CANADA / JUDGMENT

# Hadjioannou v. Hadjioannou

**2013 BCSC 43**

COURT
Supreme Court of British Columbia

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2013 BCSC 43 Hadjioannou v. Hadjioannou

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hadjioannou v. Hadjioannou,

2013 BCSC 43

Date: 20130114

Docket: E093812

Registry: Vancouver

Between:

Melissa Claudette Hadjioannou

Claimant

And

Athanasios Hadjioannou

Respondent

Corrected Judgment: The text of the judgment was corrected at

paragraph 8 on January 16, 2013.

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

Counsel for the Claimant:

Ruth Lea Taylor

The Respondent, Athanasios Hadjioannou:

Appearing on his own behalf

Place and Date of Trial:

Vancouver, B.C.

October 9-12, 15-19, 2012

Place and Date of Judgment:

Vancouver, B.C.

January 14, 2013

## Introduction

[1] The claimant and respondent married on August 24, 1999 and separated on or about November 15, 2009, just over ten years later. There was a brief separation mid-marriage as well but neither party focussed on that at trial. They have three children: N., born in late 1999, now almost 13; V., born in the spring of 2003 and now 9 years old; and M., born in the summer of 2008 and now 4 years old (together, the "Children"). N. and V. are boys; M. is a girl.

[2] The claimant was born in 1979 and was 19 years old when they married and is now 33 years old; the respondent was 25 years old at marriage and is now 39 years old.

[3] The claimant mother seeks to formalize and finalize interim arrangements for custody, guardianship and access, whereby the parents have been sharing time with the Children on an equal basis.

[4] The respondent father's starting position at trial was to increase his custody of the Children to greater than 50% of the time, and to have final veto decision making on guardianship issues. However, during the course of the trial he modified his position so that the parties are in agreement over most of the custody and guardianship issues.

[5] There are also child support, property division, and spousal support issues.

[6] The respondent was self-represented at trial except during the cross-examination of the claimant, which was conducted by counsel on his behalf (counsel who had represented him earlier in the litigation).

## Custody, Access, and Guardianship

[7] The parties seek orders under the Divorce Act. R.S.C., 1985, c. 3 (2nd Supp.) [Divorce Act] and Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], regarding custody, access and guardianship of the Children.

[8] In making my orders regarding custody, access and guardianship I have in mind that these orders will continue past the coming into force of the Family Law Act, S.B.C. 2011, c. 25 [Act] effective March 18, 2013. In this regard, I have envisioned that the orders I have made will be entirely consistent with the new concepts of parental responsibilities and parenting arrangements and parental time under that Act.

[9] It is clear that the parties had a tumultuous relationship and very dramatic marriage breakdown, followed by multiple court applications.

[10] I do not find it necessary to review this history. Over the last year, the co-parenting relationship has calmed down considerably.

[11] The claimant called several witnesses who have observed her conduct as a mother and who confirm that she is a caring, competent parent who has a nurturing and loving relationship with the Children, and I so find. The respondent did not challenge these witnesses with respect to the observations of the claimant's ability as a parent.

[12] As mentioned, the respondent father initially advanced the position that his time with the Children should be increased to greater than 50%. The respondent's concern seemed to be with respect to the claimant's allegations, upon the marriage breakdown, that he had been abusive to her during the marriage, either verbally or physically. He continually brought up a restraining order that had been obtained against him and criminal charges that had been brought against him based on her allegations. It is clear that he is very bitter about these allegations. However, he appeared to ultimately realize in the course of trial that this did not refute the evidence that the claimant is a good mother to the Children.

[13] As for the claimant, I find that she has not tried to alienate the Children from the respondent, but rather has encouraged their relationship with their father. For example, when she has been required to go to work on days when she was supposed to have the Children in her care, she offered the respondent the time to look after the Children. She was careful in the witness stand to not raise multiple complaints regarding the respondent's care for the Children, even though she does not agree with some of his parenting choices. She appeared to me to realize that both parents will have different relationships with the Children and that each will have to accept that of the other.

[14] I note that several witnesses gave evidence that the Children are doing well. This points to successful parenting by both parents.

[15] Each party has a new romantic partner. Both of these people testified at trial and they both appeared to me to be stable and reasonable. Each is in the process of developing his or her own good relationships with the Children. Neither one is making any direct contribution to the support of the Children.

[16] The evidence is clear that it is in the best interests of the Children that both parents should continue with the current regime of sharing parenting time with the Children on a roughly equal basis and also sharing parenting responsibilities for the Children.

[17] I order that the parents have joint custody and joint guardianship of the Children under a parenting arrangement that is roughly equal in time, splitting on a 4-day/3-day schedule that alternates, and splitting holidays. The exact parenting arrangement is attached to these reasons for judgment and described as "Schedule A - Parenting Arrangement".

[18] Due to the past high level of conflict between these parents, I find it in the best interests of the Children that each parent be given exclusive time with the Children during that parent's scheduled parenting time. A parent's exclusive parenting time will include the day-to-day care of the Children and any necessary decisions required for them (other than the major guardianship decisions which are governed by the guardianship terms), and attendance at activities and appointments.

[19] This exclusive parenting time will apply even if the Children are in a scheduled sporting event or field trip. Since the parenting arrangement is subject to the parties' agreement to change it, I am hopeful that over time as the parties rebuild a civil relationship there will be times when the parents will agree that both can attend the same events.

[20] However, there will be some small exceptions to the exclusive parenting time, and that is in the case of emergencies and when there are special school-scheduled events such as important ceremonies, awards, graduations, and teacher-parent meetings.

[21] With respect to joint guardianship terms, the respondent's starting position was that he wished to have the final say in guardianship matters should there be a disagreement. I was concerned about this given the claimant's view that the respondent has been unduly controlling and dominant in their relationship, and this could unfairly skew the parental relationship, giving the respondent the perception that he has more power. The evidence does not support a finding that the claimant has a history of unreasonableness in parenting decisions, rather, the evidence suggests that she has been quite reasonable.

[22] The claimant's position was that the parties should have the obligation to consult with each other and try and reach agreement over major guardianship decisions, and in event of disagreement, seek to mediate the disagreement, with either party having the right to seek review by the court should that not resolve the problem. Ultimately the respondent agreed with this proposal.

[23] I too am of the view that the claimant's position regarding guardianship is appropriate. I find that it is in the Children's best interests that there be harmony between the parents and an incentive for the parents to be reasonable with each other, and this requires a situation where both are equal to the other in their relationship with the Children and in their parenting responsibilities. It is important in this family that there should be a balance of power between the parents, and no dominance by one over the other. Giving one parent a

veto over guardianship decisions would upset the delicate balance in this case.

[24] I therefore have concluded that it is in the best interests of the Children that the parties will be joint guardians of the Children under the following guardianship terms:

(a) the parents shall be joint guardians of the estates of the Children;

(b) in the event of the death of either parent, the remaining parent will be the sole guardian of the Children;

(c) each parent during her or his primary responsibility for the day-to-day care of the Children, will have the obligation to advise the other parent of any matters of a significant nature affecting the Children;

(d) the parents will have the obligation to communicate with the other parent about significant decisions which have to be made concerning the Children, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of the Children, and each parent will have the obligation to try to reach agreement with respect to those major decisions;

(e) in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts, the parents shall attend mediation respecting such decision or engage in such other family dispute resolution process as envisioned by the Family Law Act other than court application. Failing agreement through the aid of a mediator or other family dispute resolution process, either parent shall have the right, under section 32 of the FRA or upon its repeal, section 49 of the Family Law Act, to seek the direction of the court on an issue affecting the child;

(f) each parent will have the right to obtain information concerning the Children directly from third parties, including teachers, counsellors, medical professionals, and third-party caregivers;

(g) communication between the parents shall be primarily by e-mail or text messaging, save and except in the case of an emergency, and the subject of such communications, save and except the usual conventional social graces, shall be solely about the Children and matters pertaining to their health, education, recreation, needs, wishes and such other care-giving matters as may be necessary;

(h) neither parent shall make negative, derogatory or threatening remarks about the other parent in the presence of any or all of the Children.

[25] As discussed with the parties during submissions, a major guardianship decision includes any decision to allow any of the Children to be tattooed or pierced. In other words, neither parent shall permit the Children to be tattooed or pierced unless both parents agree. The exception is that the claimant is permitted to have the parties' daughter's ears re-pierced.

[26] The guardianship term regarding communication between the parties is meant to keep the peace between the parties, to avoid the situation where either party feels harassed by the other, to minimize verbal interaction but to encourage polite communication regarding the Children. It is clear that there were at one time difficulties in the parents' communications with each other, and these problems may be lingering. But the evidence of the claimant, her fiancé, and the respondent's girlfriend, suggests that there is a relatively smooth transition of the Children between households. This tells me that the parties will be able to communicate civilly about the Children and work together in the future.

[27] Both sides criticize the other for disobeying previous court orders regarding custody and access. I expect that any such behaviour is behind the parties. Any past restraining orders are revoked and I do not include in a term of my order any police enforcement clause. Both parties understand that if they do not obey the terms of the court order they may be subject to an order for contempt, which can involve substantial penalties.

[28] Another parental issue has to do with restrictions on the Children's travel. I find that it is in the best interests of the Children to remove the restriction on travel that existed in interim orders and to replace it with the following order:

(a) either parent is free to travel with the Children within Canada during that parent's normal access time with the Children, or at other times with the consent of the other parent, subject to (c) below;

(b) similarly, either party is free to travel with the Children outside of the country with the written consent of the other parent. In such a case, the remaining parent will promptly sign and provide to the travelling parent the necessary travel documents and consents. If consent is unreasonably withheld, either party may apply to the court; and,

(c) the term (a) above is subject to the condition that in the event a party is going to travel with the Children outside of the Sunshine Coast or Lower Mainland of British Columbia for a period greater than two weeks, the parent travelling will give the other parent two months' notice of the planned trip, and, no later than one month prior to the trip, an itinerary of the same. During such a trip, the parent travelling with the Children shall ensure that the Children communicate with the other parent by telephone or Skype every two days while away.

[29] At the time of this trial, both parents had chosen to continue to live in an area known as the Sunshine Coast of British Columbia, and both parents planned to continue living there so as to facilitate stability in the Children's lives and schooling. The current regime of shared parenting works well because of this. I therefore also order that if either parent plans to move away from this area, that they give the other parent as much notice as possible but no less than 60 days' notice of the move and prospective address. Within 30 days of receipt of this notice of the planned move, if the recipient parent objects to the move, the objecting parent must give notice of the objection to the relocating parent. The purpose of these terms is to instruct the parties to provide as much notice to the other as possible on each other's

position if one plans to move away, so that the parties have time to work out any revised custody arrangements or, if such efforts are unsuccessful, to apply to the court.

[30] I fully expect both parents to put this litigation behind them and to treat each other with respect. This is extremely important for the long term health and happiness of their Children. The emotional development of the Children will be negatively affected by any animosity, anger or upset shown by the parents towards or about each other. I believe that provided the parents always keep in mind that it is in the Children's best interests, they will be able to stay calm and remain polite when dealing with each other even when having a disagreement. I do believe they will be able to provide a harmonious co-parenting environment in which the Children can thrive.

## Child Support

[31] The claimant seeks retroactive and ongoing child support payable by the respondent to her. The respondent seems to concede that he will be responsible for some ongoing child support.

Retroactive support

[32] As for retroactive child support, the legal principles regarding retroactive support are now well-established.

[33] The court has authority and discretion to award retroactive child and spousal support awards: D.B.S. v. S.R.G., 2006 SCC 37 [D.B.S.] and Kerr v. Baranow, 2011 SCC 10.

[34] The leading authority governing orders for retroactive child support is D.B.S. In making an order for a retroactive award, a holistic view must be taken while keeping the following four factors in mind: a reasonable excuse for why support was not sought earlier; the conduct of the payor parent; the circumstances of the child; and the presence of hardship occasioned by a retroactive award.

[35] In Lombardo v. Lombardo, 2007 BCSC 284, a useful while not exhaustive list of factors militating in favour of a retroactive child support award was summarized at para. 291 citing L.S. v. E.P., 1999 BCCA 393 at paras. 66-67:

1. Need and/or corresponding ability to pay;
2. Blameworthy conduct on the part of the non-custodial parent;
3. Incomplete or misleading financial disclosure;
4. Encroaching on capital or incurring debt;
5. Excuse for delay, where delay is significant;
6. Evidence of ongoing negotiations toward settlement or reconciliation;
7. Creating an unreasonable burden on the non-custodial parent;

8. Redistributing capital or awarding disguised spousal support; and

9. Significant and unexplained delay.

[36] The claimant commenced this claim in November 2009 and in it asked for child support and spousal support. It was clear throughout the proceedings that these claims were never abandoned. While applications for interim support were brought by the claimant, these were usually side-tracked and adjourned because of hotly contested issues regarding custody and access.

[37] These interim applications were also hampered by the respondent's non-disclosure of income, with the end result that there was no interim support order until July 13, 2011.

[38] Mr. Justice Kelleher made an interim order for child support on July 13, 2011. This ordered the respondent pay to the claimant $650 monthly, retroactively commencing May 1, 2011. The court specifically did not make any findings as to the respondent's income at that date.

[39] As the respondent conceded before me, even as late as the order of Kelleher, J. he had not produced sufficient information to allow the court to draw inferences as to his income. It was only as of trial that the respondent produced information regarding his corporate income.

[40] The respondent's failure to produce information in a timely way that would allow a determination of his income for child support purposes can be characterized as "blameworthy conduct" within the meaning of the case law relating to retroactive child support, especially where, as will be seen, this belatedly-produced information reveals a much higher income than he had disclosed to the claimant and the court earlier in his financial statements.

[41] The respondent did not argue that for reasons of hardship, he should pay less than the amount under the Federal Child Support Tables ("Tables") of child support under the Federal Child Support Guidelines, SOR/97-175 [Guidelines].

[42] However, he did advance a number of debts and expenses to suggest that his expenses have exceeded his income each year since separation. Unfortunately, this information was difficult to analyze, as many of the expenses he claimed in his financial statements were expenses that were actually paid for or contributed to by his company.

[43] Even looking at his figures generously, given the respondent's income, as contrasted to the claimant's income (both of which I will address shortly), it was clear after marriage breakdown that the respondent had a much higher standard of living than the claimant, and the claimant was virtually destitute. The respondent cannot rely on his own hardship as a reason for not fulfilling his ordinary child support obligations.

[44] The respondent has to appreciate that child support is the right of the child, not the parent, and refusing to pay or refusing to produce financial information to allow the court to assess income for purposes of child support will not be sanctioned by the court.

[45] I find that it is reasonable for the claimant to seek retroactive child and spousal support and the respondent is not taken by surprise by her claims. I find that the payment of retroactive child support dating back to the marriage breakdown is appropriate in this case.

Respondent's Income

[46] The first issue in respect of child support is determining the respondent's income both currently, and since separation.

[47] The respondent has a B.A. from Simon Fraser University, graduating in 1995 or 1996. He has also taken some private courses in security and private investigation.

[48] The respondent works as a security guard, and coordinator of other security guards, for the film industry. He is also occasionally a hired driver in the same industry. He contracts his services to various television and movie productions through his wholly-owned company, Reel Film Protection Inc. Some of the productions pay union rates, some pay less than those rates. He has been doing this work since at least 2004 although he did not incorporate his company until 2006.

[49] The respondent swore financial statements as required by the Supreme Court Family Rules, on January 25, 2010 and November 23, 2010, stating that his income was $15,900 and $11,900 respectively (after taking off $100 for union dues each time).

[50] On its face this asserted income was hard to believe, given that he had been the sole source of support for this family of five in previous years and he had purchased a home in 2008 on YMCA Road, Gibsons, BC, which I will call the "family home". Even taking into account the fact that the respondent received a relatively small amount of money from his father towards the purchase of the family home, the respondent also qualified for mortgage financing.

[51] At trial there was a little more light shed on the respondent's income. He brought an unsworn financial statement to the court and swore it as true when he took the witness stand on October 15, 2012. In that financial statement, he still set out that his income was $16,000, less $100 in union dues, for a total of $15,900. He testified that he simply copied the figures in his January 25, 2010 financial statement. However, the body of that financial statement sworn more than two years earlier claimed there were special circumstances affecting his company's net sales (the criminal allegations made by the claimant against him which temporarily affected his security license, and the Olympics interfering with filming). Those circumstances have not existed for a couple of years now.

[52] The respondent did attach to his recent financial statement introduced at trial some but not all of the documents required by the Form, in an attempt to illustrate three years worth of income tax filings made by him and his company.

[53] The respondent's notice of assessment for each of the income tax years 2008, 2010, and 2011 shows line 150 income of $16,000. For 2009 the figure is $12,000.

[54] While it is true that the starting point is the reported income on line 150 of the respondent's personal income tax return, this is often not determinative of annual income for child support purposes, and in the case of a person who earns income through his own incorporated business, is subject to ss. 17 to 20 of the Guidelines.

[55] The real question in the case of a parent who earns income through a closely held corporation is what money is available for child support, as held in Kowalewich v. Kowalewich, 2001 BCCA 450 at paras. 28, 43-45 [Kowalewich].

[56] Sections 16 and 18 of the Guidelines may be used to calculate the income of a person who is a shareholder or director of a company:

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

...

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

### Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[57] Although the Guidelines do not give explicit instructions regarding which s. 18(1) method, (a) or (b), to use in order to determine a spouses' annual income, Kowalewich suggests at para. 48 that when a spouse wholly controls a corporation, the corporate income method is likely to be the fairer method of determining income:

...This is because it allows a court to include not only reasonable payment for personal services but also a reasonable return on the owner's entrepreneurial capacity and investment. These are sources of income available for child support an intact family would utilize.

[58] Where the only business of the payor parent's wholly owned company is the provision of that parent's personal services, it may also be fair to consider the personal services method of determining income for child support purposes: Kowalewich at para. 49.

[59] Here both methods of determining annual income may lead to the same result. The respondent is the sole owner of his company, and its sole business is the provision of his personal services.

[60] The respondent testified that he follows a practice of having his company pay him a management fee of $16,000 each year. This is what he generally reports as his income on his income tax return.

[61] However, he also admitted that his company generates considerably more revenues than what he pays himself as a management fee. He stated that the company's fiscal year runs from March 22nd to March 21st. The documents he provided which were intended to indicate the company's sales, or revenues, indicate the following sales for the following years ending March 22: $61,620 for 2007; $57,481 for 2008; $38,675 for 2009; $49,505 for 2010; and $64,128 for 2011. These sums represent the fees that are paid to the company for the respondent's personal services.

[62] While the respondent then reduces his company's income for tax purposes by applying a number of operating expenses, it is clear that most of these expenses provide a personal benefit to the respondent and those living with him. For example, the company notionally is charged rent to operate out of the family home; and the company pays all vehicle expenses including insurance; all telephone (land line and cell phone) expenses, internet and some cable expenses; as well as some food, meals and entertainment. The company also pays for uniform expenses, but other than clothes or hats specifically labelled "security", I consider that any other clothes would have a personal use aspect to them. Furthermore, the uniform expense is relatively small and it is likely that the respondent gets more than one year's use out of the clothes he purchases for his work.

[63] The one significant expense that does not overlap with the respondent's own living expenses, is the company expense described as "subcontracts". The respondent testified that these relate to fees he pays to others to provide security services. For example, when the respondent has a contract to be security coordinator, he sometimes hires others to provide the onsite security required, and the fee he pays them is what is shown as a subcontracts expense.

[64] In addition, the respondent's annual union fee of $100 is an expense for which there is no overlap in his personal living expenses.

[65] The respondent also said that the vehicle expenses that he incurs are in part because he leases an expensive four-wheel truck, with lease payments of approximately $760 per month. He suggested he needs this truck to get to remote film locations and that were it not for his work he would own a less expensive vehicle. He thus suggested that in addition to the subcontract expense some allowance for his vehicle expense should be deducted from the company's revenues to determine his income for purposes of child support.

[66] I did not find his evidence persuasive in this regard and was given no details about the choices of vehicles and cost of vehicles available to him or about any particularly difficult-to-get-to film locations. I find that the respondent's need for a vehicle is the same as the claimant's, as a typical living expense. I do not consider it appropriate that the cost of this ordinary living expense be deducted in calculating the amount of money available to the respondent for child support, just as it would not be appropriate if I were to deduct this type of ordinary living expense from the claimant's employment income.

[67] The onus is on the respondent to establish that the corporate income available to him was required to be kept in the company for the purposes of his business, and therefore not available income for child support: Hausmann v. Klukas, 2009 BCCA 32 at paras. 51-52, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 135. Having regard to this onus, and the evidence before me, I find as a fact that for purposes of estimating the money available to the respondent for child support, it is reasonable to rely on the revenues paid to his company, less the amounts he pays other security guards as subcontractors, less his annual union fees of $100.

[68] Taking the limited records produced by the respondent attached to his recent financial statement, Exhibit 7, the revenue of his company less amounts paid as sub-contracts in each of the following years was as follows: $52,475 in 2007; $54,281 in 2008; $28,450 in 2009; $47,405 in 2010; and $42,142 in 2011. From each of these amounts I would deduct another $100 representing union fees.

[69] I have some questions about the reliability of the 2009 figure.

[70] There is no evidence as to why the 2009 fiscal year was so unusually low in income. I know that is the year the couple moved to their current home on the Sunshine Coast but that is the only unusual event of which I am aware. The subcontract expenses set out in the company's income statement for 2009 were $10,255 but in 2010 they were only $2,100.

[71] The separation occurred in November 2009, after the 2009 corporate year-end of March 31, 2009. I do not know when the respondent prepared his 2009 corporate tax return.

[72] It is natural to be suspicious of a significant drop in the respondent's company's income the very year of separation, in the absence of an explanation. On the other hand, if the respondent was manipulating his self-reported corporate income, why then did his company's income rise again after 2009, given that the matrimonial dispute was ongoing? The claimant suggests that the respondent was less than forthright generally and had not disclosed sufficient information, but the claimant's counsel did not suggest in cross-examination of the respondent that he was manipulating his corporate tax return in 2009.

[73] As for the subcontract expenses claimed by the respondent's company, there was no supportive documentary evidence of the subcontract expenses paid by the respondent introduced into evidence at trial. The respondent pointed to his corporate bank account records, and submitted that he could estimate that cheques shown as coming out of that account in a certain range of amounts would be the cheques he wrote to subcontractors. He also testified that his company bank account records showed all deposits he received from film production companies for his services. He did not produce his actual company cheque book with the stubs to show payments to subcontractors prior to trial or in evidence. In closing argument, he submitted that he had now brought the cheque book to court, but the claimant's counsel argued that the trial should not be re-opened, the respondent did not seek to re-open the trial, and the cheque stubs did not become evidence.

[74] Ms. Taylor, counsel for the claimant, advised the court that she reviewed the company bank account which was introduced into evidence by the respondent during trial. She submitted that she added up yearly deposits, but not counting transfers from the respondent's personal bank account, and not counting a $15,000 deposit that he identified as a loan. She advised the court as follows:

(a) for the calendar year 2010, the deposits totalled $77,232.45;

(b) for the calendar year 2011, the deposits totalled $65,569.75; and

(c) from January to the end of September 2012, the deposits totalled $75,133.09.

[75] Ms. Taylor therefore submitted that the income available for payment of child support was much higher than indicated by the respondent. She suggested that if the court was to allow for the prospect that some of this year's deposits might have been off-set by payments to subcontractors, but considering that the deposits to date were only for nine months and that the respondent admitted having good prospects for film security employment through to at least the beginning of December, that this Court could quite conservatively estimate the

respondent's current income to be $65,000.

[76] The respondent submitted that he added up his company's bank deposits related to revenues for the fiscal years (from March to March) and he came up with the following figures:

(a) for the year ending in March 2011, the deposits totalled $64,000;

(b) for the year ending March 2012, the deposits totalled just over $58,000; and

(c) for the present year beginning in March 2012, there is over $70,000 in revenues.

[77] When I asked the respondent what was an estimate of the amount he paid to subcontractors for the current year, he submitted that he had paid $5,000. This indicates that at a minimum the net income available to the respondent this year, if I ignore all expenses other than subcontracts, is $65,000 which coincidentally is the same figure that had been submitted as reasonable by the claimant.

[78] There is reason to believe that the respondent's income will improve in the years to come. The respondent complained that due to the disruption of the matrimonial breakdown, and consequent litigation over the last almost three years, he has not been able to work as much as he otherwise would.

[79] This was confirmed by the evidence of the respondent's father and his and the respondent's conduct, in supporting the respondent's decision to continue living in his current situation. I will explain.

[80] The respondent is currently living in the family home, which was purchased in 2008. The respondent is the sole registered owner, and obtained a mortgage to finance the purchase of the home. Currently the size of the mortgage debt exceeds the value of the home. The respondent is making mortgage payments of close to $2,400 per month. His father often helps him with the mortgage payments or by giving him money for other expenses. Very little of the principal of the mortgage is being paid down despite these sizeable mortgage payments.

[81] But rather than limit the respondent's losses and sell the home, minimizing his debt, he wants to continue living there and his father supports him in this decision. They both testified that they believe that the respondent will be able to earn more money than he has in recent years, once the disruption of this matrimonial proceeding is put behind him.

[82] There is also a separate suite in the home which could be rented for approximately $700 per month, on the respondent's evidence, with just a small capital outlay to put down flooring and some minor fixes to the suite. I do not accept that it would take $10,000 to make that suite rentable. This was a figure stated by the respondent without any research or support.

[83] The respondent pleaded with the court to understand that his income fluctuates up and down and he was very concerned that if his income was estimated to be $65,000 that this is currently an unusually high-income year and he would not be able to meet his support obligations during slow-downs in his income.

[84] He suggested that the court should average out his income net of subcontractor expenses, picking the highest year (2012 which he submits should be estimated at $65,000) and the lowest year (2009 at $28,450). If I was to do this, and estimate that the respondent earned no more income this fiscal year between October 2012 and March 2013, the average of those two years would be $46,725. Again, I would also have to deduct the union fees of $100 per year.

[85] The Guidelines address this type of situation in s. 17:

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.

### Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

[86] However, even if I was to take the approach urged upon me by the respondent, I find that he is able to earn more income this year than the $65,000 net income, as that income represents only one-half of his fiscal year, from March through September, 2012. Accepting that winter months may be slower I will not assume he will be able to earn the same income in the next six months as he did in the first six months, for a total annual income of $130,000. If I was to take the very conservative approach of increasing the current fiscal year's net income by only half of what he has earned so far, which would be another $32,500, this would mean that his net income for the current fiscal year could be projected conservatively but reasonably to be $97,500.

[87] Thus, even if I was to adopt the respondent's suggestion of averaging this fiscal year's income and the fiscal year's income in 2009, this approach should not assume that this year's income will only be $65,000. Taking the reasonable estimate of an income this year of $97,500 and adding it to his reported company revenues in 2009 of $28,450, and dividing by two, one also obtains an average figure of $62,975. This does not take into account any income he might be able to generate from renting the suite in his home. This suggests that even on the

respondent's desired approach of averaging this year's income with 2009's income, it is entirely reasonable to assume he will be earning a $65,000 income figure this year and going forward.

[88] Alternatively, considering three years of income, as suggested by s. 17(1) of the Guidelines, and if I consider his current year's income to be $97,500; his 2011 income as $42,142 and his 2010 income as $47,405, then the average of these three years would be $62,349 (less the $100 in union dues). Again, taking into account his ability to rent a suite in his home, this approach suggests to me that assuming a $65,000 current income figure is reasonable.

[89] Such an approach takes into account the fact that the respondent's income fluctuates. I also note that the respondent testified that he often has long lulls in his employment, such as during the winter months, when film crews do not need his services. I point this out because it may be that in periods of slow-down in the film industry, he will have to obtain other temporary employment.

[90] The respondent and the claimant each have an obligation to work to their greatest capacity to support the Children. If they do not, income may be imputed to them.

[91] With respect to imputing income, the following provisions of the Guidelines need to be considered here with respect to both parents:

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;

...

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(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; [and]

(g) the spouse unreasonably deducts expenses from income[.]

....

### Reasonableness of expenses

(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.

[92] Considering the amounts earned by the respondent's company so far this year, as well as in 2011 and 2010, and considering the respondent's ability to rent out a suite in the family home, and his availability to work other jobs if there is a lull in his current form of employment, and taking into account the fluctuating nature of his income, I find that for purpose of child support it is fair and reasonable to estimate the respondent's current annual income as $65,000.

[93] As for determining the respondent's income retroactively, in his evidence the respondent submitted that it was reasonable to estimate his past income at $45,000.

[94] I note that one option for the court is to ignore the unusual 2009 corporate year when considering the average revenues earned by the respondent's company, less fees paid to subcontractors. If I consider the other four years for which there is information, the average annual company revenues less subcontract fees for those four years, as reported by the company on its income tax documentation for its fiscal years, is approximately $49,000. But if I also consider the 2009 year, the calculated average corporate revenue over the five years approximates $45,000.

[95] As noted, in cross-examination the respondent was not challenged specifically on the reported corporate incomes for 2009.

[96] On balance, I find the figure of $45,000 is a fair and reasonable estimate of the respondent's past income for purposes of determining retroactive child support, given that the respondent's highest income years were before separation and this year. This $45,000 annual income is income I consider that the respondent had available to him to support the Children during the last three years.

[97] I turn to now a consideration of the claimant's income as well as her means, needs and circumstances.

## The Claimant's Income

[98] Turning to the topic of the claimant's income for purposes of child support, her background is that she did not complete high school, graduating only through grade 10. She and the respondent married quite young and she did not work outside the home during the marriage. Instead, she had primary responsibility for the home and raising the Children.

[99] On separation, the claimant had next to nothing: no residence, no furniture, no income, and not even basic household supplies. She had no work experience to build on.

[100] The respondent argues that the claimant was allowed to share the family home with him and that because she decided not to do so, her lack of the basic necessities in the period post-separation should not be taken into account as this was her own choice. I do not accept this view of the situation.

[101] While it was true that Master Baker ordered a "bird's nest order" on December 2, 2009 in this proceeding, whereby the two parents could share the family home so that the Children could continue living there, this was based on a review of affidavit evidence. I have had the benefit of hearing from the witnesses at trial as to how that situation was not workable. Master Baker's order was very much driven by the parties' dire economic circumstances and the fact that the mortgage payment on the home was then $2,300. I do not know what the respondent's counsel told the court during that hearing about his income, but it is clear to me that he continuously reported his personal income as $16,000 or less, until this trial when he produced his corporate records.

[102] Not only am I not bound by the decision of the learned Master in terms of findings of fact, I note that Master Baker also commented that it was "patently obvious" that the two people should be separated and that he doubted "very much that the parties can continue to live in this home". I find that this turned out to be true: it was not feasible for the claimant to live in the same premises as the respondent, given the volatile relationship. On December 21, 2009, Mr. Justice Savage ordered that the claimant did not have to live in the home.

[103] Thus, from separation to present, the respondent has continued to live in the large family home. The claimant has started out in a transition shelter and then has rented various modest places for herself and the Children to live.

[104] It was necessary for the claimant to obtain government social assistance post-separation. Eventually, the claimant was able to obtain minimum wage jobs.

[105] In figuring out the claimant's past income for purposes of child support, I must deduct any income related to the Universal Child Care Benefit and any income from social assistance related to the Children as opposed to herself, pursuant to ss. 3 and 4 of Schedule III of the Guidelines. The evidence and submissions were bereft of information that would allow for any precision in making these calculations.

[106] In 2009, the evidence is clear that the claimant received social assistance of $1,229 and had no other income other than the Universal Child Care Benefit.

[107] If the claimant had income of less than $9,000 the Tables provide that she would have to pay $0 child support.

[108] Whatever was the claimant's income in 2009 from social assistance unrelated to the Children, it was certainly below the threshold for her being responsible for paying child support.

[109] The claimant's employment income was also definitely less than $9,000 in 2010 and 2011.

[110] In her November 2010 financial statement filed in this proceeding, the claimant set out that her income was only $1,426.08 being social assistance related to herself. While at trial she testified in a conclusory way that her financial statement was true, I was not convinced of this figure in the absence of any oral explanation or supporting documentary evidence. This

is especially so when that figure does not correspond with her later produced income tax assessment for 2010, which was put in evidence. Her tax return for that year was not put into evidence.

[111] The claimant's assessed income for 2010, as indicated at line 150 of her notice of assessment, was $15,719. She was allowed deductions of $13,729 but this was not explained in oral evidence. There was no document produced identifying exactly how much if any income in 2010 was attributable to employment, or social assistance related to the claimant herself.

[112] In her November 2010 financial statement, affirmed as true at trial, the claimant said that she was not receiving any Universal Child Care Benefits. This is supported by her 2010 notice of assessment.

[113] The claimant's bank records indicate that she received $1055.58 from the Province of BC monthly up to June, 2010 for a total of $6,333.48. She then received a payment from the Province of BC in August of $742.02, and then $1,426.08 monthly in September and October 2010, and $1,526.08 in November 2010 for an additional $3,694.18. These bank records indicate that the total received by the claimant from the Province of BC in 2010 was $10,027.66. It seems reasonable on the evidence to conclude that this was all social assistance.

[114] Thus while the evidence is unclear as to how much if any of the claimant's reported income in 2010 was employment income, one can deduce that it could be no more than $5,691.34 if her reported income was $15,719 and if one makes the reasonable assumption that the payments from the Province of BC of $10,027.66 were included in her reported income.

[115] There is better evidence of the claimant's income in 2011, including her actual tax return. This indicates that her employment income that year was $6,251.70 and she had social assistance payments of $10,568.06. The claimant's notice of assessment for 2011 indicates that she received $1,400 as the Universal Child Care Benefit that year. Her assessed income for 2011 was $18,219.

[116] I do not know what proportion of the social assistance the claimant received in 2010 and 2011 was attributable to her only as opposed to the Children due to a lack of evidence in this regard. It seems to me that as a single adult having to find her own shelter and food, she would require roughly half of the social assistance she received to meet her own needs.

[117] In 2010, if the social assistance the claimant received was $10,027.66 and half of that relates to herself this would amount to $5,013. If I add this to what I must assume based on my earlier analysis was her maximum employment income of $5,691.34, the total is $10,705.00 and I find that this was her income for child support purposes in 2010.

[118] In 2011, following the same approach, assuming that half of the social assistance the claimant received relates to herself, the amount to add to her employment income would be half of $10,568.06, or $5,284.03. Adding this to her employment income of $6,251.70 totals $11,535.73.

[119] Currently, the claimant still is only able to earn wages at the rate of minimum wage, with little chance for advancement, especially given her lack of education, experience, and the fact that the parties live in a small community with few opportunities.

[120] In her financial statement filed September 21, 2012, the claimant estimates her current annual income from employment, not including child support, as $12,700.

[121] In his closing submissions, the respondent argued that the claimant should be imputed an income of approximately $20,000. He submitted that this is what she could earn on minimum wage.

[122] One problem I have with that argument is that it was not put to the claimant in cross-examination.

[123] Also, I am concerned that had he put that notion to the claimant in cross-examination, she might have had the opportunity to say whether or not she faces the limitations faced by many other employees with minimum wage employment, and that is that: often employers only offer part-time positions; benefits are non-existent or limited; it can be difficult for the employee to work two part-time jobs because the work schedules conflict; and it can be very difficult for the minimum wage earner who is a parent to find the equivalent of full-time employment with working hours that accommodate the Children's needs.

[124] The claimant was not challenged on her evidence as to her difficulties finding employment and her estimate of her current income at $12,700. I find that it is a fair estimate given her employment history. Her income tax return for 2011 showed her employment income as only $6,251. I found her credible in describing the lack of employment opportunities available to her. She testified as to her efforts to work two part-time jobs in the past including one with a night shift, and the problems this posed in terms of childcare and fatigue.

[125] Until September 2011, the claimant was also the primary caregiver for the parties' youngest child.

[126] I find that the claimant has made best efforts to obtain employment since separation, and that a reasonable estimate of her employment income currently is $12,700.

Child Support in Shared Custody

[127] I must also take into account the shared custody of the Children.

[128] Since practically the beginning of the separation, the parties have shared custody of the two sons on a roughly equal basis. The claimant had close to 80% custody of the parties' daughter from separation until September, 2011, when the parties began to follow the same parenting schedule with their daughter as they do with the sons.

[129] The question then becomes how to take into account the factor of the shared custody of the boys throughout the period, and the shared custody of the daughter from September 2011 forward.

[130] Sections 8 and 9 of the Guidelines deal with the proper approach to child support in a split custody and shared custody arrangement respectively:

8. Where each spouse has custody of one or more children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

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.

[131] The weight of the factors in s. 9 depends on the facts of each case, with an emphasis on a flexible and fair analysis: Contino v. Leonelli-Contino, 2005 SCC 63 at paras. 37 and 39 [Contino].

[132] The first factor in s. 9 is the applicable amount for each spouse under the Tables.

[133] With respect to the respondent's income, the Tables in force as of May 2006 provided that the child support payable by a person with an income of $45,000 and three children was $898 per month. As of December 31, 2011, this changed to $903.

[134] The court will depart from the set-off amount or make adjustments to it if it is inappropriate in light of the remaining two factors in s. 9 of the Guidelines: Contino, at 41.

[135] Considering the extra costs of shared custody, here one factor to consider is that after the parties split-up, the claimant was unable to find an affordable place to live in the same small community as where the family home was located, within walking distance of the two older children's school. This meant that she had to incur some extra costs of transporting the children to and from school when they were in her care. There was some evidence of a school bus system near the claimant's current residence, but not sufficient evidence as to whether that would have met the Children's needs to get to school all of the time.

[136] As for the evidence of the parties' means, needs and circumstances, it is clear that while debts were high and assets were low in both households, the claimant was in desperate straits whereas the respondent was living much more comfortably in the post-separation period.

[137] In 2009 the claimant was below the threshold income for paying child support.

[138] In 2010 the claimant was looking after the daughter more than 60% of the time, and had shared custody of the two sons. The Table amount of child support for two children based on an income of $10,705 would be $90.

[139] If the claimant was to pay child support based on 2011 income of $11,535.73 for two children (up to end of August 2011), the Table amount would be $122 per month. If she was to pay child support for three children from September 2011 when custody for all three children was shared, the Table amount would be $132 per month, decreasing to $103 after December 31, 2011.

[140] The court in Contino at para. 69, listed the following factors to be considered in considering the parties' means, needs and circumstances under s. 9(c) of the Guidelines: actual spending patterns of the parents; ability of each parent to bear the increased costs of shared custody (which entails consideration of assets, liabilities, income levels and income disparities); and standard of living for the children in each household. A goal of the Guidelines is that the children should not experience "a significant variation in the standard of living ... as they move from one household to another": Contino at para. 51. Further, the court is given a broad discretion under s. 9(c) to consider "other circumstances" in order to achieve this objective.

[141] In Ward v. Ward (2000), 7 R.F.L. (5th) 197 at para. 8 (Ont. S.C.J.), a large income disparity between parents leading to a potential for standard of living discrepancies for the children between households led to an order for the full Table amount owed by the higher earning spouse despite shared custody arrangements.

[142] The same factor was considered in Casselli v. Casselli, [2001] O.J. No. 5176 (S.C.J.). The policy reason for consideration of this factor was stated by Justice Aitken in Herbert-Jardine v. Jardine, [1997] O.J. No. 5404 (C.J.(Gen. Div.)):

41 As well, there is the policy consideration that a shared parenting arrangement may be compromised in the situation where one home offers the child a wide range of benefits or luxuries which cannot be afforded in the other home. From a policy perspective, if it is decided that it is in the best interests of the child that the parents share parenting responsibilities more or less equally, it is important that the financial reality in the two homes not be so divergent that the child is tempted, for financial reasons, to make the more affluent home his or her primary residence. The realization that this may happen can increase spending in the less affluent home. It is certainly one factor the Court must take into account in determining child support in a shared parenting situation.

[143] Keeping these factors in mind, considering the starkly lower standard of living of the claimant as compared to that of the respondent who remained in the family home, I conclude that the reasonable and fair result is to consider that up to the end of 2011 the respondent should have been paying child support in accordance with the Guidelines without any set-off in relation to the claimant's modest income. The respondent was living in the fully-supplied and furnished family home post-separation, able to make some recreational purchases; the claimant had to start a new home without any resources.

[144] I will start the calculations of retroactive child support in December 2009. I will consider the respondent's income to be $45,000 to the end of December 2011, and $65,000 thereafter.

[145] From December 2009 to the end of December 2011 totals 25 months, which multiplied by $898 (the Table amount of child support for three children on an income of $45,000) amounts to $22,450.

[146] As of this year, commencing January 1, 2012, I have found the respondent's income to be $65,000. The Table amount of child support for three children at this income is $1,291 per month.

[147] As of 2012, I conclude that the claimant's income is $12,700. Her living standards have improved as she has been given some of the household supplies and has been able to buy others through the assistance of friends. I conclude that it is appropriate that a set-off approach be applied to shared custody in 2012. Under the Tables, the claimant would be responsible for paying $154 in child support.

[148] The set-off approach would mean that the respondent would be responsible in 2012 and going forward for paying $1,137 per month. For all of the 2012 year this amounts to $13,644.

[149] In order to calculate the respondent's retroactive support, one has to take into account the $650 per month that the respondent had been responsible for paying from May 2011 to end of December 2012, pursuant to the Order of Kelleher J., which is 20 months and a total of $13,000.

[150] As well, for a few months the respondent paid the car payment for the car that the claimant was driving (this was an example of an expense run through his company). From December 2009 to June 2010, these payments were $434.54 per month, which totals $3,041.78. I find that this should be taken into account as well.

[151] I therefore find that the retroactive child support that the respondent is liable to pay the claimant up to the end of December 2012 is $22,450 plus $13,644 less $13,000 less $3,041.78 which equals $20,052.22, which I will round to $20,052.

[152] This assumes that the respondent has paid the ordered interim support of $650 per month through to the end of December 2012 but if not the calculations would have to be adjusted upwards to account for any shortfall in his $650/month payments.

[153] Going forward, I conclude that the respondent has an income for purposes of the Guidelines of $65,000 and the claimant has an income of $12,700. Under the current Tables, the respondent would be responsible for child support of $1,291 per month and the claimant would be responsible for paying $154. I conclude that going forward a set-off approach is appropriate and there do not need to be further adjustments made based on shared custody.

[154] I therefore conclude that the respondent is responsible to pay the claimant ongoing child support of $1,137 per month. I will consider this as the support payable as of January 15, 2013 and the 15th of the month each month thereafter while the Children are children of the marriage.

[155] The respondent is in the situation of having a substantial retroactive amount of child support payable, and not much by the way of liquid or unencumbered assets in his own name. He could however raise money by selling the cabin property or trailer which he owns (I have concluded that these are not family assets, as will be addressed shortly). He could also rent the suite in his home or work more hours.

[156] I am going to allow the respondent some ability to manage his cash flow by providing that the retroactive child support in the amount of $20,052 may be paid in installments of $1,000 per month commencing January 15, 2013 and continuing for 19 monthly payments, with the 20th and last payment to be the remaining balance of $1,052. These payments on account of the child support arrears should be paid at the same time as the ongoing monthly child support.

## Extraordinary Expenses

[157] Section 7 of the Guidelines recognizes that the Table amount of child support may not be sufficient to cover "special or extraordinary expenses":

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

(a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to the child;

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[158] When considering s. 7, the amount of spousal support is to be included in the income of the spouse receiving it and not included in the income of the spouse paying it: Guidelines, s. 3.1, Schedule III; Galliford v. Galliford, [1998] B.C.J. No. 268 at para. 7 (S.C.).

[159] This family cannot afford many extraordinary expenses for the Children. Section 7 is permissive, where the payor's means are found to be limited, the Table amount of support may be awarded with no additions for s. 7 expenses: Giebelhaus v. Bell, [1998] B.C.J. No. 627 at para. 34 (S.C.).

[160] Moreover, Contino discusses a case that is examined under s. 9, as is this case, and states the following in relation to s. 7 expenses:

71 ... given the broad discretion of the court conferred by s. 9(c), a claim by a parent for special or extraordinary expenses falling within s. 7 of the Guidelines ... can be examined directly in s. 9 with consideration of all the other factors.... Section 9(c) is conspicuously broader than s. 7.

72 ... It is not that "other circumstances" of each spouse and "hardship" are equivalent terms, it is that the discretion of the court, properly exercised, should not result in hardship. It may be that s. 10 [undue hardship] would find application in an extraordinary situation, but that is certainly not the case here.

[161] Finally, in T.J.M. v. P.G.M. (2002), 25 R.F.L. (5th) 78 at para. 49 (Ont. S.C.J.) where the husband earned 62 percent of the combined income, the court did not depart from the Table amounts despite the shared custody arrangement but did find that "the substantial amount of time the children will be spending with their father provides a shield to a s. 7 claim" which was based on child care expenses.

[162] The evidence of past expenses was vague. I consider past extraordinary expenses to be absorbed in the award I have made for retroactive child support.

[163] As for future extraordinary expenses, two areas stand out in the immediate future: extra dental or medical expenses not covered by the Province of BC; and child care expenses for daycare for the parties' youngest child when either party is at work and the youngest child is in that parties' care.

[164] Section 6 of the Guidelines states the following:

6. In making a child support order, where medical or dental insurance coverage for the child is available to either spouse through his or her employer or otherwise at a reasonable rate, the court may order that coverage be acquired or continued.

[165] To the extent the respondent has a medical/dental extended health plan, I direct that he include the Children on that plan. The respondent's s. 6 obligation under this order is in addition to monthly child maintenance payable under the Guidelines: Bowers v. Bowers, 2000 BCSC 867 at para. 17.

[166] I conclude that the parties should share the medical/dental costs not paid by the respondent's insurer, on the basis of a ratio proportionate to their respective incomes, currently a split of 84% payable by the respondent and 16% payable by the claimant (based on his current income of $65,000 and her current income of $12,700). In the future, if there is a material change in their respective incomes, I suggest they reach agreement on sharing of these expenses on a basis proportionate to their relative incomes, but if they are not able to reach agreement, either one is able to apply for a court order to address the issue.

[167] To the extent the medical, dental or prescription costs are incurred while the Children are in the claimant's care, the respondent must submit them to his insurer within 7 days of the claimant presenting him with the receipts; or, he must provide the claimant in advance with the necessary information and documents to enable her to submit the claim to the insurer. The respondent must reimburse the claimant for his proportionate share within 30 days of the claimant incurring the cost. I suggest, however, that where possible these costs be incurred in such a way so as to facilitate either direct payment of the cost by the respondent's insurance plan. Alternatively, the costs could be paid by the respondent himself, with the claimant to then pay the respondent her share of the cost over and above the insurance within 30 days of notice and receipts being provided to her. The parties may be able to work out a better process for this by way of agreement.

[168] As for any daycare expenses, normally these should be shared as well.

[169] In Myke v. Myke, [2000] O.J. No. 2056 (S.C.J.) [Myke], followed in British Columbia in Hosseini v. Kazemi, 2010 BCSC 666 at para. 43, the court found that the child care expenses fit within s. 7(1)(a) as it was in the best interest of the children and was a reasonable expense, bearing in mind the income of the parties, however the claim was disallowed because of a lack of particulars provided. The court said:

19 For example: How did the wife arrive at the figure of $150? Who is the proposed care-giver? What days and hours are involved? As well, she failed to lead any evidence under s. 7(3), as is her responsibility, regarding the income tax implications of support paid pursuant to s. 7(1)(a).

[170] In Myke the court held at para. 17 that s. 7 expenses are not to be used as a "wish list" for parents, instead

[t]here must be a reasonable expectation that the expense will soon be incurred. As I view the matter, "if and when" orders are not contemplated by s. 7 and should be avoided; "here and now" orders - or "here and almost now" orders - are preferred.

[171] Due to limited relevant evidence placed before me in this case, the request for an order for sharing of child care expenses is dismissed. I recommend that once suitable details of these child care arrangements are shared by the parties, the parties try to reach agreement to share these expenses on a basis proportionate to their incomes. Either party is at liberty to seek a further court order dealing with child care expenses on more comprehensive material.

## Other Related Child Support Orders

[172] Based on the evidence of the non-payment of child or spousal support by the respondent in the past, I think it important that the claimant have an ongoing enforceable order for payment of support. I do not make the order subject to any automatic review. However, I expect and hope that both parties will be able to increase their incomes over time. I recommend that the parties reach agreement to adjust child support if there is a material change in either one's income.

[173] To assist them, I will order that by June 1 of each year, the parties will provide each other with the following:

(a) a copy of their personal income tax return for the previous year;

(b) a copy of the corporate income tax return for any company which the party controls and through which the party provides services. For example, for the respondent, this will likely remain Reel Film Protection Inc., but should the respondent change the company name or be involved as a key person in another company through which he provides his services, he must also provide the corporate tax returns in relation to those companies. Of course if the claimant ends up with her own company she is to do the same; and

(c) for each year that the respondent continues to provide his services through Reel Film Protection Inc., the respondent must provide documentary corroboration of the amounts for which he has paid subcontractors, including but not limited to a copy of the bank account or accounts of the company, with a copy of cheque stubs if paid by cheque, or other proof if paid some other way (such as invoices). The point here is for the respondent to produce documents that will give the claimant peace of mind that what he claims as subcontract expenses as against the company revenue, are real expenses, without the necessity for her having to just take his word for it.

[174] Hopefully the order for ongoing disclosure will help each of the parties gain respect for each other's situation and allow for agreement to be reached if there is a material change in either one's income.

## Child Care Benefits and Tax Credits

[175] The parties gave some evidence and made submissions in writing regarding past and ongoing governmental child care benefits and tax credits. Based on their submissions, I find that the following approach to these benefits is fair and reasonable:

(a) the claimant is entitled to claim the Universal Child Care Benefit since separation;

(b) the parties are to split equally the Canada Child Tax Benefit (CCTB) for the three children as of January 2012 and going forward. They will cooperate in ensuring that the necessary information is exchanged between them and filings are made with Canada Revenue Agency to entitle them to equalize this benefit as of January 2012 and going forward. Prior to January 2012, the Claimant will be entitled to claim 100% of the CCTB for the parties' youngest child, their daughter; and the claimant and respondent will be entitled to share equally the CCTB for the parties' two sons; and

(c) the parties are to rotate on a year-to-year basis the Working Income Tax Benefit. If it is possible to make adjustments to their past income tax filings, the respondent is entitled to claim this benefit as of the 2010 tax year and the claimant is entitled to claim this as of the 2011 year. Going forward, the respondent is entitled to claim this benefit as of the 2012 year and the claimant is entitled to claim this as of the 2013 year; with the parties alternating the claim to this benefit in the same pattern thereafter.

Property

[176] The appropriate approach is to divide property before determining spousal support: Narayan v. Narayan, 2006 BCCA 561at para. 33.

[177] The court must consider what were the couple's "family assets" pursuant to s. 58(1) of the FRA. In this regard, there was no triggering event until this trial, pursuant to s. 56(1) of the FRA.

[178] Once a triggering event has occurred, s. 56 mandates equal ownership as tenants in common in each of the family assets: Kowalewich v. Kowalewich, 108 B.C.A.C. 12 at para. 13.

[179] The definition of "family asset" in s. 58 of the FRA includes property ordinarily used for a family purpose. If the property is in someone else's name, it nevertheless might still be a family asset in some circumstances, such as where the property is held by a corporation or held by a person in trust for a spouse.

[180] It is essentially a question of fact in each case whether an asset may be said to have been "ordinarily used" for family purposes: Bennett v. Bennett, 2003 BCCA 707 at para. 10.

[181] The division of a debt is not mentioned in the FRA, except with respect to s. 65(1)(f) which states the "liabilities of a spouse" may be a factor to consider in determining whether the presumptive equal asset division would be "unfair".

[182] In order to ensure equality and fairness, the division of family assets is based on the net value of the family assets, after the family debts are deducted; however debt itself may not simply be divided between spouses: Karisik v. Chow, 2010 BCCA 548 at para. 56.

[183] Here, this couple has a great deal of debt and it is questionable whether or not they have any asset value in excess of that debt. No assets of any meaningful value are in the claimant's name.

[184] The property issues are quite narrow: what should be done with the family home; is recreational property owned by the respondent a family asset and if so what is its net value; and are there any other assets to divide.

### The Family Home

[185] Before the marriage breakdown, the couple lived in a house located on YMCA Road in Gibsons, B.C. It was purchased in 2008, and lived in for just over a year before the couple separated. The respondent has remained living in the family home.

[186] This home was clearly used by both for a family purpose and is a family asset, even though the ownership was registered in the respondent's name alone.

[187] There was limited admissible evidence of the value of this home. The respondent asserts that there is no net equity in the home. The evidence there is supports this assertion, as it suggests that right now the mortgage debt secured against the home is greater than the assessed value.

[188] The property tax assessment indicates that the property has an assessed value of $389,000.

[189] The mortgage principal as of December 31, 2011 was just over $423,000. In that year, the monthly mortgage payments totalled approximately $26,000, with only approximately $2,500 applied to the principal. The interest rate is 5.4%. The five year term of the mortgage expires on July 30, 2013. The mortgage is in the respondent's name alone.

[190] The respondent and his father are hopeful that in time the home's market value will increase, and eventually the respondent will have equity in the home.

[191] Due to this, both the respondent and his father continue to pour money into the home by way of payment of the mortgage debt, and both testified as to their wish that the home not be ordered sold as part of these proceedings. At the start of trial counsel for the claimant seemed to take the position that the home should be ordered sold, but the practical effect of doing so was never adequately explained and this position was not forcefully maintained by the end of trial.

[192] The respondent says that although the mortgage expense is around $2,400 per month, if he was forced to sell it then rent another residence, the cost of the rent and the payments left on the remaining debt would likely approximate the amount he is currently paying by way of mortgage payments. He says that so long as he is making his child support payments, he should be allowed to stay in the home and spend his money the way he sees fit.

[193] While the respondent's statements in this regard were not supported by any documents, the claimant called no contrary evidence to suggest that if the respondent sold the home, made payments on the outstanding debt and paid rent for a home for him and the Children, that his monthly costs would be less than his current mortgage payment.

[194] The mortgage debt was incurred to purchase the home. There is no evidence as to when the value of the home dipped below the amount of the mortgage. However, the home was purchased in 2008, and the parties separated in 2009, and the respondent has continued to live in the home.

[195] Given the respondent's choice to continue living in the home since separation, and given that the respondent, supported by his father, is treating the home as a long-term investment, I conclude that the fair result is that the respondent may keep the home but he must understand that he is solely responsible for the associated mortgage debt. He made submissions at trial that he understands and accepts this position.

[196] I see no point in ordering the home sold as there is no net value in the asset. However, if staying in the home turns out to be a foolish financial decision, that will be the respondent's burden, not a burden to be shared by the Children at the cost of what would otherwise be reasonable support payments based on the respondent's income.

Recreational Property

[197] In addition, the respondent owns recreational property on which there is a dilapidated cabin, located near 100 Mile House, BC.

[198] The couple lived in the cabin property for a short while prior to the marriage. However, the cabin had no plumbing or heating services. The last time the couple used the cabin to live there was when the claimant was approximately four months pregnant with their first child. Working backwards, I would estimate that to be May or June of 1999, which was before the parties married in August 1999.

[199] The couple did not use the cabin after marriage, but did visit it at least once with the Children and stayed nearby so that they could do so.

[200] There is no evidence that the couple ever spoke about this cabin property being there for their future financial security. The respondent hoped that one day he might be able to fix it up for future use, but this was no more than a hope given the couple's limited financial circumstances. They never had the resources to improve the property to a livable state.

[201] I consider the single visit by the couple after marriage and the respondent's fanciful dreams about the future use of the property to not amount to evidence that the recreational property was used for a family purpose. Nor do I find evidence that the claimant contributed to this asset.

[202] I find that this recreational property was not a family asset.

[203] It is unclear as to what is the cabin property's value. The only evidence of value is the 2011 property assessment notice, which assets the total value of the property as $55,200. However, this assessment assigns a value of $30,400 to the property and $24,800 to the cabin. I accept the respondent's evidence that the cabin is in very poor shape. However, I do not know to what extent the assessor took this into account.

[204] The respondent was loaned $18,500 by his father to purchase the property prior to the marriage. When the loan was not paid back, the father placed a mortgage on the property evidencing a debt of $23,500 as of August, 2000 (the original loan amount plus interest).

[205] I do find that the debt is real and that the loan was not a gift. However, the respondent and his father suggested that interest on the loan to purchase the property continued to run after August 2000. I am not satisfied on the evidence that the respondent's father was charging him interest after this date. There were neither periodic statements nor requests for payment. The respondent was never in any position to pay interest due to other financial burdens. I find for purposes of the claimant's case, that the mortgage debt replaced the prior loan and after 2000 was the respondent's father's loan to him and was no longer incurring interest.

[206] This would suggest that the net value of that asset is potentially in the range of $55,200 less $23,500 for a net of approximately $31,700. I consider that to be an optimistic view but it is some evidence that the respondent has an asset of value which may be used by him to meet some of his support obligations.

## Other Property

[207] The respondent did purchase a camper trailer recently, and put the title in the name of his current romantic partner. On her evidence, it is clearly his property. It was purchased well after separation and was never used by the claimant nor did she contribute to it. It was never used for a family purpose and is not a family asset. However, it is an asset of the respondent's of some intrinsic value. He said he paid $5,200 recently for it.

[208] The claimant did not claim that the shares in the respondent's company, Reel Film Protection Inc., are a family asset. This company appears to be simply a vehicle for offering the claimant's personal services and I expect it would have no intrinsic market value in any event.

[209] There was some time taken up at trial discussing household items but I find that the household items owned by the couple as at marriage breakdown were of little value. There was eventually some post-separation distribution of some household items, the nature and timing of which seemed to cause a disproportionate amount of aggravation and should now be put behind the parties. I find that the evidence is also not sufficiently clear to do any accounting of these household items.

[210] Each side wishes to keep their own vehicles and accepts that they will be responsible for their own debts.

## Property Division

[211] I make no orders dividing family property. Each party is to retain the property currently in their own name or possession, and is responsible for the debts in their own names.

## Spousal Support

[212] The claimant was the Children's primary caregiver during the marriage, and took care of the home. Her efforts at home gave the respondent the ability to grow his business, but at the same time, this prevented her from entering the workforce and gaining experience or furthering her education.

[213] I have already made note of the fact that there has been a stark disparity between the lifestyle of the respondent and that of the claimant post-separation.

[214] The claimant has been on social assistance after the marriage breakdown, and has only been able to scrape by on borrowing money from friends and on gifts. At times she could not afford to both pay rent and to buy food for herself and the three Children, and indeed, the rental payment for a residence for herself and the three Children exceeded her social assistance. She has very little extended family support.

[215] In contrast, the respondent has remained in a large family home. He has been able to purchase flat-screen televisions, toys for the Children, and a trailer. The respondent is able to be self-sufficient and can afford some leisure time entertainment and activities.

[216] The claimant says that she wishes to further her education so that she can progress past minimum wage work and gain better paying and more stable employment. She wishes to have support that will allow her to return to school and take a six month course that will give her a certificate in home care.

[217] The respondent says that he would like to go back to school too, but he has no specific plans or goals. I do not consider him able to meet his duty to support his Children if he was to immediately return to school full-time in any event.

[218] I find that both to compensate the claimant for her contributions and sacrifices during the marriage, and on a non-compensatory basis to address her dire economic needs post-marriage breakdown, and to help her achieve self-sufficiency, the claimant is entitled to some spousal support in accord with the objectives of s. 15.2 of the Divorce Act and the principles reviewed by the Supreme Court of Canada in Moge v. Moge, [1992] 3 S.C.R. 813, and Bracklow v. Bracklow, [1999] 1 S.C.R. 420.

[219] However, the respondent says that he has a number of debts and is not able to pay spousal support.

[220] Debt is not generally a factor in the determination of appropriate spousal support. There is only one debt towards which the respondent is making monthly payments, and that is the mortgage debt on the family home. His father assists him in making this payment from time to time. As noted earlier, the respondent wishes to retain the family home and given that choice, concedes the debt ought not to be taken into account in respect of his obligation to pay child support.

[221] He asserts that he owes his parents considerable sums of money but his evidence was clear that he is making no payments towards those debts and his parents are not taking any enforcement action. I do not consider that the debts to his parents ought to be taken into account in relation to his spousal support or child support obligations.

[222] Nevertheless, it has to be acknowledged that the respondent is not financially strong and it is important not to so burden him that he will not be able to meet his child support obligations. At the same time he does have a better standard of living than the claimant, and is able to afford to treat the Children to many more leisure activities and gifts, in no small part due to the fact he was able to establish a career while the claimant sacrificed her own by being a stay-at-home mother and taking care of the family's needs.

[223] The respondent says that the claimant is now engaged to be married, and the fact that she has a partner should relieve him of any spousal support obligation. this argument does not have much effect here, where the primary basis for spousal support is to compensate the claimant for the economic disadvantages of marriage and the corresponding advantages enjoyed by the respondent: see K.A.M. v. P.K.M., 2008 BCSC 93 at paras. 69,70.

[224] Furthermore, unfortunately the claimant's fiancé is not currently employed and there is no reason to conclude that he will be able to earn an income nearing that of the respondent. It is true that he is contributing a small amount to her household expenses though, and I will take this into account.

[225] Both parties referred to the Spousal Support Advisory Guidelines in their submissions, and produced calculations based on those Guidelines and their assumed facts: Carol Rogerson and Rollie Thompson, Spousal Support Advisory Guidelines (Department of Justice Canada, July 2008) [SSAG].

[226] The SSAG are guidelines only and not binding. However, they do provide a useful starting place and the commentary explaining the formulae is very helpful.

[227] From the calculations I have run using the DivorceMate software, if the respondent's income was $45,000; he was paying child support of $898; and the claimant's income from employment was $5,719 and from social assistance was $10,000, application of the SSAG formula suggests spousal support ranging from a low of $142 to a mid-range of $250 to a high of $361 per month with a minimum duration of 5 years and maximum duration of 16 years. This might have been the approach taken in 2010. Slightly lower numbers by approximately $20 to $30 would apply in 2011 if the claimant's employment income was approximately $6,200 and her social assistance income was $10,500 and she was receiving the Universal Child Care Benefit.

[228] If the SSAG formula were applied on the basis of the respondent having an income of $65,000; the claimant having an income of $12,700; and the respondent paying net child support of $1,137 per month, then the DivorceMate software indicates that the spousal support low would be $184; the mid-range would be $478; and the high would be $639. This software indicates that the spousal support would be payable for a minimum duration of 5 years and a maximum duration of 14 years.

[229] I have to consider the practicalities of the respondent's actual ability to pay, taking into account the respondent's income and the fact that he has already been ordered to pay child support and child support arrears, the latter of which he will not pay-off for another 20 months.

[230] If the respondent is making $65,000 per year that works out to approximately $5,416 per month before taxes; then if he deducts his mortgage payment of $2,400 he is left with just over $3,000 per month before taxes. If he is paying monthly child support of $1,137 plus arrears of $1,000 he is left with under $900 cash per month to live on before taxes. Because of the way he has structured his income through his corporation, he will pay very little if any taxes. I realize that he has conceded that the debt should not be taken into account in payment of child support and the evidence indicates that his father helps him out financially when needed. If one was to assume a reasonable rent of $1,500 per month instead of the mortgage payment, he would have approximately another $900 per month to live on. It is the respondent and his father's mutual decision to keep the family home and so I expect his father will help him out in the mortgage payments. Also, if need be the respondent could raise funds by selling some of his assets - potentially the trailer that he purchased or his recreational property.

[231] I find that the practicalities are such that the respondent may not be able to pay spousal support immediately due to his child support and child support arrears obligations. This is therefore a case that calls out for restructuring, as that term is used in the SSAG, which envisions altering the duration or amount of child support to provide flexibility if individual circumstances warrant it. In this case I find that spousal support is necessary and

appropriate but that it should commence immediately after the time I have established for repayment of arrears of child support, as only at that time am I confident that the respondent will have sufficient cash flow to pay spousal support without compromising child support. In the meantime I am hopeful that to the very difficult financial circumstances of the claimant will be somewhat ameliorated by her sharing living expenses with her fiancé.

[232] I conclude therefore that spousal support shall commence as of November, 2014.

[233] The court deferred payment in Marinova v. Marinov, 2004 MBQB 168:

61 I further consider the father's means. At the moment he has none as a result of the child support order, both Table and special expenses, and his debts incurred post-separation. However, I again note that if the stock market foray had been a success, the father's means in terms of paying spousal support would have been much greater.

62 But for the debt, I would have found that the father, when earning in the area of $34,000, had some ability to pay a modest amount of support. It seems likely that the debt will not be retired until after the obligation to pay child support is finished. Section 15.3 (1) of the Divorce Act, supra, requires that priority be given to child support. As the father does not have the means to pay both, his obligation to pay spousal support must wait until the child support obligation is extinguished or the debt is paid off, whichever comes first. The issue of quantum of spousal support is therefore deferred.

[234] In my view, and in light of the considerations taken into account in the SSAG for duration and quantity of support, it makes sense to provide for spousal support while the Children are young but also in a sufficient amount as to allow the claimant to take educational courses to upgrade her skills while she is young enough to try to apply those skills in the marketplace.

[235] Taking into account all of the circumstances of these parties already mentioned in these reasons, including their ages, incomes, length of marriage, each party's level of education, the disadvantages suffered by the claimant due to her role in the marriage and the marriage breakdown, the lack of matrimonial property to be divided, the young ages of the Children which affects the claimant's ability to look for certain kinds of work or hours of work, the shared custody of the children, and the delay in commencement of spousal support due to the priority of paying child support and child support arrears (which delay further delays the claimant's ability to become self-sufficient), I find that the appropriate amount of spousal support is in the amount of $500 per month payable for 12 years after the first payment which will be in November 2014 i.e. running until the last payment in October 2026, and payable as of the 15th of each month. This duration of the child support also takes into account the approximate time when the parties' youngest child will finish high school.

[236] The considerations that are relevant to determining the suitability of a retroactive spousal support award are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse: Kerr v. Baranow, 2011 SCC 10 at para. 207. Based on all of the circumstances I have mentioned, and considering the duration of spousal support awarded going forward, I do not award retroactive spousal support.

## Other

[237] The respondent stated at trial that he was preparing to make copies of family photos and family videos to give to the claimant and I direct that he do so if he has not already carried through on that.

[238] The claimant claims occupational rent for the respondent's use of the family home since separation. I do not find this to be appropriate. I note that to some extent the cost of the home has been used to decrease the income taxes otherwise payable by the respondent's company and thereby to increase the net amount of income available for support, and I have taken this into account in my orders for the respondent's payment of support.

Conclusions

[239] I summarize the conclusions reached in these Reasons for Judgment as follows:

a) the parties will have joint custody and joint guardianship of the Children on the terms set out in these Reasons in particular at paragraphs 17-20, 24, 28-29, with the parenting arrangement as set out in the attached Schedule A;

b) the respondent is to pay the claimant ongoing child support for the Children in the amount of $1,137 per month commencing January 15, 2013 and on the 15th of each month thereafter while the Children are children of the marriage;

c) the respondent is to pay the claimant retroactive child support in the amount of $20,052 payable in installments of $1,000 per month commencing January 15, 2013 and continuing for 19 monthly payments, with the 20th and last payment to be the remaining balance of $1,152;

d) the respondent is directed to include the Children on his medical/dental extended health care plan. The parties are to share any expenses for these costs which are not reimbursed by the respondent's insurance on the basis of an 84% share payable by the respondent and a 16% share payable by the claimant, as described in paras. 165-167 of these Reasons;

e) there is liberty to apply for a court order addressing the sharing of child care expenses;

f) the parties are to produce certain financial information to each other annually, as described in para. 173 of these Reasons;

g) the parties are able to claim government child benefits or tax credits on the basis described in para. 175 of these Reasons;

h) each party is to retain the property currently in his or her name and be responsible for the liabilities in his or her own name;

i) the respondent must pay the claimant spousal support of $500 per month payable for 12 years commencing in November 2014 and payable as of the 15th of each month;

j) there is no order for payment of occupational rent by the respondent.

## Costs

[240] The last issue to address is costs. I found that the claimant was reasonable in her positions at trial, and the respondent was reasonable in his positions by the time he presented his case. However, I am left with the unfortunate conclusion that the respondent was not sufficiently reasonable prior to trial and that he should be responsible for costs.

[241] On child custody issues, the claimant started off with a reasonable position on joint custody for the most part but the respondent wanted to have greater than equal custody and a guardianship veto, only changing his position mid-trial. On the other hand, the claimant's child custody position in her trial brief was seeking an order that would give her the ability to move with the Children and the respondent was understandably concerned about that issue. Unfortunately the respondent did not attend the trial management conference and so there was no opportunity to narrow the gap on these issues. I found that the claimant was quite willing to modify her position regarding her mobility with the Children, and I suspect that had the respondent raised that this was his only custody concern at a trial management conference, all of the custody issues could have been settled prior to trial. I therefore conclude that trial time was taken up on issues regarding custody due to the respondent's failure to attend a trial management conference or engage in discussing these issues before trial.

[242] On support issues, it was impossible for the claimant to determine the respondent's income before trial, as he had not produced financial information since 2010. He only produced relevant information necessary to assist the claimant and the court in making an informed decision regarding support, as of the trial. The claimant succeeded on these issues as compared to the respondent's position at trial.

[243] On property issues, the respondent's evidence basically established that there was nothing to divide but I am of the view that his non-disclosure of the information regarding his income and his failure to pay child support put the claimant in a quite understandable position of not being able to make an informed decision on the property issues, absent a trial.

[244] The respondent reminded the court that he was ordered costs in any event of the cause for one of the pre-trial applications, the application before Mr. Justice Savage determined by order made December 21, 2009.

[245] I conclude that the claimant should be awarded the costs of this proceeding, subject to an off-set for the costs of the application before Mr. Justice Savage.

[246] This costs ruling is subject to a proviso: should the parties seek a costs hearing based on other information of which I am not aware as trial judge then they must bring notice of such a request within forty days of this judgment and then seek to make oral or written submissions on the costs issue.

"S.A. Griffin, J."

The Honourable Madam Justice Susan A. Griffin

Schedule A

Parenting Arrangement

Week 1

The claimant shall have the Children from Sundays at 10:00 a.m. to Wednesdays at 2:35 p.m. (whether there is scheduled school time or not);

The respondent shall have the Children from Wednesdays at 2:35 p.m. (whether there is scheduled school time or not) to Sundays at 10:00 a.m.

### Week 2

The claimant shall have the Children from Saturdays at 12:00 noon to Wednesdays at 2:35 p.m. (whether there is scheduled school time or not);

The respondent shall have the Children from Wednesdays at 2:35 p.m. (whether there is scheduled school time or not) to Saturdays at 12:00 noon.

### School holiday breaks (not including the summer time)

For school Spring Break and Christmas Break the parties will have the Children on an equal basis dividing up the time of the break in half and alternating who shall have the Children on the first half from year to year. This will commence with the respondent having the Children during the first week of the Christmas holiday beginning in December 2012 and the first half of the Spring Break in 2013. The claimant will have the Children in the first half of each of these breaks in the following year, with the parties alternating in this way in succeeding years.

### Summer Holiday Time

The parenting time during school summer holidays shall be on a week off and week on rotation commencing at the end of the day on the last day of school prior to the holiday.

For the summer of 2013, each parent may plan a trip of up to TWO (2) weeks be planned with the Children, but a parent wish to take such a trip must provide TWO (2) months' notice in accordance with the terms of the guardianship order. At the end of the trip, the other parent shall have TWO (2) weeks with the Children and then the one week on and one week off rotation shall continue.

For the summer of 2014, each parent may plan a THREE (3) week trip with the Children on the same criteria of two months' notice and the other parent having three weeks with the Children on their return. If there are no trips, then the week on and week off rotation shall apply.

For the summer of 2015 and onwards, each parent shall have ONE (1) full month with the Children (either July or August to be determined by May of each year).

During trips of two weeks or longer taken with the Children by either parent, the travelling parent shall ensure that the other parent receives communication from the Children every TWO (2) days either by telephone or Skype.

### Children's Birthdays

The claimant shall have all of the Children for each of the Children's birthdays in 2013 and the respondent shall have all of the Children for each of the Children's birthdays in 2014 and the birthdays will be alternated between the parents in like fashion each year thereafter.

All three Children will attend a child's birthday and stay overnight with the parent whose turn it is to have all the Children for the birthday.

If the birthday falls on a school day, the parent who has the Children normally for that day shall take them to school and the other parent whose turn it is to have the Children on their birthdays may pick them up and return them as usual the next day.

If the birthday falls on a weekend, the parent whose turn it is to have the Children for a birthday shall pick up the Children at 10:00 a.m. on the birthday and return them the next day, when the usual parenting rotation shall continue.

### Mother's Day

Regardless of the usual rotation, the claimant shall have the Children from 10:00 a.m. Mother's Day Sunday until the usual exchange time on the following day.

### Father's Day

Regardless of the usual rotation, the respondent shall have the Children from 10:00 a.m. Father's Day Sunday until the usual exchange time on the following day.

### Mother's Birthday

Regardless of the usual rotation, the claimant shall have the Children from 10:00 a.m. on her birthday until the usual exchange time on the following day.

### Father's Birthday

Regardless of the usual rotation, the respondent shall have the Children from 10:00 a.m. on his birthday until the usual exchange time on the following day.

### Halloween and Thanksgiving Day Weekend

The claimant shall have the Children for Halloween in 2013 and the respondent shall have the Children for Halloween in 2014, with this event alternating for each parent thereafter.

The claimant shall have the Children for the Thanksgiving Day Weekend in 2013 and the respondent shall have the Children for the Thanksgiving Day Weekend in 2014 with this holiday alternating with each parent thereafter.

### Easter

The respondent shall have the Children for Easter Weekend in 2013 and the claimant shall have the Children for Easter Weekend in 2014 with this holiday alternating with each parent thereafter.

### Generally

All changes and additions to the parenting arrangement as set out herein shall be by mutual agreement. Failing mutual agreement, the parenting arrangement shall continue as set out above.

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