
CANADA / JUDGMENT

K.B. v. A.R.

2014 BCSC 1642

COURT

Supreme Court of British Columbia

DECIDED

28 August 2014

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2014 BCSC 1642 K.B. v. A.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.B. v. A.R.,

2014 BCSC 1642

Date: 20140828

Docket: E102208

Registry: Vancouver

Between:

K.B. (aka K. P. R.)

Claimant

And

A.S.R. (A.R.)

Respondent

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

Counsel for Claimant:

M.R. Eeles

Appearing on his own behalf:

A.S.R.

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 24-28, 2014

March 3,4, 2014

March 10-13, 2014

April 22-25, 2014

May 26-28, 2014

July 7-11,2014

Place and Date of Judgment:

Vancouver, B.C.

August 28, 2014

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A. Introduction

- [1] The parties were married in December 2000 and a final separation took place in February 2011. The claimant/mother is the wife of the respondent/father. There are three children, aged 9, 7 and 5 at trial.
- [2] From 2001 to 2009 the parties lived and worked in North Carolina, USA, where they owned a house and where the children were born. The parties were originally from the Vancouver area of British Columbia, they returned in 2009 and they reside there now. The respondent, a chemist, has not worked since 2011. The claimant has been working full-time as an administrative assistant since before the separation.
- [3] There are now issues about the divorce of the parties, division of family property (including real property in North Carolina and investments), guardianship and access to the children, child support, spousal and child support and other matters.
- [4] The current parenting arrangement is a co-parenting one with alternating weeks with each parent. This was the recommendation of a psychologist in October 2011. The same psychologist did a second report in February 2014 and recommended that the claimant have sole guardianship and the respondent have access on alternate weekends. The respondent alleges that the claimant has physically abused the children.
- [5] The claimant has filed a Notice of Family Claim (amended March 2, 2011) and the respondent has filed a counterclaim (amended February 17, 2014).
- [6] The names of the children and their parents have been anonymized for the protection of the privacy of the children.
- [7] In her original notice to civil claim the claimant sought a name change. At trial she withdrew this claim.

B. Background

- [8] The background to this highly contentious and lengthy trial can be summarized as follows:
 - (a) Divorce

- (i) The parties have been living separate and apart since February 2011 and each party seeks a divorce on that basis. However, for reasons related to the disposition of family property in North Carolina and discussed below, the claimant requests that her application for a divorce be adjourned generally.
- (b) Property: family home in North Carolina USA
 - (ii) The division of family property is under the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA").
 - (iii) The parties own property in North Carolina. They agree the property must be sold and there was a consent order from this court in May 2011 that the parties list this property for sale with joint conduct of the sale.
 - (iv) The property has not been sold because the respondent has placed conditions on any sale. The claimant now seeks a contempt order against the respondent and requests the orders below to effect the sale. In the meantime it is being rented to tenants.
 - (v) Each party has obtained an appraisal of the North Carolina property. The claimant's appraisal was \$325,000 and the respondent's appraisal was \$300,000, both in U.S. dollars ("USD"). The respondent now disagrees with the appraisal he obtained. In the past (and after the order to sell the property) he said it is worth substantially less and it will be difficult to sell. There is a mortgage of approximately \$200,000 USD against this property. He now says he will agree to the sale if the claimant will compensate him for his costs and money he would lose from rental income. The value of the property may have increased recently.
 - (vi) The claimant now seeks an in personam order against the respondent that would permit her to carry out the order for sale without the cooperation of the respondent. She has entered expert evidence that explains the system of property law in North Carolina and she seeks a Quit Claim Deed that would be filed in that jurisdiction.
 - (vii) The claimant also seeks an order that she can take all necessary steps to sell the North Carolina property for \$300,000 USD or more and that she have sole conduct of the sale. Further, once the sale is complete, the claimant seeks the proceeds to be held in trust by her counsel and then applied to other financial issues in this litigation, including costs. The respondent opposes the claimant's submission that she be given sole conduct of the sale of the property.
- (c) Family assets: accounts
 - (viii) The parties have investments and pension accounts from their time in North Carolina. These include 401(K) accounts, pension cash balance accounts, Roth IRAs and a 457(B) account. There is expert evidence from the claimant with respect to the division of some of the American accounts.

(ix) At the time of separation the respondent had three Roth IRA accounts and he has disposed of one account since separation. He also disposed of an individual account in the amount of \$135,000 USD by transferring the money to his father. He says this money has now been returned to his account.

(x) The parties also have investments in Canada. The respondent has disposed of his RRSP in the amount of \$43,047 (as of December 31, 2013) and he disposed, for his own use, a RESP investment meant for the children. The respondent explains his use of this money as a "noble cause" to protect the children from the physical and emotional abuse of the claimant.

(xi) The claimant does not seek the division of each individual account. Instead she seeks one transfer from the respondent's 401(K) account to her 401(K) account. She calculates that this would pay her essentially the amount she is owed from all the family accounts, including the money spent by the respondent.

(xii) The claimant seeks the return of gold jewelry given to her by her parents as a marriage gift. The respondent took possession of this jewelry early in the marriage and she has not had access to it for some time. According to the claimant, in brief discussions related to reconciliation the respondent said that he would return the jewelry if they were reconciled. According to the respondent he does not have the jewelry and either the claimant or her mother has it.

(xiii) There are two vehicles from the marriage, estimated to be worth about \$7,000 in total.

(d) Children

(xiv) After separation the three children resided with their mother, the claimant. Since July 2012 there has been a co-parenting arrangement in place, with each party having alternate weeks with the children. There is an issue whether the current joint parenting arrangement has worked in the best interests of the children.

(xv) Each party now seeks sole guardianship of the children and child support from the other. As an alternate position, the respondent seeks maintenance of the status quo; i.e. access for each parent on alternate weeks and joint guardianship.

(xvi) The evidence includes taped telephone calls and other communications between the parties with respect to their conduct with the children. For example, the respondent alleges that the claimant has physically and emotionally abused the children and that she is mentally ill. Below I find these claims are baseless and a psychologist who interviewed the parties and the children reached the same conclusion.

(xvii) For her part, the claimant submits that the respondent was oppressive in his treatment of her during the marriage and he has attempted to do the same after separation.

(xviii) In October 2011 a psychologist prepared a report which suggested the children spend alternate weeks with each parent. This was reflected in an order of this court dated July 4, 2012. A parenting coordinator was also appointed. This is the current arrangement.

(xix) A second report by the same psychologist, dated February 17, 2014, included re-testing of the parents. The tapes and photos taken by the respondent in his bid to prove abuse were before the psychologist. The report described significant deterioration in the parents' ability to co-parent since the first report, particularly the respondent. It expressed concern about changes in a number of areas of his psychological tests. It was noted that he attributed any difficulties with the children to the claimant rather than to his own actions and there is "little support" for this position. Special needs of the children as well as their preferences were also noted and the psychologist criticized the respondent's use of the children in interviews to obtain information against the claimant about potential abuse.

(xx) The psychologist's second report recommended that the claimant have sole guardianship including sole decision-making responsibility over the children. The respondent would have access every other weekend and the role of the parenting coordinator would end.

(xxi) The claimant now seeks an order to reflect the second report by the psychologist. The respondent seeks sole guardianship or, in the alternative, continuation of the current arrangement, as recommended by the first report of the psychologist.

(xxii) There have been unfortunate incidents regarding the claimant's attempts to obtain the children's passports and health information from the respondent. For example, the respondent had possession of these documents before and after separation of the parties but he shredded the American passports of the children. Further, he refused to provide the claimant with the medical Care Cards for the children until ordered to do so by this court.

(xxiii) An interim order for child support was made in May 2011. This was based on the respondent's guideline income of \$67,000 (as of May 2, 2011) and the claimant's guideline income of \$39,000. Child support, retroactive to March 1, 2011, in the amount of \$1,317 per month was set, as well as a retroactive amount for arrears.

(xxiv) When the family returned to British Columbia in 2009 from North Carolina the respondent was employed as a scientist. This was the basis of the guideline income of \$67,000. In October 2011 this employment ended. He has not been employed since then and he testified that he has attempted to obtain work from a number of employers. The claimant says he has not made reasonable attempts to find work.

(xxv) When the respondent left his employment he paid child support at a reduced amount and then stopped paying support entirely. He has made no application to vary the May 2011 order with regards to child support. He testified that he has no income and he has had to use the family assets and rental income from the family property in North Carolina to support himself and pay his legal fees.

(xxvi) The claimant commenced work in January 2011 as an administrative assistant and that work is the basis of her guideline income of \$39,000 in 2011. She has been successful in this work and she continues with it.

(xxvii) The claimant does not seek payment of arrears for child support. She does submit that the respondent has not made reasonable efforts to find employment and a level of guideline income should be imputed to him for the purposes of calculating future child support.

(e) Spousal support

(xxviii) The claimant included a claim for spousal support in her notice of family claim. However, she now seeks to have it adjourned generally.

(xxix) In his amended counterclaim filed February 17, 2014 the respondent seeks spousal support payable to him by the claimant.

(f) Costs

(xxx) The claimant seeks special costs against the respondent based on his conduct during these proceedings. Alternatively, costs at a higher scale than usual are sought. The claimant points to the respondent's refusal to disclose information on family assets and his conduct in refusing to comply with the May 2011 order to sell the family property in North Carolina.

C. Previous orders

[9] The history leading up to trial can be seen, in part, from the following 14 previous Orders of this Court, summarized by me. They reflect the conflicted nature of these proceedings and it is relevant to the issue of costs, discussed below. It also demonstrates the difficulties that the claimant had obtaining disclosure of financial information from the respondent. The dates given are the hearing dates for each application(s).

(a) May 19, 2011 (by consent)

(i) Guideline income for the claimant was set at \$39,000 and for the respondent at \$67,000.

(ii) The order provided for the respondent to have overnight access to the children on an interim basis on alternate weekends.

(iii) The respondent was to pay \$1,317.00 per month for child support and installments to pay retroactive child support back to March 1, 2011.

(iv) The claimant was given primary care of the children and possession of the children's medical Care Cards.

(v) Restrictions were set for traveling with the children outside the Vancouver area.

(vi) The parties were to agree on a psychologist to prepare a report under section 15 of the Family Relations Act. Dr. Posthuma prepared this report and it is dated October 6, 2011.

(vii) The parties were ordered to list their North Carolina property for sale and they were to have joint conduct of the sale. The net proceeds of the sale were to be held by counsel for the respondent pending determination of their division. The property has not yet been listed.

(b) October 11, 2011 (by consent)

(i) The respondent's alternate weekend access to the children was facilitated by providing for the exchange of the children at the Port Moody Ice Rink.

(ii) Provisions were made for the respondent's access to the children on Pro D Days and overnight access on Wednesdays.

(iii) The parties were to keep each other informed regarding all medical appointments for the children.

(c) May 2, 2012 (by consent)

(i) Pursuant to section 67 of the Family Relations Act the parties were restrained and enjoined from collapsing or withdrawing funds from Canadian and American accounts.

(d) July 4, 2012

(i) Following the recommendations of a section 15 report, the parties were to share the care of the children on a seven-day rotation and to have joint guardianship.

(ii) A parenting coordinator was appointed for a three month contract unless the parties agreed to a longer period of time. The parties were to share the cost of the parenting coordinator.

(e) October 29, 2012

(i) The parenting coordinator was to continue and the parties were to sign a contract extending her time.

(ii) A schedule for access to the children at Christmas was set out.

(iii) Dates were set for disclosure of documents.

(iv) Each party was to bear their own costs.

(f) January 28, 2013

(i) By consent, the respondent's bank was ordered to produce to counsel for the claimant various financial documents.

(ii) The claimant's application that another person be appointed to complete a further custody/access report was dismissed with the costs of that application to the respondent in the cause.

(iii) The parties other applications were adjourned generally.

(g) February 14, 2013

(i) The respondent was ordered to produce to counsel for the claimant un-redacted statements of a number of financial accounts. A follow-up hearing to check the status of this disclosure was set.

(ii) The parties were also ordered to agree on a realtor and a list price for the North Carolina property

(iii) The other applications of the parties were adjourned.

(h) June 6, 2013

(i) The respondent's application to move the trial in this action to New Westminster was dismissed.

(ii) The respondent was ordered to pay the claimant's costs of the application in any event of the cause.

(iii) Approval of this order by the respondent was dispensed with. A draft order was prepared by the Master.

(i) July 29, 2013 (Judicial Case Conference)

(i) Orders were made with respect to the attendance of the parties for discovery.

(ii) Former counsel for the respondent was to deliver to the respondent his complete file.

(iii) The respondent was given 96 hours to review the terms of the order.

(iv) The judicial case conference was complete.

(j) August 13, 2013

(i) The respondent was to file and deliver to the claimant all of his materials in response to an application by the claimant.

(ii) The order of May 2, 2012 was varied to restrain and enjoin the respondent further from transferring etc. all of the respondent's assets.

(iii) The respondent was ordered to pay the claimant's costs in any event of the cause.

(iv) Approval of the form of the order by the respondent was dispensed with.

(k) August 29, 2013

(i) The order of August 13, 2012 was varied to restrain and enjoin the parties from disposing their assets.

(ii) Other applications by the parties were adjourned generally.

(iii) Approval of the form of the order by the respondent was dispensed with.

(l) October 11, 2013 (by consent)

The respondent's financial institutions were directed to produce to him statements of all transactions within all accounts for the period December 27, 1999 to October 1, 2013.

(m) December 18, 2013

- (i) By consent, each party was at liberty to deliver to the other an appraisal of the property in North Carolina. This was to be as soon as possible and in any event no later than January 30, 2014.
- (ii) Dr. Allan Posthuma, who prepared a previous report in October 2011, was appointed to do an assessment of the needs of each of the children, their views in relation to the family law dispute and the ability and willingness of each of the parents to satisfy the needs of the children. The cost of this assessment was to be shared equally between the parties. His subsequent report is dated February 17, 2014.
- (iii) Dr. Posthuma was to be provided a letter from counsel for the claimant and a letter from the respondent outlining the concerns of each.
- (iv) The respondent was to pay the claimant's costs of the application in the cause.
- (v) The signature of their respondent approving the form of the Order was dispensed with.
- (n) January 31, 2014
- (i) The respondent was to provide to the claimant copies of all audio and video recordings and photos respecting alleged abuse of the children.
- (ii) The respondent was to provide to the claimant other documents including statements from the claimant's bank account, statements of the respondents credit cards, correspondence between the respondent and a former landlord, all emails between the respondent and the parenting coordinator, the December 31, 2013 statement of an American account of the respondent and a document of the respondents relating to the value of the American account prior to the marriage in November 2000.
- (iii) The respondent was to request copies of statements in American accounts by February 3, 2014.
- (iv) By February 7, 2014 the respondent was to provide the claimant a sworn Form 8 with all required attachments.
- (v) The respondent was ordered to pay the claimant's costs of the application in any event of the cause.
- (vi) Approval of the form of the Order by the respondent was dispensed with.

D. Analysis

[10] As above, the issues in this case include guardianship, access, family property, child and spousal support and divorce.

- (a) Guardianship

- [11] As above, the parties first separated in June 2010. There was a brief and unsuccessful attempt at reconciliation and then a final separation in February 2011. There are three children of the marriage: K.R., currently nine years old; T.R., currently seven years old; and S.R. who was five years old in May 2014. K.R. and T.R. are in school. S.R. is to start kindergarten in September 2014.
- [12] The claimant and the children live with the claimant's mother, who looks after the children while the claimant goes to work. Among other things the grandmother takes K.R. and T.R. to school, picks them up, looks after them after school and she looks after S.R. during the day.
- [13] At the time of trial, the claimant and respondent shared joint guardianship of the three children. This is set out in the Order dated July 4, 2012 and it followed the recommendations of Dr. Posthuma in his report of October 6, 2011. He interviewed the children and the parties and conducted a number of psychological tests.
- [14] I set out the conclusions and recommendations of Dr. Posthuma's report of October 6, 2011 as follows:

CONCLUSION AND RECOMMENDATIONS

The parents of these three children are in somewhat of a unique situation in that their children are relatively young, they have recently separated, and have not had extensive pleadings or other altercations that have resulted in entrenched views on parenting arrangements for the children in the future. They do, however, have a variety of misgivings and quite different proposals for future parenting arrangements. While both claim that their extended families have not had a history of cooperation and good will, the fact of the matter is that these children presumably grew up with the extended families and, therefore, see them as part of their lives. Both parents propose to have their mothers involved in providing care for the children in their absence from home while at work or in any other activities. While the observation periods were limited and certainly did not reveal any indications of the concerns that both parents raised about the other's mother, it would appear that both grandmothers are effective in meeting the needs of their grandchildren and the children relate to both in a similar manner, as they do to their parents. Fortunately, both households are relatively close together, providing ease of movement between them and the school.

In addition to these pragmatic concerns, the psychological testing would indicate that both parents have above average potential in dealing with the emotional and psychological challenges of co-parenting. Unless there are some compelling reasons to have other arrangements, the psychological research and the examiner's understanding of legal criteria indicates that the children benefit, in the event of divorce, from co-parenting arrangements where both parents are equally involved with the care of their children. It is recommended that both parents consider this option. The children spent the last two months of the summer in alternate 10 to 12 day residency with both parents. It would appear that a residency exchange on alternate weeks between the parents would be the most reasonable arrangement for these children in the future.

There would need, however, to be some mechanism for these parents to agree on arrangements for medical, dental, educational, and extracurricular arrangements. It is recommended that they work with a parenting coordinator to develop a plan that is mutually satisfactory and effective in dealing with the children's needs. Given the potential these parents show in the psychological testing of emotional intelligence, they should be quite capable of quickly overcoming their past difficulties.

If these parents are unable to come to an agreement on a joint custody co-residency arrangement, the issues that both parents raised about the other will need to be examined by other evidence before the Court. That is, the psychological testing of both parents' emotional adjustment is not of assistance in addressing these parents' allegations of the other. The parents' responses to the various parenting questionnaires with regards to the children do not indicate any major differences or concerns. While both parents allege various events in the past that indicate shortcomings or concerns with regards to the other parent's abilities and the safety of the children, this was not able to be addressed in the current assessment.

[15] Following an application by the claimant, an Order dated December 18, 2013 appointed Dr. Posthuma to do a second assessment of the needs of the children, their views as well as the ability and willingness of each of the parents to satisfy the needs of the children.

[16] Dr. Posthuma's second report is dated February 17, 2014 and he conducted a number of the same tests as in October 2011. The second report recommends that the claimant have primary guardianship of the children. I reproduce his conclusions and recommendations as follows:

CONCLUSION AND RECOMMENDATIONS

This assessment would indicate that the relationship between the parents and their ability to co-parent constructively their children has significantly deteriorated since the earlier assessment by the examiner dated October 6, 2011. [S.R.] at this point presents with special needs, primarily in language development, but also in his lack of social skills with peers and his inability to function in the normal range of other children his age in preschool. Unless these parents are able to work together in a cooperative and effective manner for their son's best interest, the current co-parenting plan of equal residency on alternate weeks is not in [S.R.]'s best interest.

This development is very unfortunate given that the earlier assessment indicated that both parents have the potential to work together with the demands of a co-parenting arrangement in an effective manner. While this examiner will comment on some of the factors that may be contributing to the conflict between the parents, he would recommend that the Court hear the evidence from the parenting coordinator and the parents on why they have not been able to resolve their difficulties effectively. At the present time, it is clear that the parents have minimal and ineffective communication and that they are asking the parenting coordinator to address relatively minor issues that should be well within their capabilities to resolve without this assistance. Each parent blames the other for the breakdown. This is probably best summarized

by the letters of concern [references omitted] the examiner is including with this report and by the examiner's review of the decisions made by the parenting coordinator.

From the standpoint of issues that are more readily addressed by the examiner than the Court, this assessment would indicate that these children are more emotionally attached or bonded with their mother than their father. They behave with their mother and paternal [sic?] grandmother that are inconsistent with the father's allegations of adverse discipline and parenting practices in the maternal household. The children are more relaxed, spontaneous, and flexible in their interactions with each other and in the maternal home than they are in the paternal home. This is very unfortunate given that when the family was assessed in 2011 the father showed much more flexibility, imagination and ability to interact with his children in a way that was consistent with the maternal household at that time than he does at the present time. While the father has lost his job and has been unemployed in the interim, he does not attribute his job loss to any difficulties in his parenting. He sees himself as the superior parent to the mother, minimizes any disadvantage from unemployment, aside from his lack of money for the children. In fact, he sees his unemployment as an opportunity to provide better quality of care for his children. This is highly unlikely, given what has transpired with his interaction with the children.

The Court is probably in a better position to examine the salience of the parents' concerns and other pleadings, including their involvement with the parenting coordinator. The examiner would suggest that one probable source of difficulty is the father's attribution of any difficulties with the children lies with the mother rather than his own actions. There is little support for his opinion. His focus is on the mother's failings and not how they can both provide for the children.

While in the initial assessment both parents' statistical validity measures in psychological testing were problematic in many of the tests. On this occasion, they remain problematic with the father. The father presents an unrealistic portrayal of his emotional adjustment given a prolonged period of unemployment from his profession and from a prolonged acrimonious matrimonial dispute.

Unfortunately, the concern for the children is not so much based on the parenting potential or the strengths and weaknesses of the parents, but the intractability of these parents to work out their differences over time and/or with the assistance of an experienced and well-qualified parenting coordinator. While the oldest daughter, [K.R.], is faring relatively well, it is her that is most clear on her desire to live primarily with the mother in a parenting plan that provides every second weekend residency with her father. While [T.R.] is somewhat more ambivalent because of her age, she also is quite clear that she would only wish to visit her father when she was in the company of her older sister, [K.R.]. [S.R.] is a special needs child whose problems cannot be correctly or accurately identified at the present time because of his age and the matrimonial dispute. These parents have clearly demonstrated their inability to work together towards their children's best interests. This is untenable for a child with special needs such as [S.R.], as it requires carefully working together in a consistent manner with caregivers and other specialists to ensure [S.R.] is able to maximize his cognitive and emotional development. This assessment would indicate that the mother is in a better position to accomplish this task than the father.

In the 2011 assessment, the examiner noted that while the father wanted a joint custody and equal residency arrangement at that time, the mother had reservations, believing the children would be better served in a sole custody and primary residency arrangement. While this appears to reinforce the father's belief that the difficulties between them are the mother's fault, the examiner carefully reviewed the material available to him in order to determine the validity of this explanation. The examiner believes it is unlikely, given the fact that the children behaved so differently in the maternal home than the paternal home, and that what occurs in the maternal home is more typical of a well-functioning family than what exists in the paternal home. Further, although [K.R.] is only eight years of age, she is mature and provides a preference for a parenting plan primarily with her mother. It is the examiner's belief that the mother is in a better position to support and address the needs of all three children and foster their emotional and cognitive development than is the father. It is recommended that the children be in the primary guardianship of their mother and that she have sole decision making on medical, educational, and recreational activities of the children. A parenting plan that provides every second weekend from after school on Friday to Sunday 5:00 p.m. be implemented with arrangements to be agreed upon between the parents for school holidays and special occasions. The parenting coordinator would not need to be involved if this plan is accepted by the Court.

Hopefully, the resolution of this matter by the Court might enable the father to be more accepting of the mother's parenting and direction with regards to the children. If this does occur, then the father's involvement with the children's extracurricular activities, including transportation, could increase, as this is an obvious source of support he could provide for these children. This would provide, over the years, his opportunity to develop meaningful and supportive relationships with the children.

- [17] I am to decide what changes, if any, will result from this second report when it is considered with the evidence and submissions I have heard.
- [18] The respondent urges me, first of all, to give him sole guardianship of the children with the claimant having weekend access. He says that the claimant has physically and emotionally abused the children. In the alternative, he urges me to disregard the second report, adopt the first report and confirm the current joint parenting arrangement. For her part, the claimant submits that I should make an order that reflects Dr. Posthuma's second report; i.e. that she be given sole guardianship and that the respondent's access be limited to alternate weekends.
- [19] In short, the respondent says the status quo should continue and the claimant says that the situation should return to what it was from May 2011 to July 2011.
- [20] I will review the different sub-issues in turn: allegation of abuse, current access situation and, finally, how the parties have managed the needs of the children including doctors and extracurricular activities.

(i) Allegation of abuse

- [21] The respondent alleges that the claimant and her mother have physically and emotionally abused the three children. He has produced photographs he has taken of the children which show marks on their faces and limbs, he has an audio tape of an interview he did with the children and he has a video recording of an interview he did of the youngest child, S.R. He says all of these support his allegation of physical abuse.
- [22] It goes without saying that it is of the utmost importance that the Court examine carefully any allegations of abuse of children. Accordingly, I have set out each and every piece of evidence the respondent relies upon to support his allegations and given my findings on each. However, the result of my analysis of this evidence (and the conclusion of a psychologist who reviewed it) is that the respondent's abuse allegations are baseless and, indeed, reveal more about his own parenting abilities than that of the claimant.
- [23] Turning to the evidence, over the objection of the claimant, I allowed the respondent to testify about what he says the children told him about these marks. Rather than have very young children testify I concluded that necessity required the admission of evidence that was otherwise hearsay. With respect to reliability I directed that the evidence should be heard and I would decide reliability as part of my final determination after hearing final argument (*J.P. v. B.G.*, 2012 BCSC 938 at paras. 102-120). There was no direct evidence under oath from the children.
- [24] The respondent testified that he believes what the children told him (and discussed below) and he believes the children fear their mother and grandmother. Further, according to the respondent, the children are in physical and emotional danger and that is why he should have sole guardianship.
- [25] There are 26 photographs. Twenty-four photographs were dated by the camera used to take them and two are not dated. A description of the 24 dated photos is as follows (the two undated photos are discussed separately below):
- (a) Three photographs dated February 17, 2011. These are of T.R. and they show a slight mark on her chin. The respondent says he was told by T.R. this was from a slap by the claimant. Other than a general reference to the marks that active, young children get from time to time, the claimant and the grandmother could not identify these marks or their cause.
 - (b) Two photographs dated February 17, 2011. These are of K.R. A slight reddish mark is on her left cheek. The respondent says K.R. told him this was from a slap by the claimant on February 17, 2011. The claimant says that this is eczema. There was an exchange later that year, in December 2011, when the respondent accused the claimant of causing a rash on K.R. by the use of something corrosive to burn the skin, perhaps cleaning materials that had not been properly cleaned up. The claimant then said that the problem was eczema and not anything like the respondent alleged.

- (c) Three photographs dated September 25, 28, 2011. These show a small round red mark on her left cheek of T.R. The respondent says this was from a burn by the grandmother. The grandmother testified that it was a mosquito bite that T.R. scratched to the point of some bleeding.
 - (d) Two photographs dated February 29, 2012. There is a barely noticeable red mark under the right eye of S.R. A third photograph dated September 28, 2011 shows a very small red mark under what the respondent says is S.R.'s nose. The respondent says the children told him that these were from slaps by the claimant or the grandmother. The latter could not recall the marks but denied any slapping.
 - (e) Three photographs dated April 9, 2012. They show a thigh and diaper of a very young child. The respondent says this is S.R. and the photos show a mark from another slap. There is a slight reddening of the skin near the diaper. The grandmother testified this was a diaper rash.
 - (f) Three photographs dated April 9, 2012 and one photograph dated May 11, 2012. These show what appear to be the lower limbs of a child. At one point the respondent was not sure who the photographs referred to but he later said they were of K.R. They show very slight bruising in one photo, possibly another bruise in a second photo and nothing remarkable in the other two photos. The respondent says they show more bruising from slaps. The claimant and the grandmother could not recall the marks but denied any slapping.
 - (g) Four photographs dated May 11, 2012. The respondent says these show marks on K.R.'s foot and ankle and the children told him that the marks were caused by the whipping of a wet towel. A close look at the photos suggests that two of them may be an arm and another may be an ankle. The respondent was not sure whether there was a photo of a knee. Neither the claimant nor grandmother could recall these injuries but the grandmother believed they were from eczema. The respondent suggested that it was only K.R. that had eczema but the grandmother said that all the children had it.
- [26] There are some problems accepting these photographs as proof of abuse.
- [27] First of all, the respondent's descriptions of some photos are vague including, for example, not being clear whether a photo is of a leg or an arm. As well, in two photos he had problems recalling which child was in the photos. And, while one should be very vigilant with suggestions of abuse, it has to be said that there are questions as to whether some of the photos show anything.
- [28] There is also some reason to question whether the respondent is well informed about the health of his children. When he was cross-examining the grandmother she described more than one set of photos as being eczema. The respondent said only one of the children had eczema and he was told by the grandmother in her evidence that they all have this condition. His attempt to get the grandmother to change her evidence was met with her indignant statement that "eczema is eczema." I find the grandmother's explanation more

credible than the respondent's allegations. Finally, it has to be said that, as the claimant testified, three young and active children get scratches and bruises as part of their everyday activities.

- [29] There is also an issue about how seriously the respondent himself took the information recorded in the photographs. As above, they are dated in February, April, September 2011 and February, April and May 2012.
- [30] The evidence is that the respondent did nothing with these photographs at the time they were taken. He did not confront the claimant, contact any social service agency or contact the police. The respondent now says he thinks the children are in physical danger living with their mother half the time. However, he clearly did not think so at the time the photographs were taken or, in the case of some photographs, for a period of three years.
- [31] Nor did the respondent provide Dr. Posthuma with the photographs from February, April and September 2011 when Dr. Posthuma interviewed the respondent for his October 2011 report. Dr. Posthuma concluded a co-parenting arrangement was appropriate at that time and information about abuse would have been very relevant to that conclusion. It was not until February 2014 that the respondent disclosed to the claimant that this information existed at all despite the clear language on the required form for listing of documents to disclose them. As will be seen, Dr. Posthuma had the photographs and other information related to the respondent's allegations of abuse for his 2014 report and he recommended that the claimant have primary guardianship and custody.
- [32] The respondent explains the delay in disclosing the photographs by saying they were in a box at his parents' house in Victoria, perhaps under a bed, perhaps in the garage. This explanation also contradicts the respondent's allegation that the children were and are in danger. The obvious question is: why was he so casual about storing the information and, more significantly, why did he not do something to protect his children at the time? As it happens, his disclosure of the photographs to the claimant took place just before trial and after discovery. This delay and lack of action on the part of the respondent weakens his position that the children were in danger then and are still in danger when they are with the claimant.
- [33] I turn next to the two undated photographs. These are of S.R. and they show he has a small mark under his left eye. The respondent says this was caused by an assault by the claimant, or possibly the grandmother. He also has a video of an interview he did with S.R. The video is short in time with very close pictures of S.R. and the respondent asking him questions as well as asking him to move his head in different directions. S.R. is struggling to follow his father's directions for the positioning of his head and the video also reflects his speech difficulties (see below) as he struggles to answer his father's questions. Despite his genuine efforts, some of his answers are not understandable.

- [34] With regards to the specific injury to S.R. there is no dispute he had an injury near his eye as demonstrated by the photograph and video
- [35] The claimant took S.R. to the doctor the next day to look at the injury and nothing untoward arose from that visit. Of more significance, the respondent took S.R. to his own, different doctor just after making the recording set out above. However, he did not show the doctor his recording or ask the doctor about whether the injury could have been caused by abuse. It is surprising that a father who suspected his child was being abused, and who believed he had proof of that abuse, would not raise the issue during a medical appointment to treat the alleged abuse. The result is that there is no medical evidence that there was an injury as a result of an assault. Indeed, there is no medical evidence at all except that S.R. was treated by two physicians without any difficulty or suggestion of abuse. In his evidence the respondent could only confirm all of this.
- [36] As another basis for his allegations of abuse, the respondent relies on an interview with the children K.R. and T.R. that he taped. S.R. may have been there but he does not say anything. The respondent is unclear when the interview was done. He can only say that it was after October 2011 because Dr. Posthuma's first report was October 11, 2011 and the interview was not included in that report. He says he would have given Dr. Posthuma the tape but I note that he did not disclose to Dr. Posthuma the photographs he had at the time Dr. Posthuma was doing his first report. The second report from Dr. Posthuma was in February 2014 and, as will be seen, he had this interview to consider. So the interview may have taken place between October 2011 and February 2014.
- [37] There is a transcript prepared by the claimant from the tape disclosed by the respondent of this interview. The respondent is suspicious of the transcript because it was prepared by the claimant. He is unable to point to any specific examples of where there are differences between the tape and the transcript but he nonetheless maintains the transcript is not accurate. The respondent goes further and alleges collusion by the claimant and her counsel to make changes or deleting material. He has no evidence to support that assertion. There is none and I reject it.
- [38] The tape was played in court and I have listened to the tape while reading the transcript. The only things not on the transcript are sounds that legitimately could not be transcribed. I find the transcript is an accurate transcription of the tape.
- [39] I have included a complete copy of the transcript as Appendix 1. I consider the following parts to be of significance, taken in the order they appear in the transcript.
- [40] At the beginning, there is the following exchange between the respondent and T.R. ("Nani" is the grandmother) reproduced from the transcript:

A [A.R., the respondent] - Listen guys I want to ask you like you said hey T.R. what are those marks on your legs

T [T.R.] - Okay Nani

A - How did you get those

T - I do not know

A - okay What's that red mark on your leg? T.R.

T - okay that red mark on my face that scratch my nose

A - No no I am asking about your legs

T - No I will tell you how I got hurt on my nose Nani put some fire on it

A - On your nose what do you mean fire

T- Fire from stove

A - How did she put it on your nose?

T - She got a chopstick

A - She put a chopstick on the stove and got a fire and put in on your nose

T- Yep

A - Why

T - I do not know

A - What about your leg is that a burn mark what that from?

T - Burn mark from Nani

[41] The respondent relies on this exchange as essentially making his case for abuse. However, after this exchange, K.R. interjects and, apparently addressing T.R., says, "Okay I am telling Nani you are lying T.R." The respondent ignores this and asks T.R., "How did you get that burn mark on your leg?" Before T.R. answers, K.R. says "That's not a burn mark what that you [the respondent] have in your hand?" There is then a discussion between the respondent and K.R., which continues throughout the interview, in which he tries to, first of all, avoid disclosing he is recording the discussion. He says it is "just a little toy." K.R. is not so easily distracted and she says, "Okay I know what that is daddy" and she later questions whether it is a toy. The respondent also tries to get K.R. to say that she had been warned about recorders by Nani. K.R. denies this. She correctly identifies the device in the respondent's hand as a recorder and at a later part all the children are laughing at the respondent for recording them.

[42] The respondent then asks K.R. why she said she did not want to say anything and K.R. answers, "Because Nani will get me in trouble [b]ecause I am the oldest." Then this exchange:

A - So they [claimant and grandmother] told you if T.R. says anything right - if there is anything from what T.R. say you'll get in trouble right because you are the oldest right?

K - Yes

A - Why would you get in trouble?

K - I do not know

T - Because it's a lie

A - So what do they want you to do K.R.? They want you to get T.R. to say nothing?

K - I do not know

A - okay how does you getting in trouble stop T.R. from saying anything?

K - I do not know

A - Did they really tell you if there is any trouble you will get in trouble because you are the oldest you just told me that they did say that

K laughs

A - K.R. did they say that?

K - No

A - You just said before that you did not want T.R. to say anything you said she is lying and I said why are you saying she is lying and you started crying that they said if there is any trouble you are going to get in trouble because you are the oldest

K - T.R. is lying

A - Really

T - No

A - Then you must be lying too because you are telling me 2 different things one time you told me that they told you if there is any trouble you are going to get in trouble because you are the oldest so make sure there is no trouble and now you are saying that is not true T.R. is lying so which one is the truth K.R.?

K - T.R. is lying

[43] When asked if Nani hits her T.R. says, "yes on the back." But when the respondent asks where, K.R. says, "No Nani does not", then T.R. says "yes she does." Later K.R. says that Nani never hit her but she put her "in the bedroom for no reason." She also denied that Nani hit S.R. but said she puts him in the bedroom. About half way through the interview the respondent asks K.R. to be quiet and he asks T.R. what was used to burn her on the leg. T.R.

answers, "this is not from Nani it's from somebody in my class." A short time later K.R. says "Nani does not burn me."

- [44] The respondent threatens to tell Nani that the children are lying and they will get in trouble. Some way into the interview the respondent feigns impatience, or actually does lose patience, and says he needs a "straight answer" from T.R. or "I am going to Nani and I will tell what you told me." K.R. says "No" and then the respondent says, "I request that you tell me the truth before I call her. Tell me the truth about what is going on with her burning you guys." K.R. answers, "She does not burn us I know where T.R. got the bruise from and I think I know why T.R. probably hurt herself." The respondent responds to this by questioning how K.R. could know when she is at school all day and K.R. says, "hey T.R. daddy is telling a lie."
- [45] From the very first line (" I want to ask you like you said ") it is clear that the respondent had a conversation with the children before the interview started. He refers to that conversation later in the interview when he is not getting the information he is seeking. Taking one sentence from this interview there is an indication from T.R. that she was burned. For the respondent that is sufficient to prove his suspicion that there is abuse and he ignores the rest of the interview. However, as can be seen, there is much more to the interview and when in it is considered in its entirety there are strong reasons to question that interpretation. For example, K.R. directly challenges T.R.'s account of what happened by saying she is lying. Even T.R. later says the injury is not from the grandmother but from someone at school.
- [46] The grandmother testified and she denied any burning of the children. She could not explain what the children said in this interview except that when she meditates she brushes incense smoke across her face. The children are curious about what she is doing and she sometimes brushes incense over their face. Also, it appears to be the case that the children are put in their room by themselves from time to time. I find that this is accurate and properly explained by the evidence of the claimant and the grandmother that sometimes they use "time-outs" in the children's rooms as a means of control.
- [47] More generally, listening to the interview one is struck by the fact that these are very young children. They are naturally energetic, noisy and inquisitive, talking over each other as well as over the respondent. They are interested in having some fun, often trying to make light of the situation, even trying to find some humour. However, the respondent brings them back to questions he repeats. The children are also trying to provide the answers expected of them but they are not sure what those answers are. There is crying at least on one occasion but there is another occasion when the children are mocking their father.

- [48] I conclude that the tape of the interview of the children was conducted in an unfair and result-oriented way and it should be given very little weight. I do not accept that it proves the respondent's allegations of abuse. And, as above, the respondent has not explained in any convincing way why he did nothing with an interview which, according to him, proves serious physical abuse until he disclosed it until just before trial (even though, again, he was previously required to do so in clear language in the form for listing documents).
- [49] Dr. Posthuma had the benefit of this tape (as well as the video and photographs and he did home visits with both the claimant and the respondent) prior to preparing his second report of February 17, 2014. His conclusions about these materials accord with my own (page 9):

It is likely, given these children's reaction to their father during the home visit and the various concerns raised by the father in his interview with the examiner and his letter of concerns, that his questioning of the children is a prominent feature of his normal interaction with them. That is, it is atypical of parents to assume that questioning the children would be seen as an effective parenting strategy. His behaviour is also more consistent with gathering information displayed in the audio and video recordings that support his view of the mother's shortcomings as a parent. The tapes demonstrate very poor interviewing skills with leading questions and a lack of sensitivity to the children's answers and feelings. At one point, he persists on a threat to take them home to their mother to get proof of their honesty. He clearly leads the children into "dishonesty" by his poor questioning. He was oblivious to their discomfort with this threat of taking them to their mother's to "prove" a point that he erroneously generated.

The examiner reviewed the audio and videotapes of [the respondent's] questioning of [S.R.] and his daughters, [K.R.] and [T.R.]. It is surprising the father sees these tapes as evidence that will lead the court to give him full guardianship of the children, excluding the mother. If anything these recordings indicate the father has lost his perspective of appropriate parenting actions and has become consumed with maligning his ex-wife.

- [50] There are two final matters relied on by the respondent to support his allegations of physical abuse of the children by the claimant.
- [51] One arose in the evidence of the respondent's sister. She testified that she observed an incident when her family was visiting her parent's home in Victoria. She was not clear about the date except to say it may have been December 2010. The claimant and the respondent were also there with their three children. One evening the claimant was feeding T.R. in the kitchen and having some difficulties getting T.R. to eat. The claimant abruptly took T.R. and put her outside, on the other side of a glass door. T.R. was upset, crying and asking to be let back in but the claimant refused for a period of time. The sister testified she believed this was abuse by the claimant of T.R. In her evidence the claimant denies this incident took place at all.

There are some problems with the sister's evidence. She denied that the respondent had a drinking problem but she also agreed that he did not tell her that the claimant believed he drank too much and he agreed to stop drinking. During cross-examination by claimant's counsel, the

respondent's sister was asked if she believed it was unsafe to leave children in a hospital for fear they might be abducted. She quickly answered "absolutely not." The next question to the sister was whether she knew that the respondent believed his children were at risk of abduction in the hospital. She paused and then answered that it would depend on the circumstances and said she would like to be there. I add that in his evidence the respondent maintained that there was a serious risk of abduction of children while they are in the hospital.

- [52] The respondent's sister did not know why the respondent would have shredded one of the children's valid US passports. Nor had the respondent told his sister that he had moved \$135,000 from the United States to their father's account after he separated from the respondent.
- [53] Overall, I find the respondent's sister fashioned her evidence in ways to put the respondent in the best possible light and the partisan nature of her evidence makes it unreliable. Alternatively, the respondent has not disclosed a full or accurate description of his relationship with the claimant and the children. There may have been a relatively benign incident in Victoria that the sister has embellished or, as the claimant says, no incident at all. I find it is unlikely that there was an incident as described by the respondent's sister in her evidence.
- [54] The final information relied on by the respondent for his allegation of abuse of the children relates to when the family were tenants in two separate basement suites. In both cases there were complaints from the landlords (who lived upstairs) of children crying and the smell of burning food. The respondent is convinced that these complaints were the result of the claimant's abuse of the children. He denies any responsibility for the situations even when the evidence is that the crying occurred at times when he was at home and not at work. In any event, the claimant called one landlord as a witness and he testified that there was crying as might be expected with young children and no more. The evidence of the other landlord was also not helpful to the respondent.
- [55] I conclude that there is no reliable evidence that the claimant or the grandmother abused the children. Further, these are very serious but unfounded allegations and they support Dr. Posthuma's conclusion that the respondent has lost his perspective as a parent and he has become consumed with maligning the claimant with false and hurtful accusations.

(ii) The exchange of the children

- [56] The children currently spend alternate weeks with each parent. They are picked up by and dropped off by the respondent at the home of the claimant. As above, the claimant and the three children live with the claimant's mother in a house in Port Moody. There have been difficulties with the exchange of the children between the parties, which I will describe.
- [57] Sometime in 2013 the security alarm in the grandmother's house was set off more than once and the police attended. There was concern that there were bears in the neighborhood that were setting off the alarm and there were some broken fences. The grandmother testified

that she was alone in the house a good deal and so she had surveillance cameras installed for her protection. In cross-examination by the respondent she denied that the cameras were installed because he inquired about the smell of marihuana around the outside of the house (see below). She testified that she "put no blame" on the respondent for the installation of the cameras and the problems were that the alarms were going off, probably from bears. She did testify that she observed the respondent acting strangely by walking around her house and garage and looking in windows.

- [58] The claimant and the grandmother testified that, after the installation of the cameras on the grandmother's house, the respondent arrived to pick up the children wearing a baseball hat and sunglasses. He also carried an open umbrella in what they described as an attempt to hide his identity. He wore the sunglasses and used the umbrella regardless of the weather. As well, he set up a camera in his vehicle and aimed it at the front door of the house to record his picking up the children. The respondent would come to the front door, pick up the children and then take them to his car and then dismantle the camera. The claimant testified that she told the parenting coordinator, who then told the respondent to stop. The grandmother testified that the last time the respondent wore sunglasses and a hat was a few weeks before the commencement of this trial.
- [59] In his evidence the respondent said that he wore sunglasses only when it was sunny and used an umbrella only when it was raining. However, he agrees that his first response to the cameras being installed at the home of the claimant was to set up a camera when he arrived to record the exchange of the children. His explanation is that "they started it", meaning the claimant and the grandmother started watching him with the cameras they installed. I find the accounts of the claimant and the grandmother's account of these incidents to be accurate.
- [60] A related matter is that the claimant and the grandmother testified about another series of incidents when the children were picked up by the respondent. The children left the house and went to the respondent's car with him. They would then remove their jackets or the respondent would remove them. K.R. was then sent back to the house to return the jackets, then return to the respondent's car and they would drive away. The claimant described K.R. as being upset and in tears some times when she did this.
- [61] In his evidence, the respondent does not deny that these incidents took place. He explains them by saying that he cannot help it if the children do not want to wear the clothes their mother gives them and they want to take the clothes back. I find the respondent's explanation quite implausible and I accept the claimant's description of what happened.
- [62] Turning to another incident, according to the respondent he attended at the grandmother's house on one occasion and he smelled marihuana outside the house. The claimant and the grandmother say that the respondent told them that the claimant's brother was there at the time and the respondent complained that the brother was a bad influence on the children. In his evidence, the respondent explains this by saying he did not accuse the claimant of

using marihuana. Further, he says he did not say the brother was using marihuana, he only suggested it was suspicious that there was a smell of marihuana at the same time the brother was there. I find that the respondent did tell the claimant that he was concerned that that the brother was using marihuana around the children.

- [63] The claimant's brother testified and he denied the use of marihuana generally and on the occasion referred to by the respondent the brother testified that he was in another location. He has been employed in a very responsible position for a number of years and been successful in that employment. He explained that his wife was at the grandmother's house driving his car. His wife also testified and corroborated this account.
- [64] There is no evidence other than the respondent's fear and speculation about marihuana being used around the home where the claimant and her children live with the children's grandmother. I find there was no incident at the grandmother's house involving marihuana and the claimant's brother.
- [65] Taking these incidents together, it is difficult to explain the removal of the children's jackets as a privacy issue. The obvious explanation is that it was a crude attempt by the respondent to persuade the children that things provided by the mother were unworthy. This was taken to the point of embarrassing and upsetting K.R.
- [66] I also conclude that the respondent has an exaggerated notion of his personal privacy that is exhibited by what can only be described as bizarre behaviour. This led him to record the exchanges of the children and to wear sunglasses, a baseball hat and use an umbrella as expressions of his extreme privacy concerns. They also represent an overt challenge to the reasonable security concerns of the grandmother and the claimant, a challenge on full display to the children. According to the claimant these activities stopped with the intervention of the parenting coordinator. However, the respondent demonstrated in his evidence that he is still uncomfortable with the security cameras at the claimant's home and he still perceives them solely intended to violate his privacy.

(iii) Medical needs of the children and their sports activities

- [67] As above the current parenting arrangement is a co-parenting one, following on the October 2011 report of Dr. Posthuma and an Order of this Court dated July 23, 2012. The evidence includes a very large number of incidents about the co-parenting experiences between the parties. I will consider a few of these in detail and then summarize others.

a. Medical/dental care

- [68] On November 18, 2011 the claimant advised the respondent in an email that K.R. fell and scraped her nose and upper lip during a school outing. The email also said, "[s]he is fine just a scrape on her nose and upper lip."

[69] The respondent replied about an hour later saying he had "already received a similar message from you this morning." He appreciated being informed but "[y]ou usually do not inform me of such things and thus I considered it to be serious."

[70] The next day the claimant advised the respondent by email that K.R. had been coughing and reporting that she had a sore throat. The claimant took her to the doctor to make sure she did not have strep throat. Further:

[h]er throat was fine seeing she was congested the Dr. ordered a chest ex-ray to rule out pneumonia got that done and the Dr. read the results in his office and said the lungs are fine but suspects she is fighting a virus and recommended tylenol and liquids."

[Reproduced as written]

[71] The respondent replied in an email dated November 19, 2011:

Thanks for informing me of [K.R.]'s health concern. The strep test takes days to get the result back so we do not know if it is strep. I'm concerned why the family doctor you have is quick to ask for a chest x-ray. Recall that [S.R.] at age 2 was also recommend and you agreed to have a chest x-ray to rule out pneumonia.

Perhaps you should seek a different family practice that uses a more logical approach to prognosis instead of subjecting young children to harmful radiation unnecessarily. I've never heard of children under 10 getting chest x-rays except in cases of COPD and difficulty breathing.

Please understand that different practices handle prognosis and follow differently and the current practice may not be best for young children. Can we look at a pediatric practice and paid the extra out of pocket?

[Reproduced as written]

[72] The claimant replied on November 21, 2011 that she was comfortable with the doctors who were treating the children and pediatricians required a referral from a family physician.

[73] The respondent replied the same day as follows:

Then in the future. When you take any of the children to wilson practice inform me of the outcome of the appointment before you take any next steps, especially if something out of the ordinary is requested such as an x-ray. At that point I would like to take the child to my family practice and see if we get the same prognosis. My doctor is very good. He requested a pediatric ENT for [S.R.] and is doing his best to get me that appointment ASAP.

Bottomline is I am not comfortable with the practice you are taking the children to. When [S.R.] was not even 1 ½ year old he recommended a chest x-ray and now again with [K.R.] We can talk all day about this but you need to really think if this is a good practice. Listing to her lungs should have ruled out a need for x-ray.

[Reproduced as written]

- [74] Another aspect of this incident is that the respondent is critical of the claimant because K.R. played soccer the following Sunday and it was raining. The claimant explained in her evidence that K.R. was much improved on Sunday and she very much wanted to play soccer, which she did. I can find nothing objectionable in the claimant's judgment.
- [75] The result is that the respondent now has his own doctor for the children because he is not satisfied with the claimant's choice of doctor. The claimant discussed this with her doctor who expressed concern about two doctors treating S.R. He suggested that the claimant authorize the respondent's doctor to send copies of information on his file to her doctor. She did so. The respondent believes this was an attempt by the claimant to replace the doctor chosen by him. He also says it was an attempt by her to subvert what he claims are his legitimate concerns about the children's health and how they are not being properly cared for by the claimant. I find the claimant authorizing the release of information to her doctor was a reasonable and responsible act, with the interest of S.R. in mind and on the advice of her doctor.
- [76] On another occasion K.R. required some dental work including fillings. The respondent was very concerned that metal fillings were used rather than white ones. In fact the claimant discussed this issue with her dentist and the claimant testified that the dentist explained that metal fillings were appropriate for the particular procedure that was being done. I can find no basis for the respondent's second-guessing of the work of the claimant's dentist.
- [77] The respondent is also critical of the dentist chosen by the claimant as being more interested in attending a hockey game than practicing dentistry but there is no evidence of that other than the respondent's speculation. The respondent also criticizes the claimant for the number of cavities the children have, maintaining that his care of the children produced no cavities. This is a partisan misrepresentation. And in his evidence the respondent testified that he had looked on-line and the dentist chosen by the claimant had poor reviews and he was not a paediatric dentist. She chose the dentist "unilaterally" and "against my wishes." He believes the choice of a dentist should be made by both parents.
- [78] Turning to another issue, the respondent says the claimant excluded him from a number of medical appointments for S.R. In fact, he knew about the appointments and he chose not to attend.
- [79] These incidents reflect some of the core difficulties with the current co-parenting arrangement. The respondent believes that it requires agreement between the parents on virtually all issues. However, his agreement is rarely forthcoming and only after a protracted exchange of emails in which he is uncooperative or antagonistic. When the claimant makes a judgment, after talking to a dentist, that metal fillings are appropriate she is criticized for that. When she accepts medical advice to have a chest x-ray to rule out pneumonia she is criticized on the basis of the respondent's opinion as to the proper treatment. These criticisms are not made in any constructive way. Instead they wrongly assume the claimant is making wrong and even negligent decisions about the children.

[80] The respondent's decision to retain his own doctor for the treatment of the children is not justified on the basis of the information at the time or during trial when he aggressively defended his actions by describing the claimant as being unilateral and acting against his wishes. Finally, he has a point that medical care is a joint responsibility under the current arrangement but he thinks he can operate unilaterally when there is disagreement with his views. In fact, the respondent's idea of co-parenting is stridently presenting his position to the point of impasse. In contrast, the claimant has adapted her concerns to the intransigence of the respondent by, for example, obtaining medical information from the respondent's doctor rather than challenge the need for a second doctor at all.

b. Speech therapy

[81] As above S.R. has a speech problem that requires therapy.

[82] There is something of a disagreement between the claimant and the respondent on this issue. The claimant had some speech development issues as a child. She accepts that S.R. has a speech difficulty but she does not believe it is as serious as the respondent believes. At one point there was concern that S.R. might have autism but this was ruled out.

[83] In an email dated October 27, 2011 the respondent said to the claimant that, among other things, he would be arranging a specialist appointment for S.R. "to determine if his lack of speak [sic] is a physical problem which will involve testing of his hearing and cognitive skills. I will let you know when I have an appointment."

[84] The claimant replied in an email dated October 30, 2011:

Hi,

I realized you are concerned about [S.R.]'s speech delay he's been attending appointments with Barb at Fraser Health the next appointment is November 14 at 9:15 a.m. I have had conversations with Barb about his hearing and cognitive skills based on her initial observations does not believe it is his hearing or cognitive skills. However she does believe like [T.R.] he would benefit from playgroups, library programs and preschool as some children benefit from such interactions. In the past Barb has suggested some simple vocal and mouth exercises which I believe have benefitted [S.R.]. I have noticed [S.R.]'s vocabulary is increasing and he does repeat words in Punjabi and English but he is just reserved when it comes to talking. Perhaps speaking with Barb first might be a good idea.

[Reproduced as written]

[85] To this the respondent replied in an email dated October 31, 2011:

Hi,

[S.R.] has had three appointments June 29 and Aug 3 and Sept 12. The June 29 report, clinical impressions: "[S.R.] was silent for most of the session and did not spontaneously imitate playful sounds or words". Also out of 7 communication skills he had difficulty or was not evaluated in 5

out of 7. So I'm sure you can understand my concern as his Father. I was not asking for your permission nor do I need it, I was simply notify you of my intention to seek additional health resources in evaluating [S.R.]. I understand your concern that such intervention may bring to light what has caused his lack of speech but you should be thinking of what is in the best interest of [S.R.]. The more help and analysis at an early stage we can get for him, the more he can potentially benefit if there is a problem. I think anyone would be concerned when a parent is trying to keep or discourage a child from getting medical attention that could help the child.

As the Fraser health authority communicated to me when I went to get the children's consultation reports, is that a child that is 2 ½ years old that is not speaking is not a problem and that he is still to young, is not acceptable to me,

So thank you for suggesting we wait another two weeks when from the June 30 report I have seen no improvement to date (4 months). In fact, over the past three days I have had him he has said no recognizable words of any kind, other than babbling.

He will be seeing a number of specialists and when I have confirmed appointments I will let you know.

Thanks

[Reproduced as written]

[86] At one point during the speech therapy of S.R. the respondent accused the claimant of not providing him with copies of a speech assessment. In fact, she had taken S.R. for an assessment but it had not been put into writing.

[87] There was also a referral of S.R. to a specialist in speech difficulties, Dr. T.M. Kope. In a report dated February 7, 2013 Dr. Kope diagnosed a primary developmental language disorder. His hearing had been checked and was normal.

[88] Dr. Kope also referred to "tension between the parents" and each was interviewed separately, then with S.R. and then with both parents. The respondent had a long list of concerns and he wanted to know what caused the speech delay. The claimant had a much shorter list of concerns. Dr. Kope noted that the respondent "wondered whether the speech language delay was related to emotional factors. He expressed concern about the mother/child relationship, particularly in the past." Dr. Kope also said:

Some of the difficulties described by the father with low frustration tolerance are commonly seen in children who have speech and language disorders. In addition, he may be responding to tension between the parents, although there was certainly no overt conflict in my office.

[89] The above are noteworthy for the concerns the respondent has that the claimant is somehow responsible for S.R.'s speech delay. He was clearly trying to get Dr. Kope to agree with him on this point and but that support was not forthcoming from her. His statement to the claimant that he understood that his suggestions for treatment "may bring to light what has caused his lack of speech but you should be thinking of what is in the best interest of

S.R." was reasonably taken by the claimant to reflect his opinion that she was responsible for S.R.'s speech delay. There is no evidence of any kind, including medical, linking the claimant's childhood speech difficulties with those of S.R. Unfortunately, the respondent went further in his evidence by speculating that the reason for S.R.'s speech difficulties was that he fell off a table while in the claimant's care and hit his head. This is a baseless and hurtful accusation.

[90] As a final comment on this evidence, the respondent's comment "I was not asking for your permission nor do I need it" reflects his unilateral approach to the care of the children and belies his insistence that he is trying to maintain and protect the co-parenting arrangement currently in place.

[91] T.R. also had some delayed speech for a period of time. The respondent says that he was excluded from speech therapy treatments for T.R. In fact the therapy was arranged prior to the February 2011 separation of the parties. No fault can be attributed to the claimant if the respondent did not know that his daughter was taking speech therapy while they were living together.

c. Choice of schools

[92] The oldest of the children, K.R., attended school at Panorama School in Coquitlam. This school was chosen by the respondent while the parties co-habitated and he believed it had been highly rated. The plan was that all three children would attend.

[93] After separation in 2011 the claimant moved to her mother's house in a different catchment area but still in Coquitlam. The respondent stayed at the basement suite he had shared with the claimant and the children until he was evicted and he moved to a different suite in Port Coquitlam. Currently, both parents live outside the catchment area for Panorama School.

[94] In 2012 the second oldest child, T.R., was of an age to attend kindergarten for 2012-2013. The claimant registered her at Panorama school in the belief that the respondent chose the school originally for K.R. and he would agree to it for T.R. Also, it was more comfortable for T.R. to attend the same school as her older sister.

[95] On February 8, 2012 the claimant advised the respondent by email that she had registered T.R. for kindergarten at Panorama School. The school requested a copy of a tenancy agreement (or property tax form) to prove the residency of K.R. and T.R. The claimant asked the respondent to provide a copy of his tenancy agreement to the school to prove residency (and the claimant was living with her mother as a non-tenant).

[96] The respondent replied in an email the same day, February 8, 2012:

You did not discuss or inform me of your intention to register T.R. for kinder garden beforehand. You unilaterally took it upon yourself to do this without consulting me or advising me of your intentions. I believe if you did not need the tenancy agreement you would not have informed me of her registration. Unfortunately this is a consistent pattern that started with registering the children for 2 months of activities in May 2011 without informing me of your desire to do so even though those activities would fall upon days I have the children.

[Reproduced as written]

[97] The respondent ultimately accepted that T.R. should go to Panorama School.

[98] In his evidence the respondent said the claimant deliberately registered T.R. at Panorama School without his permission in order to "purposely" make him angry. Further she did this to "get me removed as a parent" and she believed she was the only parent. When he was asked in cross-examination what was wrong with the school, the respondent answered illogically that there was nothing wrong with it because he chose it.

[99] There is a similar issue with S.R. The claimant registered S.R. for preschool in February 2012 for September 2012. Her thinking was that his sisters were happy there and S.R. knew the school from being with the grandmother when K.R. and T.R. were dropped off and picked up.

[100] The respondent's response, as with T.R., was that the claimant had registered S.R. without his consent. In fact, the claimant put S.R. on a list to make sure he would have access to a limited number of spaces. A final commitment by the parents was required by June 2012, including a deposit. The respondent wrongly insists that this was a unilateral decision by the claimant to register S.R. in pre-school; she was simply holding a place for him that probably would not have been available later in the year.

[101] In any event, while the respondent initially opposed preschool for S.R., he is now enthusiastic about it and wants to increase the numbers of days per week. He now criticizes the claimant for opposing him on this increase, again, illogically. In fact, she quite reasonably says that there are four months left in the school year (at the time she gave her evidence) and she did not want to make a change this year. She is, however, agreeable to increasing the days next year.

[102] The issue of choice of schools continued throughout trial. The claimant would like S.R. to go to kindergarten at Panorama School with his sisters and the school has agreed to this even though the children are outside the school's catchment area. The respondent wants all of the children to move to another school because he says it is a better school. A reason he gave for not being enthusiastic about Panorama School now is that he says K.R. was behind in her work because a good teacher there had been let go or transferred from Panorama School. As well, although he has not worked at all since October 2011, he says the new school he wants the children to attend has after-hours care that he will need when he returns to work (his attempts at finding work are discussed below).

[103] This issue was considered by the parenting coordinator who referred it to the trial judge. During the trial the respondent maintained his view that all three children should move to a different school. He said he was worried that there could be lay-offs of teachers or some other event that required the children to move in any event. During argument I obtained the agreement of the respondent that the three children will attend Panorama School in September 2014. A consent order has been entered to that effect and will be reflected in the order following this judgment.

d. Other issues

[104] I summarize a number of other issues between the parties here.

- (a) The respondent is critical of the claimant for not attending soccer games with K.R. and him when they lived in North Carolina. The claimant says that the family attended some soccer games but she generally agrees that she stayed home with T.R. and the newly born S.R. She quite sensibly says that it was necessary to stay home with a newborn baby and, as well, she wanted to allow the respondent some time alone with K.R.
- (b) The respondent says the claimant is mentally ill and has been ill since they lived in North Carolina. The basis of the respondent's allegation is that the claimant took some anti-depression medication in 2007 or 2008, apparently related to the birth of one of her children. In contrast the claimant went through a number of psychological tests with Dr. Posthuma, in 2011 and 2014, as did the respondent. Dr. Posthuma's concern was with the respondent and not the claimant.
- (c) When the parties moved back to B.C. in 2009 the children had U.S. passports. They were kept in the possession of the respondent, as he kept all such documents out of his concern for personal privacy. After separation in 2011 there was a dispute over the passports and this arose in the evidence several times. The respondent shredded all three of the children's passports. He testified that he did this because they had all expired. However, in light of S.R.'s age, and the period of time that American passports are valid, his was still valid. I find that the respondent destroyed two expired passports and one that was not expired. He may have done this as a way of controlling the movement of the children or because of his views on the protection of personal information.
- (d) In December 2011 the respondent asked about a red rash on both of K.R.'s cheeks (among other things). He complained that he had not been informed and he said "I don't know what happened at your residence to cause this." As well, the respondent said it looked like "something corrosive has burned/dried her skin" and he wondered if the claimant had used cleaners which had not been "properly clean[ed] up." The next day the claimant advised the respondent that the spot on K.R.'s cheek was eczema, "not the assumptions you have made " To this the respondent replied on December 12, 2011:

I know you have had battles with facial acne/eczema in your childhood to there may be a genetic reason for this but on my side of the family no one has ever had to deal with skin problems. If the problem continues I will seek out a dermatologist. I did put moisturizer on [K.R.]'s cheeks but it did not help.

If this is eczema I want to get [K.R.] help ASAP. Left untreated she could end up with a skin problem that could permanently leave her with scars/bumps on her face and disfigure her skin. I think you know what I mean. Please use yor own experience as to what can happen if the problem is not dealt with properly.

There is no evidence of any exposure to harmful products while the children have been in the care of the claimant. Following that allegation the respondent's comment "I think you know what I mean" was a hurtful and baseless allegation that the claimant was responsible for the skin condition of K.R.

- (e) The respondent says the claimant refused to give him a copy of her extended health plan card so he would have it in case he needed it for the children. In fact she gave him a copy of the card soon after he requested it and then applied for an extra card for him. In his evidence and submissions the respondent ignores the copy he was given. He maintains that the claimant refused to provide him with important medical information involving the children. Alternatively, he complains that it took too long for him to obtain his own card. I find that the claimant's action were entirely appropriate.
- (f) The respondent says that the claimant used the parenting coordinator most of the time and she did that instead of working things out with him. I find that the claimant was extraordinarily patient trying to work things out with the respondent and she had to involve the coordinator frequently because of the respondent's frequent intransigence. As above, his view of the current co-parenting arrangement is that virtually every issue is pressed to impasse.
- (g) The respondent insists that the parenting coordinator sided with him with respect to a dispute over skating lessons for S.R. and the coordinator agreed with him that S.R. might hurt himself while skating. In a written determination, the coordinator said that the "children" should be enrolled in skating. The respondent says that "children" does not include S.R. but there is no basis for this assertion.
- (h) The respondent opposed private skating lessons for S.R. to the point of threatening an application to court. However, two days before the lessons started the respondent agreed to the lessons.
- (i) The claimant had primary custody of the children in the period following the separation of the parties in 2011. In the summer of 2012 the parties agreed between themselves that the children would spend alternate weeks with each parent. The court order in place at the time gave the claimant primary custody of the children. In September 2012 the claimant wanted a return to her having primary custody as reflected in the extant court order. Among other

reasons, she said that she did not want to set a "precedent." The respondent objects to a change to the voluntary sharing of access to the children. While it was undoubtedly not what the respondent wanted to happen, I find that it was reasonable for the claimant to be concerned about setting a precedent that the respondent could use in the future. This was the time when the respondent began to exhibit some of the behaviour described above.

- (j) The claimant went to a local swimming pool to watch the children during swimming lessons while the children were with the respondent and his mother. She watched from outside the pool and at the end of the lesson she went into the change room to say goodbye. The respondent says the claimant did this to harass him and his mother and interfere with his time with the children. I find it was entirely appropriate for the claimant to want to say hello to her children and, indeed, it could have been perceived as her acting distant and cold to the children if she did not.
- (k) The claimant enrolled S.R. in a free afterschool drop-in program to help him get prepared for school. The respondent knew about this but he says the claimant refused to tell him what school it was at. In fact the program was run at a number of schools. The respondent insists that the claimant kept from him the names of the specific school but there was no specific school.
- (l) There was a school event for the children that was described in a notice sent home with them. The respondent says the claimant did not give him a copy of the notice so he could not attend. In fact, the respondent had previously told the claimant that he was taking the children to Victoria to visit his parents at that time. The claimant reasonably concluded it was not necessary to send the notice to the respondent.
- (m) The claimant's paternal uncle lived in the basement of the grandmother's house. He is an adult but with developmental issues. He is very shy, he has difficulty talking to people and he generally kept to himself in his room in the basement. He moved out to a home in early 2014 or late 2013. The respondent says the uncle is a threat to the children because he grabs his crotch and makes unusual gestures. In fact, the respondent has not been allowed in the grandmother's house since the parties separated and he has had no contact with the uncle.

In his evidence the respondent says that the uncle was moved out by the claimant just before Dr. Posthuma's second visit to the claimant's home so that Dr. Posthuma would not see him. It is true that the uncle moved out to a home a few months before Dr. Posthuma's visit. However, the grandmother explained this as necessary for the uncle's care as he was getting older. I accept that explanation.

The respondent also testified that the carpet in the uncle's room was replaced after he moved because it had blood and "bodily fluids" in it. There is no basis whatsoever for this extreme allegation.

To be very clear, there is no basis whatsoever that there was any risk of any kind to the children while the uncle lived with them.

- [105] I should add here that the evidence included considerable discussion about the parties' relationship when they lived and worked in North Carolina from 2001 to 2009. The respondent in particular was determined to prove that the abuse of the children began there with the claimant slapping the children. There is no evidence of that from anyone including the family of the respondent who visited North Carolina. As well, the respondent is very critical of the claimant for falling asleep while nursing her infant children. I conclude this is an entirely natural thing for a mother to do.
- [106] A major issue between the parties during the time they lived in North Carolina was an occasion when the respondent's mother and sister visited as did the mother of the claimant. The occasion was the birth of T.R. in 2007. The respondent's sister testified that she was sleeping one morning when the claimant's mother burst into the bedroom and accused the respondent of controlling the claimant and making her unhappy. They went downstairs where, again according to the respondent's sister, the claimant's mother was very angry. According to the claimant and her mother, there had been a previous exchange between them and the respondent, while the latter's family slept. During that exchange the claimant's mother confronted the respondent about how he was treating the claimant. The respondent replied by saying some unpleasant personal things about the claimant.
- [107] I am frankly at a loss as to the significance of this family argument in 2007. The respondent in particular was intent on reopening this issue at every opportunity and then the claimant felt obliged to respond. I ultimately limited the evidence on this issue at trial on the basis of relevance. I concluded that a family argument in 2007 had little or nothing to do with the issues I had to decide. Upon completion of the evidence and after hearing the submissions of the parties I remain of that view.

(iv) Discussion of guardianship

- [108] As can be seen, a number of the incidents cited above happened in 2011 and 2012. A possible explanation for them is that the parties were angry after having separated in February 2011. That would not be a justification but it would be an explanation that is common enough in family disputes. However, the evidence does not support that as an adequate explanation for the claimant's concerns previously and at trial.
- [109] First of all, there are recent and recurring incidents such as the bizarre behaviour of the respondent when picking up the children a few weeks before trial and the respondent objecting to S.R. attending the same school as his sisters in September 2014. The respondent also alleges that the physical abuse he says he recorded in 2011 and 2012 continues and he vigorously defends his allegation that the claimant is mentally ill (on the basis of taking anti-depression medication in 2007 or 2008, possibly as a result of child birth).

- [110] As well, the respondent was given considerable opportunity to say that he regretted the things he said and did or that they were made under the stress of the separation. On perhaps two occasions he did say he was upset following the separation and, while talking about some emails he sent, he said he could have put it a "bit differently." Other than those times the respondent was quite unrepentant in his evidence about what he said in 2011 and 2012.
- [111] An extreme example of this is that in his evidence, for the first time, he said that the claimant might have let S.R. fall off a table so he hit his head, and that is the cause of S.R.'s hearing problems. Another example is that the respondent still believes that the claimant is trying to subvert the respondent's choice of a separate doctor for the children. There are certainly reasons to question the need for a second doctor but, as above, all the respondent did was make sure her doctor had copies of information from the respondent's doctor. In short, the respondent in his evidence has for the most part adopted his statements in his emails from 2011 onwards and even added new unfounded allegations.
- [112] The above issues have been and continue to be closely fought between the parties. The primary initiator of this conflict has been the respondent. As can be seen from the above exchanges he has constantly sought to engage the claimant on a large number of issues to the point of impasse. Then, when he is not able to get his way, he accuses the claimant of acting unilaterally. His actions affect the children. For example, he has recorded the children in attempts to prove they have been abused and he maintains that abuse continues. The effect of the father asking the children if their mother has been deliberately burning and assaulting them is a serious concern. As above, the respondent's allegations are not at all convincing.
- [113] In his evidence the respondent explained his interpretation of co-parenting. He believes that it requires discussion and then agreement on matters affecting the children. In broad terms that is an accurate description of co-parenting.
- [114] However, in this case it has broken down for two reasons. First, the respondent takes the view that virtually every issue involving the children, from scheduling swimming lessons to medical care, require this approach. The consequence is that the care of the children has taken large amounts of time and emotional energy and then cost for things such as a parenting coordinator. In his evidence the respondent was asked about some of the claimant's decisions about the children he initially objected to, only to later support the decisions, even enthusiastically (pre-school for S.R., for example). His response was that even when he agreed with the claimant and even when the decision was obvious it was necessary to have a full airing of the issue. In short, nothing can happen with the children without the respondent's participation to an unrealistic and unworkable degree.
- [115] Second, the respondent has demonstrated a serial inability to make the compromises necessary to make the co-parenting of his three children possible. He not only second-guesses the claimant but he questions medical advice she obtains because it does not

conform to his own medical opinions (white dental fillings versus metal fillings or the need for a chest x-ray, as examples). When he does not get the claimant to agree to his position he escalates the issue by strident positions accompanied by hurtful personal allegations about her. These include suggesting that she is responsible for the speech delay of S.R. by letting him fall off a table. There is no basis for these allegations and yet the respondent believes strongly that they are true. Ultimately, when he is unable to get his way on some issues he acts unilaterally.

- [116] In his evidence the respondent defends his actions by saying, first of all, it is the claimant that is acting unilaterally. Without prompting in his evidence, the respondent justifies his actions by declaring himself the better parent, the only reasonable parent. He says the claimant is the worse parent. He is incapable of giving her any credit at all as a parent despite the obvious difficulties of her working full time to support the children because the respondent is not paying child support. Indeed, he says the children are in physical danger living with the claimant.
- [117] There are additional credibility problems with the way the respondent presented during his testimony. He was excitable and he does not hear views different than his own. He ultimately admitted in cross-examination that he had all of the information he needed about the claimant's pre-marriage income (he had not read it) but he subsequently applied for documents to support his discredited view that she was hiding documents on this same issue.
- [118] In stark contrast, the claimant in her evidence acknowledged the value of the respondent as a parent (taking the children skating for example, an activity she is not good at). Further, in her evidence the claimant was quiet but strong, calm, intelligent and showed she has a genuine concern for her children. She went out of her way to be fair to the respondent, even in the face of his unreasonableness and intransigence on his part. For example, in her testimony the claimant explained the difficulties she was having getting the respondent to agree to a school and to skating lessons for S.R. At the same time she acknowledged that he was concerned about how S.R. would manage his speech problems at school and in skating lessons. Similarly, the claimant described the difficulties she had getting the respondent to agree to piano lessons for K.R. and she explained his actions by saying he was concerned about the effect of lessons on her school subjects.
- [119] As can be seen above, the claimant was faced with considerable problems from the respondent, including emotional abuse, and yet she was able to see some value in his point of view. I note Dr. Posthuma's opinion that, if the claimant is to be faulted at all, it may be that she over-controls her anger.
- [120] The respondent has no respect for the claimant as a parent and the co-parenting relationship has suffered accordingly. In my view, a requirement for a successful co-parenting arrangement is a minimal level of respect between the parents for their roles as parents even though the marriage is at an end. While joint parenting may be an "ideal

solution" when parents are willing to cooperate this can also be an "illusion" where there is a "triumph of optimism over prudence" (Young v. Young, [1993] 4 SCR 3 at 48; cited in B.D.M. v. A.E.M., 2014 BCSC 453 at para. 100).

- [121] For the above reasons, I conclude that the current parenting arrangement must end because the respondent is not capable of making it work and it has come to the point where the interests of the children are being negatively affected. He is the father of these children but, in my view, the opportunities for his involving the children in unfounded allegations about abuse by the mother and his bizarre behaviour when he picks up the children must be minimized.
- [122] Dr. Posthuma, in his report of February 17, 2014 also concluded that the current co-parenting arrangement should end. I note the following from his report:
- (a) The sleeping arrangements at the respondent's basement suite were noted. Although there are two bedrooms the respondent and the three children sleep in one room. The respondent goes to bed with all three children and, once the daughters fall asleep, he places them on small cots and remains in bed with his son. The bed and cots take up the available floor space, blocking the use of the closet. The second bedroom is used for storage, mainly toys. In the grandmother's home the girls have their own bedroom, with separate beds, and their "own individually inspired decorations to the bedroom area." S.R. sleeps either with his mother or grandmother. Unlike in his father's suite, the option of his own bedroom is available. (page 4).

On the same issue I note the evidence of a former landlord of the respondent that in May/June 2013 his basement suite was barely habitable. This was a different suite than the one seen by Dr. Posthuma. The landlord described it as "scary" and he was concerned about the health of his children. He described the sleeping arrangements in the suite as the respondent and his three young children sharing mattresses on the floor. There was a strong smell of urine and body odour coming from the floor in the next room. The respondent says the landlord's evidence should not be believed because there was a bitter dispute over the eviction of the respondent in which he ultimately received damages from the Residential Tenancy Branch. That dispute was real enough but I conclude it is not a reason to reject the landlord's evidence in its entirety.

- (b) Dr. Posthuma conducted a number of tests for his first report in October 2011 and he repeated several of those tests for his February 2014 report. In the first tests the results for both parents showed positive biases when measuring whether they had been candid in response to the test.

With respect to the respondent, the second set of tests indicated a strong positive bias in his approach to the testing. The result was that the previously noted validity problems persisted and these prevented any comprehensive interpretation of the test results. Of concern was the respondent's denial of any particular stresses in his life other than the conflict with the claimant. This was in spite of his unemployment for over two years and the requirement of a parenting coordinator. Despite these stressors the respondent's overall reading of his own stress was in the

6th percentile, meaning that 94% of fathers in a normal family situation (not an acrimonious custody dispute or unemployed) are more stressed. Another test failed to detect any stresses in the respondent's life. Dr. Posthuma concluded that, at least for the first test, it was unlikely to be a valid representation of the respondent. (pages 6-7).

In his submissions, the respondent noted the tests conducted by Dr. Posthuma and he presented the test results for his stress levels as a positive thing. That is, the respondent ignores Dr. Posthuma's conclusion that the test results were invalid and misrepresents the report as confirming him as strong and capable of dealing with considerable stress.

- (c) With respect to the claimant, Dr. Posthuma noted a significant improvement in the validity scores of her tests in 2014 compared to 2011. Specifically, looking at the tests for stress, the claimant's results were valid and representative of the stresses that exist in the family. Dr. Posthuma also considered the respondent's allegation that the claimant has anger problems and he found her expression of anger to be within normal limits. Further:

If she is to be faulted, the test results indicate that she may over-control her anger at times, thus losing out on the opportunity of problem solving or heading off the development of a more serious conflict. On the other hand, given what appears to be a high-conflict dispute between her and the children's father that fails to be ameliorated by a skilled parenting coordinator, it may not be possible to practice constructive problem solving. (page 8).

- (d) Dr. Posthuma noted his conclusion in 2011 that the parties had a high potential to co-parent their children. In his 2014 report he said that conclusion was "erroneous." The explanation for this was that the previously noted high levels of emotional intelligence can be used constructively or destructively and, in this case, they were now being used destructively by the respondent. As an example of this Dr. Posthuma noted the respondent's questioning of the children about his allegations of abuse by the respondent. I have set out the parts of Dr. Posthuma's report on this issue above but I again note Dr. Posthuma's conclusion that the respondent lead the children into dishonesty in his questioning of them. Further, the respondent's actions indicated that he had lost his perspective of appropriate parenting actions and become consumed with maligning the claimant. (pages 9-10).

- (e) I have also set out Dr. Posthuma's conclusion and recommendations above.

[123] The respondent attacks the 2014 report of Dr. Posthuma as the result of collusion between the doctor and the claimant and/or her counsel. There is no evidence of this whatsoever. Further, while his 2011 report makes very different conclusions he explains why his 2014 report is different, as summarized above.

- (v) Guardianship

[124] The respondent seeks in his counterclaim sole guardianship. I deny that claim for the reasons given above. His obstruction of the normal activities of the children and their medical issues, his bizarre behaviour when he picks up the children, his attempts to involve the children in his unfounded allegations of abuse and his unfounded attacks against the

mother strongly support a conclusion that it would not be in the best interests of the children if the father was to be sole guardian. Dr. Posthuma's conclusion that the claimant should have sole guardianship speaks for itself. I add that the respondent's claim for sole guardianship includes a complex and in light of the above evidence, wholly unworkable dispute resolution process that attempts to codify the respondent's view that co-parenting is an ongoing battle over any and all issues.

[125] There is then the claimant's claim.

[126] Schedule 2 of the claimant's amended Notice of Family Claim (filed March 2, 2011) states that she is seeking "sole custody and guardianship of the children with reasonable access to the Respondent " This is sought under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the FRA. The latter was replaced by the Family Law Act, S.B.C. 2011, c. 25 ("FLA") in March 2013 and the latter has a very different approach to children. For example, there is no concept of "custody" under the FLA and the presumption under the FLA is that parents will be joint guardians (FLA s. 39(1); Hansen v. Mantei-Hansen, 2013 BCSC 876 at para. 118).

[127] Considering the claimant's claim under the FLA, I have found above that the current arrangement of co-parenting (described as "joint guardianship" in the July 23, 2012 order) is not working and it must end. I have also dismissed the respondent's claim for sole guardianship.

[128] Logically, that leaves the claimant's claims for sole guardianship for consideration. Under the FLA, both the claimant and the respondent are presumed guardians under the FLA of their three children. Therefore, in order to grant the claimant's application for sole guardianship, I must terminate the respondent's guardianship of the children. Section 51(1) (b) of the FLA allows for the termination of a person's guardianship of a child. Current case law suggests that this would be an "extraordinary remedy" (Director and B., 2014 BCPC 111 at para. 36) and done only in the "most extreme situations" (Director and B at para. 24).

[129] Rather than terminate guardianship, the courts have attempted to assign parental responsibilities under s. 41 of the FLA in a way that best meets the best interests of the children without terminating a parent's status as guardian. As Judge Merrick put it in D. v. D., 2013 BCPC 135 at para. 24 "[t]he approach to be taken is, first, to ask whether, through an allocation of parenting responsibilities, it continues to be in the best interests of the children that the parent remain a guardian". In M.A.G. v. P.L.M., 2014 BCSC 126 at paras. 44-46, Fleming, J. adopted a similar approach to s. 51(1)(b) that was taken in D. v. D.

[130] I also note that termination of guardianship under the FLA requires a specific application under s. 51(1) as well as notice to "each parent or guardian of the child affected by the application." In the subject case there is no specific application or notice (from or to either party) with respect to the termination of guardianship. However, in a previous case the Court of Appeal considered termination of guardianship in the absence of an application and found that the interests of justice required them to determine the issue without referring it back to the Supreme Court. The court concluded that the issue was "clearly

raised by the parties" before the court below and the best interests of the child required a decision without referring it back to the Supreme Court (BC Birth Registration No. 2004-59-020158 (Re), 2014 BCCA 137 at para. 42). Further, while s. 52(1) of the FLA mandates that notice be given for any application regarding guardianship, s. 52(3) also allows the court to grant an exemption from the requirement to give notice if the "court considers it appropriate."

[131] On the evidence set out above the respondent has put himself in a position where there is a legitimate question as to whether he should continue to be a guardian of his children. However, I take the point that this would be a draconian step to terminate his status as guardian, as only a guardian can exercise the parental responsibilities listed in s. 41 of the FLA.

[132] I adopt the approach that the best interests of the children can be served by an allocation of parental responsibilities between the respondent and the claimant. In this regard I note ss. 40(3) and (4) of the FLA:

- (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by
 - (a) one or more guardians only, or
 - (b) each guardian acting separately or all guardians acting together.
- (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
 - (a) that parental responsibilities should be allocated equally among guardians;
 - (b) that parenting time should be shared equally among guardians;
 - (c) that decisions among guardians should be made separately or together.

[133] Section 41 is as follows:

Parental responsibilities

- 41. For the purposes of this Part, parental responsibilities with respect to a child are as follows:
 - (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
 - (b) making decisions respecting where the child will reside;
 - (c) making decisions respecting with whom the child will live and associate;
 - (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;

- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) subject to any applicable provincial legislation,
- (i) starting, defending, compromising or settling any proceeding relating to the child, and
- (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[134] As per s. 37(1) of the FLA, the only consideration in making an order allocating parental responsibilities is the best interests of the children. Section 37(2) of the FLA provides a list of children's needs and circumstances that must be considered when determining what is in their best interests.

[135] Having considered all of the children's needs and circumstances, on the facts in this case I conclude that the best interests of the children require that parental responsibilities be allocated primarily to the claimant, that she have more parenting time with the children essentially as the primary guardian and that she be given primary decision-making over the children. To be clear, I am significantly limiting the parental responsibilities of the respondent rather than terminating his guardianship.

[136] Accordingly, the allocation of parental responsibilities for the children in this case will be, using the subjects listed in s. 41 of the FLA:

- (a) Making day-to-day decisions affecting the children and having day-to-day care, control and supervision of the children.

The respondent, since July 2012, has demonstrated that he cannot participate in decisions affecting the day-to-day care, control and supervision of the children without creating acrimony and an environment in which the children are exposed to bizarre behaviour and obliged to participate in inquiries about whether they have been abused by their mother.

The claimant will have this responsibility except for the times the children are with the respondent during his parenting time, as per s. 42 of the FLA.

(b) Making decisions respecting where the children will reside.

The claimant will decide where the children will live in the greater Vancouver area (defined as Horseshoe Bay to Hope to the United States border). The claimant will give the respondent notice of any move within that area and within a reasonable time before the move. His agreement to any move is not required. In the event the claimant wishes to change the residence of the children outside this area she will give written/email notice within a reasonable time to the respondent. If the respondent disagrees with the move outside the Vancouver area, he may apply to court within 30 days of the date the notice was received to decide the issue. This time period is to be strictly interpreted.

(c) Making decisions respecting with whom the children will live and associate.

The claimant will have this responsibility except for the times the children are with the respondent during his parenting time.

(d) Making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location.

These matters have been particularly difficult in the past. The claimant will have the primary role for this responsibility including education activities through the schools. She will advise the respondent about these activities by a short email before they commence; she does not need the respondent's agreement to any of the activities she decides to enroll the children in. The respondent's role is limited only to those activities that arise during his parenting time. For example, he may arrange for sports or extracurricular activities during his parenting time and he may decide the nature, extent and location (within the geographic bounds set out here) for these activities during his parenting time. He will advise the claimant of these activities before they commence.

To be clear, the respondent will not have decision-making rights over most issues of education. For example, the respondent may have views about which schools the children will attend and the claimant should consider those views if they are presented clearly and rationally. But it is her decision which schools the children will attend. The claimant will consult with the respondent with regards to any significant educational decisions. This means giving the respondent reasonable notice of the significant educational issues, permitting him time to respond, considering his response and then explaining her decision. Consultation does not mean the claimant must agree with the respondent or that he is entitled to comment more than once. Again, it is her decision.

The consent order that all three children will attend Panorama School in September 2014 is confirmed.

- (e) Making decisions respecting the children's cultural, linguistic, religious and spiritual upbringing and heritage.

Both parties have strong ties to their culture and religion. The claimant will have this responsibility except for when the children are with the respondent during his parenting time. In the event there is a significant change to the cultural, religious and spiritual upbringing of the children the party that first becomes aware of it will advise the other as soon as practicable.

- (f) Subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the children.

This is another area where there have been a number of problems in the past.

The claimant will have this general responsibility and she will have the authority to give her sole consent to treatment of the children. In the event there is a significant, non-emergency medical, dental or other health issue when the children are with the claimant, she will consult with the respondent as soon as possible. To be clear, a "significant health issue" does not include regular check-ups, speech therapy for S.R., choice of doctor (including specialist) or other non-significant issues.

Consultation means giving the respondent reasonable notice of the significant medical issues, permitting him time to respond, considering his response and then explaining her decision. Consultation does not mean the claimant must agree with the respondent or that he is entitled to comment more than once. In emergency situations the claimant will act as required without any consultation or notification to the respondent until an appropriate time when the situation has stabilized.

If there is any medical or dental health issue when the children are with the respondent he will as soon as possible advise the claimant of the issue. He will obtain the consent of the claimant before authorizing any examination or treatment of the children, including examination or treatment by a specialist. As above, only the claimant will give the consent required for any medical treatment for the children. In the event of a genuine emergency while the children are with the respondent he will attempt to contact the claimant as soon as possible. If he has not been able to contact the claimant after seriously attempting to do so, he may consent to any emergency treatment required and then notify the claimant as soon as possible.

- (g) Applying for a passport, licence, permit, benefit, privilege or other thing for the children.

The claimant will retain the United States passports of the children and the respondent will retain the Canadian passports of the children. Each party will provide the passports in their possession to the other party upon request. They will be returned as soon as practicable after any travel. The parties will also cooperate with the renewal of passports. The claimant will renew the United States passports and the respondent will renew the Canadian passports. Travel with the children is discussed under access below.

- (h) Giving, refusing or withdrawing consent for the children, if consent is required.

The claimant will have this responsibility.

- (i) Receiving and responding to any notice that a parent or guardian is entitled or required by law to receive.

The claimant will have this responsibility.

- (j) Requesting and receiving from third parties health, education or other information respecting the children.

The claimant will have this responsibility.

- (k) Subject to any applicable provincial legislation,
 - (i) starting, defending, compromising or settling any proceeding relating to the child, and

The claimant will have this responsibility.

- (ii) identifying, advancing and protecting the child's legal and financial interests.

The claimant will have this responsibility.

- (l) Exercising any other responsibilities reasonably necessary to nurture the children's development.

The claimant will have this responsibility. It is broadly drafted to emphasize that the claimant generally has the primary responsibilities for the children.

[137] Finally, the parental coordinator's appointment will end effective the date of this judgment.

(b) Parenting time

[138] I next turn to the respondent's parenting time with the children. Parenting time is defined in s. 42(1) of the FLA as the time that a child is with a guardian as allocated under an agreement or order. Dr. Posthuma recommended alternate weekends and I agree with that recommendation.

[139] The respondent will have parenting time with the three children beginning the Friday following the date of this decision or three days after the date of this decision, whichever is longer:

- (a) From 6:00 PM Friday evening until 7:00 PM the following Sunday on alternate weekends.
- (b) The first day of the second half of the Spring school break, beginning at 8:00 AM until 6:00 PM on the last day of the Spring break. In the event there are an odd number of days in the break, access will commence at noon of the middle day.

- (c) During the Christmas break, on even numbered years, commencing in 2014, the respondent will have parenting time from 10:00 AM on December 26 until 12:00 noon the day before resumption of school in January of the next year. On odd-numbered years, commencing in 2015, from 6:00 PM on the last day of school before the break until 10:00 AM on December 26 of the same year
- (d) During the summer break, up to two consecutive weeks of uninterrupted parenting time (i.e. without returning the children to the claimant during that time) provided the claimant is given notice of the specific weeks with the respondent by email on or before May 31 of the same year. The claimant will as soon as possible after receiving the respondent's notice notify him of the dates of two weeks of uninterrupted time with the children during the summer (i.e. without weekend access to the children by the claimant). Two weeks is 14 days of uninterrupted access. Summer time scheduled with the children will be considered firm unless there is a significant reason for one parent to change the schedule.
- (e) The transfer of the children shall be at the residence of the claimant. The respondent will not record any transfer, wear any unusual clothing or equipment and he will accept the children as they are dressed by the claimant or the claimant's mother. If necessary, the claimant's mother may stand in for the claimant during a transfer. The respondent will be by himself.
- (f) In the event that the respondent is unable to visit with the children on the above times and dates, or as an alternative to day care while the children are with the respondent, the claimant will have first refusal to keep them with her (or her mother). The respondent will not have first refusal for time the children are with the claimant and her mother.
- (g) Either party who wishes to travel with the children outside the Vancouver area (defined above) will give the other party reasonable notice of the travel. The respondent may take the children to his parents' home in Victoria during his parenting time after giving notice to the claimant. Travel outside British Columbia by the respondent with the children will be only after permission is given by the claimant but such permission will not be unreasonably be withheld. Travel outside British Columbia by the claimant with the children will be only after reasonable notice is given by the claimant to the respondent. If the respondent objects to the travel he can apply to court within 30 days of receiving the notice or on short leave if necessary. This time period is to be strictly interpreted.
- (h) On demand but after reasonable notice, each party will provide to the other a letter authorizing the other party to travel with the children, such authorization not to be unreasonably withheld.
- (i) These arrangements can be changed only by agreement between the parties. If one party proposes a change and the other party does not agree after considering the request the above will apply. Any discussions about changes will take place within a reasonable time and with minimal communication.

(j) Any emails involving the children will be factual and about the details of parenting time or appointments. Emotional exchanges between the parties about any issue will be separate from emails about access and appointments for the children.

(k) The above discussion of parental responsibilities applies to parenting time, as required.

(c) Family assets

[140] The primary family asset is the former family home in Cary, North Carolina (the "Wedgemere Street Property"). It is owned by the parties in what is called "tenancy by the entireties" in that jurisdiction.

[141] On May 11, 2011 this court issued a consent order for the sale of the Wedgemere Street Property. It has not been sold and, therefore, there are two issues to be considered here. First, the claimant seeks a finding of contempt against the respondent for not agreeing to implement the sale of the Wedgemere Street Property. Second, what is to be done about the Wedgemere Street Property?

[142] There is also an issue with respect to the bank accounts and investments of the parties.

[143] Pursuant to s. 252 of the FLA, the division of family property in this case is a matter under the FRA. There is no dispute that the Wedgemere Street Property, the bank accounts and the investments are family assets.

(i) Claimant's application for contempt

[144] Again, an order of this court was issued on May 11, 2011, by consent, ordering the sale of the Wedgemere Street Property. It has not been sold.

[145] The chronology of events after the May 2011 order is that the respondent asked the claimant in an email on August 5, 2011 what her position was on the sale. She replied on August 8, 2011 that she wanted to sell the property. The parties both changed counsel at the end of 2011 and there was an attempt at a mediated settlement in January 2012. Following that, counsel for the claimant asked counsel for the respondent numerous times about proceeding with the sale including a letter dated January 12, 2012 asking about names of a realtor. There was no response from the respondent or his counsel. At discovery in November 2012 the respondent refused to agree to the sale of the Wedgemere Street Property. In March 2013 counsel for the claimant proposed the name of a realtor in North Carolina and again in May 2013. There was no response. The respondent began to represent himself in April 2013.

[146] On July 18, 2013 the claimant applied to this Court for an order that the respondent was in contempt of the May 2011 order to sell the Wedgemere Street Property. The respondent applied to vary the May 2011 order. A hearing date was set for August 16, 2013. Ultimately, the respondent applied on short leave to adjourn the hearing date, this was successful but costs were awarded to the claimant in any event of the cause. August 29, 2013 was set for hearing the claimant's contempt application but this was adjourned on the basis of

agreement on a widened freeze order then in force for all family assets.

- [147] The claimant, through her counsel, then decided that it was more cost-effective to make the contempt application at trial. As a result I am deciding whether the respondent is in contempt of the May 2011 order to sell the Wedgemere Street Property.
- [148] Again, there is no dispute that the Wedgemere Street Property has not been sold. In fact no steps have been taken to implement that order. Nor is it in dispute that the May 2011 order to sell the property was a consent order, that the respondent did not appeal it (if a consent order can be appealed), or that he did not pursue his efforts to vary it.
- [149] The respondent explains the failure to sell the Wedgemere Street Property in a number of ways. He says that the parties obtained appraisals of the property some time ago and the value has deteriorated since then although it has rebounded recently. There is only hearsay evidence from a realtor in North Carolina to support the respondent's view of these changes in value but they are not challenged by the claimant. In any case, the May 2011 Order of this Court was not dependent on the value of the Wedgemere Street Property so that somehow it was to be sold only when it was at a high point in the real estate cycle. Orders of this Court or sales of property are not market driven but driven by the need to divide family assets as one event in a divorce, in good markets as well as poor ones. Compliance with Court Orders is also required.
- [150] The respondent further explains his delay in implementing the May 2011 Order for sale of the Wedgemere Street Property on the basis that it is being rented. He says this raises two issues. First, the tenants would have to be evicted before it could be listed for sale. However, as he acknowledges, he has no specific knowledge that this is the case and it is only speculation on his part.
- [151] The second issue is a related one: the respondent says that the tenants would leave because no tenant could stand the disruption of living in a house that was listed for sale. There is no evidence on this point but the respondent maintains it steadfastly. He says that if he was the tenant he would move. In any event, his concern is that, if there were no tenants, the rental income would be lost. This is a problem because there are costs to maintaining the house.
- [152] The respondent says he can agree to the sale of the Wedgemere Street Property as long as the claimant agrees to replace the rental income. This reflects his view that the May 2011 order for sale of the Wedgemere Street Property is open to negotiation and then impasse. As described above, this is a common theme in the respondent's response to all matters.
- [153] In summary, the claimant has been willing and able to sell the Wedgemere Street Property since at least August 2012 and thereby comply with the May 2011 consent order. In January 2013 she requested that the respondent agree to a listing agreement. At discovery in November 2012 the respondent refused to comply with the order to sell the property and he has continued to refuse to sell it. None of his reasons have merit and indeed are self-serving. The issue of contempt was scheduled to be heard in August 2013 but it was

adjourned. The claimant decided to make the application for contempt as part of the trial.

- [154] It could perhaps be said that the claimant should have moved more expeditiously after May 2011 in enforcing the order for sale. However, there was a change of counsel (by both parties) and an attempt at mediation. Putting the matter off to trial is not unreasonable in light of the likely costs involved in a separate hearing. That development also provided the respondent more time to comply with the Order but he remains non-compliant. Overall, I can find little fault in how the claimant has conducted herself with respect to the order to sell the Wedgemere Street Property.
- [155] On the other hand I find that the respondent has knowingly and deliberately refused to comply with the order for sale. That is not really in dispute. The respondent explains his non-compliance with reasons which reflect his disrespect for an order of this court. I find he is in contempt of the May 2011 Order for sale of the Wedgemere Street Property.
- [156] The next issue is what is to be done about the contempt of the respondent?
- [157] Contempt is a serious matter and it can ultimately lead to sentencing. It may come to that in this case, but I conclude that the respondent should be given an opportunity to purge his contempt. As it happens that opportunity is obvious: he is to cooperate with the orders below relating to the sale and disposition of the Wedgemere Street Property. Failing that cooperation the claimant is entitled to set this matter down before me for sentencing the respondent for contempt.
- (ii) Disposition of the Wedgemere Street Property
- [158] As above there cannot be any dispute that the Wedgemere Street Property is to be sold since an Order of this Court in 2011 directed the sale (and because it is a family asset). The respondent has obstructed that sale and I have found above that his actions are in contempt of the May 2011 order for sale.
- [159] The claimant now reasonably requests the court's assistance in effecting the sale of the property. She has obtained two expert reports from Steve Palme, an attorney in Raleigh, North Carolina, USA, dated July 11 and July 23, 2013. In the first report Mr. Palme has opined on the filing of foreign judgments related to real property in North Carolina in the courts of that state. The second report is a summary and analysis of the division of marital property in North Carolina.
- [160] These reports were served on the respondent pursuant to the Supreme Court Family Rules. There is no issue with respect to the qualifications of Mr. Palme and the respondent did not seek to cross-examine him on his reports. Therefore, they stand on their own as Mr. Palme's opinions. I have attached a copy of the July 11, 2013 report as Appendix 2 and a copy of the July 23, 2013 report as Appendix 3 (his reports attach cases he cites and I have not included those cases in the appendices). There is no other expert evidence on the issues discussed by Mr. Palme.

[161] In his first report of July 11, 2013 Mr. Palme describes the jurisdiction of the North Carolina courts in terms that are, to some extent, familiar to the courts of British Columbia. For example, the North Carolina courts have in rem jurisdiction over property in that state and the authority to adjudicate the rights to that property. In this case the North Carolina courts have in rem jurisdiction over the Wedgemere Street Property and British Columbia courts do not.

[162] The North Carolina courts also have in personam jurisdiction to bring a party into its adjudicative processes. With respect to in personam jurisdiction here, according to Mr. Palme, the North Carolina courts may have in personam jurisdiction over the respondent because of his "minimum contacts" with the state, primarily managing the rental of the Wedgemere Street Property. However:

while North Carolina could exercise in personam jurisdiction over the parties, the district court would be unlikely to do so given the extensive litigation ongoing in Canada. As long as the British Columbia court orders a party to transfer title, but does not attempt to change title on its own motion, North Carolina will enforce that order.

[163] Mr. Palme opines that the basis for North Carolina enforcing an order of a British Columbia court is because the latter has in personam jurisdiction over both parties. In this regard, the parties are resident in British Columbia, the claimant works here and their children attend school here. If it is necessary, I also find that the parties have attorned to the jurisdiction of the British Columbia courts by virtue of each filing separate claims in this Court. Therefore, I conclude that the British Columbia courts have in personam jurisdiction over the parties and I accept Mr. Palme's opinion that a North Carolina court can enforce a British Columbia order on this basis.

[164] Turning to Mr. Palme's second opinion, dated July 23, 2013, he points out that the parties own the Wedgemere Street Property in what is called in North Carolina a "tenancy by the entireties." This appears to be very similar to what is called joint tenancy in British Columbia since they both relate to an undivided one-half interest in property and neither party can convey or encumber the property without the agreement of the other.

[165] However, as explained by Mr. Palme, in North Carolina tenancy by the entireties is only available to married couples. It applies to property acquired by spouses during the marriage and that property is deemed to be marital property (unless rebutted by clear and convincing evidence to the contrary). This is significant because divorce will convert ownership from tenancy in the entireties to tenancy in common which then allows an owner to encumber or convey his or her interest without the consent or knowledge of a co-tenant in common and former spouse.

- [166] While the claimant seeks a divorce she also is very reluctant to create another opportunity for the respondent to obstruct and delay the sale of the Wedgemere Street Property. Put another way, granting a divorce in British Columbia would convert the parties' ownership of the Wedgemere Street Property from tenancy in the entireties to tenancy in common, thereby permitting the respondent to exercise his rights as a tenant in common and to continue to obstruct the sale.
- [167] The solution to this problem, according to the claimant, is twofold. First, the granting of a divorce should be adjourned generally. Second, the respondent should be directed to execute and deliver to the claimant all documents necessary to transfer to the claimant ownership of the Wedgemere Street Property, including a Quitclaim Deed in a form approved by the North Carolina courts. The effect of the execution of the Quitclaim Deed by the respondent would be to transfer his entire ownership of the Wedgemere Street Property to the claimant.
- [168] The claimant's submission continues by saying that if the respondent does execute the Quitclaim Deed the claimant should have sole conduct of the sale of the Wedgemere Street Property and she would be authorized to accept any offer to purchase the property more than \$300,000 USD. After completion of the sale, the net proceeds of the sale would be paid into the trust account of counsel for the claimant. Each party would be entitled to one-half of the net proceeds of the sale, except the respondent's share would be held in trust as security for costs of this litigation, payable to the claimant. If the respondent does not execute the Quitclaim Deed, the claimant would seek her remedy in the North Carolina courts.
- [169] Generally I accept that approach and I particularize it as follows:
- (a) The respondent shall take any and all legal means necessary in North Carolina to transfer his interest in the Wedgemere Street Property to the claimant, including the execution and delivery to the claimant of the necessary documents such as a Quitclaim Deed.
 - (b) The claimant shall have sole conduct of the sale of the Wedgemere Street Property including, without limitation, the power to retain and instruct a realtor and including signing a listing agreement, setting a list price and agreeing to the commission of the realtor.
 - (c) The claimant may accept any offer to purchase the Wedgemere Street Property in excess of \$300,000 USD. The contract for purchase and sale of the property will be served on the respondent and approved by this court prior to completion. If there are difficulties selling the property for an amount in excess of \$300,000, further directions can be sought from this court.

- (d) The net proceeds from the sale of the Wedgemere Street Property will be held in trust by counsel for the claimant and paid out in accordance with the orders of this court. The net proceeds will be calculated after payment of all selling costs including realtor commission, discharge in full of the existing mortgage on the property, payment of property taxes, homeowner fees, utilities and property insurance and payment of any taxes arising from the sale. If there are other costs, further direction from this court can be sought.
- (e) The claimant shall be entitled to one half of the net proceeds of the sale of the Wedgemere Street Property, payable following the completion of the sale, an accounting of the proceeds (not necessarily by an accountant) and the delivery to the respondent of the accounting.
- (f) The respondent shall be entitled to one half of the net proceeds of the sale of the Wedgemere Street Property. This amount will be held in trust by counsel for the claimant as security for the accounting of other family assets and for payment of costs awarded to the claimant (see below). Payment of these amounts to the claimant shall be made upon the amounts being determined by this court or by agreement of the parties. The amount remaining from the respondent's share of the net proceeds of sale, if any, after the claimant's costs have been paid shall be paid to the respondent as soon as practicable following the accounting of the respondent's share of the proceeds along with a copy of the accounting.
- (g) Mr. Justice Steeves is seized of all matters related to the sale of the Wedgemere Street Property, including implementation of the above.

(iii) Bank accounts, investments and other assets

[170] The parties have a number of investments and accounts. As there is no dispute that these are family assets, the presumption found in s. 56 of the FRA is that each of the claimant and respondent is entitled to a one-half interest in each asset.

[171] In *N.M.M. v. N.S.M.*, 2004 BCSC 346, Joyce J. undertook an extensive review of how and when to value assets under the FRA, specifically where the value of an asset has been depleted by one party. He wrote:

76. From my review of the forgoing authorities I distill the following principles:

1. Because it is the triggering event that gives each spouse a prima facie equal interest as tenants in common in each family asset the circumstances as they exist at that date are to be considered in determining whether the prima facie equal division would be unfair.
2. Generally speaking, the spouses will share any increase or decrease in value of a family asset that occurs after the triggering event because their interests in the asset have vested.

3. Valuation at the date of trial is generally appropriate when considering the mechanism under s. 66 [of the FRA] to achieve the division of family assets, for example by dividing the assets in species by vesting the various assets in the names of the parties or by vesting an asset in the name of one party in exchange for an order compensating the other for the divested interest.
4. While generally the appropriate date for valuing family assets will be the trial date it appears there is discretion to fix another date, not earlier than the triggering event, if that is necessary in order to achieve fairness.
5. Discretion may exist to reapportion assets or to vest title in one spouse while awarding the other compensation taking into account events following the triggering event where, for example, the conduct of one party alone has caused the asset to increase or decrease in value and it would create unfairness and injustice if those events were ignored.
6. Where it is established that one spouse has disposed of a family asset or caused it to decrease significantly in value it is open to the court to order compensation for that loss. Such a compensation order will be based on the loss in value and will necessarily involve determining the value of the asset prior to the loss.

[172] In the subject case, the respondent has an account with his former employer in North Carolina, GSK Chemicals ("GSK"). He has other American accounts including one with another former employer, the University of North Carolina ("UNC") and a ROTH IRA. In addition he has kept both vehicles of the marriage, valued collectively at \$7,000. There is a further issue of valuable family jewellery which the claimant alleges is possessed by the respondent.

[173] The respondent has, unfortunately, spent money from some of these accounts for himself. These include a Canadian RESP for the children, his Canadian RRSP account, an American ROTH IRA account and another American account, Vanguard. He justifies these draws with two reasons.

[174] First, he says he has been out of work since October 2011, he is unable to find work and he has needed the money to live on. The respondent's employment situation is discussed below under support. In his evidence he rejects any suggestion that he should have shared the assets he was expending with the claimant. He claims she is well off and does not need the money even though she is raising three children on a modest income. In any event these justifications are not responsive to the issue of the division of family assets.

[175] Another problem with the respondent's explanation for unilaterally reducing family assets is that he has not been forthcoming in disclosing all of his accounts or all of his expenditures. In general the claimant has had to go to considerable effort to get any disclosure from the respondent even in the face of orders of this court for disclosure. On this view, he says he was entitled to use the accounts for his own needs and there would be an accounting in which his use of the money would be included. However, if the

respondent's attempts to hide family assets like investment accounts had been successful (see below), there could be no accounting of those assets,

- [176] There have also been some problems for the claimant to trace the family accounts.
- [177] One such problem was that the respondent transferred \$135,000 in small amounts from an American account to his father in Victoria, Canada. He says this was done because his father agreed to cover any difference in the exchange rate. The father was not called as a witness. I find that this transfer was done to hinder or hide a significant family asset from the claimant. The respondent has reversed the payments he made to his father but this was only because of the vigilance and persistence of the claimant. In fact, if it was not for the actions of the claimant her share of this significant family asset would have been lost to her.
- [178] The respondent's actions have caused the claimant to go to significant cost to obtain disclosure and to request and obtain an adjournment of a previous trial date because the respondent had not complied with orders for disclosure. His actions have caused significant delay to these proceedings.
- [179] The second reason given by the respondent for using family assets for himself is that he is fighting a "noble cause" as he put it in his evidence. By this he means he needed to spend money from family assets on legal fees and to support himself while he fought for the interests of his children and to keep them from their mother, whom he alleges is abusive. I have considered the respondent's allegations of abuse by the mother above and I have rejected them as unfounded; there is no cause, noble or otherwise. In any event, there is no basis in law for one party using family assets to fight the other party.
- [180] Another issue of family assets is the valuable jewellery that was given to the couple at their wedding and worn by the claimant then and on a small number of occasions until the separation in 2011. The claimant says that she has not seen it since the last time she wore it before separation. The respondent says the claimant has the jewellery or her parents have it. There is no dispute in the evidence that the respondent kept this jewellery with his parents in Victoria during the marriage. I find that it is either still there or it has been disposed of by the respondent in some way.
- [181] As to the value of the jewellery, the respondent said in a telephone conversation (a transcript was entered in evidence) with the claimant that it was worth \$10-15,000. This conversation was recorded by the claimant and the respondent did not know it was being recorded. The respondent now says he had no idea of the value of the jewellery when he was talking to the claimant, he was just speculating. I find the jewellery should be valued at \$8,500.00 and the claimant is entitled to her share of that amount.
- [182] Turning to the valuation date, as discussed in *In N.M.M. v. N.S.M* above, generally the date of trial is used and there is some discretion to set another date in the interests of fairness. Here the claimant has used December 31, 2013 as a valuation date because the statements she obtained from the respondent used that date. I also note the difficulty the claimant had

in getting full disclosure from the respondent of his financial statements. I can find no benefit in putting the claimant through this process again to get statements dated a few months later (the trial commenced in February 2014 and completed in July 2014) and I conclude that December 31, 2013 is a fair and sensible valuation date.

[183] On the basis of the above I conclude that the family assets in the control of the respondent and valued as of December 31, 2013 are as follows (I have also indicated the accounts that have been cashed out by the respondent):

401K (GSK) \$229,951 USD

Pension cash \$58,254 USD

UNC 401K/457B \$38,136 USD

ROTH IRA \$68,064 USD

ROTH IRA (cashed by respondent) \$12,105 USD

Vanguard (cashed) \$135,000 USD

RESP (cashed) \$5,580 CAD

RRSP (cashed) \$23,335 CAD

Jewellery \$8,500 CAD

Vehicles (x2) \$7,000 CAD

[184] The totals of the respondent's accounts also separated into Canadian and American funds are as follows:

\$44,415 CAD

\$541,510 USD

\$590,190 Total

[185] I will continue to separate the accounts at issue by U.S. and Canadian currencies. In her calculations the claimant assumed parity of the two currencies. Since that is to the benefit of the respondent I adopt that approach when I come to a final reconciliation of the numbers involved.

[186] For her part, the claimant has an investment account with the respondent's former employer, GSK, and one American ROTH IRA account. She also has a Canadian RRSP account. She has not spent any of the money in these accounts. Her accounts are as follows (also valued at December 31, 2013):

401K GSK \$80,868 USD

ROTH IRA \$64,214 USD

RRSP \$43,037 CAD

[187] The respondent alleges that the claimant is hiding money she earned from her employment prior to the marriage and before the parties went to North Carolina. Prior to the marriage the claimant worked for B.C. Hydro as an administrative assistant with modest earnings. For some time the respondent has insisted that the claimant had significant cash from her pre-marriage employment and she has hidden it from the respondent, perhaps by giving it to her mother. There is no evidence this took place and the logical explanation is that the claimant lived off her income prior to marriage.

[188] Further, the respondent has also insisted that the claimant disclose income tax information to explain her income before the marriage. She disclosed a number of documents covering more than one year, including print-outs from her accountant. The respondent has insisted that she needs to disclose a "transcript" from the Canada Revenue Agency to prove her income and the materials she has disclosed are inadequate. However, in cross-examination, and after a good deal of prevarication, the respondent agreed he did have all the information he needed. The problem was that he had not read it.

[189] I can only conclude there is no merit to the respondent's allegation that the claimant has hidden income she received before the marriage in 2000.

[190] The totals of the claimant's accounts, separated into Canadian and American funds, are as follows:

\$43,037 CAD

\$145,082 USD

\$188,119 Total

[191] The totals for both parties US and Canadian accounts are as follows:

\$91,717 CAD

\$686,592 USD

[192] Turning to the equal division of these family assets, one-half of the parties' total CAD accounts is \$43,726 (one-half of \$87,452). The claimant has \$43,037 in her Canadian accounts leaving \$689 owed to her.

[193] One-half of the parties' US accounts is \$343,296 (one-half of \$686,592). The claimant has \$145,082 in her US accounts, leaving \$198,214 owed to her.

[194] There is also the matter of the lost investment return on the amounts the respondent removed from his accounts. These amounts and their total are as follows:

\$135,000 Vanguard (cashed May and June 2011)

\$12,105 ROTH IRA (cashed in 2012)

\$23,335 RRSP (cashed September 2011-June 2012)

\$5,580 RESP (cashed February 2011)

\$176,020 Total

[195] As can be seen there are different dates when these amounts were withdrawn by the respondent. The claimant uses a two year period to calculate lost investment income and I note that approach underestimates the period for some accounts to the overall benefit of the respondent. For that reason, as well as ease of calculation, I adopt the two year period.

[196] I am urged by the claimant to apply an investment return to the amount of \$176,020 of 18.75%. That is the return she has obtained through her investments. I decline to adopt that figure because it reflects recent high returns. As well, the respondent is a more conservative investor than the claimant to the point of using money accounts for significant amounts of his investments. I conclude that an investment return of 7.5% is an appropriate annual return. Applying that to the total of investments spent by the respondent and to which no returns were available to the claimant (\$176,020), the return would be \$26,403 over two years. The claimant is entitled to half of that amount, \$13,201.

[197] Overall, I find that the claimant is entitled to the following amounts and I have included a total:

\$689 Claimant's equal share of the Canadian accounts

\$198,214 Claimant's share of the US accounts

\$13,201 Claimant's lost return on investments spent by respondent

\$212,104 Total

[198] I find that an equal division of the parties' investments results in the amount of \$212,104 being owed to the claimant by the respondent.

[199] There remains the issue as to how the claimant is to be paid this amount. The most effective way to do this is for the respondent to take the measures necessary to cash his accounts to pay to the claimant the above amount. As the claimant points out, her share of the family accounts could be satisfied with the respondent cashing his 401K with his former employer, GSK. As above the value of that account (as of December 31, 2013) was \$229,951 USD and the amount owed to the claimant is \$212,104.

[200] The claimant is concerned that the respondent will not take the necessary steps to pay her the share of the family accounts she is entitled to. In light of the history of the respondent's actions that is a reasonably-held concern. In this regard the claimant has obtained a third expert opinion from Mr. Palme, the attorney in North Carolina, on "Qualified Domestic Relations Orders" ("QDRO"). I will summarize that report and not include it as an appendix.

- [201] A QDRO is used to distribute retirement funds such as the ones at issue here. The focus of Mr. Palme's opinion whether and how the respondent's 401K account with GSK could be used to pay the claimant her share of the family accounts.
- [202] A QDRO is defined in a United States statute titled the Internal Revenue Code, 26 USC § 414 ("IRC"). It sets out what must be included in a valid QDRO that divides a retirement account. As well, the Employment Retirement Income Security Act, Pub.L. 93-406, 88 Stat. 829 ("ERISA") describes various retirement plans such as 401K.
- [203] There is some variation among employers about the creation of a QDRO but all of them comply with the IRC. A plan administrator with the employer (or financial institution) reviews the QDRO and can reject it if it does not comply with the applicable guidelines. Mr. Palme has made inquiries of GSK and he has drafted a QDRO that complies with the requirements of GSK for division of the 401K account there. There is no limit on the proportion of a 401K account that can be distributed as long as it does not exceed the total value of the account.
- [204] Mr. Palme also opines on the domestication of a foreign judgment in North Carolina. He has confirmed that a foreign judgment that includes a QDRO will be accepted by the GSK plan administrator. The North Carolina General Statutes §§ 1C-1801 governs the recognition of foreign judgments which are defined as "any foreign judgment that is final and conclusive and enforceable where rendered" (§ 1C-1803). There are two ways to domesticate a foreign judgment in North Carolina.
- [205] Under the Uniform Enforcement of Foreign Judgments Act 1989, c. 747 (found in the North Carolina General Statutes, §§ 1C-1701) a foreign judgment may be registered in a North Carolina court to enforce a QDRO. Mr. Palme cites two judgments in support of this. In one (*Schuman & Co. v. Edwards*, 191 N.C. App. 356 (2008)) a party with costs in a judgment in Canada successfully enforced the cost order in a North Carolina court. A second case involved the enforcement of child support arrears that was successfully enforced in North Carolina (*Cotter v. Cotter*, 185 N.C. App. 511 (2007)). Speaking generally, Mr. Palme states as follows:

The domestication of foreign orders is uncontroversial so long as the order is entered in a jurisdiction that observes substantially similar rules of due process and affords a Defendant the opportunity and notice of hearing on the merits. This last point should not be an issue given the fact that the Defendant is proceeding through a lengthy trial in British Columbia.

- [206] A second method for recognition of a foreign judgment in North Carolina is through the "long recognized" common law doctrine of comity, according to Mr. Palme. So long as a defendant has been afforded acceptable due process (including the court exercising in personam jurisdiction), has been given notice, an opportunity to be heard on the merits and the judgment does not violate public policy in North Carolina, comity should be extended to that judgment (*Southern v. Southern*, 43 N.C. App 159 (1979); *Howard v. Howard*, 200 N.C. 574 (1931)).

[207] The stated preference of the claimant in the subject case is for the respondent to execute a QDRO in the form presented in Mr. Palme's report. It is submitted that this approach would be the most effective way for the claimant to obtain her share of the family accounts. There is, however, one qualification of this. The submission of the claimant ended up with a total of \$233,157 CAD owing to the claimant as a result of a higher investment return than I used above (for the judgment amount of \$212,104 CAD). The thinking of the claimant was that all of the respondent's 401K GSK in the amount of \$229,951 USD would be transferred to her by means of a QDRO signed by her and the respondent. For the ease of calculation she would forgo the difference between \$233,157 CAD and \$229,951 USD (as well as any currency exchange amount).

[208] As can be seen, on my calculation the amount owed by the respondent to the claimant is less than the value of his 401K GSK account. Mr. Palme addresses this in his report at p. 2 where he discusses the proportion of distribution permitted and says "there is no statutory limit on the proportion of a 401k account that can be distributed so long as the amount does not exceed the total value of the account." That discussion seems to assume that an account need not be transferred in its entirety. He also references, on p. 1, that the QDRO must express the division of the account as "dollar amount or a percentage" again indicating that a division is possible.

[209] On the basis of the above, I order as follows:

- (a) That the respondent will pay to the claimant, as soon as practicable after the date of this judgment, the amount of \$212,104 CAD;
- (b) To give effect to this order both parties are also ordered to sign the documents necessary to transfer the amount of \$212,104 CAD from the GSK 401K account of the respondent to a GSK 401K account chosen by the claimant and in her name; and
- (c) Both parties will sign a QDRO in a form acceptable to the General Court of Justice, District Court Division, County of Wake, State of North Carolina, U.S.A., and acceptable to the Plan Administrator of 401K plan at GSK.

[210] I also note that it is open to the claimant to use the doctrine of comity to have this judgment enforced in North Carolina.

(d) Support

[211] Both parties claim child support against the other. The respondent seeks spousal support from the claimant. The claimant's original claim included spousal support but she now seeks to have that adjourned generally.

[212] In May 2011 an interim order for child support was made based on guideline income for the respondent of \$67,000 (based on his work as a chemist) and \$39,000 for the claimant (based on her work as an administrative assistant). Child support payments payable by the respondent were set at \$1,317 per month, retroactive to March 1, 2011.

- [213] The respondent's employment ended in October 2011 and he has not worked since then. He paid child support at a reduced rate and then stopped paying entirely. He has made no application to vary the 2011 order to pay support.
- [214] The claimant does not seek retroactive spousal support. She continues to work in the same position of administrative position and she has obviously been successful in that work.
- [215] The current guideline income declared by the respondent is nil. This is on the basis of not working since October 2011 and his claim for support from the claimant is on this basis as well.
- [216] According to the respondent he has been diligently looking for work since he last worked in October 2011. In his evidence he referred vaguely to a number of potential employers where he has applied for work as a chemist. However, he is able to identify only a small number of specific names of potential employers and he has no evidence of the positions he applied for or the dates he applied. He says he applied on-line to a number for a number of positions but no information is forthcoming about them, including any information from on-line.
- [217] In short, the respondent does not have the usual evidence expected to demonstrate reasonable efforts to find employment. When pressed on this in cross-examination he says that the claimant could have hired a private investigator to find out what he has done to obtain employment. That position is not responsive to the issue of his employment or otherwise persuasive.
- [218] The claimant found an advertisement for a position at the previous employer of the respondent, one that was similar to the one he worked at before. During discovery he said he was not aware of the position or that the employer was hiring and he had not made any inquiries of the employer. However, in his direct evidence he said he replied to the advertisement but it was a fake ad to motivate the people already working. At one point he referred to a situation in North Carolina where this happened. He is not able to provide any direct or detailed evidence of this application or that it was a fake ad as he describes. I find he did not apply for this position.
- [219] The respondent is trained as a chemist, he worked in North Carolina in this field and he worked in that general area when he returned to B.C. in December 2009. He says there is limited work in that field in the Vancouver area. Assuming that is true, it has been more than 2.5 years since the respondent last worked and he has not considered alternate work. He testified vaguely about returning to school but he does not identify any specific course, relate any training to the work market or explain how the training will be paid for. It is also relevant to note that during the time the respondent has been unemployed he has been living off his unilateral spending of family assets. And, as above, he has attempted to hide significant family assets.

- [220] Overall, I conclude that the respondent has done little or nothing to find employment since he last worked in October 2011. While he may have narrow employment skills for work in the Vancouver area he has done nothing to look for alternate work. His response to this suggestion is that he should not be expected to work for minimum wage. However, he has no information about the availability of alternate work in positions that pay something less than what he earned as a chemist but more than minimum wage. He is apparently content to live off the family assets and to use them to finance what he describes as the "noble cause" of his counterclaim for sole guardianship.
- [221] I conclude that income should be imputed to the respondent. He was earning \$67,000 as a chemist in 2011. We do not know what other work is available for him because he has not made any inquiries about alternate work. He obviously needs to make efforts to be economically independent and he cannot continue to spend the family's assets to the exclusion of the claimant. He has not been diligent in obtaining alternate work but it would create new problems to impute income to him immediately without time to make the transition to some kind of employment.
- [222] For these reasons I impute income to the respondent on the following basis:
- (a) From the date of this judgment to September 30, 2014 no income will be imputed to the respondent. This will permit him to make the efforts necessary to obtain employment without the burden of paying support. He will not be entitled to spousal support for this period.
 - (b) For the period October 1, 2014 to December 31, 2014 income in the amount of \$40,000 will be imputed to the respondent. He will not be entitled to spousal support for this period and nor will he be required to pay child support.
 - (c) For the period January 1, 2015 to March 31, 2015 income in the amount of \$50,000 will be imputed to the respondent. Child support will be calculated on the basis of that income for the respondent and on the basis of guideline income of \$45,884 for the claimant as recorded on her Form 8. Child support, calculated in the mid-range, will be effective January 1, 2015, plus an amount for extraordinary expenses described below.
 - (d) The parties will swear and file new Form 8s on April 1, 2015 based on 2014 income and these will be exchanged on or before April 15, 2015. Included in the Form 8s will be copies of pay cheque stubs from the parties for the month of March 2015.
 - (e) Upon receipt of the information in (d) above, the claimant may apply for further orders relating to the income of the respondent. The respondent may also apply for further directions but only on the basis of significant personal circumstances that affects his employability. For example, inability to find any work or only minimum wage work would not be significant personal circumstances. I am seized of any application.

- (f) In the event there is no application under (e) above, the respondent's guideline income will continue to be imputed at \$50,000.
- (g) On or before June 1 of each year on a going forward basis, the parties will exchange valid copies of Canada Revenue Agency Notices of Assessment for the previous tax year. The first exchange will take place on or before June 1, 2015, whether or not there is an application under (e) above.
- (h) There will be no arrears of child support up to January 1, 2015.
- (i) The respondent's application for child and spousal support is denied.

[223] Turning to extraordinary expenses for the children, they are active in various activities. I assume the children's activities will continue, perhaps even expand as they get older. Both parents support and participate in these activities although they have generated the conflict and impasses primarily caused by the respondent and described above. For this reason I am very reluctant to put in place a system whereby the parties will have to agree on costs and who is to pay those costs. Considering the history of this issue as described above I am, frankly, not confident that the respondent is capable of the kind of respectful discussions and compromises that would be necessary in that kind of arrangement.

[224] Therefore, I conclude that a monthly amount should be added to child support as an effective way to compensate the claimant for extraordinary expenses. That amount will be \$100 per month per child. That is, \$300 per month total, effective January 1, 2015.

(e) Divorce

[225] The parties first separated in June 2010. There was a brief attempt at reconciliation and then a final separation in August 2010. Since then the parties have been living separate and apart and there has been no collusion to obtain a divorce.

[226] Both parties seek a divorce. However, as described above, the claimant seeks to adjourn any granting of a divorce until the sale of the Wedgemere Street Property. Under North Carolina law a divorce would convert the tenancy by the entireties tenure of the property to tenants in common and that would open up another opportunity for the respondent to obstruct the sale. On the evidence, in particular on the basis of the refusal by the respondent to comply with the May 2011 order to sell the property, I conclude that the claimant's position is a reasonable one.

[227] I therefore adjourn the application for a divorce generally. I am seized of any future application for divorce.

(f) Costs

[228] The claimant seeks costs against the respondent. Clearly she has been substantially successful in her application and she is, therefore, entitled to costs. The respondent's application for costs is dismissed.

- [229] Costs are pursuant to Rule 16-1 of the Supreme Court Family Rules. Section 1 of Appendix B sets out the scale of costs as based on whether a matter is less than ordinary difficulty, ordinary difficulty or more than ordinary difficulty. Special costs are also available under Rule 16-1(1)(b)(i).
- [230] Fundamentally, the issues in dispute in this case are not particularly novel. However, the claimant has had to obtain expert opinions about how to dispose of the Wedgemere Street Property because the respondent has not complied with the May 2011 order of this court to sell the property. She has also had to respond to the very serious but unfounded allegations that she has abused her children. And the conduct of her case has been made more complicated and lengthy by the respondent's failure to give timely disclosure of financial information and attempt to hide a significant asset.
- [231] In short the conduct of the respondent has transformed this litigation into something that is of more than ordinary difficulty. I make that order and I will determine the amount of those costs. The parties may make written submissions on this issue or they can schedule a hearing before me. I add that there is a basis for special costs in this case. However, I am very reluctant to create another extended process by which the history of this case can be repeated and I am not awarding special costs to the claimant.
- [232] I also conclude that there is a serious question whether the claimant will be able to recover the costs payable in this case. The respondent's past conduct demonstrates he is quite capable of obstruction, delay and simple denial of his obligations. Therefore, pursuant to Rule 22-1(6), I order that the respondent's share of the proceeds from the sale of the Wedgemere Street Property be held in trust by counsel for the claimant as security for the costs in this case. This is also discussed under family assets.

E. Summary

(a) Guardianship

- [233] Pursuant to s. 39 of the FLA, both parents are guardians of the three children.
- [234] Pursuant to s. 40 and s. 41 of the FLA, effective the date of this judgment, parental responsibilities are allocated between the claimant and respondent as discussed at paragraph 151 of this judgment.
- [235] The respondent's application for sole guardianship is dismissed.
- [236] The parental coordinator's appointment will end effective the date of this judgment.

(b) Parenting time

The claimant will have parenting time with the children most of the time. The respondent will have parenting time with the children as specified in paragraph 154 of this judgment.

(c) Contempt

[237] The respondent has not complied with the May 19, 2011 order of this court to sell the Wedgemere Street Property in North Carolina. His reasons for non-compliance are not compelling.

[238] The respondent is in contempt of court. The respondent is given an opportunity to purge his contempt by cooperating with the orders relating to the disposition of the Wedgemere Street Property. A hearing on sentencing is adjourned. It can be scheduled before me by the claimant, if necessary.

(d) Family assets: Wedgemere Street Property (North Carolina)

[239] Family assets are determined under the FRA.

[240] The Wedgemere Street Property will be sold as soon as practicable in compliance with the other terms of this judgement.

[241] The sale of the Wedgemere Street property shall be conducted as specified at paragraph 184 of this judgment.

(e) Family assets: savings and accounts

[242] The family assets include investment and savings accounts in Canada and the United States. The respondent has unilaterally spent some of these assets for his own purposes. A significant amount of his assets are in American accounts.

[243] An accounting of all of these accounts results in the amount of \$212,104 CAD owing to the claimant by the respondent. He does not have that amount in his Canadian accounts.

[244] The amount owing by the respondent to the claimant will be paid as specified at paragraph 224 of this judgment.

(f) Support

[245] The claimant's application for spousal support is adjourned generally.

[246] The respondent's application for spousal support is dismissed.

[247] The claimant's current income will be determined by her Form 8.

[248] The respondent's income will be imputed and child support calculated as specified at paragraph 237 of this judgment. Future determination of the guideline incomes of the parties is also set out there.

[249] The respondent will pay to the claimant the amount of \$300 per month for extraordinary expenses of all three children as an addition to child support, effective January 1, 2015.

(g) Divorce

[250] The application for divorce is adjourned generally.

(h) Costs

- [251] This is a case of more than ordinary difficulty and, pursuant to Rule 16-1, costs are payable by the respondent to the claimant on that basis. The parties may make written submissions or schedule a hearing on this issue.
- [252] As well, pursuant to Rule 22-1(6), I order that the respondent's share of the proceeds from the sale of the Wedgemere Street Property be held in trust by counsel for the claimant as security for the costs in this case.
- (i) Other
- [253] Approval by the respondent of the form of this order is dispensed with.
- [254] These orders supersede all previous orders of this court with the exception that the restraining order of May 2, 2012, pursuant to s. 67 of the FRA, continues until all issues involving family assets are concluded.
- [255] Specifically, the claimant and the respondent are restrained and enjoined from collapsing or withdrawing funds from their respective Canadian and American registered and unregistered investments which, without limitation include their RRSPs, their IRAs, their 401K investment vehicles and brokerage accounts, except with the written permission of the other party, such permission not to be under reasonably withheld.
- [256] Mr. Justice Steeves is seized of any issues with regards to implementation of this judgement and any subsequent application by either party on the issues in this judgement.

"Steeves, J."

F. Appendices

APPENDIX 1

Transcript of undated tape of audio session between Respondent ("R") and the three children, K.R. ("K.R.") and T.R. ("T.R."). S.R. is the third child, M.R. "Nani" is the mother of the claimant and the grandmother of the children.

A [A.R., the respondent] - Listen guys I want to ask you like you said hey T.R. what are those marks on your legs

T [T.R.] - Okay Nani [children's name for the claimant's mother, their maternal grandmother]

A - How did you get those?

T- I do not know

A - okay What's that red mark on your leg? T.R.

T- Okay that red mark on my face that scratch on my nose

A - No no I am asking about your legs

T- No I will tell you how I got hurt on my nose Nani put some fire on it

A - On your nose what do you mean fire?

T- Fire from stove

A - How did she put it on your nose?

T - She got a chopstick

A She put a chopstick on the stove and got a fire and put in on your nose

T- Yep

A Why

T I do not know

A - What about your leg is that a burn mark what that from?

T - Burn mark from Nani

A - How

K [K.R.] - Okay I am telling Nani you are lying T.R.

A - How did you get that burn mark on your leg?

K - That's not a burn mark what that you have in your hand?

A - Nothing its just a little toy, what happened to your leg T.R.

K - Okay I know what that is daddy

A - K.R. what did you just tell me you do not want to say anything why?

K - Because Nani will get me in trouble

A Why will she get you in trouble

K Because I am the eldest

A Is that what they told you

K Yes

A So they told you if T.R. says anything right - if there is anything from what T.R. say you'll get in trouble right because you are the oldest right?

K Yes

A Why would you get in trouble?

K I do not know

T - Because it's a lie

A So what do they want you to do K.R.? They want you to get T.R. to say nothing?

K - I do not know

A Okay how does you getting in trouble stop T.R. from saying anything?

K I do not know

A Did they really tell you if there is any trouble you will get in trouble because you are the oldest you just told me that they did say that

K laughs

A K.R. did they say that?

K No

A you just said before that you did not want T.R. to say anything you said she is lying and I said why are you saying she is lying and you started crying that they said if there is any trouble you are going to get in trouble because you are the oldest

K T.R. is lying

A Really

T no

A Then you must be lying too because you are telling me 2 different things one time you told me that they told you if there is any trouble you are going to get in trouble because you are the oldest so make sure there is no trouble and now you are saying that is not true T.R. is lying so which one is the truth K.R.?

K T.R. is lying

T No yiyga (T.R. calls K.R. this) is lying, hey how do you put this on

A Okay listen does Nani hit you?

T- Yes on the back

A Where?

K No Nani does not

T yes she does

A K.R. K.R. does Nani hit you look all Daddy has in his hand is a little toy thing that all it is--what do you think it is?

K a recorder

A a recorder really how do you know what a recorder is K.R.? Did Nani tell you should be careful of that?

K no

A huh

T Can I have that?

A Hey let go of that it is just a toy. Is Nani telling you should watch for something like that? No this is just a little toy

K - No its not it does not look like a toy

A Look it is a toy a plastic toy ..

K Then can we have it?

A yeah you can have it after if you want

K Can I have it

A So let me ask you again I just want to know did Nani hit you?

K - I do not know

A T.R. did Nani hit you?

T Yes

A were did she hit you ?

T on the back

A K.R. I just asked you if Nani hits you and now you are saying on your back

K No she does not she hit T.R. on the back

A She never hit you before I thought you said she did one time for no reason

K No put me in the bedroom for no reason

A Okay but she never hit you

K no either she before

A So she did hit you a few times before

K A long time ago

A when was a long time ago

K ouch T.R. ouch

A What was that what did you do to S.R.? Does she hit S.R. if he is acting out?

S [sic] - No she sends him to the bedroom

A oh really so she does not hit him on the back

K eh ha

T daddy

A what is it hang on a sec T.R. I want to find out more about you guys on what Nani has done okay what about mommy does she hit you?

K no

A T.R. does mommy hit you?

T on the back as well

A K.R. how come T.R. is always hit so much and not you

K Because she does a lot of trouble

A You do not do any trouble what about S.R. does he do any trouble?

K He does

A What about him how do they discipline him

K They put him in the bedroom and shut the door and do not let him out until he cries

A They do not let him out until he cries

K until a few minutes after he cries I think

A oh really why do they just not do that with T.R. why do they hit T.R.

K Oh because T.R. can learn out of it T.R. will not cry

A T.R. cries all the time for no reason

K No she does not except when you look into her pants

A She cries all the time she did not a note and she cried she cries all the time

T Yiya cries wha wah

K I do not wah wah wah

A T.R. you said Nani burns you on the leg what did she use to burn you on the leg

K nothing

A K.R. I already know you are not going to saying anything because you already said if you say anything you are going to get into trouble ... you know what I am going to go give Nani this and you will tell the truth otherwise you will get in a lot of trouble okay

K Daddy has a (inaudible) on his face

Laughter laughter

K it was a recorder

A it is not a recorder a little thing right

K Can I use it

A no you can use it later so K.R. tell what does Nani use to burn T.R.? T.R. what does she use to burn you on the leg with

K NOTHING T.R. is lying

A Okay T.R. what does she use to burn on the leg with be quiet K.R. I am not talking to you okay T.R. what does she use to burn you the leg with

T this is not from Nani its from somebody in my class

A you said Nani burns you on the leg what does she burn you on the leg with K.R. stop telling her stuff K.R. are you scared of Nani? Are you afraid of Nani what if I call Nani right now and tell you are saying these things will you get in trouble?

K yes

A really what do you think she will do to you?

K put me in timeout

A is that all.. why do I not pick up the phone right now and call Nani right now and tell her that you K.R. are saying that Nani is burning you and T.R. I will also say that you are saying that Nani is burning you with the stove and I am going to bring you guys right back to her house so you could talk to her

K Nani does not burn me

A well I will just call her right now and just tell her

K - No

A I will just call her and tell her that you guys are saying you are doing that

K no

A hey if she is not doing it then it should not be a problem right if she is not burning you than why would Nani care she will say oh I am not doing that and then she will not care right if she is really doing it then she will get upset like get you in big trouble right

K she is not doing it

A then you do not have to worry about it I will just call her right now

K no

A why not

K cause

A cause why

K I do not want you to

A why not

K I do not want you to

A why do I not just call up Nani right now right I will call her up right now and say K.R. and T.R. say you are burning them and let's see what she says okay

K no

A why not are you afraid what going to happen I cannot hear I cannot hear you what why what is she going to do

K get me in big trouble

A If it is not true why would she get you in trouble she will get you in trouble if you say something you should not have said are you saying something you should not have said

K I know why

A Is it because she will say you have said something you should not have said

K No because lied

A She is not going to get you in trouble for lying

K Last time T.R. got in big time trouble that she was lying about Bebi and Papa coming here A oh really what kind of trouble did T.R. get in

K big trouble

A Like what

K I do not know

A What difference does it make if Bebe and Papa are here why would she get in big trouble for that how does nani know if bebe and Papa are here how does she know

K because she knows

A how does she know

K because nani know because I have no idea ;

A how do you know nani know

K no she does not because she asks and nani believes me

A okay K.R. I need to get a straight answer from you okay I am going to nani and I will tell her what you told me

K No

A I request you tell me the truth before I call her Tell me the truth about what is going on with her burning you guys

K she does not burns us I know where T.R. got the bruise from and I think I know why T.R. probably hurt herself

A how do you know K.R. you are at school all day do you know what going on during the day you know what you cannot comment on it hey T.R. you what I want to ask you

K hey T.R. daddy is telling a lie

A T.R. come here I want to know something from you does Nani burn you T.R. does Nani burn you

Child whisper no

A okay listen T.R. I am getting ready to call nani right now and she can come pick you up if you are not going answer the question okay

T I will tell you

A alright

T Nani really hit me

A she hit you where did you hit you

K where the bruise was

A with what

K she used a spoon right T.R.

A T.R. did she use a spoon okay T.R. time to you if you are not listening I am going to take you out let's go

T no no I will tell she hit me on the knee

A where on the knee with what

T she hit me with a pot

A a pot T.R. what were you doing that caused her to hit you with a pot

T I do not know

A you do not know she hit you for no reason

T yep

A Okay what about burning you does she burn you

T yes

A when did she burn you what do you do when she burn you

T I let mommy

A what does mommy do when you tell her

T put nani in the bedroom

A she puts nani in the bedroom really K.R. have you ever seen nani being put in the bedroom?

K.R. why are you laughing you think this is a joke I am asking serious questions here T.R. did Nani burn you?

T yes and then she got put in the bedroom

A okay you know I am going to get nani on the phone and ask her since you are not telling me I will ask nani okay did nani burn or not why T.R. was it only one time that she burnt you

T yeah

A only 1 time really K.R. you are saying it was 1 time when was it have you ever been burned by nani have you been hit by nani

K before before before

A did you stop doing what you were doing T.R. are you scared of nani

K no

A what about S.R. is he afraid of her what does she does she do to him but you seem so happy when you go over there you are not happy to go to nani's house

K not when its trouble time

A does nani go cuckoo once in awhile and there is trouble time then everybody gets in trouble whenever she gets really angry then there is trouble so everything is good until nani gets angry right then you hide somewhere

K then we play hide and seek trouble hide and seek

A is nani playing trouble hide and seek with you

T yeah

Noise in background why

[end of transcript]

APPENDIX 2

Expert Report of Steve Palme

July 11, 2013

As you requested, our office has researched North Carolina case law regarding the effectiveness of former judgments on North Carolina real property. It is our opinion that North Carolina will recognize a judgment from a British Columbia, provided that the British Columbia court does not attempt to transfer the property itself.

North Carolina may exercise in rem jurisdiction over property, which means North Carolina has the ability to adjudicate the rights to a piece of property within North Carolina's borders. In personam jurisdiction is North Carolina's ability to bring a person into its adjudicative process.

North Carolina has in rem jurisdiction over the marital residence located at 312 Wedgemere Street in Cary, North Carolina. Although North Carolina has in rem jurisdiction over the residence, the state does not necessarily also have personal jurisdiction over [A.R.] or [K.B.] North Carolina cannot enter an equitable distribution order that transfers title to one of the parties without having in personam jurisdiction over the parties. With both of the parties living in British Columbia, the British Columbia court has in personam jurisdiction over the parties.

North Carolina courts will recognize a foreign judgment that has jurisdiction over both parties. In *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E.2d 2 (1979), the North Carolina Court of Appeals affirmed a district court ruling that upheld a Texas property judgment. In that case, the husband lived in Texas and filed a petition asking Texas to distribute the parties' property, which included a house and a lot in North Carolina. The Texas district court ordered the husband to transfer, quitclaim and deed to the home and lot in North Carolina to the wife. After the husband failed to perform, the wife filed suit in North Carolina to enforce the Texas judgment. The husband counterclaimed and alleged that the Texas court had no authority to transfer title. The North Carolina district court ordered the husband to convey the properties in accordance with the Texas judgment, which the husband then appealed.

The North Carolina Court of Appeals agreed with the husband's contention that a foreign jurisdiction does not have authority to transfer title to real property in North Carolina. See *McRary v. McRary*, 228 N.C. 714, 47 S.E.2d 27 (1948). However, a foreign jurisdiction does have the authority to order a party to transfer land as part of a divorce proceeding. "In personam decrees affecting non-local realty are neither against the laws or policies of this State, nor the laws and policies of the State of Texas." Courtney at 297, 253 S.E.2d at 5. So long as the foreign jurisdiction has in personam jurisdiction over both parties, North Carolina courts will recognize a foreign judgment ordering one of the parties to act. In *McRary*, an Ohio divorce decree attempted to use its order to transfer North Carolina title to one of the parties. The North Carolina Supreme Court held Ohio had no authority to transfer title in North Carolina.

In this case, should the British Columbia court order [A.R.] to transfer title to the Wedgemere Street property, [K.B.] would be able to take that judgment to the Wake County District Court in North Carolina for enforcement.

[K.B.] could, in theory, file an action in Wake County, North Carolina regarding the division of marital property. From my research, it is clear that North Carolina may exercise in personam jurisdiction over [A.R.] because he has "minimum contacts" with the state. [A.R.] continues to work with a rental company based in North Carolina that maintains the marital residences and collects rent from that property. The property taxes on the 312 Wedgemere Drive were paid in 2011 and 2012 and presumably, [A.R.] is subject to North Carolina's Department of Revenue for the rental income on the Wedgemere property. If [K.B.] sought to file here, North Carolina could exercise personal jurisdiction over [A.R.]

Although North Carolina could exercise jurisdiction, it is unlikely that a judge in Wake County would actually chose to do so. The parties are already well into their litigation in British Columbia and neither party resides here, In *Staton v. Russell*, 151 N.C. App. 1, 565 S.E.2d 103 (2002), a North Carolina court issued an injunction against the defendants, who asked a Florida court for a declaratory judgment relating documents at issue in the North Carolina action three years after the original North Carolina complaint was filed. As the plaintiffs had filed first in North Carolina, the North Carolina Court of Appeals held that the lower court could enjoin the defendants from asking a foreign jurisdiction to settle the matter. "When a suit deals with specific property, a court is authorized to enjoin a party from bringing a new action in another court where that other action has the potential to delay or interfere with adjudication of rights affecting such property." *Staton* at 11, 565 S.E.2d. at 109 (quoting *Kline v. Burke Constr. Co.*, 260 U.S. 226, 67 L. Ed. 226, 43 S. Ct. 79 (1922)). A Wake County District Court Judge will likely take the same position -- the parties are already well into litigation in British Columbia and filing in North Carolina would delay and interfere with the parties' rights.

In summary, while North Carolina could exercise in personam jurisdiction over the parties, the district court would be unlikely to do so given the extensive litigation ongoing in Canada. As long as the British Columbia court orders a party to transfer title, but does not attempt to change title on its own motion, North Carolina will enforce that order.

I have enclosed the three cases cited above.

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APPENDIX 3

Expert Report of Steve Palme

July 23, 2013

As you requested, below is a basic summary and analysis of North Carolina's property division regime for marital property.

North Carolina's statutory and public policy framework for dividing property on the dissolution of a marriage is an equitable distribution regime as opposed to a community property regime. The statute governing equitable distribution is the Equitable Distribution Act, North Carolina General Statute §50-20.

In N.C.G.S. §50-20(a), the forms of property are defined as Marital, Separate, and Divisible. "Marital" property is all property acquired by either spouse during the marriage and before date of separation. Because North Carolina is not a title state when it comes to the division of assets defined as marital, the manner in which property acquired during the marriage is titled is not determinative when considering how the property is to be classified. "Separate" is defined as property owned by either spouse prior to the date of marriage or acquired by an individual spouse during the marriage by gift or via an inheritance. A gift from a spouse during a marriage must include specific language in the conveyance that the grantor intended it to be the grantee's separate property. Finally, with respect to separate property, premarital property or funds used to purchase property during the marriage retains their character as separate property (so long as the funds can be traced back to a premarital source). The last category, "Divisible" property encompasses property or funds that were acquired during the marriage but did not vest or otherwise materialize until after date of separation. Examples of divisible property include performance bonuses from an employer, stock options, and passive increases in value to real estate and financial accounts.

The division of marital property following separation includes the presumption that an equal division is equitable. This presumption can be overcome if an unequal division is requested and the Court, after hearing the evidence and considering the 12 factors set forth in N.C.G.S. §50-20(c) (1)-(12), determines an unequal division is appropriate. In addition, there are two further presumptions in every equitable distribution action: (1) property is presumed marital until the presumption is rebutted with evidence showing that the property is separate and (2) debts are presumed separate until rebutted with evidence that the debt was incurred for a marital purpose and is therefore marital.

The right to an equitable distribution that belongs to each spouse under North Carolina's Equitable Distribution Act does not create an exercisable property right in marital property during the marriage. That right does not vest until the beginning of the dissolution of the marriage at

date of separation (*Hearndon v. Hearndon*, 132 NC App. 98 (1999)). This distinguishes North Carolina as one of the equitable distribution jurisdictions as opposed to the minority of states that approach the division of property using the legal theory of community property. Further, the right to state a claim for equitable distribution is not available to spouses prior to the date of separation and is extinguished upon divorce if not asserted prior to the entry of a divorce judgment (N.C.G.S. §5Q-20(k); *Howell v. Howell*, 321 N.C. 87 (1987)). The Courts of this state can only divide the marital and divisible property of spouses. They lack the authority under the statutory framework to distribute separate property.

Finally, real property acquired during the marriage is titled in a manner different from other forms of jointly-owned real property. In North Carolina, spouses who acquire real property do so as a tenancy by the entireties rather than a tenancy in common. (N.C.G.S. §39-13.6). A property acquired during the marriage and titled as a tenancy by the entireties, even if separate funds are used in the purchase, is considered evidence of general donative intent and will be deemed marital property unless rebutted by the clear and convincing evidence standard (*McLean v. McLean*, 88 N.C. App. 285 (1987)).

The tenancy by the entireties form of ownership is only available to married couples and functions as an undivided one-half interest. It prevents the encumbrance or conveyance of the property without the consent of both spouses. Since the tenancy by the entireties is only available to married persons, divorce will convert ownership to a tenancy in common (*Beam v. Beam*, 92 N.C. App. 509 (1988)). The parties will still both maintain a one-half interest in the property, but they are free to encumber, convey or otherwise dispose of their interest without the consent or knowledge of their co-tenant and former spouse because N.C.G.S. §39-13.6 no longer applies and they are now subject only to the common law requirements of the tenancy in common.

I have enclosed the cases and statutes cited above.

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