
CANADA / JUDGMENT

Hokhold v. Gerbrandt

2012 BCSC 1313

COURT

Supreme Court of British Columbia

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2012 BCSC 1313 Hokhold v. Gerbrandt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hokhold v. Gerbrandt,

2012 BCSC 1313

Date: 20120706

Docket: 45924

Registry: Vernon

Between:

Andrew Nicholas Hokhold

Plaintiff

And

Laurie Darlene Gerbrandt

Defendant

Before: The Honourable Mr. Justice Cole

Reasons for Judgment

Counsel for the Plaintiff:

B.H. Kirkpatrick

Counsel for the Defendant:

K.R. Fiddes

Place and Date of Trial:

Vernon, B.C.

June 6-8,11-14, 2012

July 9,10,12,16 and 17, 2012

Place and Date of Judgment:

Vernon, B.C.

September 6, 2012

INTRODUCTION

- [1] This is a family law proceeding. The issues are custody, guardianship, access, mobility, determination of income, child support, spousal support and a name change sought for the infant Ella. Throughout these reasons I will refer to the plaintiff Andrew Hokhold as the father and the defendant Laurie Gerbrandt as the mother.

BACKGROUND FACTS

- [2] The father is a dentist who practised in Fort St. James, British Columbia until 1998, when he was involved in a motor vehicle accident after which he was off work for approximately one year. He then moved to Armstrong, British Columbia in 2000, where his parents live, and worked part-time as a dentist while also working on two inventions: one was a dental chair and equipment that greatly reduced cross-contamination; the other was a new type of building block called "Chateau Blocks" that was designed to last for 500 years. The work on his two inventions ceased in 2004 and did not recommence until approximately 2008. The father was also involved in two political parties which he founded: the Advocational International Democratic Party (AID) and the B.C. Patriot Party.
- [3] The mother is a pharmacist who completed her degree in Saskatchewan around April 1998 and then moved to Armstrong where she lived with a man by the name of Larry Chudyk.
- [4] The parties met in September of 2000 and discussed how they both wanted to get married and have children. They commenced a relationship in 2005 and started to live together at the father's home, L&A Crossroads near Armstrong in October of 2006. In June of 2007 the mother moved out and took her horses and animals back to her parents' residence in Swift Current, Saskatchewan, where they own substantial farm property and where she was raised.
- [5] In July of 2007 the mother came back to British Columbia. The parties moved onto Predator Ridge which is a golf course on the south side of the City of Vernon at a place called The Lodge in October 2007.

- [6] In September of 2006, the mother had had a miscarriage and in April of 2007, when she got pregnant again, the pregnancy was deemed to be a high risk pregnancy. Consequently on May 31, 2007 she stopped working as a pharmacist and has not worked since save and except for minor part-time work for the father's dental company. In the spring of 2008 the parties moved into a residence at Silver Star Mountain which is a ski area northeast of Vernon. That pattern of staying at Silver Star in the off season and then moving to Predator Ridge for their off season continued.
- [7] From January of 2009 to February of 2010, the father said that he stayed at the mother's residence for 80-90% of the time. He kept toiletries and clothing at the residence throughout the relationship, but would leave when the relationship was strained and stay at L&A Crossroads and then return when the parties were once again getting along.
- [8] The parties' eldest child Will was born on January 25, 2008. After the birth of Will, the mother considered going back to work part-time but the father, according to the mother, did not want her to return to work. He wanted her to be a full-time mother and they entered into a confidentiality agreement where she would do some work for his company. She was on maternity leave and her only other source of income since the birth of Will had been unemployment insurance for a period of one year.
- [9] In September 2008 the father commenced putting money into a chequing account in the name of Will and then had that money transferred to the mother. This was set up because the father did not want to appear to be supporting the mother. From September 30, 2008 to February 17, 2010, he deposited various amounts of up to \$3,000 per month for a total of \$38,750 or an average of \$2,279 per month.
- [10] Beginning in April of 2007 when the mother first realized that she was pregnant, she had kept a diary for her unborn child (the "Baby Diary"). In the early part of April 2009, the father accessed the Baby Diary without the mother's consent. In that diary she accused the father of being abusive and dangerous, to which he took exception. He then left the premises at her request and they separated for approximately one month.
- [11] Shortly after, the mother travelled to Saskatchewan to visit her parents. The father drove them to the airport and then filed an application in the Provincial Court of British Columbia dated April 30, 2009, asking for an order for custody, guardianship, and access to Will. This was a without notice application. The father said he was concerned because the mother had indicated numerous times in the past that she was going to take Will back to Saskatchewan permanently.
- [12] In the father's affidavit sworn May 7, 2009, he related his fears that the mother would move back to Swift Current without notice to himself and that she might commence proceedings in Swift Current with respect to custody. He stated at para. 16:

I swear this Affidavit to support my application for custody, guardianship and access to Will and that all outstanding matters between Will, Laurie and myself be dealt with in the Vernon

Registry.

- [13] What the father failed to disclose was that he had driven the mother and Will to the airport and that he had sent flowers to her stating "Love to have you at home, love Andrew". He failed to disclose that he trusted that she would return to British Columbia and that there were in fact arrangements for him to pick her up at the airport. I am satisfied that the failure of the father to make full and frank disclosure led to this ex parte order where it was ordered that the Provincial Court had jurisdiction over their son Will. Unfortunately, the father never arranged to have this affidavit, notice of motion or order served on the mother until the beginning of March 2010, when he obtained a further ex parte order in the Supreme Court of British Columbia ordering the mother to return Will to Vernon, British Columbia, by Saturday, March 6, 2010; in default the RCMP were to locate and deliver the child back to the father.
- [14] I am satisfied that the father's two ex parte applications have contributed significantly to the breakdown and the trust between the mother and the father.
- [15] Leading up to the order of March of 2010, the parties had a disagreement. The father along with Mrs. Bird, a long-time platonic friend of his, had gone to Toronto with respect to the AID Party building a school that the Chateau Blocks were going to be a part of. Upon his return to their residence he discovered a note dated February 25, 2010 from the mother, who was at this time pregnant with their second child, advising him that she had left for Saskatchewan with Will to:
- ...be safe during this pregnancy due to your abusive attitudes and treatment. I pray that you will seek the mental health care that you need.
- Will and I are safe and well with our family. I am resting and grieving. Please do not try to contact me tonight. I will call you Friday evening around 6 p.m. your time.
- [16] A second note requested that he remove his personal belongings from their home and leave the key for the garage door opener. A third note dated the same day said that she resigned from her clinical/pharmacy position with Dr. Andrew N. Hokhold Inc.
- [17] On February 26, 2010 the mother called the father. He claimed that he had not read the note, but admitted that he assumed that she was with her parents in Swift Current because of the phone number. He further said that he did not know her phone number despite the evidence that she went to Swift Current 3-4 times per year and that he frequently called her parents' home as that is where she always stayed. This evidence of the father lacks believability in this regard as does his justification for obtaining the second ex parte order.

- [18] Shortly afterwards, on June 24, 2010, the mother gave birth to the parties' second child. The circumstances surrounding the birth reflect poorly on the character of the mother. Prior to Ella's birth, there were two applications outstanding. One was a request that Will be placed in the father's care upon the mother entering the hospital or going into labour, and if the mother were to have a caesarean section that he be in the care of the father during the time she was in hospital. That application was heard June 8. Judgment was reserved until June 30.
- [19] The mother had filed an affidavit stating she agreed that if she went into the hospital with a c-section, she would have no difficulty with Will being placed in his father's care while she was hospitalized, providing he was not working.
- [20] One week before Ella's birth, she had advised Dr. Upton, her obstetrician, that she wished to be induced. She did not advise the father of this decision.
- [21] The father had also filed a notice of motion on June 17, 2010, asking that he be appointed guardian of their soon to be born child, that the mother complete the Lifebank Corp. registration form, and that upon commencement of the labour she contact him. The father was to be advised of any immediate health treatment and be allowed to hold and comfort the newborn child and take photographs within one hour of the birth. This notice of motion upset the mother, who, on cross-examination, admitted that she changed her mind with respect to having the father look after Will if she had a c-section because of its receipt.
- [22] The mother had Will taken to the transition house by her mother who looked after him at the transition house save and except for the two-hour period during which time the mother gave birth to Ella. Upon Ella being born, the mother phoned the father and did not tell him of the birth of Ella, only telling him that Will was sleeping and he could not exercise his planned access.
- [23] In addition to this, prior to the birth of Ella, the mother arranged with the RCMP and the transition house to ensure that there were security arrangements in place during the birth of Ella. These included instructions that if the father called or attended the hospital he was not to be advised of the birth of his daughter and not to be advised that the mother was even in the hospital. The hospital security had been alerted that the father was not allowed to attend the hospital room. The Vernon Jubilee Hospital records indicate that "There is an alert on the chart for no access from multiple other family members including the biological father."
- [24] The RCMP records detailing contact with the mother concerning the birth of her child state as follows: "She is due to have her baby this month and the hospital is aware of her situation. Andrew's apparent request to be present during the birth and his wanting his girlfriend, Beverly Bird to be there in the room videotaping the birth."
- [25] Under cross-examination however, the mother confirmed that the father had not requested to be in the delivery room, had not requested to videotape the birth of Ella, and had not requested Beverly Bird to attend the hospital.

- [26] When asked why she did not want the father in the hospital, her answer was that he was unpredictable. This is the same answer she has given on a number of occasions but she has never provided any evidence that he is in fact unpredictable.
- [27] This is only one example of the extent that the mother will go to in order to deprive the father of access to his child.
- [28] It was not until receipt of correspondence from the mother's lawyer stating that he could visit his baby daughter the following day, providing he was alone, that the father received news of the birth. The mother's solicitor also forwarded a further letter inviting the father and his parents to visit Ella at the mother's residence. The father never replied to either of those messages and never saw his child until access was ordered in September of 2010. The father's failure to visit his child or make an application to court was not in the best interests of the Ella.
- [29] Since being ordered to return Will to British Columbia, the parties have been consumed with this litigation. The father has sworn over 30 affidavits and made 18 applications with 3 appeals, one of which was abandoned. The mother has sworn over 26 affidavits. The parties have fought over every conceivable issue. Gradually the father has been having more frequent access to the children, now having Will from Sunday to Tuesday and Ella for day access, twice a week. The mother is still unemployed and wants to return to Swift Current to be with her family who can provide emotional and financial support.

SECTION 15 REPORT

- [30] In order to attempt to understand how these well educated, intelligent parents have ended up becoming consumed with this litigation, it is helpful to review the Section 15 report prepared by Dr. Waterman entitled "Psychological Assessment Report".
- [31] Both the parties were subject to psychological testing with Dr. Waterman.
- [32] The Minnesota Multiphasic Personality Inventory - 2 (MMPI-2), which is an objective personality test designed to detect a number of major patterns of personality and emotional disorder, was used. On that test the mother "made a strong effort to present herself in a very positive manner and appears to have been rather defensive in the way that she responded to the test items." It is noted that she "sees the world as a threatening place" and "herself as being unjustly blamed for problems created by others and does not feel that she is being treated fairly." With respect to child custody concerns, Dr. Waterman states:

...there could be potential problems in parenting because of some of Laurie's personality characteristics. Her lack of trust and suspiciousness toward others may at time make it difficult for her to hear constructive feedback. At times, she may become angry and difficult in terms of cooperating with others regarding herself or her child. Her results suggest that she may be overly moralistic and may blame others for what happens to her or her children. Because she does not feel that she is being treated fairly by the world, she may express angry feelings inappropriately

at times. As long as everything is going well in this woman's life, she will probably parent quite effectively. However, if subjected to long periods of high stress, she could begin to deteriorate and behave in ways that are less than acceptable.

[33] The father's test produced a "marginal clinical profile because he responded in such a defensive manner." Dr. Waterman found that:

He tries to present himself as not having any personal problems. Such individuals can be rather intolerant of the weaknesses of others and may find it difficult to accept the unconventional beliefs of others. Such individuals typically lack insight and are unwilling to see any of their problems as being psychologically based. His results should be interpreted with caution because such individuals generally produce profiles that tend to underestimate any problems they may be having.

...

In terms of child custody considerations, Andrew's tendency to deny any personal problems makes conclusions difficult. As a parent, he may tend to deny or ignore problems rather than facing them directly when they occur. His tendency to see himself and others in an overly favorable manner may make it difficult for him to accept that his child is experiencing difficulties. Because he lacks insight into his own functioning, he will probably find it difficult to see how he is contributing to a situation, if it should occur. Also, his need to be in control in all situations may model a maladaptive manner of dealing with the difficulties of his child.

[34] The Millon Clinical Multiaxial Inventory - III (MCMI-III) test "assesses relatively specific personality characteristics including both characterological and emotional factors."

[35] With respect to the mother, she:

...made a strong effort to present herself in a socially acceptable manner. Her results suggest that she resisted admitting to any personal shortcomings or emotional problems. In spite of this, Laurie did obtain some significant results.

[36] In terms of parenting the author wrote:

...their strong need to be seen by others as being acceptable may influence their parenting decisions. Because of their own insecurity, it may be difficult for such individuals to establish firm boundaries and to have consistent consequences for their child. These individuals' strong need for approval and positive feedback will result in their giving in to their child's wishes more than is good for the child. Due to their strong need to always appear in control of their life, they may model dysfunctional ways of dealing with situations that could be dealt with in a more assertive or confrontational manner. Also, as their child get[s] older, begins to demand more independence and act out in various ways, such individuals can have difficulty dealing effectively with normal developmental problems.

[37] With respect to the father, it was noted that he:

...made quite an extreme attempt to present himself in the best possible manner.... It should be noted that Andrew failed to obtain any score on fourteen of the twenty-four clinical scales. Individuals who respond in this manner may see psychological problems as a sign or moral weakness. It typically reflects a concern about being seen unfavourably by others or a suspiciousness of the motives behind the assessment. It should be noted that when individuals show a high level of denial, repression and an unwillingness to share information about themselves, certain aspects of their personality functioning may not be identified.

... While at time he may experience frustration or anger, he seldom expresses it in case he loses emotional control.... While he is usually successful in repressing any negativity or anger, occasionally resentment will break through. If it does, he will usually direct it toward himself to avoid negative feedback. Because it is important to Andrew that he be seen by others in a positive manner, he must maintain a certain level of control at all times. As a result, he may experience a moderate level of physical symptoms and discomfort, particularly if exposed to longer periods of high stress.

In terms of parenting considerations, this man's high need to be in control may cause problems, particularly as his child gets older. Because of his lack of insight, he may not be able to see or understand how he may be contributing to difficulties that his child may experience from time to time. Because he finds it difficult to deal with upsetting emotions or problematic relationships, he may deal with situations involving his child in a manner that would not be beneficial to the child. If exposed to higher levels of stress for prolonged periods of time, he may also model dysfunctional ways of dealing with stress rather than being more open with his emotions.

[38] It was clear to Dr. Waterman that Will and his mother "have a very close and loving relationship" and that she "appeared to be a very patient, caring and emotionally supportive mother who obviously loved her children but was able to set limits when necessary". It is also noted in the report that the father describes the mother as a "triple A - triple plus mom", but that he "does question [her] thought process."

[39] With respect to the father, Dr. Waterman noted:

Andrew demonstrated good parenting skills throughout the home assessment. The children responded well to him despite not having had a lot of contact with him.

...

Based on what was observed regarding the children's interactions with their father, there were no concerns about Andrew's ability to parent his children.

[40] In his recommendations, Dr. Waterman states:

In considering possible recommendations resulting from this assessment, two major area[s] of concern were prominent for this Assessor after of course, what was in the best interests of the children. The first major area of concern was the amount of litigation material that was produced and needed to be reviewed. The amount of material is significant, since it is an indication of the

level of animosity in this situation, which can definitely impact the children. The majority of the material was produced by Andrew Hokhold. Even ignoring the last material that was sent to the Assessor for review, which the Court ruled was not to be reviewed because it arrived after a certain date, the amount of material was worthwhile noting. In the over twenty-nine years that this Assessor has been conducting Section 15 assessments, he has never been asked to review the amount of material that he reviewed during the course of this assessment. This is particularly relevant in this case because both parties were given the same instructions at the beginning of the assessment, which was that a certain amount of material was helpful but beyond a certain point, further material would probably not add anything to the assessment process and in fact, may be detrimental in some way to the parent's position. The amount of material produced is also related to the second major area of concern that was identified, which was the amount of money that was being spent on this litigation process which could impact the economic security of the children.

From the information that was gathered during the course of this assessment, it appeared that Andrew Hokhold has far more money available to him to pursue litigation than does Laurie Gerbrandt. Laurie even stated at one point that she had been told by Andrew that he would keep taking her back to Court until she was broke.

[41] With respect to the recommendations, Dr. Waterman stated this:

- 1) The degree of mistrust, hostility, anger and fear that exists between these two parents is producing a highly dysfunctional environment for these two children. Many examples of these concerns have been identified above in this report and will not be repeated here. However, the consequence is that the possibility of a joint custody arrangement and cooperative co-parenting does not seem to be even a remote possibility for these two parents. Therefore, it is recommended that sole custody be granted to Laurie Gerbrandt. While neither of these parents has consistently demonstrated appropriate parenting that puts the children's needs first, Laurie, for the most part has been more consistent in terms of putting the children's needs ahead of her own.

[42] In recommending that the mother be given custody, Dr. Waterman acknowledged the dangers that arise where a custodial parent feels high levels of hostility towards the non-custodial parent. For example, on February 20, 2010, the mother wrote in her diary: "It would be a blessing if I never had to see or speak to him again. It would be best if the children never knew the sick and twisted man who fathered them."

[43] The mother has also admitted to having a "rage" against the father and referred to speaking to him with "hatred in her eyes".

[44] Dr. Waterman observed that this type of hostility on the part of the custodial parent towards the non-custodial parent can create a barrier to a full and meaningful relationship between the child and the access parent.

[45] Dr. Waterman was asked:

-- if one parent has in their mind it would be best if the children never knew the sick and twisted man who fathered them, that's a serious matter for you as an assessor...

[46] Dr. Waterman said that with respect to parents that he does Section 15 reports for:

It's common that both parents -- one or both parents hate each other. It's common that one or both parents believe the other parent is deviant, psychologically disturbed, not fit to parent the children. So the short answer is, yes, it's a concern, but it's -- it's not an uncommon concern in the assessments that I -- I do.

[47] Dr. Waterman was also asked if such a belief could be a very real and significant obstacle to the children having a meaningful relationship with the access parent and he said:

Yes, if it continues. Typically what happens is that over time as things get resolved, those beliefs are let go, and there's a lot more cooperation between the parents.

[48] When asked whether or not a custodial parent with those beliefs often finds ways to deny access, Dr. Waterman answered:

Yes. Usually one or two things happen. The parent either tries to -- or figures out ways of denying access or they begin alienating [the children] from the other parent.

[49] When asked if these types of beliefs held by the custodial parent would intensify if the custodial parent moved a great distance from the access parent, his answer was:

If that belief persisted, yes, that could be a -- a very big stumbling block to maintaining a relationship with the other parent.

[50] Both parties have a "strong" or "high" need to be in control. As explained by Dr. Waterman, in his view, typical of the Section 15 assessments he has performed, the mother's center of control is the children while the father's center of control is financial. That, in my view, is one of the core problems between the parents and is one of the contributing factors to this dysfunctional environment that they have created.

THE FATHER'S FINANCIAL CENTER OF CONTROL

[51] The father is financially well off and is capable of billing up to \$10,000 per day as a dentist. He seems to have access to almost unlimited amounts of money as his sister also loans him substantial sums which he puts into his limited company as a shareholders loan and then withdraws tax-free. He only declares an income, however, of slightly under \$12,000 per year, declaring significant expenses related to the inventions he is working on.

[52] The father is very litigious and uses his considerable resources to this end. Glenna Waters, a lifetime friend of the mother, met the father in August of 2008 while the parties were living at Silver Star. Ms. Waters says that after dinner that night, the father excused himself as he had to work on a court case and he told Ms. Waters that he liked to represent himself in court as it allowed him to keep going in and going in, keeping his opponents in court until

they ran out of money and could not continue with the case. He said that he was better than most lawyers and judges liked him because of his vocabulary and his preparedness.

Although the father denied making that statement, saying it was ridiculous, I accept the evidence of Ms. Waters. I found her to be credible and sincere.

- [53] The father has been involved with numerous lawsuits, the majority of them being collections for his dental practice, and he has admitted that he has represented himself either for entire cases or for substantial portions of cases. Certainly, the father is using his knowledge of the court system and his financial resources to fuel this litigation with the mother of his children.
- [54] When the mother asked him to attend mediation in order to resolve their outstanding issues, he agreed to do so but only if she paid all the costs. He was asked why he would not pay half the costs and his reply was that he knew with lawyers involved it would not be productive. In addition to the over 30 affidavits he has filed in these proceedings, he has also provided 22 new affidavits either prepared by himself or Mrs. Bird that he forwarded to Dr. Waterman even though there was an order dated October 30, 2011 ordering that he "finalize all communication with Dr. Waterman on or before September 16, 2011". He said that he appealed the order and did not know that he could not continue to contact Dr. Waterman after September 16. The father, however, does not indicate where he got his understanding that he could continue to contact Dr. Waterman.
- [55] In his examination for discovery of February 6, 2012, he was asked at question 123:
- Q.: You are aware there was an order in place that you had to provide him with all your material by the 16th of September, 2011?
- A. That's correct.
- [56] When asked if that answer was true, he said he did not know.
- [57] In addition to the affidavits, he also provided a 69-page "personal relationship dossier". The affidavits and dossier were delivered to Dr. Waterman by Mrs. Bird well after the September 16, 2011 date. Mrs. Bird flew the documents to Nanaimo on the instructions of the father.
- [58] I reject the suggestion that the father did not understand that he could not continue to contact Dr. Waterman after September 16. The father had counsel at the time who would have been well aware that the filing of an appeal would not automatically suspend the operation of a valid order.
- [59] Between November 30, 2010 and November 30, 2011, the father paid approximately \$250,000 in legal fees. He has also given money to the AID Party in the form of a loan of \$115,000 on November 14, 2011. This is some indication of the financial resources that the father has and is prepared to use.

ACCESS

- [60] As discussed in Dr. Waterman's report, the mother's center of control is the children and she has used her power in this regard to withhold access.
- [61] The access to Will has been problematic from the very beginning. The father would initially take Mrs. Bird with him to videotape the access pick-ups and drop-offs. He says that he wanted a witness and video documentation to show that neither Will nor the mother was afraid of him and that the mother made things up. The father says that he felt he needed to take this step because of entries in the Baby Diary and the negative things that the mother had said about him.
- [62] Mrs. Bird's attendance as a witness and operator of the video camera was problematic because the father knew that the mother did not like her, feeling that Mrs. Bird had consistently interfered with their relationship. The mother said that the video invaded her privacy, but she also videotaped the father on some occasions. The father would, I am satisfied, also frequently surreptitiously audiotape conversations he had with the mother and between the mother and Will. This audio and videotaping was done by the father in order to manufacture evidence, setting up situations that would put him in the best light or trying to trap the mother into making admissions.
- [63] On March 9, 2010, upon the father's application, there was an order that he have interim access for the following two months at specified dates and times with this pattern of access to continue in the absence of a further court order. This access was to "be personally exercised by Mr. Hokhold".
- [64] The father had been exercising access. He would park his car out in front of the mother's residence and escort his son part way to the front door. On August 29, access was terminated by the mother because she was of the view that this did not constitute "personally exercising access". She agreed, however, on cross-examination, that he was present for all pick-ups and drop-offs of Will. She also said that she wanted to ensure that Will, who was 2 years old, did not run free in "a potentially hazardous environment" (affidavit of mother, September 8, 2010), by which she meant the roadway running in front of her property. However, Will had been walking down the path from his father's car to the door for many months prior to August 29, with no problems arising and the mother had described the roadway in her affidavit of October 17, 2010 as "my quiet wide residential neighbourhood street".
- [65] The mother also said she did not want to leave the 2-month old child, Ella, alone in the house, but it appeared that she would only be venturing to the front door of the house or the porch, a few feet from Ella.

- [66] The position the mother takes is that she did not deny access, but that he denied himself access because, according to her, he chose not to come to the door to exercise access in accordance with the terms of the order. I find the position of the mother untenable. She refuses to accept responsibility for the fact that she was the cause of violating the court order.
- [67] Access to Ella was equally problematic. The father exercised access to Ella up to November 18. Up to that time, the father had been placing Ella in a lounge chair on the porch, knocking on the door, then stepping back, after which the mother would pick up Ella and take her into the home. This of course was reversed upon the child being picked up. The father wanted to keep his distance from the mother because of the allegations she made in her Baby Diary, her statement on May 23, 2010 at an access exchange that she did not wish to "endanger her life" during an access exchange, and the mother's allegation that the father lurched at her during an exchange on March 28, 2010. The mother's allegation with respect to the lurch is completely without merit as video taken from the incident clearly shows no lurch.
- [68] The mother refused access because she wanted a hand-to-hand exchange of Ella. The father had suggested that Ella be returned in a car seat, as the weather was getting cooler, and that she could take the car seat inside, remove Ella, and return the car seat outside of the door.
- [69] I am satisfied that the conduct of the mother was unreasonable. This was not a life threatening situation or anything close to it and if she wanted to change the routine that had been in place for the pick-up and drop-off, she should have gone to court and made the application instead of unilaterally imposing her views on the father and denying access.
- [70] Access was also denied from September 9, 2011 to October 17, 2011, as a result of a scratch and bruising on Will's arm which occurred as a result of interaction with his dog Shadow while in the care of the father. It is clear from the photographs that there was a dog bite imprint on the upper arm and scratches on Will's lower arm, however, there was no blood and it did not appear to be anything more than a playful incident.
- [71] On September 6, 2011, the father sent an email to the mother which included a description of how the dog and Will interacted that caused the bite marks on Will's arm. The mother, on September 11, forwarded an email that stated:

Andrew,

From the information I have to date, there has not been satisfactory resolution to the safety issue of your German Shepard in contact with the children. There will be no access to Will tomorrow, Sunday, Sept 11th. Access to the children can occur once you have dealt with the safety issue of your dog.

To spare the children from more conflict, we will not be home tomorrow morning.

Laurie

[72] On September 12, 2011, the father sent an email which stated in part:

As of today, Will's Shadow will be segregated from Will and our daughter while they are both in my care, individual or collectively, until this matter is resolved within this judicial process. I hope you realize that Shadow is Will's dog, a present bought for him by my sister. He knows it to be his dog and he talks about Shadow to his friends. He has said numerous times that he loves Shadow and Will greets him every morning when Will is with me.

Please advise me today whether or not this is acceptable to you and whether you will give me permission to have access to both of my children again.

...

I love them both very much and I miss being with them.

Andrew

[73] On September 13, 2011, the father forwarded another email requesting clarification. However, the mother continued to deny access. Her position was that she wanted the dog destroyed.

[74] On October 18, 2011, the Court eventually ordered that any time the children are with the father in the presence of the dog Shadow, the dog "shall be on a leash with a muzzle".

[75] I am satisfied that there was no valid reason to deny access to these children under these circumstances. The refusal of the mother to respond appropriately to suggestions by the father indicates a lack of cooperation and a failure to put the interests of the children first. The mother has been intransigent in virtually all matters relating to access, denying the father's requests for makeup access to make up for the time he lost when she had taken the children to Swift Current, and even refusing to allow Will to attend his paternal grandfather's birthday.

[76] During these three periods of time that the father was denied access, he would attend with a witness at the scheduled pick-up time and wait there even though it was obvious that he was not going to be seeing the children. He said he was doing this so that he could show that he cared for his children. That may be true. However, if he really cared about the welfare of his children he should have made an application to court immediately to ensure that he had continual access with these children. The father's conduct was not in the best interests of the children either.

FURTHER LACK OF COOPERATION BETWEEN THE PARTIES

[77] The parties' desire to score points off one another at the expense of their children's best interests seemed to become almost all-consuming as the litigation drew on.

[78] One example is the parties' failure to cooperate with respect to medical appointments. The father made an appointment for Will to see an urologist and advised the mother in an email on January 5, 2012, asking if she wished to attend. The mother responded on February 1, 2012, stating:

I am taking Will to his urology appointment tomorrow (February 2nd) to provide Will with comfort and reassurance and to provide the urologist with a complete history.

[79] This was a date that the father was working, and of course, was unable to attend.

[80] On January 24, 2012, the father emailed the mother discussing Will's eye exam and the need to pick out eyeglass frames and inquired when they could meet together to do so. The mother replied by email dated January 29, 2012, which stated: "Will's glasses have been ordered."

[81] The father was reluctant to agree to Ella's immunization schedule. He wanted more information and met with the representative of the health unit on August 11, 2011. He arranged for the immunization to take place on August 22 and on October 3 for Will to have his full and second dose of MMR vaccination. The father indicated in his email that he would "like to do this for Will". The mother responded on August 23 stating: "I rescheduled the dates. Will had his first one today and was scheduled for a second immunization September 27."

[82] This lack of communication and unwillingness to cooperate is most unfortunate and not in the best interests of the children.

[83] Another example involved an allegation that Will had been told by his paternal grandfather to urinate on his bed in his mother's house and on his mother's floor. The mother did not herself believe that the paternal grandfather told Will to urinate on the floor and in the bed etc., but she took Will to Dr. Brown, the child's doctor, and in the presence of Will related the story about purposely peeing. The following day, the mother returned with Will to Dr. Brown at the request of her lawyer and Will told Dr. Brown about the peeing incident. The doctor then noted in her clinical records what took place and provided that to the wife's lawyer who then used that in her affidavit to oppose expanded access.

[84] Paragraph 5 of the mother's affidavit of January 10, 2012 states: "The Court should know the following regarding Will". She then relates the peeing incident and included the notes from the doctor.

[85] This conduct by the mother is deplorable. She told the Court that she did not believe that the grandfather made these comments yet put it in an affidavit in order to oppose expanded access.

[86] In still another example of this type of behaviour, after the birth of Ella, the father attended at the mother's residence at Predator Ridge and while she was downstairs feeding Ella, the father observed Will playing outside on the grass with his tricycle. There was a fenceless

rock cliff along the boundary of the property. The father said he was shocked when he saw this but did nothing about it. When asked why he did not say something to the mother he said because he was "frozen". He furthermore stated that he did not say anything to the mother because he is "damned if he does and damned if he doesn't". What the father did instead was return later on to the premises with Mrs. Bird to take pictures and measure the stone wall to show that this was in fact a dangerous situation. I am satisfied that these actions of his were founded in a desire to score points off the mother rather than in genuine concern for his son's safety.

- [87] On another occasion when Ella appeared to have some faint bruising on her thighs, the father took her to his doctor who performed a physical examination and found nothing wrong with the child. The father nonetheless subsequently returned to the doctor's office along with Ella and within a period of five days had her undergo three complete physical examinations. It was not in the best interests of the child to have these physical examinations when there was clearly nothing wrong.
- [88] The mother, on several occasions, attempted to get the father into trouble with various authorities. After the mother was required to return with Will to British Columbia in March 2010, she went to the transition house and the transition house with her agreement put her in contact with the RCMP. On April 15, 2010, the mother provided a detailed history of their relationship and had a two-hour recorded interview with the RCMP. During this interview she discussed the father, his political dealings, and business affairs and categorized those matters as "white collar crime". On cross-examination the mother admitted that she asked of the RCMP officer, "Is any of this white collar stuff capable of getting me out of here?" She agreed that "out of here" referred to being able to get out of Vernon.
- [89] The mother also told the RCMP about the father threatening her family with litigation, saying he had access to millions of dollars, that he would have no trouble killing someone, that he said that she is "replaceable", that he refuses to seek mental help, that he has a history of killing cats by trapping them, that his ex partner fled to Germany 15 years ago and he still seeks her out and that he wears sunglasses with a video camera attached. She also told the RCMP that she feared that the father would sedate her and perform a c-section to remove her child.
- [90] All of the above has been denied by the father.
- [91] The mother has also admitted that she has contacted Canada Revenue Agency and the Insurance Corporation of British Columbia telling the latter that she believes the father was working and was fraudulent with respect to his claim regarding his motor vehicle accident. She told Canada Revenue Agency about the father's political party and his business dealings, and referred to his mother Clara, his father Frank, his sister who works for Revenue Canada and Beverly Bird.

- [92] When asked why she reported the father to the RCMP, Revenue Canada, and ICBC, she said that she was attempting to protect herself so at least the children would have a mother.
- [93] I am satisfied that she contacted these institutions because she wanted to put pressure on the father and that if in fact he had done something wrong, that would make her custody case somewhat easier to win. There is no evidence whatsoever that by reporting these incidents to the various authorities, she was protecting herself.

CUSTODY AND MOBILITY

- [94] Section 24 of the Family Relations Act, R.S.B.C. 1996, c. 128, sets out the applicable law with respect to the issues of custody, access and guardianship:

24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;
- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

(1.1) The references to "other persons" in subsection (1) (c) and to "each person" in subsection (1) (e) include parents, grandparents, other relatives of the child and persons who are not relatives of the child.

- (2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well being of the child.
- (3) If the conduct of a person does not substantially affect a factor set out in subsection (1) or (2), the court must not consider that conduct in a proceeding respecting an order under this Part.
- (4) If under subsection (3) the conduct of a person may be considered by a court, the court must consider the conduct only to the extent that the conduct affects a factor set out in subsection (1) or (2).

- [95] This issue of mobility was discussed in the Supreme Court of Canada decision of *Gordon v. Goertz*, [1996] 2 S.C.R. 27, where the Court stated at pp. 27-28:

49 The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;
 - (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - (f) disruption to the child of a change in custody;
 - (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[96] Custody here has not been determined as there are only interim orders and consequently there is no requirement to prove such a change in circumstances when the application relates to an interim order (see *Woods v. Woods*, 2012 BCCA 312 and *Javid v. Kurytnik*, 2006 BCCA 565).

- [97] A comprehensive review of mobility cases is set out in the decision of *McArthur v. Brown*, 2008 BCSC 1061, paras. 112-138. I do not intend to reproduce that lengthy and learned analysis. I will refer to a few of the most recent decisions of our Court of Appeal.
- [98] Our Court of Appeal in *S.S.L. v. J.W.W.*, 2010 BCCA 55 heard an appeal concerning the application of a mother to move to London, Ontario, where Huddart J.A. noted at para. 21:
- [21] The point of departure in Canada for any parental mobility case must be the Supreme Court's decision in *Gordon*. In *Nunweiler*, this Court was clear that the approach set down in *Gordon* to a custodial parent's variation application was to be taken, insofar as applicable, to an original application regarding children whose parenting they had been sharing.
- [22] However, as the plethora of judgments that have applied *Gordon* demonstrate, the factors listed at para. 49 in the judgment of McLachlin J. (as she then was) provide insufficient guidance for two good parents, their counsel, and the trial court as they face the agonizing decision required in two circumstances: (1) a pre-school age child who has been in the primary care of one parent (usually the mother) where age-appropriate access is unworkable if one parent moves away (*Karpodinis v. Kantas*, 2006 BCCA 272, leave to appeal refused [2006] S.C.C.A. No. 318; *Hanna v. Hanna*, 2002 BCCA 702), and (2) a joint parenting situation where one or both parents' needs (economic, educational or personal) are seen as requiring a change.
- [99] In *R.E.Q. v. G.J.K.*, 2012 BCCA 146, the mother wished to move from Maple Ridge to Calgary with two children, aged 14 and 9. Newbury J.A. stated at para. 46:

The Court in *Falvai* also observed that the approach suggested in *Nunweiler* did not create a two-step analysis, or change the conventional approach to determining custody "in an initial application, where there is no pre-existing determination that the relocating parent is the one best suited to meet the child's needs". The Court advocated a "balancing of all relevant factors, including a parent's proposed move with the child to a new community". (Para. 25.) In the result, it found that the restriction imposed by the lower court on the mother's custody of the child was not supportable by the applicable legal principles and suggested that given the mobility of modern society, permanent conditions restricting the movement of a custodial parent should not be imposed "except in the rarest of cases". (Para. 40.)

- [100] In the case of *Woods v. Woods*, our Court of Appeal reiterated that the best interests of the children are the paramount consideration and that where a parent's proposed relocation impacts on access to a child, this should be considered along with other relevant factors, stating at para. 10:

Her proposed relocation is a significant factor to be balanced with others in determining what will best serve the interests of the children, and their ultimate place of residence will clearly have an impact on access rights.

- [101] The present custodial arrangements allow for access when the father is not working, although access to Ella has not been as frequent and there has not been overnight access save and except for Christmas. The relationship between the parents and their children is very good with the children having, I am satisfied, a strong attachment to both parents considering their age.
- [102] There is always a need to maximize the contact between the children and their parents and because of the young age of these children, frequent access is far more important at this stage of their lives.
- [103] The mother has been the primary caregiver, both parties have a close and loving relationship with their children, and the father describes the mother as being an excellent parent.
- [104] The children have an extended family in Vernon as the father has many friends that participate in the lives of these two children, with the father's parents living nearby in Armstrong. The mother has a large family in Swift Current that the children have seen regularly.
- [105] The views of the mother are deserving of a great deal of respect and she wishes to move to Swift Current because her family there offers a support system. Mrs. Gerbrandt senior gave evidence that her family would assist her daughter in obtaining a mortgage if she wishes to buy or build a home in Swift Current but says that she would not assist her if she wishes to purchase a home in Vernon because she says the prices are too high. She offers, however, no evidence whatsoever to substantiate the difference, if any, in the price of real estate between the two communities.
- [106] Further, after the mother commenced a relationship with the father she told Vernon Spetifore, a long-time friend of the father, that she was estranged from her family in Saskatchewan and did not want to go back or have anything to do with them because they would not give her money to purchase Mr. Chudyk's interest in the Armstrong property that they jointly owned. The mother does not deny this allegation but says that they have patched up their differences. I do not place a great deal of weight on the fact that the mother's family will provide her with financial support.
- [107] I accept the fact that the mother does have a large extended family including cousins, a brother, a sister-in-law, and parents, but she has only one non-family friend in Swift Current and that is Kay Waters, who was so elderly and frail that she could not attend the trial in Vernon.
- [108] At trial, the mother said that she had no friends in the Okanagan but in her affidavit sworn March 16, 2010, she refers to Kelly Gagnon as someone who "was and is a close friend and a person with whom I had a wonderful working relationship", admitting that that statement was true.

- [109] The mother has also made no attempt whatsoever to determine if she can qualify to register as a pharmacist in Saskatchewan or how long such qualification would take.
- [110] I am satisfied that the primary reason that the mother wishes to move to Saskatchewan is to deny access to the father. There have been three occasions where she denied court ordered access and there are multiple examples of her failing to cooperate with the father with respect to changing access.
- [111] The extent to which the mother has gone in involving the RCMP, Revenue Canada and ICBC indicates the extent to which she will go to get the upper hand in this litigation. The extreme measures that the mother took to prevent the father being with his new daughter, one hour after the birth, are even more troubling. To have Will looked after by strangers in a transition house even for two hours when the father was perfectly capable of looking after his son is telling of the mother's attitude towards the father.
- [112] Also disturbing are the comments made by the mother in the Baby Diary concerning the father, specifically her comment:

What kind of mother am I to expose you to someone like him.

It would be a blessing if I never had to see or speak to him again. It would be best if the children never knew the sick and twisted man who fathered them.

- [113] There are other similar comments in the diary. With this attitude ingrained in the mother and her demonstrated track record of denying access and being uncooperative in terms of changing access times (acknowledging that the father is only marginally better in terms of being cooperative), I am satisfied that if these children are allowed to move to Saskatchewan, there is a high probability that the mother will deny access and alienate the children from their father.
- [114] Dr. Waterman agreed that it is a serious matter where "one parent has it in their mind that it would be best if the children never knew the sick and twisted man who fathered them". Although Dr. Waterman said that such views were not uncommon in contested divorces, what happens typically is that over time things get resolved, such strong beliefs subside, and eventually the parents learn to cooperate. If these types of beliefs persist however, the custodial parent will typically find ways to deny access and attempt to alienate the children from the other parent. He agreed that concerns about parents going down the latter path would be heightened if the custodial parent moves a great distance away.
- [115] I am satisfied that because of the intense animosity and hostility that the mother and father have towards each other, the beliefs of the mother about the nature of the father will persist. Her past conduct is consistent with this. I am satisfied that it would not be in the best interests of these children to allow them to go to Saskatchewan and live with their mother. I am aware that the right of the mother to move with her children should only be denied in the "rarest of cases" but after balancing all of the relevant factors and considering what is in the best interests of the children, I order that the children not be removed from

the Vernon area which includes Armstrong, Silver Star and Predator Ridge.

- [116] I am satisfied that it is in the best interest of the children because of their ages and because of their attachment to their mother that the mother be awarded sole custody. This is consistent with the recommendations of Dr. Waterman.
- [117] In order to attempt to change the "dysfunctional environment" that exists, I accept the recommendations of Dr. Waterman that contact between these parties should be restricted and I order that they are to only contact one another by email and shall respond to such contact within five hours. They also have each other's cell phone numbers which can be used in emergencies. The pick-ups and drop-offs will be at the mother's home, but the actual pick-ups and drop-offs will be done by an employee of "We Care" or by some other individual that the parties agree to in writing. The father will remain in his automobile during the pick-ups and drop-offs and this issue should be reviewed in one year.
- [118] One thing that will assist in defusing the power-struggle between the parties will be the introduction of a parent coordinator which was recommended by Dr. Waterman. I also encourage the parties to seek professional counselling as in my view it is in the best interests of these children that they do so, although I do not have authority to make an order to that effect.
- [119] Both parties should be involved with these children and it is my view that there should be an order for joint guardianship based on the Joyce Model with appropriate variations as necessary to deal with the parent coordinator.
- [120] Because the father works Thursday to Saturday and both parents wish to take the children to church on Sunday, I order that the father will have access to the children from the first Sunday following the filing of these reasons at 8:00 in the morning to Tuesday at 7:00 in the evening. While Ella has only had access overnight during Christmas, I am satisfied that she is old enough and that the father is certainly capable of looking after her for overnight access. Access will be the same for both children. Having the children picked up and dropped off at the same time will also reduce the friction that has been caused by the pick-ups and drop-offs.
- [121] The parents will each have the children for four hours on their parents' birthdays and grandparents' birthdays, the mother will have four hours on Mother's Day, and the father four hours on Father's Day. Christmas will be shared, the mother will have the children one week prior to Christmas Day with the exchange taking place at 12:00 noon on Christmas Day and the father will have the children for one week following with this schedule alternating each year. The father will be entitled to the long weekend this Easter and the mother the following Easter, again, rotating each year. During summer 2013, the father will have the first two weeks, commencing the first Saturday in July, the mother the following two weeks to complete an eight-week summer access schedule.

MARRIAGE-LIKE RELATIONSHIP

[122] The obligation to pay spousal support is found in s. 89 of the Family Relations Act, which states:

89 (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;
- (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- (c) custodial obligations respecting a child;
- (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
- (e) economic circumstances.

[123] A spouse is defined in s. 1(1) of the Family Relations Act as follows:

"spouse" means a person who

- (a) is married to another person,
- (b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together and, for the purposes of this Act, the marriage-like relationship may be between persons of the same gender,
- (c) applies for an order under this Act within 2 years of the making of an order
 - (i) for dissolution of the person's marriage,
 - (ii) for judicial separation, or
 - (iii) declaring the person's marriage to be null and void, or
- (d) is a former spouse for the purpose of proceedings to enforce or vary an order.

[124] The position of the father is that this was not a marriage-like relationship and in any event they did not live together for a period of two years.

[125] The term "marriage-like relationship" has been interpreted by our Court of Appeal in *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.) [*Gostlin*], where Lambert J.A. for the Court stated at pp. 267-278:

In deciding whether a couple lived together as husband and wife, I would be guided by the scheme and intention of the Act itself. The purpose of the legislative scheme is to impose on an unmarried couple the same obligations under s. 57 as are voluntarily undertaken by a married couple. So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced

the permanent support obligations of s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.

Of course, in the particular circumstances of any case, the answer to that question may prove elusive. If that is so, then other, more objective indicators may show the way. Did the couple refer to themselves, when talking to their friends, as husband and wife, or as spouses, or in some equivalent way that recognized a long-term commitment? Did they share the legal rights to their living accommodation? Did they share their property? Did they share their finances and their bank accounts? Did they share their vacations? In short, did they share their lives? And, perhaps most important of all, did one of them surrender financial independence and become economically dependant on the other, in accordance with a mutual arrangement.

All those questions, and no doubt others, may properly be considered as tending to show whether a couple who have lived together for more than two years have done so with the permanent mutual support commitment that, in the relevant sense of the Family Relations legislation, constitutes living together as husband and wife.

[126] In *J.J.G. v. K.M.A.*, 2009 BCSC 1056 [J.J.G.], after referring to *Gostlin*, Madam Justice Dardi states as follows:

[33] The Court of Appeal in *Austin v. Goerz*, 2007 BCCA 586, clearly articulated that some level of financial dependence is not a necessary component of a "marriage-like" relationship. As the trial judge in *Austin* observed, such a principle would be untenable in the context of modern society's marriages and relationships. How the parties arrange their financial affairs is but one factor to be considered in the analysis of whether a relationship is "marriage-like". Likewise, shared shelter, sexual and personal behaviour, services, social activities, and social perception of the couple, as described in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), are factors to be considered.

[34] In modern society, however, there is no "checklist of characteristics" that will be found in all marriages or "spousal-equivalent" relationships: *Austin*. Rather, in undertaking the analysis of what constitutes a marriage-like relationship, the court should take a broad view in order to reflect the diversity of spousal relationships that exist in modern society.

[35] The focus of the inquiry is on the parties' intention to live as "husband and wife" or in a "marriage-like" relationship as "divined" from an objective overview of the facts. The comments of the majority decision in *Takacs v. Gallo* (1998), 157 D.L.R. (4th) 623 (B.C.C.A.) at para. 53, are instructive:

- [53] By the same token, of course, subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such.
- [36] The Court states at para. 55 that, while objective factors will be relevant to determining the intention of the parties, those factors will rarely be determinative in and of themselves.
- [37] In summary, in undertaking an analysis of whether persons are living together as spouses, the court must examine the relationship as a whole and consider all the various objective criteria referred to in the authorities. The presence or absence of one particular factor will not be determinative. The court must recognize that each relationship is unique and, in applying a flexible approach within the context of the particular relationship, make a determination as to whether the parties intended to and were living in a marriage-like relationship.
- [38] With respect to what constitutes a termination of a common-law relationship, Binnie J. in *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65, cited with approval the observation of Morden J.A. in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 249 (C.A.) at 432:

Subject to whatever provision may be made in a statute, a common law relationship ends "when either party regards it as being at an end, and by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one."

See also *Gosbjorn v. Hadley*, 2008 BCSC 219.

- [127] It asked of the parties whether they would consider themselves committed to the lifelong financial and moral support of the other if at any time during the relationship they were to be suddenly disabled for life. The father said no. The mother said yes, "for a period of time, but that changed over time", never explaining when this change occurred.
- [128] The father says that the evidence is consistent that he never intended to enter into a lifelong financial and moral obligation. The mother herself admitted that he had told her that he "did not love her enough to financially support her". There is also a note in the mother's diary of September 29, 2007, where she wonders if the father intended to give her any financial support.
- [129] Since *Gostlin* was decided in 1986, in my view, society and the nature of relationships have changed. Moreover, it is somewhat unrealistic to ask people after they have separated whether or not during the relationship they would have considered themselves committed to lifelong financial and moral support, as there will usually be an obvious incentive on the part of at least one party to misrepresent their intentions. While this question and its answer can provide some guidance to the Court, the objective indicia of commitment must also be examined in order to determine the parties' actual intent at the time.

[130] The parties here did not refer to themselves as husband and wife or as partners. The father on a number of occasions made it clear that he was not a husband and they were not married and even the mother's evidence was that the father never referred to her and Will as a "family". However, the father, when filing his 2008 and 2009 income tax returns referred to the mother as his "common law partner" and his 2011 income tax return indicated his marital status was "separated". That statement, I take it, is to mean he was separated from his common law partner, otherwise the word "separated" would not make any sense.

[131] The parties lived at the father's premises at L&A Crossroads for the first year of their relationship and then rented premises at either Silver Star or Predator Ridge Golf Course. The father's company paid for the residence at Silver Star in the summer of 2009 and the father and mother both signed a lease for a season at Predator Ridge, although prior to moving in the father took his name off the lease. There is ample evidence that the parties shared the living accommodations at Predator Ridge and Silver Star.

[132] Other than the rental accommodation, they did not share property or bank accounts, but they certainly shared finances. In an email at Exhibit 50, dated September 24, 2007, the father wrote to the mother saying:

My intention, ever since we began dating, was to provide you financial situation. I thought I was doing the right thing. We've been living together for approximately a year now. During that time I covered most of our day-to-day expenses. Allowing you to dedicate your resources to increasing your financial portfolio. I even thought that by planning to negotiate a new private placement on your behalf, was also doing the right thing for you.

[133] What is most telling is that in an affidavit sworn by the father on June 16, 2010, he states:

The defendant and I live on and on and off basis commencing in or about October of 2006 and in a common law relationship from October 1, 2007 until the defendant abducted our child, William Christopher Hokhold, born January 25, 2008, to Swift Current, Saskatchewan on February 25, 2010.

[134] That statement is consistent with Dr. Hokhold's income tax returns of 2008 and 2009 and consistent with the mother's contention that they lived together for a period of time in excess of two years. By Dr. Hokhold's own evidence they lived in a common law relationship for three years and seven months.

[135] The parties also shared expenses. In addition to Dr. Hokhold paying for one season's rent at Silver Star, he paid for most of the groceries for the home, paid for her car insurance for one year and paid her way to visit her elderly parents in Swift Current.

[136] Although the father went out of his way to give the appearance that he was not supporting the mother, it is clear that, since the mother had no source of regular income after the termination of her maternity leave, the father supported the family. Those payments I have already referred to and total an average of \$2,279 per month.

- [137] The parties also entertained together, held business promotion events for the father's dental practice and vacationed together including spending Christmas with the father's parents. In addition, the father attended some of the mother's medical appointments and they also attended a fertility clinic together. The parties certainly shared an intimate long-term relationship as the mother was pregnant on four occasions and gave birth to Will and Ella.
- [138] Looking at this relationship in its totality, through its ups and downs, I am satisfied considering all the evidence that this was a marriage-like relationship that existed for a period of over two years.

INCOME OF THE FATHER

- [139] The Federal Child Support Guidelines are incorporated into the Family Relations Act of British Columbia pursuant to the Child Support Guidelines Regulation, B.C. Reg. 94/2007.
- [140] Section 19 of the Federal Child Support Guidelines, S.O.R./97-175 states:
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;
 - (b) the spouse is exempt from paying federal or provincial income tax;
 - (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
 - (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;
 - (g) the spouse unreasonably deducts expenses from income;
 - (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
 - (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

- [141] The position of the mother is that the father should be working four days a week, not three, that his property is not being reasonably utilized to generate income in part due to his donations to political parties, and that expenses are being unreasonably deducted from his income.
- [142] The father works three days a week, for 10-11 hours per day. The normal work week for a dentist is four days a week, but he says he is unable to work four days because of injuries sustained in a motor vehicle accident which occurred on December 24, 1998. The father and his many witnesses including the mother have noted that he has soreness in his neck and has headaches and rubs his neck when he is tired or has worked long hours. I accept the proposition that medical evidence is not always necessary to prove an injury but when medical evidence is available, there must be a good reason as to why it was not produced.
- [143] After the accident, the father was off work for one year and then later sold his practice in 2000. This accident was the subject of a lawsuit which settled after a one-week trial, but there is no evidence as to how much he received for loss of future earning capacity.
- [144] The father's position is that he entered into a confidentiality agreement with the insurance company and is not allowed to divulge the terms of settlement. The Court invited him, however, to apply for an order to have the information produced and sealed in Court, but he refused to do so.
- [145] Supreme Court Rule 7-1(1)(a) requires the Court to:
- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, ...
- [146] The failure of the father to provide the available medical evidence from the trial leads me to draw the adverse inference that the medical evidence would not have assisted his claim.
- [147] The father says that in any event there are not sufficient patients to enable him to work four days a week. Sigrid Olynuk, his receptionist, gave evidence that the father has been booking appointments approximately two weeks in advance and the father argues that based on that evidence there is insufficient work on a long-term basis for him to work four days per week. I reject that argument because it seems reasonable to conclude given that the father's practice is restricted to oral surgery that his patients come to him in distress after having already seen their regular dentist. Therefore, because of the nature of the father's practice, it would likely not be unusual that he only books two weeks in advance.
- [148] Based on all the evidence, I am satisfied that the father has the capacity to work four days a week and his income should be imputed accordingly.

EXPENSES RELATING TO THE CHATEAU BLOCK

[149] The father deducts from his income expenses related to the development of the "Chateau Block". These expenses are run through his limited company and are not segregated from his dental expenses. The mother argues that the Chateau Block is more of a speculative adventure and that the expenses are unreasonable and should not be deducted for the purposes of determining child support.

[150] The position of the father is that research and development of the Chateau Block is a legitimate business undertaking which was pursued between 2000 and 2005 and since 2008.

[151] In *Volken v. Volken*, 2001 BCSC 970, Mr. Justice Macaulay at para. 31 stated the following:

Lifting the corporate veil pursuant to s. 18 permits the court to scrutinize corporate decision-making where the payor has complete control over the company. This should not lead to overturning reasonable and prudent business decisions, but will ensure that the court is able to conduct a fair accounting of the money available for the payment of child support without being bound by how the payor chooses to characterize the remuneration from the company.

[152] In *Needham v. Needham*, [1998] B.C.J. No. 202 (S.C.), Mr. Justice Ralph stated at para. 14:

... it is my opinion that the Guidelines seek to determine a means of balancing the incurring of reasonable expenses against the alternative of using those funds for child support. In particular, section (19)(2) of the Guidelines recognizes that "the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act".

[153] In *Botha v. Botha*, 2000 ABQB 870, the Alberta Court of Queen's Bench considered the income of a medical doctor's professional corporation and certain farm losses written off by him pertaining to race horses he owned. The doctor's position was that the farm losses were real and they should reduce his income for child support purposes as he believed the horses would eventually make money. The Court stated at paras. 24-25:

24. When s. 19 speaks to the unreasonable deduction of expenses from income, it does not require establishing that the spouse has acted improperly or outside the norm in deducting expenses. Section 19(2) explicitly recognizes that reasonableness is not governed solely by whether the deduction is permitted under the Income Tax Act. The deduction may be quite proper insofar as tax policy is concerned. The issue is whether or not the full deduction of expenses which may be permitted by the Income Tax Act results in a fair recognition of the actual income that is available to that spouse from that source of income. The objective in determining income for the purposes of the Guidelines is to determine the monies available to a payor from the sources of income in the T1 General for the support of the payor's children. The payor's disposable income can be considerably more than his taxable income. If the payor's children remained part of the payor's household they would have the advantage of and would benefit from that disposable income and not just from the payor's taxable income: *Wilson v. Wilson* (1998), 165 Sask. R. 241 (Q.B.) (paras. 34-38).

25 The drafters of the Guidelines were aware that shareholders, such as Dr. Botha, of a private company can dictate the income received from the business. The drafters were aware that the shareholder can receive salary, bonuses, dividends, benefits paid on their behalf, repayment of shareholders' loans, or even defer the payment of income. The shareholder may expense many personal items to the business and reduce the amount of income he receives. Sections 17-20 of the Guidelines allows the court to take into consideration all or any of these factors and to add income back to the payor to ensure the Guideline income reflects true income as closely as possible.

[154] In August 2011, the father's company entered into a sale agreement to purchase an excavator and a hydraulic hammer for a total sum of \$766,080. These were delivered in the latter part of October 2011, used for only two days in order to train the father in the machines' operation, and have sat in the vendor's yard ever since. The father's company's year-end was October 31 and for the year 2011, he claimed for this equipment an amortization or write-down of \$92,651, which according to his accountant Mr. Cousins, was half the normal rate of amortization because he did not use the machine for the full year. I am satisfied that the purchase of this machinery and its delivery and use just prior to year-end is not coincidental. It may be legitimate for income tax purposes but it is not a proper deduction for calculating child support.

[155] The main issue with respect to the Chateau Block business is whether or not it is more in the nature of a hobby, a speculative adventure, or a legitimate business.

[156] In 2011, Read Jones Christofferson, a consulting engineering firm, was retained by the father to provide engineering services and advice. They state in their report:

The project includes the construction of 80 meter high tower. Due to the many unique features that will be incorporated into the design of this structure, it is difficult to determine anticipated constructions costs with any accuracy. The perimeter walls of the tower are expected to be 4 to 5 times thicker than conventionally reinforced concrete walls. I expect, therefore, that construction costs for this structure will exceed 4 times the cost of conventional structure and therefore, are likely to be well in excess of \$3 million. This excludes fabricating costs for the precision formworks to produce the Chateau Blocks, batch plant costs and assembly, as well as operating and producing select graduated aggregates.

[157] I conclude from the engineering report that they cannot provide any satisfactory answers as to when this block will be in production, if it is viable, or what it will cost.

[158] The father, however, claims that experimental development costs associated with the project have been approved by Revenue Canada through 2000 to 2004. The letters from Revenue Canada however do not include the experimental development expenses that are claimed. Instead, many of the letters state that:

The claim is being processed without a science review. We remind you that "proceeds without a science review" means that a determination has not been made of whether the work claim meets the definition of SNRED in s. 248(1) of the Income Tax Act.

[159] Further, there is no secured source of aggregate for the blocks, a facility necessary to construct the blocks has not been obtained, there has been no business plan, nor is there any evidence that financing would be available. There are no market studies that have been conducted to determine if there is any demand for this particular product. I am satisfied that this venture is so speculative that it should not be used to reduce the funds available for child support.

CALCULATION OF INCOME

[160] Most of the income derived in 2010 was prior to the father opening his own dental office. The expenses claimed such as "consulting fees" were mainly for Mrs. Bird who did work for both the dental practice and for the Chateau Block projects. Unfortunately, there is no documentation that provides a breakdown. The mother claims that the Court should reduce the claimed expenses by 50%, while the father says there is no basis for such a reduction. I am satisfied that it is up to the father to provide the documentation for his claimed expenses, which he has not done. Therefore, taking 50% of the consulting fees and applying them to the dental practice's earnings before taxes yields an income of \$246,052. Adding back a salary of \$12,000 and \$21,000 for consulting fees, I calculate the amount to be \$279,052 for the father's income for 2010, year ended October 31.

[161] The mother did not argue that the four-day week should be applied to the year 2010 and this may be because the father had not set up his own practice in his own building at that time.

[162] For 2011, the father's revenues were \$1,196,257. Accounting for the fact that he can work four days a week would increase his income by \$398,752, less his increase in variable expenses of \$117,640 with earnings before other items at \$556,975. Adding back the automobile expenses of \$9,575 as he did not use his automobile for business yields a total of \$576,125.

[163] Again, the expenses for Mrs. Bird amount to \$69,483 (consulting fees), so adding back 50% of those, or \$35,000, gives a total of \$610,000.

[164] The mother says that the amount due from the B.C. Patriot Party of \$1,070,510 was a loan without interest and that this was not a prudent use of family resources. She says that to reflect this, interest at a rate of 4%, amounting to a total of \$42,820 should be added to his income. She argues that there was a further loan to the B.C. Patriot Party of \$147,600, which at 4% interest would mean another \$5,904 should be added to his income. It is somewhat confusing as to the exact purpose of these loans and as to which of his two political parties was to be the beneficiary.

[165] In any event, I am not prepared to find that monies that the father or his company loaned to various political parties should result in income being imputed to him on the basis that it is not a prudent use of family resources because the vast majority of loans were made prior to the birth of any children. This is a political donation, something that the Court should generally not question, and in any event, the father has ample resources to pay support in the scheme of things. This is not a significant item. I therefore find that as of October 31, 2011, the father has income for child support purposes of \$610,000.

CHILD SUPPORT

- [166] The mother has been out of the workforce for five years; she quit work shortly after becoming aware of her pregnancy with Will because she was high risk. Although there is no formal agreement that the father would support the mother, I am satisfied that this was an understanding they had as there was no suggestion at any time that the father requested that the mother return to work, save and except for doing some part-time work for his dental practice.
- [167] The mother requested spousal support be paid until Ella is in Grade 1 which will be for a period of four years. The position of the father is that the mother should have been working and that there are jobs available. A witness was called on his behalf who testified that there is a part-time position available in the Vernon London Drugs for a pharmacist.
- [168] It is my opinion that because of the turmoil these children have gone through and the necessary period of adjustment that is going to have to be made to allow both of these families to settle into some normal routine, that to force the mother back to full-time work under these circumstances at an early date would not be in the children's best interests.
- [169] I am of the view that the mother should be requalifying to practice pharmacy in British Columbia and that within one year from the date of this order, she should have some type of part-time employment that does not interfere with her childcare responsibilities. I am satisfied that spousal support should be reviewed in July of 2016. That will have given the mother ample opportunity to get back on her feet and pursue her profession.

RETROACTIVE CHILD SUPPORT

- [170] On April 9, 2010, the mother filed a counterclaim seeking child and spousal support. An application was set down in the summer of 2010 for child and spousal support but did not proceed. It was not set down on an earlier date because the father did not have his financial statements up to date, and there were further delays because of insufficient court time. Finally in September 2010, there was a without prejudice settlement made which included a lump sum payment and periodic payments. Monthly payments have been made since that date.

- [171] Ms. Muto, who was the father's solicitor at the time these proceedings commenced, stated that when the without notice application was made in March 2010, the father inquired as to his financial obligations for support and was advised that she could not give him advice because he had no proper financial documents. He told her that he only made \$12,000 a year in income and she was of the view that that would not have been accepted by the Court. Various demands were made for financial disclosure but because of the need to bring the father's accounting records up to date, financial disclosure has not been timely.
- [172] I am satisfied the date of effective notice is the date of the filing of the counterclaim.
- [173] The issue of retroactive support was reviewed by Rowles J.A. in *L.S. v. E.P.*, 1999 BCCA 393, at paras. 66-67:
- [66] A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.
- [67] Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.
- [174] In *D.B.S. v. S.R.G.*, 2006 SCC 37, the Supreme Court of Canada stated that the factors to be considered in determining whether to make an award for retroactive support were: (1) the existence or absence of a reasonable excuse as to why the support was not sought earlier, (2) the conduct of the payor parent, (3) the circumstances of the child (in particular his or her current standard of living), and (4) any hardship that would be occasioned by a retroactive award.
- [175] I am satisfied that there is a need on the part of the children and of the mother and that there is a corresponding ability to pay on the part of the father and that there is some blameworthy conduct on behalf of the father as he had not provided timely, complete, financial disclosure. I am satisfied that the mother was pregnant at the time of the separation and that she already had one child and she had no source of income other than the support that had been provided by the father. I am satisfied that the delay was caused by the lack of financial disclosure and that there was ample notice that the mother intended to pursue the issue of support. There is no suggestion that the order would cause an

unreasonable or unfair burden on the father and I am not purvey to the without prejudice payments made by the father and therefore have no opinion as to whether or not the order will serve to redistribute capital. The circumstances of the children, who will be living primarily with their mother who is currently not working, will also be ameliorated by a retroactive award. In all the circumstances, an order for retroactive support is appropriate in this case and I order that there be retroactive child support and spousal support as of April 15, 2010, less any payments that have been made to date.

NAMES OF THE CHILDREN

[176] Pursuant to s. 4.1(1) of the Vital Statistics Act, R.S.B.C. 1996, c. 479:

4.1 (1) The court may, in an order declaring a child's parentage, make an order

- (a) that the registration of a child's name be changed, or
 - (b) if the child's name has not yet been registered, requiring the child's name to be registered as specified in the order.
- (2) If an order under subsection (1) is in respect of a child's surname, the court must order the child's surname to be
- (a) the surname of either parent, or
 - (b) a surname consisting of both parents' surnames hyphenated or combined in alphabetical order, in which case, section 4 (2) and (3) applies.
- (3) Before making an order under subsection (1), the court must
- (a) consider the best interests of the child, including the matters set out in section 9 (1) (a), (b) and (c),
 - (b) if the child is at least 7 years of age but less than 12, consider the views of the child, and
 - (c) if the child is 12 years of age or older, have the child's written consent to change the child's name.
- (4) If an order is made under subsection (1),
- (a) the chief executive officer must record the child's name on the registration of birth, consistent with the order of the court, and
 - (b) a birth certificate issued after recording the name under paragraph (a) must be issued as if the original registration had contained that name.

[177] There is no dispute that there was an agreement that the mother would name the first child and the father would name the second child. The mother says she breached this agreement because everything changed following the separation. Unfortunately, nothing has changed with respect to the naming of the child; they still have the same father, the same mother, and their son Will still has the name Hokhold. The mother now says that the last name

should be hyphenated, but prior to separation both parties agreed that a hyphenated name would not be appropriate. I agree that a hyphenated name would not be in their best interest.

[178] I am satisfied that the father should have been allowed to name his daughter. He wanted her to be called Clara in honour of his mother. Ella's first name should not be changed because that is what she is used to, but I am satisfied that it is in her best interests to also have the name Clara and I so order that her name will now be Ella Clara Hokhold.

[179] A parenting coordinator has been agreed upon by the parties and that, in my view, is an important first step towards a more cooperative relationship. I will be seized of this claim which I trust will add some stability to this litigation.

[180] Since the father's Guideline income is in excess of \$150,000, counsel should have an opportunity to make submissions on the proper level of child and spousal support, the date of the annual review of child and spousal support, the timing of the annual exchange of income tax returns and financial statements and the matter of costs. The father's submissions are to be filed by September 17, 2012, and the mother's submission and reply by September 24, 2012 with the father's reply to be filed by October 1, 2012.

The Honourable Mr. Justice F.W. Cole

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