties have lived separate and apart for about two years;
- (c) while the evidence did not disclose the precise date the parties acquired the Coquitlam Property, they appear to have owned it since at least 1997 and disposed of it in December 2007;
- (d) the Coquitlam Property was not acquired through inheritance or gift;
- (e) both parties need to become or remain economically independent and self-sufficient. At present, it is likely that Ms. Di Marco's health will enable her to return to work full time. Mr. Gaita has skills that would enable him to be economically independent, although he has not demonstrated an ability to run a profitable business for an extended period. The annual income imputed to Mr. Gaita is \$80,000 and Ms. Di Marco's likely annual income is \$74,000;
- (f) both parties have an obligation to care for Dylan; and

- (g) Mr. Gaita has responsibility for \$127,100 more in family debt than Ms. Di Marco.
- [175] Having regard to all of these circumstances, an equal division of the family assets would be unfair if it did not take into account Mr. Gaita's responsibility for family debt. Otherwise, the assets should be allocated roughly equally.
- (v) Division of family assets
- [176] The parties' CPP plans and Ms. Di Marco's teacher's pension plan should be divided pursuant to Part 6 of the Family Relations Act, R.S.B.C. 1996, c.128. The plans should be divided on the basis that the parties were married on August 10, 1991, and the entitlement date is October 30, 2006, being the date of the "triggering" event arising from the declaration in the Groberman Order that the parties had no reasonable prospect of reconciliation.
- [177] The order of H. Holmes, J. of November 2, 2007 dealt with distribution of family photos and mementos, and it should be followed.
- [178] Regarding the other family assets, Ms. Di Marco presently has possession of the following family assets with a total value of \$31,290:
- (a) \$20,000 of the funds distributed from the net sale proceeds of the Coquitlam Property;
  - b) the U.S. cash Ms. Di Marco took from the safe, which was equivalent to \$690 (Cdn.);
  - c) the cash advance Ms. Di Marco took from the Visa card in the amount of \$2,300; and
  - d) her life insurance policies with Clarica in the approximate amount of \$8,300.
- [179] Mr. Gaita has possession of the following family assets with a total value of \$103,000:
- a) \$20,000 of the funds distributed from the net sale proceeds of the Coquitlam Property;
  - b) notional occupational rent of \$34,500, by having stayed in the Coquitlam Property and collected rent;
  - c) the Company shares worth \$20,000;
  - d) the car worth \$13,500;
  - e) firearms worth \$5,000;
  - f) \$6,000 more than Ms. Di Marco in household furniture; and
  - g) the Aeroplan points worth \$4,000.
- [180] Mr. Gaita has responsibility for \$127,100 more than Ms. Di Marco in family debt. However, he owes Ms. Di Marco \$1,150 regarding Dylan's bedroom furniture. He effectively has about negative \$24,000 in family assets (being \$103,000 less \$127,100), and owes Ms. Di Marco \$1,150.

- [181] The undistributed family assets consist of the portion of the net sale proceeds of about \$156,700 plus interest in Mr. King's account, plus about \$10,600 in Vancity accounts, for a total of about \$167,300 in undistributed family assets. An equal division would be about \$83,650 to each party.
- [182] Mr. Gaita has an effective "negative" \$24,000 in distributed family assets, and he owes \$1,150 to Ms. Di Marco. As a result, considering only the family assets and the family debt, Ms. Di Marco should pay Mr. Gaita \$10,850, being one half of \$24,000 less \$1,150. Taking into account Ms. Di Marco's receipt of \$31,290 in distributed family assets, Mr. Gaita is entitled to a further \$15,645. As a result, an equal division of assets requires Mr. Gaita to receive \$26,500 more than Ms. Di Marco from the undistributed assets.
- [183] As a result, Mr. Gaita should receive the first \$26,500 from Mr. King's account, and the balance including interest must be divided equally. The Vancity accounts are to be divided equally.
- [184] This will have the effect that Mr. Gaita will receive about \$91,600 ( $\$26,500 + \frac{1}{2} \times \$130,200$ ) and Ms. Di Marco will receive about \$65,100 from Mr. King's account. Each party will receive about \$5,300 from the Vancity accounts.

(e) Spousal Support

- [185] Ms. Di Marco seeks ongoing spousal support of \$2,200 per month and retroactive spousal support of \$44,000. She calculated the retroactive support on the basis of 20 months at \$2,200 per month. Mr. Gaita argued that he should not pay any spousal support, either retroactively or on an ongoing basis.

- [186] The relevant provisions of the Divorce Act are as follows:

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
  - (b) the functions performed by each spouse during cohabitation; and
  - (c) any order, agreement or arrangement relating to support of either spouse.
- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
  - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
  - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
  - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
  - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[187] In *Yemchuk v. Yemchuk*, 2005 BCCA 406, the Court of Appeal accepted the Spousal Support Advisory Guidelines ("SSAG") as a useful tool to assist judges in assessing the quantum and duration of spousal support.

[188] Dealing first with ongoing support, using the imputed incomes of \$80,000 for Mr. Gaita and \$74,000 from Ms. Di Marco, the SSAG suggests that spousal support could fall in the range of \$0 to \$32 per month.

[189] The SSAG takes into account items such as the difference in the taxes payable and the government benefits received by the parties. In the circumstances of this case, ongoing spousal support is not appropriate.

[190] Retroactive spousal support is ordinarily available only for the period commencing when the spouse was given effective notice that spousal support would be pursued. Here, that is the period commencing March 2, 2007, after Ms. Di Marco's counsel sent a notice of motion seeking spousal support.

[191] For that period, I have imputed income of \$60,000 to Mr. Gaita. Ms. Di Marco was receiving about \$46,700 per annum and for purposes of spousal support, \$3,500 in child benefits, for a total of \$50,200. The SSAG suggests spousal support in a range of \$0 to \$116 per month.

[192] In the circumstances of this case, retroactive spousal support is not appropriate. The difference between Mr. Gaita's imputed income and Ms. Di Marco's actual income was not sufficiently great.

(f) Costs

[193] Both parties seek costs of this lawsuit. Ms. Di Marco argued that she should be entitled to costs because of Mr. Gaita's failure to provide documents to her as required by the Rules of Court and the several court orders. Mr. Gaita seeks costs on the basis that Ms. Di Marco was unreasonable in settlement negotiations.

- [194] The general rule regarding costs is that they should follow the event unless the court otherwise orders as set out in Rule 57(9). This is discussed in *Gold v. Gold* (1993), 49 R.F.L. (3d) 56 (C.A.) leave to appeal dismissed with costs [1994] 1 S.C.R. vii (S.C.C.). The court ordinarily considers the difference between what the parties argued at trial was the appropriate order and what was the final result.
- [195] In this case, there has been mixed success. Mr. Gaita has been substantially successful regarding parenting. However, Mr. Gaita is required to pay child support, both on an ongoing and retroactive basis, although not at the level sought by Ms. Di Marco. The family assets have been distributed in a way that provides both parties with less than they argued was appropriate. Mr. Gaita has been successful on the issues of spousal support. Ordinarily, with this degree of mixed success, the appropriate order would be for each party to bear his and her own costs.
- [196] However, this litigation was made far more difficult for Ms. Di Marco, and the proceedings were prolonged, because of Mr. Gaita's procrastination and defiance of court orders and court rules in providing the necessary documents. As a result, it is appropriate for Mr. Gaita to contribute to Ms. Di Marco's costs, although not to pay all of her costs of the nine day trial.
- [197] As a result, Mr. Gaita is ordered to pay the full amount of the court hearing costs for all nine days of trial, together with Ms. Di Marco's taxable costs for preparation for and attendance at five days of the trial.

## Summary

[198] In summary, the order is as follows:

- (a) subject to s. 12 of the Divorce Act, the parties are divorced effective on the 31st day after the date these reasons for judgment are released;
- (b) the plaintiff's last name is changed to "Di Marco";
- (c) the parties will share joint custody and joint guardianship of Dylan on the following basis:
  - (i) the parties will be the joint guardians of Dylan's estate and person;
  - (ii) in the event of the death of either party, the other parent will be the sole guardian of Dylan and will make his or her best efforts to ensure that Dylan maintains a relationship that is as meaningful as possible with the extended family of the deceased parent;
  - (iii) each party will advise the other party of any matters of a significant nature affecting Dylan;

- (iv) each party will discuss with or correspond by email or letter to the other party about any significant decisions that have to be made concerning Dylan, including significant decisions concerning the health (except emergency decisions), education, religious instruction, extracurricular activities and general welfare of Dylan, and each party will attempt to reach agreement on major issues;
- (v) in the event that the parties cannot reach agreement upon those decisions, Ms. Di Marco will be entitled to make those decisions, subject to Mr. Gaita's right to seek a review by the court on the basis that the decision is not in Dylan's best interests;
- (vi) each party will be entitled to contact Dylan's medical and dental practitioners to obtain records;
- (vii) each party will be entitled to attend events at Dylan's school, and be entitled to deal directly with the school concerning events and other matters;
- (viii) each party will have the right to obtain information concerning Dylan directly from third parties, including but not limited to teachers, counsellors, coaches, medical professionals, and third party care givers;
- (ix) the ordinary parenting schedule until the summer of 2010 will be the parents will alternate their time with Dylan on a 2/2/3 day basis, unless the parties agree to change it prior to the summer of 2010, and when it changes, it will become a schedule of alternating weeks with each parent delivering Dylan to school or the other parent on Monday mornings. In addition, Dylan will be with his father until 3:30 p.m. on school professional days;
- (x) If Mr. Gaita chooses to take Dylan to Tae Kwon Do at the Yuen Institute, or arrange for someone else to do so, he may, but if not, Ms. Di Marco is entitled to pick Dylan up at his father's and take him to Tae Kwon Do and return him to his father's even during those times Dylan would otherwise be with his father. Ms. Di Marco will arrange Dylan's medical, dental, orthodontic, and other necessary appointments, such that about equal time will be spent on such appointments during Dylan's time with each parent. If Mr. Gaita does not confirm to Ms. Di Marco 24 hours before an appointment scheduled for a time that Dylan would otherwise be with his father that Mr. Gaita will take Dylan, Ms. Di Marco may pick Dylan up at his father's and take him to the appointment, and return Dylan to his father's afterwards;
- (xi) the ordinary schedule will be suspended during Dylan's summer, winter and spring school holidays and replaced by the following:
  - (a) unless the parties otherwise agree, each party will be entitled to have two periods of two consecutive weeks with Dylan during the summer, with Ms. Di Marco having Dylan for the first two weeks of July and August and Mr. Gaita having Dylan for the last two weeks of July and August;

- (b) the parties will share Dylan's winter school holiday equally, and the parties will alternate having Dylan for Christmas Eve and Day and for New Year's Eve and Day, such that in 2008, Mr. Gaita will have Dylan on Christmas Eve and Day and Ms. Di Marco will have Dylan on New Year's Eve and Day;
  - (c) each party will have Dylan for the whole of his spring school holiday in alternating years, with Mr. Gaita having Dylan for his 2009 spring holiday;
  - (d) the parties will alternate having Dylan for the Easter weekend, with Ms. Di Marco having Dylan for the 2009 Easter weekend, except that if the Easter weekend coincides with Dylan's spring holiday in a particular year, the parent having Dylan for his spring school holiday that year will also have Dylan for the Easter weekend;
- (xii) regardless of which parent has Dylan according to the parenting schedule, each party will have Dylan on each of their birthdays and Father's Day and Mother's Day, respectively. On these four days of the year, Dylan will go to the respective parent who is celebrating that day on the night before the event date, and will be dropped off at school or to the other parent the day after the event by 8:45 a.m.;
- (xiii) Dylan's birthday in each year will be shared by the parents. If it falls on a school day, the parent who does not have Dylan that day will pick him up from school and drop him off to the other parent by 6:30 p.m. If it falls on a Saturday, Sunday or a holiday which is not the day of his party, the parent who does not have Dylan on the applicable day will pick up Dylan at 10:00 a.m. on his birthday and drop him off back to the scheduled parent by 4:00 p.m. the same day. If his birthday falls on a Saturday, Sunday or a holiday and that is also the day of his party, the parents will share Dylan during the time of his party and the parent who does not have Dylan will pick Dylan up at 10:00 a.m. on the day before or after his party and drop him off at the scheduled parent by 4:00 p.m. the same day;
- (d) Mr. Gaita is required to pay Ms. Di Marco \$50 per month commencing September 1, 2008 for child support so long as Dylan remains a child of the marriage as defined in the Divorce Act. The parties shall each provide the other with copy of his or her filed income tax return no later than January 1 of each year;
  - (e) Mr. Gaita is to contribute 50 per cent of the costs of Dylan's expenses for special expenses, including Tae Kwon Do, orthodontic treatment, and expenses for activities like summer camp;
  - (f) Mr. Gaita is required to pay Ms. Di Marco \$4,455 in retroactive child support;
  - (g) Ms. Di Marco's claims for ongoing and retroactive spousal support are dismissed;
  - (h) the parties' CPP plans and Ms. Di Marco's teacher's pension plan should be divided pursuant to Part 6 of the Family Relations Act on the basis that the parties were married on August 10, 1991, and the entitlement date is October 30, 2006;

- (i) the parties will each retain the family assets that are presently in their possession;
- (j) the funds held in trust by Mr. King are to be distributed firstly \$26,500 to Mr. Gaita, with the balance to be divided equally;
- (k) the Vancity accounts are to be divided equally; and
- (l) Mr. Gaita is required to pay the full amount of the court hearing costs for all nine days of trial, together with Ms. Di Marco's taxable costs for preparation for and attendance at five days of the trial.

"Madam Justice Gray"

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