

CANADA / JUDGMENT

K.P. v. S.K.

2021 BCSC 1426

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Supreme Court of British Columbia

DECIDED

21 July 2021

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2021 BCSC 1426 K.P. v. S.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.P. v. S.K.,

2021 BCSC 1426

Date: 20210721

Docket: E58906

Registry: New Westminster

Between:

K.P.K. also known as K.P.

Claimant

And

S.K.

Respondent

Before: The Honourable Mr. Justice Kirchner

Reasons for Judgment

Counsel for Claimant:

D. Wilson

Appearing on his own behalf:

S.K.

Place and Date of Trial:

Abbotsford, B.C.

June 28-30, July 2 and

July 5-8, 2021

Place and Date of Judgment:

Abbotsford, B.C.

July 21, 2021

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Introduction

- [1] The claimant in this family law proceeding, seeks orders for a divorce, child and spousal support, including arrears, division of family property and family debt, payment of certain debts from the proceeds of the sale of the family home, and, most contentiously, an order authorizing her to relocate the children of the marriage to Alberta where the parties previously lived.
- [2] The respondent opposes the relocation application and this issue consumed the vast majority of the trial. He also disputes some of the amounts claimed as family debt, arguing they were gifts from the claimant's friends and family with no obligation to repay, and he disputes the claimant's student loan is a family debt. He does not oppose the application for child support.
- [3] To protect the privacy and well-being of the two children, I order that the parties' initials be used in the style of cause. I have also used initials for the parties, their children, and other witnesses throughout these reasons and I have avoided reference to non-essential details that might help identify them.

- [4] The trial was held in the last week of June and first week of July. Because of the relocation issue, the parties required a quick decision so they know where to register the children for school in September. The subject matter of the case, together with the need for a decision in a relatively short period of time, presented something of a challenge for the Court but the task was made manageable by the manner in which both parties conducted themselves at trial. I am grateful to counsel for the claimant for his professionalism and thoughtful approach to this case and his helpful and fair submissions, having regard to the fact that the respondent was self-represented. I am also grateful to the respondent, S.K., who, in representing himself, ably conducted his case in his second language and showed courtesy and respect for the Court, the claimant's counsel, the witnesses, and the process throughout. The burden placed on me has been eased by both.

Facts

The Parties and the Marriage

- [5] The claimant, K.P., has deep roots in Alberta. She was born in Poland and immigrated to Canada with her family when she was two years old. They settled in Grand Prairie, where K.P. grew up, so they could reunite with her father's extended family who had previously settled there. There is a large Polish community in Grand Prairie and the family developed a network of friends. K.P. is still close with her family and with the friends with whom she grew up, most of whom still live in Grand Prairie or Edmonton.
- [6] K.P.'s father and other relatives still live in Grand Prairie. Her mother currently lives in Edmonton. (Her parents were divorced some time ago.) She has a sister who is attending school in Kamloops but will be returning Edmonton later this year. K.P. is very close to all three. She also has a large extended family, including aunts, uncles, cousins, all of whom live in Edmonton or Grand Prairie.
- [7] The respondent, S.K. is also from Poland. He immigrated to Canada after meeting K.P. when she was visiting Poland in 2009. K.P. had travelled there on a scholarship to study Polish on a six-week program but she met S.K. and decided to stay longer to pursue the relationship. She stayed for almost a year teaching Spanish and English. S.K. worked as a welder and a coal miner, going back and forth between the two lines of work. The parties lived in different parts of the country but maintained a long-distance relationship until 2010 when they moved to Alberta together.
- [8] In 2010, K.P. wished to return to Canada to finish her studies at the University of Alberta. Before coming back, she contacted her father to see if she could stay with him and bring S.K. with her. Her father was surprised, pleasantly, to hear from K.P. as there had been some discord between the two following his divorce from K.P.'s mother. He readily agreed to have K.P. and S.K. stay with him in Grand Prairie, which they did upon their arrival in Canada. After about two months, the parties moved to stay with K.P.'s mother, who was then also living in Grand Prairie, and they eventually moved to Edmonton where they rented a place

of their own. By this time, S.K., who had only expected to remain in Canada for three months on a tourist visa, had decided to continue living in Canada with K.P. Meanwhile, K.P. finished her degree in modern language and cultural studies at the University of Alberta and worked part time for Statistics Canada and at a coffee shop.

- [9] The parties were married in Edmonton in January 2011. S.K. was granted permanent residency in Canada in 2012 and began working as a welder in Edmonton.
- [10] In 2012 the parties purchased a house in Edmonton. K.P.'s mother loaned them \$6,000 to help cover the down payment, which they paid back over time. They sold that house and bought another in 2013.
- [11] The parties' first child, Z.O.K., was born in 2014. K.P. took one year of maternity and parental leave, after which she returned to work for a few hours in the day while S.K. continued full time work, often doing night shifts from 4:30 p.m. to 3:30 a.m. K.P.'s mother would visit from Grand Prairie perhaps twice a month to help out. Her father and sister were also frequent visitors and other family members - aunts, uncles, and cousins - would visit from time to time.
- [12] Around 2014 or 2015 the parties began discussing a move to British Columbia so K.P. could pursue an education in naturopathic medicine. K.P. testified they did not want to leave Edmonton but the program she wished to attend was only available in Vancouver or Toronto. Since Toronto was further away from family, she preferred Vancouver and said S.K. was "on board" with that plan. She maintains the parties always intended to return to Alberta.
- [13] S.K. provides a different perspective. He testified that while the immediate motivation for the move was for K.P.'s schooling, the parties' intention was to establish a new life for themselves in British Columbia. He testified they wanted to be far from Edmonton because significant tensions between S.K. and K.P.'s mother had caused problems for the family. I heard much about these tensions and how they developed over the years. The difficult relationship between K.P.'s mother and S.K. was certainly a contributing factor to the souring of the relationship between the parties.
- [14] Whether the move was considered to be temporary or a permanent "fresh start" is a matter of considerable dispute to which I will return later in these reasons. Regardless of the reason, the parties went ahead with the plan.
- [15] In January 2016, S.K. found a welding job in the Vancouver area. He had been laid off from his job in Edmonton and, since the parties had resolved to make the move to British Columbia, they decided S.K. should go ahead and start work at the new job. He would also take this time to search out places for the family to live when they would come later in the year.

- [16] By this time, K.P. was pregnant with their second child. She continued to work in Edmonton until February 2016 when she moved to her father's place in Grand Prairie and lived with him until August 2016. This allowed her to stay near family in the last months of her pregnancy and to have their help in looking after Z.O.K. both before and their second child, Z.A.K., was born in April. K.P. also needed to complete some prerequisite courses for her naturopathic medicine program and the support of her family gave her some time and freedom to study. When Z.A.K. was born, S.K. drove back from Vancouver and, though he could not be present for the birth, arrived late in the evening to be with his family.
- [17] K.P. testified she could not have managed those months without the help of her family in Grand Prairie. After Z.A.K. was born, they helped with childcare of both children so K.P. could get some rest and complete her prerequisite course work.
- [18] In August 2016, K.P. and the kids joined S.K. in British Columbia and in September she started her program at the Boucher Institute of Naturopathic Medicine in New Westminster. They lived in rented accommodation in New Westminster but, in November 2017, bought a condominium in White Rock.
- [19] K.P. testified that prior to the move from Edmonton, the parties considered keeping their home and renting it out while they were away. However, the rental income they expected to receive would not fully cover the cost of their mortgage and taxes so that they could not afford to keep the home. S.K. disputes this and suggests that between the rental income for the main floor of the home, the basement suite, as well as a parking space they rented out on a monthly basis to an employee of a nearby hospital, they could have kept the house and would have done so if they were truly going to return to Edmonton.

The Naturopathic Medicine Program

- [20] Completion of the program at the Boucher Institute would position K.P. to write qualifying exams to become a naturopathic doctor in either Alberta or British Columbia (or elsewhere). It is a four-year program when done full time but K.P. completed it over five years. S.K. suggests some negative connotation with her having done so, relating it to a course she did not pass, and suggested this forced her to add an additional year to the program. However, given she was also raising two small children at the time, I find nothing untoward about completing the program over five years.
- [21] Throughout this time, K.P. took out student loans and grants from the governments of Canada and Alberta. The money was used to pay her tuition and to support herself and the family while she was attending school. The grant portions of the funds advanced by both governments need not be repaid but the loans do. K.P. testified that to qualify for the Alberta grant, she had to confirm it was her intention to return to Alberta after completing her program. K.P. finished her program this year. Her last day was during the trial. She will soon be called upon to start repaying the student loans.

Family Violence

- [22] K.P. testified that S.K. had always been controlling in the relationship. While they were living in Alberta, she said things went in cycles, with good times between the bad. She testified that S.K. would have angry outbursts and be mentally and emotionally abusive to her. After these incidents he would work at getting better and a better period would indeed follow, but the cycle would eventually return. She said these problems became progressively worse after the move to British Columbia. She said if things did not go S.K.'s way, he would lash out at her or the kids. This would involve yelling or excessively spanking the children. She said the spanking would sometimes become so bad she needed to yell at him to stop.
- [23] K.P. also testified that S.K. engaged in verbal and emotional abuse, threatening not to give the children water if they misbehaved. She said there were a lot of angry outbursts and yelling. She said he would break things, describing one incident where he became angry at K.P. for leaving dishes in the sink and he began throwing dishes in the dishwasher, breaking some things. She said these incidents were scary and the kids would cry. When she asked him to stop and cool down, he lashed out (verbally) and threatened her. She said on one of these occasions things got so bad she needed to leave the house and she called a very close family friend - G.R. - who lives in Port Coquitlam to come and pick the kids up and her up.
- [24] K.P. testified that if she wanted peace in the house, she needed to keep her mouth shut. She said S.K. prevented her from seeing her family, though not completely as there were some visits from her sister and others. She said he would not permit her to speak with her mother when S.K. was in the home. As noted, it is common ground that S.K. and K.P.'s mother had a very poor relationship.
- [25] K.P. said she felt a lot of shame about what was going on in the home and it was difficult to talk about. She started seeing a counsellor in late 2018 or early 2019 and it took her a long time to drum up the courage to talk about S.K.'s behavior and the problems in the marriage.
- [26] S.K. denies this behaviour. He acknowledged that he spanked the children but denies it was excessive. He also denies he was controlling or that he would have the angry outbursts K.P. described. However, the events of December 1, 2019, to which I will turn in a moment, indicate he is not immune to such outbursts.
- [27] I generally found K.P.'s evidence that S.K. was controlling and prone to angry outbursts to be credible, though some aspects were perhaps overstated. Her evidence that he was controlling and verbally abusive is consistent with what she reported to her counsellor in confidential sessions dating back to at least November 2018 and potentially as far back as November 2017. S.K. tendered K.P.'s counselling records as evidence. I do not rely on those records for the truth of their contents but, as prior consistent statements, they support K.P.'s credibility as it relates to these aspects of her evidence of her relationship with S.K., which evidence S.K. challenged: *R. v. J.A.T.*, 2012 ONCA 177 at paras. 96-100.

- [28] K.P. also testified that one day in February 2019, she came home to find Z.O.K. very upset. She testified that Z.O.K. told her that S.K. had bit her on the arm and she showed K.P. the bite mark bruises on her arm. K.P. took a photograph of the mark. S.K. denies this incident and states he had never heard of it until these proceedings began.
- [29] Z.O.K.'s statement is hearsay and not admissible unless it meets the criteria of necessity and reliability. Moreover, it is a hearsay statement of a serious allegation that bears directly on the issues I am to consider. In such circumstances, it is particularly important for the statement to meet the requirements of threshold and substantive reliability, as well as necessity, to be admitted as evidence for the truth of its contents: *G(JD) v. G (SL)*, 2017 MBCA 117 at para. 56; *D.A.M. v. D.M.T.*, 2013 BCSC 359 at paras. 23-24. As Justice Francis stated in *D.D.R. v. K.T.R.*, 2019 BCSC 1805 at para. 94: "Obtaining evidence from a child, and determining that child's views and wishes, is a delicate and difficult procedure."
- [30] I am not satisfied the threshold is met in this case. There is little in the way of evidence or procedural safeguards that allow for the statement to be tested. For example, the statement was not recorded. It was not taken by a person trained to investigate child abuse or under any formal interview protocols that would assist in assessing its reliability. I note, for example, in *D.D.R.* the hearsay evidence of the child was obtained through a child and youth counsellor with 30 years experience working with children who have experienced violence, and through a social worker with the Ministry of Children and Family Development. There are no such safeguards here.
- [31] K.P. maintains the photo shows an "adult-sized" bite mark but there is no medical evidence in support of this. The mark itself appears quite small when examined in proportion to Z.O.K.'s arm, which was also small (she was not yet five in February 2019). It is not unreasonable to consider that it may have been caused by her younger brother rather than an adult. Biting would be quite unusual conduct for an adult and there is no evidence of S.K. biting the children before or after this incident. The statement was worthy of investigation but, in the circumstances, I find the required degree of reliability needed to admit it as hearsay evidence has not been established and I do not rely on it.
- [32] S.K. also challenges this evidence, pointing to the fact that K.P. continued to leave the children alone with him after the time this incident is said to have happened. He also argued that K.P. is not above being dishonest when it suits her purposes and points to an incident where she falsified an application for Z.A.K.'s preschool, stating that he had received all his regular vaccinations, a requirement for entry at the preschool, when in fact he had not. K.P. acknowledged this but pointed out that S.K. agreed they should make this false statement in the application.
- [33] I place some significance on the fact that K.P., as S.K. states, continued to leave the children with him for at least brief periods after the alleged biting incident. I also place some significance on the fact that K.P. did not report the alleged incident, although I accept that the nature of the relationship generally caused her to fear how S.K. might respond her

reporting on incidents that occurred in the household. On balance, though, and in addition to the inadmissibility of the hearsay statement, I am not able to find that mark photographed on Z.O.K.'s arm was caused by S.K.

- [34] K.P. also testified she would find bruises on the children in the buttocks area when she left the children alone with S.K. after February 2019 but she did not take action on these observations either until after the separation. Nor did she report the alleged biting incident to the police on December 1, 2019 when she gave a statement about the events on that day. She reported excessive spanking to the police on that occasion but did not mention finding bruises on the children. For the reasons discussed below, I find K.P.'s evidence of excessive spanking to be credible, though not to the point where she found bruises on the children.
- [35] Matters between the parties came to a head on December 1, 2019 when K.P. was preparing to leave the home in the morning to meet a classmate at the Boucher Institute to study for an exam. She testified she had initially planned to leave the kids with S.K. and was only going to be gone for about two hours but as she was preparing to leave, Z.O.K. became panicky and begged K.P. not to leave her and Z.A.K. alone with S.K. K.P. then contacted G.R. - the close family friend in Port Coquitlam - to see if he could look after the kids, which he agreed to do.
- [36] When S.K. learned of this, he became very angry and told K.P. the kids were not going to go anywhere. K.P. maintained the kids would be leaving and would be gone for a few hours. S.K. then grabbed K.P.'s car keys and when she tried reaching for them he shoved her back. She tried reaching for the keys again and S.K. continued to shove her and grabbed her arm, turning it back and injuring her wrist. She testified the kids observed this confrontation and were crying and begging S.K. to stop hurting her. At that point, K.P. determined she could not live in this relationship anymore and felt she needed help getting out. She called the police who attended and arrested S.K.
- [37] S.K. describes this event in more mild terms but admits to taking K.P.'s keys and refusing to let her leave the house with the kids. He said in cross-examination that "the door was open" and she was free to leave anytime. He said he would have given her the car keys once she walked out the door as long as she did not take the kids with her. He initially said he was "disappointed" that K.P. was going to take the kids that day because the previous day K.P. had planned to leave the children with him for the day and he had made plans to take them out to the forest. However, on further cross-examination, he admitted that he was angry. He also acknowledged that he shoved K.P. when she tried to get the keys from her and that he "may have" grabbed her arm. He acknowledges that the children witnessed this confrontation but he asserts that Z.A.K. thought it was a game and he sent the kids to their room when Z.A.K. tried to participate.
- [38] S.K. also stated that during this confrontation he brought up an unrelated issue with K.P. that he knew would provoke an angry response from her. He acknowledged he wanted to provoke her. I find this significant in that, in addition to the physical attack on K.P., S.K. deliberately sought to escalate the fight at a time when the children were present.

- [39] Following this incident, a no-contact order was put in place. An ambulance also attended and the paramedic advised K.P. to go to the hospital but, while her arm hurt, she knew it was not broken and felt there was nothing the hospital could do for her, so she chose instead to carry on with her plan to study for the approaching exam. G.R. took the kids during this time.
- [40] K.P. testified that her arm hurt for the rest of the day and that evening as she was getting ready for bed she noticed a bruise had developed on her arm. She took a photo of the bruise, as well as swelling and mark on her hand, those photos were introduced as evidence.
- [41] I accept K.P.'s evidence about the events of December 1, 2019. S.K. acknowledges some of the basic facts of the event but downplayed their significance, and continued to do so in cross-examination. Further, the fact that S.K. tried to escalate the conflict when the children were present demonstrates a lack of responsibility and disregard for the emotional well-being of the children at the time.
- [42] The change in plan for the children's care that day was not calculated by K.P. The previous day she expected to leave the kids with S.K. and I find she would not have made that arrangement if she did not intend to follow through with it. I accept her evidence that her decision not to leave the kids with S.K. was prompted by Z.O.K.'s reaction to the plan that morning.
- [43] The parties did not resume co-habitation after the December 1, 2019 incident.
- [44] S.K. was also cross-examined on his spanking of the children. He acknowledged that he spansks them but denies doing so excessively. He maintained it is lawful to spank one's children in Canada, but when asked in cross-examination about details of this spanking and how often he does it, he grew very agitated and sarcastic. He eventually suggested it could be once a week or once a month.
- [45] K.P. argues S.K.'s response to this line questioning discloses a cavalier attitude towards a form of disciplining children that, while legal, might easily cross the line into abuse. Her counsel argued S.K.'s responses show a lack of appreciation for where that line may fall and reflects poorly on his ability to make the necessary judgments to care for and meet the needs of the children.
- [46] As S.K. suggested, the Criminal Code does excuse parents from criminal liability for imposing particular kinds of mild physical "corrective" measures on their children but, as the Supreme Court of Canada has found, this defence has strict limits. Section 43 of the Criminal Code states:

43 Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

[47] In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, the majority held that this defence is constitutionally valid but found it is very limited. Speaking for the majority, Chief Justice McLachlin said:

First, the person applying the force must have intended it to be for educative or corrective purposes: *Ogg-Moss*, supra, at p. 193. Accordingly, s. 43 cannot exculpate outbursts of violence against a child motivated by anger or animated by frustration. It admits into its sphere of immunity only sober, reasoned uses of force that address the actual behaviour of the child and are designed to restrain, control or express some symbolic disapproval of his or her behaviour. The purpose of the force must always be the education or discipline of the child: *Ogg-Moss*, supra, at p. 193. [emphasis added]

[48] The Chief Justice added "Generally, s. 43 exempts from criminal sanction only minor corrective force of a transitory and trifling nature" and "conduct stemming from the caregiver's frustration, loss of temper or abusive personality" is excluded from the defence.

[49] Thus, K.P. is right that this form of discipline, though lawful, may easily cross the line into abuse. I agree with K.P. that S.K.'s cavalier responses to cross-examination on this very serious subject raise concern about his appreciation for the legal bounds of when the use of force against one's child may be lawful. He knew he would need to answer K.P.'s allegation that he excessively spansks (or spanked) the children but his response was one of frustration rather than reason. One would expect S.K. to have a more considered answer to this line of cross-examination. I find his lack of appreciation for the legal bounds of this form of discipline is a factor I should consider in assessing the best interests of the children.

Parenting

[50] K.P. has been the primary caregiver for the children since separation and before. When the parties were together, S.K. would do some of the parenting duties, such as giving Z.A.K. his bath and putting the kids to bed a couple of times a week, but most of this work fell to K.P. during the relationship. She managed all the day-to-day arrangements for the children, including making their medical and dental appointments, enrolling them in school, before and after school care, and pre-school. She attended all the parent-teacher meetings, S.K. did not. He explained that because he was working he was unable to attend those meetings, but he also gave extensive evidence of his boss' generosity, including with respect to time off when needed, and that he and other employees were treated as "family." If S.K. needed to adjust his schedule or have time off to attend parent-teacher interviews, I expect his boss would have been accommodating.

[51] I acknowledge that S.K. did inquire in September 2020 about attending parent-teacher interviews but this was after this proceeding had been commenced and at a time when he had legal counsel. The evidence is that he made no such effort to attend the interviews before this time.

- [52] Once the no-contact order arising from the December 1, 2019 incident was varied, S.K. has been given parenting time with the kids. He has completed a parenting after divorce seminar and has had parenting time every second weekend and telephone contact two times a week. The parties have adjusted the schedule to provide for more in-person parenting time during the week in place of phone and video calls that were not working satisfactorily.
- [53] S.K. has also had some overnight parenting time by agreement of the parties. K.P. testified that Z.O.K. has expressed being uncomfortable staying with S.K. but she (K.P.) recognizes the need for the kids to have a relationship with their father so she tries to find a balance. The acrimony between the parties clearly makes this challenging and the parties have had considerable disagreements since separation, particularly as it relates to K.P.'s efforts to take the children to Alberta to visit her family.
- [54] S.K. called several witnesses who testified about his parenting. P.C. and D.C., who are friends of the parties and have children around the same age, each testified that they have spent considerable time with the parties and the kids, including time with just S.K. and the kids. Their observations were that he is a good father and the kids are happy with him. They both testified that they have left their own kids with S.K., including for sleepovers, and had no concerns about doing so.
- [55] S.K. also called J.W., his new partner whom he met in December 2019. She has a six-year-daughter who likes to spend time with Z.O.K. and Z.A.K. She testified that her observations are that S.K. is a caring and loving parent who is very organized with his parenting time, ensuring he has snacks and food for the kids. She has not observed the kids being scared or apprehensive around S.K. and, in fact, they often tend to stay close by his side when they are out. J.W. has left her own daughter with S.K. and has no concerns in doing so.
- [56] I accept the evidence of these individuals but note that it has its limitations in that these witnesses had only limited exposure to S.K.'s parenting and not of the day-to-day challenges of parenting.
- [57] S.K. also tendered as evidence a video prepared by a professional videographer. This video is a compilation of snippets taken from S.K.'s parenting time. The footage was shot over the course of three different days and it shows the kids happily enjoying time with S.K. One of the days was just after Christmas when the kids were opening presents with S.K. The other days captured outdoor adventures with the kids.
- [58] I place very little weight on this video. It is heavily edited and, at best, shows a few snapshot moments of S.K.'s parenting time on fun occasions. The children were obviously alive to the fact they were being filmed. The videographer, Greg Swiercz, is a director and documentary film producer. The video was a high-quality production made by a professional. Mr. Swiercz testified that the children were given to understand that he was a friend of S.K.'s who was spending some time with them. I accept that this likely had some impact on the children's behaviour and does not provide a reliable depiction of S.K.'s parenting. The video, like the evidence of P.C., D.C., and J.W., shows nothing about S.K.'s parenting abilities when

performing the necessary tasks in the more challenging times that parents face on a regular basis.

- [59] S.K. also led evidence of video and audio recordings of the children during his parenting time and, specifically, of an incident where Z.A.K. said that he did not want to leave at the end of the day to go back home to K.P. The recording captures S.K. consoling Z.A.K., appropriately explaining the need to go back to K.P. without invoking criticism of her or the parenting arrangement. Again, though, I place little weight on this as it is a single isolated incident that cannot provide a full picture of S.K.'s parenting. I accept there are days when the children, or Z.A.K. anyway, does not wish to leave S.K. This may be especially true after a particularly fun day when the parenting time involved going on adventures. However, as with the video, this snapshot provides little in the way of insights to S.K.'s overall parenting abilities.
- [60] Based on the totality of the evidence, I find that K.P. was responsible for the bulk of the parenting tasks prior to separation. S.K. was involved in some activities, such as bathing Z.A.K. and helping put the kids to bed. He also made some of the meals, but he was not responsible for the bulk of the children's care or for making the children's medical and dental appointments, arranging their extracurricular activities, or enrolling them in school. After separation on December 1, 2019, K.P. has overwhelmingly been the primary caregiver, although much of this is of necessity due to the no-contact order that was in place for some time.
- [61] Since March 2020, S.K. has been given parenting time every other weekend and this has increased modestly since then. I accept he is working at his parenting and has made accommodations, such as renting a larger apartment where the kids could have their own room to share and has taken the parenting after divorce course. However, the day to day responsibilities to looking after the children and all their needs has largely fallen to K.P., both now and during the marriage.

Planned return to Alberta

- [62] As mentioned, K.P. maintains the parties always planned to move back to Alberta after she completed her program at the Boucher Institute. S.K. maintains they intended to create a new life for themselves in British Columbia.
- [63] K.P. led evidence from four different witnesses, besides herself, each of whom testified to some degree about the parties' plans when they moved to British Columbia. Each testified they understood the move was temporary and that the parties planned to move back to Alberta once K.P. was done school. These witnesses were J.V., a friend from the Boucher Institute, G.R., the close family friend who lives in Port Coquitlam, her father P.P., and one of her cousins, K.A.P.

- [64] S.K. called four witnesses in addition to his own evidence, two of whom - G.S. and D.C. - spoke about the move to Vancouver.

K.P.'s Witnesses

- [65] J.V. was a licensed realtor who attended the Boucher Institute with K.P. He assisted the parties in buying their condominium in White Rock. He now practices as a naturopathic doctor in his own clinic. He testified that when the parties were looking for a place to buy, they asked him about the resale value for the condominium as they had planned to put it back on the market once K.P. finished school. He said there were two occasions when he recalls this coming up. He confirmed it was K.P., and not S.K., who asked about resale but S.K. was present for the conversations. He also testified that at school, K.P. often spoke of her plans to move back to Alberta to establish a naturopathic clinical practice.
- [66] I found J.V. to be a credible witness. He is much more closely associated with K.P. than S.K. but I have no reason to question the veracity of his evidence.
- [67] G.R. currently lives in Port Coquitlam but used to live in Cranbrook, B.C. from where he carried on a long-distance relationship with K.P.'s mother for some time starting in 2005. He travelled frequently to Grand Prairie to see K.P.'s mother and came to know K.P. and her sister throughout that relationship. Though he and K.P.'s mother are no longer together, he remains very close with K.P. and her sister, both of whom call him "Uncle G.". He went on camping trips and travelled with the family, including after the parties were married.
- [68] G.R. loaned or gave the parties money to help them buy the White Rock condominium. (Whether it is a gift or a loan is a dispute I will address later.) He testified that K.P. told him the White Rock condominium was just a temporary home and they would be selling it once she finished school. He testified the parties said they would pay him back once they sold the condominium after K.P. completed school. G.R. understood from this that the parties planned to return to Alberta when she was done school.
- [69] I also found G.R. to be a credible witness. It is clear that he is very close to K.P. and has considerable affection for her. However, he was fair in giving evidence about S.K., particularly when it came to issues regarding his parenting and accusations of family violence. Despite his close connection to K.P., I found him to be a reliable witness.
- [70] P.P., K.P.'s father, testified he spoke with the parties about their plan to move to the Vancouver area so that K.P. could attend school and said their plan was to come back to Alberta once she had finished. He testified he had this conversation with both K.P. and S.K. He said whenever they came back to visit from Vancouver, they always talked to him about coming back to Alberta.

- [71] In cross-examination, he testified about a specific discussion he had with S.K. when they were buying their condominium in White Rock. P.P. said it made him sad the parties were buying the home because it meant that they were going to stay in Vancouver but S.K. told him they were only buying so they could earn some money by building equity in the home. He said S.K. told him their mortgage payment would be less than their rent so they would ultimately make money when they sold the condominium to move back to Alberta.
- [72] S.K. argued that P.P.'s evidence cannot be relied upon given that he is K.P.'s father. When P.P.'s evidence was put to S.K. in cross-examination, S.K. denied it was true and said that he would say the same thing for his daughter. Regardless of P.P.'s very personal interest in this matter, I found him to be a credible and truthful witness, though I accept his perspective favoured his daughter.
- [73] K.A.P. is K.P.'s cousin. He lives in Edmonton and he and K.P. are close. He also developed a friendship with S.K. after he came to Canada. S.K. was a groomsman at K.A.P.'s wedding in July 2017, although S.K. was dismissive of the significance of this. K.A.P. and his wife visited the parties in White Rock in 2019 when they were in the Vancouver area to attend the world junior hockey tournament. He described a conversation he had with S.K. during that visit in which S.K. expressed satisfaction with the equity they had built in the condominium and were continuing to build. He testified that S.K. said they would sell the condominium and use the equity for the next home purchase. K.A.P. understood this to mean that S.K. was not expecting to be a long-term resident of British Columbia, although he does not recall any discussion of where the next home purchase might be.
- [74] He said his assumption has always been that the parties would return to Alberta and that K.P. was not establishing a life for herself in British Columbia. He said he visited them regularly in Edmonton and was in fairly regular communication with them, through phone calls, video chats, and social media when they were in British Columbia, which, he says, may be how he came to this understanding. He was forthright in acknowledging he could not remember S.K. specifically stating that the parties intended to move back to Alberta but this has always been his understanding.
- [75] Since K.A.P. could not recall any specific conversation or discussion about the parties' intention to move back to Alberta, particularly with S.K., I place little weight on the evidence of his "understanding" on this point. I accept that he genuinely believes this to be the parties' intention. He was a credible witness who chose his words carefully so as not to be misleading on this point. He was forthright that he could not recall a specific conversation on the topic. Thus, in giving his evidence little weight, I am not suggesting he lacked credibility. Quite the opposite. He was a witness who was careful to testify within the limits of his knowledge and recollection.

S.K.'s Witness

- [76] G.S. is another ex boyfriend of K.P.'s mother (after G.R.). They were together when the parties moved to British Columbia. He testified K.P.'s mother wanted to live in Victoria and so the parties plan when they left Alberta was to stay in British Columbia. I note this evidence is inconsistent with S.K.'s evidence that the move to British Columbia was motivated in part to put distance between the parties and K.P.'s mother. I heard no other evidence about this planned move to Victoria, including from S.K. As noted, K.P.'s mother still lives in Edmonton.
- [77] D.C. testified about discussions he had with the parties about their move to British Columbia. He said he understood from those discussions they had moved so K.P. could attend school. He also testified he understood the parties were looking for "a new start" in British Columbia and that S.K. did not like Alberta because of the cold. His evidence was ambiguous because he said "you were looking for a new start". As this was stated when S.K. was examining D.C., it is not clear whether D.C. was referring to S.K. specifically or to both parties, but I understood it to be the former, particularly as it was tied to the comment of not liking the cold. D.C. was also not specific about the source of this information, other than that he learned it from one or both of the parties. I found D.C. to be a credible and truthful witness. His evidence was quite general and he strained to remember details of conversations that took place several years ago.

Other Evidence Regarding Alberta Plans

- [78] There is other evidence that is consistent with at least K.P. having a plan to move back to Alberta after completing her program and S.K. being aware of that. This includes the following:
- The parties have continued to be registered under the province of Alberta's healthcare plan and have not switched to the British Columbia medical services plan. Though not living in Alberta, they are able to do this because K.P. is a student enrolled in a post-secondary program in British Columbia and their residence here is temporary;
 - The parties' vehicle is registered in Alberta and has an Alberta licence plate. S.K. argues this is because the insurance premiums are less in Alberta than they are here, but, as K.P. points out, they are only able to maintain their Alberta registration and insurance because they are temporarily out of the province for a post-secondary education program with the intention of returning;
 - K.P. has been required to do practicum-type work or "shadowing" in naturopathic clinics. She has chosen to do all this work in Alberta, doing only one session in British Columbia. There is no evidence that S.K. objected or complained about K.P. focusing her shadowing work in Alberta or that he has ever suggested she should be doing this in British Columbia clinics instead;

- Over the course of taking her education in naturopathy, K.P. worked to develop professional connections in Alberta to set herself up for a job there one day. She did not do this in British Columbia and there is no evidence suggesting otherwise. Nor is there evidence that S.K. urged her to pursue professional relationships in British Columbia; and

- K.P. has student loans from the government of Alberta, a portion of which is considered a grant that need not be repaid. She testified that in order to qualify for this grant, she must intend to return to Alberta to practice.

[79] S.K. argues that K.P. kept the car insurance and the medical services plan in Alberta so that she could appear as an Alberta resident and qualify for a student loan from the Alberta government. However, on the totality of this evidence, I find that K.P. at least continues to consider herself to be an Alberta resident and has maintained an intention to return.

[80] K.P. also testified there are significant differences between what a registered naturopathic doctor in Alberta can do compared to a British Columbia naturopathic doctor. I place no weight on this evidence. K.P.'s training would allow her to write the qualifying exams to become a naturopathic doctor in British Columbia regardless of the differences in regulation between the two provinces. K.P. testified she would need to do more shadowing work to feel personally qualified to perform some of the tasks that a naturopathic doctor in British Columbia can perform that are not permitted in Alberta but this is a personal choice about what she feels comfortable doing. Once her school program is complete, she would be eligible to write qualifying exams in either Alberta or British Columbia.

[81] K.P. has chosen not to register to write the British Columbia qualifying exams. She testified that if she were to now change her plan and seek to become certified in British Columbia, she would be delayed by some six months because the deadline to register for those exams has passed. In his cross-examination of K.P., S.K. showed that the deadline for at least some of the British Columbia exams has not passed but K.P. maintained the deadline for others has. While this cross-examination showed that K.P. was not entirely forthright in her evidence in chief about the exam registration deadlines, I am satisfied that K.P. chose not to register to write the qualifying exams in British Columbia because it has not been part of her plan to practice here.

[82] As I have described above, K.P.'s roots in Alberta run deep. She has a large family in Edmonton and Grand Prairie with whom she is very close. She speaks with her immediate family members daily and extended family members frequently. There is no evidence of K.P. ever expressing serious (or any) intention to stay in British Columbia after she completed her program. I find K.P. was not ready to pull up her Alberta roots and commit to a life in British Columbia. While I am not persuaded that she was unmovable from this position, I accept her evidence that she expected to pursue a practice in Alberta after completing school and this was known to S.K. In making this finding I place particular significance on the fact that she did her shadowing work in Alberta and S.K. acquiesced in this without objection. There is no evidence of her laying any foundation at any time for a

potential career in British Columbia. I also rely on the evidence of the witnesses K.P. called, particularly that of J.V. and G.R.

- [83] S.K., on the other hand, did not have the same deep connection to Alberta and he may well have viewed the move to British Columbia as a "fresh start" as both he and D.C. suggested. He has grown comfortable living in British Columbia with a job and employer he likes. Meaningful communication was not a strength in this marriage and the parties' intentions may, to some extent, have been ships passing in the night. However, as stated above, I find S.K. was at least aware that K.P. had expectations of moving back to Alberta though I believe he held out some hope they might stay.
- [84] In this respect, it is something of a misnomer to describe this as an application to "relocate" the children to Alberta. Alberta is where the kids were born, where K.P. grew up, and where she planned to build a practice after completing her education. Indeed the Alberta government still considers K.P. and the children to be Alberta residents. S.K. seeks to paint a picture of a mother trying to take the children away from their father by moving to Alberta but he has always known this was at least a real possibility, and even a likelihood, even if he was growing to enjoy the new life of his own in British Columbia.

The Relocation Application

- [85] Regardless of whether remaining in British Columbia would constitute a change to pre-existing planned return to Alberta, the Court's task is to determine what is in the best interests of the Z.O.K. and Z.A.K., having regard to the fact that K.P., as the primary caregiver for the children, now wishes to move back to Alberta and pursue a new career in naturopathic medicine, supported by her immediate and extended family.

Applicable Legal Principles

- [86] Under both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Law Act, S.B.C. 2011, c. 25, a determination of whether a parent may relocate children is driven by what is in the best interests of the children. As K.P. bases her application on the Divorce Act, I will focus my analysis on that legislation. However, I note that in light of the recent amendments to the Divorce Act, there is now little, if any, light between it and the Family Law Act in how to approach consideration of a child's best interests on a relocation application.
- [87] Section 16 of the Divorce Act specifies what I am to consider in determining the best interests of the children. Subsection (2) states the primary consideration is "the child's physical, emotional and psychological safety, security and well-being." This is the lens through which all factors in s. 16(3) and those in s. 16.92(1), which apply specifically to relocations, are to be considered.
- [88] Section 16(3) states the following:

16. (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
 - (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
 - (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
 - (d) the history of care of the child;
 - (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
 - (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
 - (g) any plans for the child's care;
 - (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
 - (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
 - (j) any family violence and its impact on, among other things,
 - (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
 - (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
 - (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.
- [89] These factors, though not identical, are substantially similar to the factors set out in s. 37(2) of the Family Law Act.
- [90] I am also to consider the maximum contact principle set out in s. 16(6) of the Divorce Act which reads:
16. (6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

[91] In *A.D.W. v. B.J.W.*, 2018 BCSC 1179, at para. 50, Justice Dardi considered this section in the context of an application to relocate a child. She noted that it is a mandatory consideration but not an absolute one. Citing *Gordon v. Goertz*, [1996] 2 S.C.R. 27, she stated:

A proposed relocation will not necessarily be denied solely on the basis that it will have the effect of reducing a parent's parenting time with the child: at para. 25. As observed by the Court in *McArthur* [*McArthur v. Brown*, 2008 BCSC 1061], at para. 117, the fact that there will be reduced parenting time for the non-moving parent to see his or her children is an obvious outcome of relocation in the vast majority of cases. The focus of the Court must be on the consequences to the child of the reduced parental interaction which would result from the proposed relocation.

[92] In *D.D.R.* at para. 35, Justice Francis said: "while the maximum contact principle must be observed, it cannot overshadow the consideration of the best interests of the children."

[93] Section 16.92 of the Divorce Act specifies additional considerations that apply to a determination of the children's best interests on an application to relocate children. It reads:

16.92 (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

- (a) the reasons for the relocation;
- (b) the impact of the relocation on the child;
- (c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- (d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
- (e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- (f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
- (g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

- [94] Under both the Divorce Act and the Family Law Act, I am not to consider whether K.P. would relocate to Alberta without the children or not relocate. The purpose of this is to avoid placing the relocating parent in a "double-bind", which was described as follows by the Alberta Court of Appeal in *Spencer v. Spencer*, 2005 ABCA 262:
- [18] In conducting this inquiry, it is problematic to rely on representations by the custodial parent that he or she will not move without the children should the application to relocate be denied. The effect of such an inquiry places the parent seeking to relocate in a classic double bind. If the answer is that the parent is not willing to remain behind with the children, he or she raises the prospect of being regarded as self interested and discounting the children's best interests in favour of his or her own. On the other hand, advising the court that the parent is prepared to forgo the requested move if unsuccessful, undermines the submissions in favour of relocation by suggesting that such a move is not critical to the parent's well-being or to that of the children. If a judge mistakenly relies on a parent's willingness to stay behind "for the sake of the children," the status quo becomes an attractive option for a judge to favour because it avoids the difficult decision the application presents.
- [95] Finally, I note that when it comes to parenting arrangements, I am to do a "blended analysis" in which I consider the relocation application and the parenting arrangements together, rather than sequentially: *K.W. v. L.H.*, 2018 BCCA 204.
- [96] I will consider each of the factors set out in ss. 16(3) and 16.92 of the Divorce Act.

The Section 16(3) Factors

The children's needs, given their age and stage of development, such as their need for stability

- [97] The children are young. The need for stability is great. I find the primary form of stability for the children is currently K.P. who is and always has been their primary caregiver. I accept they also draw stability from having a relationship with their father and their needs include maintaining and further developing that relationship.
- [98] Their needs would also be well-served by K.P. pursuing the career she has chosen, which is in both the short and long-term economic interests of the children. It is also in their interests that she do that in an environment where she and the children are well supported to maximize her potential for success and provide solid family support for the children while she does. I find the extensive family network in Alberta would provide that support.

The nature and strength of their relationship with each parent, siblings, and grandparents and any other person who plays an important role in the children's life

- [99] The children's strongest relationship is with K.P. Their relationship with S.K. is less so, in part due to the fact that he was not the primary caregiver while the parties were together and his parenting time has been limited since after separation. I am satisfied though, that the relationship, particularly with Z.A.K., has grown stronger since 2020 through the parenting time S.K. was granted by the court in March 2020 and the increases in parenting time he has had by K.P.'s agreement.
- [100] I heard some evidence about the children's relationship with their maternal grandparents. K.P.'s father has visited them on a few occasions and he no doubt has considerable affection for his grandkids, although I did not hear evidence that a particularly strong bond has formed. I also did not hear specific evidence of such a bond with K.P.'s mother, but given the frequency and length of her visits after the separation, I infer the relationship is important. For the same reason, I infer the same about the children's relationship with their aunt, K.P.'s sister, who will be returning to Alberta later this year.
- [101] The children's paternal grandmother, who lived in Poland, has passed away. I heard no evidence about their paternal grandfather, other than that S.K.'s parents were divorced when he was young.

Each spouse's willingness to support the development and maintenance of the children's relationship with the other spouse

- [102] K.P. testified she recognizes the importance of the children's relationship with S.K. and believes that their parenting time with him is important. She has shown some reluctance in the past to accommodate that parenting time and, though accepting of it, she does not appear enthusiastic about it. Nevertheless, she has shown more flexibility of late, such as extending S.K.'s parenting time, agreeing to overnight visits (without a court order), and rearranging a planned birthday party for the children so as not to interfere with S.K.'s weekend parenting time.

The history of care of the children

- [103] Both before and after separation, K.P. has been largely responsible for child care duties. S.K. has stepped in when needed but I find the bulk of the work has fallen to K.P. She has been aided in this, while attending school and since separation, by family members who have come from out of town to stay and help.

The children's views and preferences, unless they cannot be ascertained.

- [104] I have not had specific evidence about the views of the children. There is no s. 211 report providing evidence of the children's views and the parties have not tried to lead evidence on what they believe the views of the children would be about moving to Alberta. I accept that given the young age of the children, this is not a substantial factor to consider: *A.J.D. v. E.A.E.*, 2013 BCSC 2160 at para. 49.

The children's cultural, linguistic, religious and spiritual upbringing and heritage

[105] Both children were born in Canada but their Polish heritage is obviously an important part of their lives and upbringing. K.P. is fluent in Polish and her extended family network will provide considerable support for the children's Polish heritage. S.K., of course, would also support this as being a fairly recent immigrant from Poland and he has developed a strong friendship with D.C. and P.C., who are also immigrants from Poland and whose children are playmates of Z.O.K. and Z.A.K.

Any plans for the child's care

[106] K.P. has not made specific plans for childcare in Alberta, but her family members stand ready to help her. I am satisfied, though, she will make appropriate arrangements in Alberta, as she has done in British Columbia, should she be permitted to relocate the children there. Z.O.K. will be in school and I assume Z.A.K. will be enrolled in pre-school as he is here. I am satisfied K.P.'s family will assist her with care while she makes these arrangements.

[107] In British Columbia, Z.A.K. is enrolled pre-K while Z.O.K. will be going into grade 1 in September. She has been attending before and after school care while in kindergarten and I assume this would continue if the children remain in British Columbia.

[108] I heard no evidence from S.K. as to how he would arrange for child care if the children remain in British Columbia, given that he will continue working full time. I assume he would continue the current arrangements, though it is K.P. who has always made these arrangements.

The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the children

[109] There is no question that K.P. is fully willing and able to care for and meet the needs of the children. I am not satisfied that S.K. has, at this stage, the same abilities. His caregiving function during the marriage was secondary to K.P.'s. Since separation, he has not had to meet the full demands of a parent as his parenting time has been limited. I accept that this is something that S.K. is working at but, at present, I find the needs of the children are best met by K.P. as the primary caregiver.

The ability and willingness of each person to communicate and cooperate, in particular with one another, on matters affecting the children

[110] In my view, both parties struggle with this. There is much animosity between the parties and communications, before and after separation, have been a challenge.

Any family violence and impacts on the ability to care for and meet the needs of the children and the ability to cooperate on issues affecting the children

[111] The Divorce Act defines "family violence" to include:

any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person -- and in the case of a child, the direct or indirect exposure to such conduct

It specifically includes physical abuse, threats to kill or use bodily harm to any person, and psychological abuse.

[112] In considering how family violence impacts on the best interests of the children, I am to take into account the additional factors set out in s. 16(4) of the Divorce Act which reads:

(4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

- (a) the nature, seriousness and frequency of the family violence and when it occurred;
- (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
- (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
- (d) the physical, emotional and psychological harm or risk of harm to the child;
- (e) any compromise to the safety of the child or other family member;
- (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
- (h) any other relevant factor.

[113] I will consider these together rather than address each individually. As I have found above, I am satisfied that S.K. has engaged in some forms of family violence during the relationship, including a pattern of coercive and controlling behaviour and, at least on December 1, 2019, physical abuse of K.P. The children were directly exposed to the December 1, 2019 incident. Given my findings on this, and K.P.'s evidence on the subject, which was corroborated by her counselling records, I find it is likely that the children have witnessed other forms of non-physical family violence that K.P. has encountered. I say non-physical because I accept that the December 1, 2019 incident is the only one where S.K. used physical force on K.P. This is consistent with what K.P. reported to the police on that occasion, stating to the police that "he's never hit me in the past". She did report the excessive spanking which I

have addressed above. I am satisfied that observing this and other incidents has caused some emotional harm to the children, or at least to Z.O.K.

- [114] I also find, however, that the incidents of family violence have not continued since separation. There is still considerable hostility between the parties but their separation seems to have curtailed S.K.'s outbursts. He has been with a new partner since, I take it, early 2020. She works as a clinical counsellor, including with children and has done referral work for the Ministry of Children and Family Development. Though she does not live with S.K., she spends time with him and the kids, along with her own daughter, and has not witnessed any type of family violence, including coercive or controlling behavior. As noted earlier, she has observed S.K. to be a good parent. There have been no complaints and there is no evidence of any family violence since the separation.
- [115] Further, K.P. has agreed to extend S.K.'s parenting time, beyond that ordered on an interim basis. This suggests she has grown more comfortable with S.K. having longer exposure to the kids. Indeed her parenting time proposal, should she be permitted to relocate the children to Alberta, would leave the kids with S.K. for up to two weeks at a time. I do not believe K.P. would have proposed this if she viewed S.K. to be a significant threat of committing family violence.
- [116] That said, the family violence that occurred at least on December 1, 2019 cannot be ignored. Nor can S.K.'s response in cross-examination to the allegation of excessive spanking. As I must, I take this into account in considering the children's best interest.

Any civil or criminal proceedings relevant to the safety, security, and well-being of the children

- [117] S.K. will be standing trial in September for charges related to the December 1, 2019 incident. This, of course, will be subject to a higher standard of proof than is required for my finding of family violence. K.P. argues a conviction might affect S.K.'s continuing eligibility to remain in Canada as a permanent resident, but the evidence on this is speculative at best. I have addressed the issues respecting the December 1, 2019 incident earlier in these reasons and there is no need to repeat that here.

The Section 16.92 Factors

- [118] With that, I turn to a consideration of the factors set out in s. 16.92 of the Divorce Act. I will consider subsections (a) through (c) together followed by (d) through (g) individually.
- [119] The first factor under s. 16.92 is the reasons for the relocation. In *Stav v. Stav*, 2012 BCCA 154 the court addressed the rationale for considering this and its description of typical relocation application is also true of this case:

- [88] often the parent seeking to relocate will submit that doing so will enable him or her to obtain financial and/or family support that is unavailable in his or her present situation, and which will both directly and indirectly benefit the children. The other parent will argue that whatever benefit there is to the relocating parent in those situations is more than offset by the detriment to the children of being removed from their community and, more importantly, from regular contact with the other parent. In my view, these are legitimate considerations which may assist a judge in determining to what extent the move will operate in the children's best interests. It is simply one more factor to weigh in the balance. The trial judge considered these factors in this case and, in my view, she was right to do so.
- [89] The question should not be whether the evidence of the reason for a proposed move is admissible, but how it relates to the children's best interests, if at all. Ulterior reasons for moving which are a thinly disguised attempt to thwart contact with the other parent are clearly relevant to whether a parent is acting in the children's best interests. Similarly, reasons for moving which benefit the person seeking to relocate can also be for the benefit of the children, but have to be weighed together with the other evidence to determine whether the move is in the children's best interests.
- [90] The fact that a move is in the best interests of the parent seeking to relocate does not necessarily mean that it will be in the children's best interests. It is more likely to be so if the person seeking to move is the custodial parent with a healthy relationship with the children, than if the person seeking to move is an access parent who has had limited contact or involvement with the children. These are but two scenarios along a broad spectrum.
- [120] K.P. wishes to relocate the children to Alberta because she has always planned to establish herself in the field of naturopathic medicine there and because she has a strong network of family and friends who will support her, including with respect to child care, as she pursues this career path. Further, she has a deep connection to Alberta and the extended family she has there. This is important to her and the children. Neither party has that kind of family network (or family of any kind) in British Columbia. I find she has no ulterior motive and the move is not intended to defeat the children's contact with S.K. Indeed I find the circumstances in Alberta will be beneficial to the children.
- [121] S.K. argues that no amount of extended family can replace the children's connection with their father. I agree. The significantly diminished opportunity for regular direct contact and parenting time will negatively impact the children and their opportunity to develop bonds with S.K. at their relatively young age. I must also consider the maximum contact principle set out in s. 16(6) of the Divorce Act. I find that while S.K.'s relationship with his children during the marriage was not free of difficulties, he has made a serious effort with the parenting time he has had to work on that relationship and build a bond with his children.
- [122] That said, it is not the mere fact of being close to family that drives K.P.'s planned return to Alberta. Nor does she seek to substitute her family in place of S.K. Her family will give her personal and emotional support after a challenging time and will allow her to build her

new career in the field she has worked to enter over the past five years. I accept that she could seek out that work in British Columbia, though with some delay, but she would not have the kind of family support or the professional contacts she has developed through shadowing that provides the best opportunity for her success. While I take the maximum contact principle into account, I cannot allow the question of the frequency of S.K.'s parenting time to "overwhelm the analysis" if the children's best interest lie in staying with K.P. in Alberta. As the Court of Appeal stated in *K.W. v. L.H.* at para. 132:

- [132] While there is no question that it is in the interests of N to maintain his relationship with his Father, the maintaining of that regular contact cannot be allowed to overwhelm the analysis of N's best interests. It is, as noted in *Stav*, but one factor to be considered. As stated in *Nunweiler*, the maximum contact principle must be subordinated to the overall consideration of the best interests of the child. If it was otherwise, then a parent would never be allowed to relocate because in almost every case, relocation will lessen the contact between the child and one of the parents. [Emphasis added]
- [123] K.P. is and always has been the children's primary caregiver. She has spent the vast majority of time with them and has been responsible for the substantial duties of parenting. I find their best interest lie in remaining with her in that capacity. S.K. has made efforts since the separation to develop a stronger parenting role for the children but, while both parents are and will be guardians, I find that an equal parenting role is not in the children's best interests at this stage.
- [124] S.K.'s parenting as a single father has not been seriously tested in the context of the day-to-day challenges of long-term parenting. The December 1, 2019 incident of family violence is a concern as is his hostile and cavalier response to the cross-examination on the nature and frequency of his spanking the children, particularly since he knew he would be called upon to respond to the accusation of "excessive spanking." I acknowledge that under s. 16(5) of the Divorce Act, I am not to consider past conduct unless that conduct is relevant to the exercise of parenting time, decision-making responsibility, or contact with the child. In my view, this conduct is relevant to considering those matters here.
- [125] Thus, while I agree that K.P.'s extended family is no substitute for contact with S.K. and the diminished opportunity for direct contact with him will negatively affect the kids, I find, on balance, that the move to Alberta with K.P. will be for their benefit and is in their best interests. In this respect, I find the circumstances here to be similar to those in *K.W. v. L.W.*:
- [135] When considered in the round I find that N should not be separated from his Mother who has been his primary caregiver for almost all of his life. The move to Nova Scotia is clearly in the Mother's best interest. The move will provide her and N with much needed emotional support. More importantly, I find the move is in N's best interest. The Mother's increased stability and personal happiness will undoubtedly have a positive impact on N. The move is likely to enhance the general quality of his life. He is a troubled child who will benefit from being surrounded by a loving extended family. I find that his best chance to

succeed in life would be to live in Nova Scotia with his Mother.

With the exception of the child in K.W. being "troubled" I find this passage applies with equal force to the circumstances in this case.

[126] Subsection 16.92(d) of the Divorce Act requires the Court to consider whether K.P. has complied with the applicable notice requirements under s. 16.9 of the Divorce Act or other provincial family law legislation. K.P. has not given formal notice under the Divorce Act, something her counsel attributed to amendments to the Act only coming into force after the proceedings had been commenced and discussions of K.P. moving back to Alberta were already underway between the parties and their counsel. While I would not say this excuses the absence of formal notice, I find that S.K. was certainly aware of the plan and was given a proposed parenting plan by K.P. No prejudice is suggested from the lack of formal notice under s. 16.9 and I find it would not be in the children's best interest permit this factor to prevent a move that is otherwise in their best interests.

[127] Section 16.9(e) requires me to consider the existence of an order specifying the geographic location in which the children are to reside. There is an interim order made by Master Caldwell (as he then was) restricting the parents from removing the children from the Lower Mainland without the parties' consent. However, this was an interim order pending trial and did not substantively consider the relocation application. It was intended to preserve the status quo pending trial but not tie my hands in assessing the relocation request.

[128] Subsection (f) requires me to consider the reasonableness of K.P.'s proposal to allow S.K. to exercise parenting time. That proposal is that S.K. would have the following parenting time:

- a) One week during the children's spring holiday;
- b) One week during the children's Christmas holiday;
- c) Two weeks during the children's summer holiday;
- d) On long-weekends agreed between the parties; and
- e) Any other time, by agreement between the parties.

It is also proposed he have regular and frequent telephone or video contact with the children at times to be agreed between the parties. Further, she proposes the costs of travel at spring, Christmas and summer be shared by the parties. I infer from this that S.K. is to be responsible for the cost of any additional long-weekend visits.

[129] In my view, this proposal is a reasonable start but I do not accept that it provides sufficient parenting time for S.K. For example, I find that two weeks during the two-month summer holiday is too little time for S.K. and the children. K.P. argues that, since separation, the children have never had more than one night with S.K. and she fears that a period longer than two weeks would jump in too quickly for the children's level of comfort. She also

argues S.K. can only typically get two weeks holiday in the summer, though there is no evidence of that.

- [130] I also find that long-weekends only "as agreed between the parties" is not in the children's best interest. This requires a higher level of certainty. Nor is it fair to S.K. that he would bear the entire cost of travel for this time.
- [131] S.K. argues that the proposal is not reasonable because the cost of travel is prohibitive and the children will need an adult to accompany them on the trip.
- [132] While I find that K.P.'s proposal is a reasonable start, I would require some changes to it to deal these concerns as best they can be addressed in the circumstances. I will set those out later in these reasons.
- [133] Lastly, subsection (g) requires the court to consider whether each person who has parenting time or decision-making responsibility has complied with their obligations under, among other things, a court order.
- [134] I heard considerable testimony about whether K.P. breached an interim order of the court by taking the children on a trip to Alberta. She had secured S.K.'s permission but gave him a false address for where they would be staying. S.K. argues that the giving of a false address nullifies his consent. K.P. acknowledged she gave a false address but said she was staying with her mother and given the toxic relationship between S.K. and K.P.'s mother, she did not want to give S.K. her mother's home address. She says her concerns were validated when S.K. sent a friend to the address to check on her. S.K. says he sent the friend to confirm his suspicions that she had given him an incorrect address.
- [135] I also heard considerable evidence of S.K. attempting to contact K.P. and the children, indirectly through friends and K.P.'s family, while there was a protection order in place that prevented him from doing so. K.P. also points out that S.K. has significant arrears of child support indicating he has not fully complied with the interim child support order. S.K. argues that he had his hours reduced at work and he was not able to fully meet his obligations, but he is committed to doing so.
- [136] I am satisfied that both parties have at times not fully complied with the letter of the court orders that bind them. This gives rise to some concern about future compliance. In that respect, it is more of a concern for K.P. who proposes to have the children in Alberta with her as the primary caregiver. To ensure S.K. is given reasonable parenting time in that scenario, it is vital that she strictly comply with orders of the court.

- [137] Weighing all these factors together, and considering the totality of the evidence, I find on balance that the significant benefits to the children of living with K.P. in Alberta where they were born and where K.P. has a strong family network to support her as she establishes herself in a new field of work outweighs the harm that inevitably follows from the separation from their father. I therefore find, on balance, that the children's best interests lie in remaining with K.P. as their primary caregiver and moving with her back to Alberta.
- [138] I note, though, that separation from S.K. is neither necessary nor inevitable. S.K. wishes to remain in British Columbia. That is understandable. He has a job that he likes and a boss that is kind and generous to him. He does not have the same connection to Alberta that K.P. has and he has established himself in British Columbia with a good job and new friends. However, I would expect that his skills as a welder are readily transferrable to Alberta. He testified that he would have to restart the welder's apprenticeship program again, but it is not apparent on the evidence that the certification he has received in British Columbia would not be transferrable.
- [139] The best scenario for the children would be for S.K. to move back to Alberta where he would be close the children. In those circumstances, his parenting time should be substantially increased from what I set out below so that he could work at developing a deeper bond with the children and his own parenting skills.
- [140] However, as stated in *K.W. v. L.H.*:
- [133] In the circumstances of this case, the best solution would be for both parents to move to Nova Scotia. The Father, however, has been adamant that he will not move to Nova Scotia notwithstanding that a court may approve the relocation application. A court cannot order him to do so even though such a move might be in N's best interest.

At this point, a move back to Alberta does not appear to be in S.K.'s contemplation.

S.K.'s Parenting Time

- [141] I have earlier found K.P.'s parenting time proposal to be a reasonable start but ultimately inadequate for S.K. and the children. As I have said, the parenting time for the summer is insufficient and more opportunity is required for long-weekend visits when they can be accommodated.
- [142] I do not accept K.P.'s argument that more than two weeks in the summer would be an unmanageable increase in the children's time with S.K. There will be a full week at Christmas and another full week spring break for the children to become accustomed to a longer stay with S.K. Further, to the extent K.P.'s logic holds true, it would make the week at Christmas challenging since the children may have no or limited personal contact with S.K. between now and then.

- [143] In these circumstances, I order that S.K. have at least one week of parenting time this summer (2021) before the children are relocated to Alberta. If K.P. is correct that jumping into an extended stay will be difficult on the children, it would be best to start off such extended stays while K.P. is still in the Lower Mainland.
- [144] I then order, in addition to the parenting time K.P. has proposed, that S.K. have three weeks of parenting time during the children's summer break in 2022 and this be increased to four weeks starting in the summer break of 2023.
- [145] With regard to long weekends as agreed to by the parties, I order that K.P. may not unreasonably refuse to agree to a reasonable proposal for S.K. to have parenting time on long-weekends, which may include not only holiday weekends but also long weekends that arise from professional development day closures at the children's school. As Z.A.K. will be in pre-school for another year, I would state now that it would be unreasonable to insist that he not miss a day of pre-school when there is a reasonable proposal for S.K. to have parenting time over a long weekend.
- [146] This is not to say that parenting time must be accommodated on every three-day weekend that may arise over the course of the year. Indeed the travel costs may be a limiting factor in this for the parties. However, I make this point to emphasize that K.P. should offer considerable flexibility in accommodating parenting time for S.K. given that the children will be living far away from him. This flexibility is important for the children's best interests which include maintaining a strong connection to S.K. in the circumstances.
- [147] To help alleviate costs of travel. I also order that S.K. may, at his discretion, exercise some or all of his parenting time in Alberta if he wishes to travel there to do so. This would be less costly than bringing the kids to British Columbia. This, however, is subject to S.K. making reasonable arrangements for the children's accommodation if they are to stay overnight with him in Alberta. If suitable accommodations cannot be arranged, he may exercise his parenting time from 9:00 a.m. to 7:00 p.m. each day he is in Alberta.
- [148] I also order that parties share equally in all travel expenses to facilitate S.K.'s parenting time, including weekend time.
- [149] As this parenting time schedule has been designed in concert with my analysis of the relocation issue, in which it is assumed that S.K. will not relocate to Alberta, I also order that S.K. has liberty to apply to vary the parenting time provisions of this order if he relocates to Alberta.

Child Support

- [150] Child support is to be determined in accordance with the Federal Child Support Guidelines, SOR/97-175. Under s. 16, the starting point for determining a spouse's annual income for the Guidelines is line 150 income, adjusted in accordance with any allowable adjustments under Schedule III. The court retains a discretion under s. 17 of the Guidelines to use the

spouse's tax returns for the last three years if the most recent line 150 income would not be the fairest determination of that income. The court also has discretion to impute income under s. 19.

- [151] In this case, I find S.K.'s most recent line 150 income is a fair determination of his income. It reflects his most recent pay increases and, at this point, is a fair assessment of what his income for the coming year is likely to be. Further, it is what K.P. relies on in seeking a child support order. I note that S.K. had his hours reduced temporarily earlier this year but, since that was a temporary reduction, it does not reflect a larger pattern of income reduction.
- [152] S.K.'s 2020 tax return shows a line 150 income of \$86,851.97.
- [153] K.P.'s line 150 income for 2020 was \$5,552.44. This fairly reflects her income for 2021 since she is not expected to start work until December, but it is unlikely to reflect her income after December 2021 once she is expected to begin working in her chosen field of naturopathic medicine. Nor does it reflect her past income, post-separation, which includes non-repayable students grants. I will address those points in a moment when dealing with spousal support and ongoing financial disclosure obligations.
- [154] Based on these incomes, and applying the Guidelines on the basis K.P. will be resident in Alberta and S.K. will be resident in British Columbia and have less than 40% of the parenting time, S.K.'s child support obligation are set at \$1,342 per month to be effective June 1, 2021.
- [155] Based on the parties current income, K.P. asks for an order that S.K. will pay 95% of the children's medical, dental and child care costs, along with any other agreed upon s. 7 expenses and K.P. will pay 5% of those expenses. However, this does not take into account the spousal support component off K.P.'s income which I will discuss below. When that is factored in, using the DivorceMate calculator, the percentages shift to 89% for S.K. and 11% for K.P. I therefore order that the s. 7 expenses be apportioned on this basis.
- [156] As proposed by K.P., and in light of the anticipated change in her income as a result of her returning to the workforce after completing school, I order that the parties will adjust the child support amount and the share of the s. 7 expenses on June 1, of each year, based on the parties' most recent income. The adjustment to be based on the Guidelines amount. As there is some uncertainty about how K.P.'s income will be structured, I would not confine this to the parties' line 150 income as K.P. may have other sources of income to consider. However, line 150 would certainly be the starting point.
- [157] I also note there could be a significant change to S.K.'s income if he decides to relocate to Alberta to be closer to the children. As I have found above, the best scenario for the children is to have both their parents living in Alberta and thus if S.K. decides to return to Alberta and his income is affected by this move, there should be a re-examination of his child support obligations in light of that income change.

Spousal Support

- [158] Spousal support is more difficult given that K.P. is on the cusp of a new career with real potential for financial reward. She testified that by the time she completes her exams and qualifies to practice in Alberta, it will likely be December of this year before she can begin to work. If she establishes herself in a successful practice, she may not need or be entitled to spousal support within a relatively short period of time.
- [159] In the meantime, though, having regard to the factors set out in s. 15.2(4) of the Divorce Act and the objectives of spousal support as set out in s. s. 15.2(6), I find that K.P. is entitled to spousal support for at least a brief time.
- [160] The marriage was not particularly long, just over nine years from the date of cohabitation to the date of separation. While K.P. was primarily responsible for the care of the children, she also completed her degree at the University of Alberta and the program at the Boucher Institute during the marriage. The parties were supported in this by S.K.'s income and K.P.'s student loans and grants. K.P. is now just 33. Her evidence is that Alberta holds out many good employment opportunities in her chosen and her prospects obtaining good work in that province are strong. She also testified it can be a lucrative field, although this would be commensurate with years of practice. She was supported in the marriage to pursue her education which provides for these good opportunities. Thus, while she was primarily responsible for the care of the children during the marriage, this is not a case where compensatory spousal support should be ordered.
- [161] K.P. argues that spousal support should be ordered based on the parties' respective current income but, rather than set it for a fixed period of time, it should be reviewed in four years' time, having regard to the fact that K.P. is about to start on a new professional career. When questioned whether four years is too much time given the circumstances, K.P.'s counsel acknowledged that it may be too long but said he found no authority for a shorter period.
- [162] Having regard to the condition, means, needs and present circumstances of each spouse, I agree that K.P. is entitled to non-compensatory spousal support but for a relatively short period of time while she establishes herself in a new career. She presently has almost no income because she has been attending school full time but by December her income is likely to change substantially.
- [163] K.P. is a well-organized and confident person who is sure to do well in her field and quickly become self-sufficient. Apart from the good opportunities in naturopathic medicine in Alberta, I find that K.P.'s age, her level of education (including her undergraduate degree), her intelligence, and her confidence position her well for success in any work she might pursue.
- [164] K.P. seeks an order that S.K. pay spousal support in the amount of \$737 per month, which she says is the mid-range of the Spousal Support Advisory Guidelines. However, the support calculation her counsel has provided has not factored in the section 7 expenses, most of

which will be paid by S.K. The calculation of spousal support under the Spousal Support Advisory Guidelines must factor in the payor parent's share of s. 7 expenses: Spousal Support Advisory Guidelines: The Revised User's Guide, 2016 (Department of Justice) p. 32. [1]

- [165] There is no evidence of what the s. 7 expenses for the children will be in Alberta. Thus, the only evidence I have for guidance is what the parties have paid in the past. For 2020, the only full year of expenses available to me, the s. 7 expenses were \$11,495. If the expenses are less this in the future, it may warrant an adjustment in the spousal support calculation. However, a DivorceMate calculation factoring in the s. 7 expenses at this amount and the childcare expenses deduction claimed at line 21400 of K.P.'s 2020 tax return (\$7,118) would set the low-end of the range for spousal support at \$176 per month and the middle of the range at \$383.
- [166] The mid-range includes some amount for compensatory spousal support which I found is not necessary in this case. On the other hand, K.P. will be without an income for a few months while she completes her qualifying exams and settles into a new career and will not have student loans or grants during this period to assist. This is an economic hardship, albeit a brief one, arising from the breakdown of the marriage.
- [167] I therefore order under s. 15.2(1) of the Divorce Act that S.K. will pay spousal support in the amount of \$350 effective July 1, 2021.
- [168] I also order as a condition under s. 15.2(3) that this spousal support should be reviewed on June 1, 2022 and each year thereafter with appropriate adjustments to address changes in K.P.'s income. I acknowledge that orders providing for reviews have only a limited role in family law (*Leskun v. Leskun*, 2006 SCC 25 at para. 39) but this is an unusual case in that K.P. is in a unique place moving from having no income as a full time student to a potentially good income within a few months. That income, though, cannot be predicted with any certainty or on the evidence.
- [169] I also order the spousal support obligation will last no more than four years from the date of this order, having regard to the strong employment opportunities described by K.P. and the fact she is entitled to relocate to Alberta which maximizes her ability to pursue those opportunities, supported by her family. The annual reviews may result in a termination of spousal support earlier than this but, having regard to the date of separation and K.P.'s strong employment prospects, four years from the date of the order is sufficient time for K.P. to become self-sufficient.
- [170] I would add this point as it relates to spousal support. I have found the children's best interests are met by remaining in the primary care of K.P. and to relocate with her to Alberta but I have also found the best scenario for the children is for S.K. to also return to Alberta, although he has not expressed a willingness to do so. Should he decide to do that, and his income is adversely affected as a result, I find this would constitute an economic disadvantage and potentially an economic hardship to S.K. arising from the breakdown in

the marriage (as contemplated by s. 15.2(6) of the Divorce Act). I find that a move back to Alberta to be near the children would not be unreasonable for S.K., even if it means taking a cut in his income. Depending on K.P.'s success in establishing herself in the field of naturopathic medicine or other work in Alberta and the income she is able to achieve, these points may be part of a future consideration of spousal support, including whether S.K. might have a claim for it at some point in the future.

Ongoing Financial Disclosure

[171] K.P. seeks an order that the parties exchange financial information on an annual basis. I make that order but I further order the parties immediately report to one another any significant changes in their income that might affect support obligations or entitlements. Since K.P.'s income is likely to jump significantly in a short period of time, the situation is fluid and S.K.'s spousal support obligations and, potentially, entitlements could change rapidly. Such ongoing disclosure is required to ensure that S.K.'s spousal support obligations do not fall out of proportion to K.P.'s expected jump in income and, in any event, is an ongoing obligation of the parties when there are children to support: *Colucci v. Colucci*, 2021 SCC 24; *Michel v. Graydon*, 2020 SCC 24.

Past Support Obligations

Past Obligations

[172] K.P. seeks an order fixing arrears of child support, s. 7 expenses, and spousal support dating back to January 1, 2020. The claim was filed in December 2019, shortly after separation, so there has been no delay in pursuing these past obligations.

Past Child Support

[173] K.P. asks to have child and spousal support obligations for 2020 and 2021 assessed based on the parties' line 150 income for the previous year up to June 1. This is the same method she asks to have support assessed going forward. Thus, she asks to have support for the following periods assessed on the basis of the following line 150 incomes:

Period

Tax Year

S.K.

K.P.

Jan. 1, 2020 - May 1, 2020

2018

\$63,328.07

\$2,467.00

June 1, 2020 - May 1, 2021

2019

\$65,445.98

\$1,531.00

June 2021

2020

\$86,851.97

\$5,552.00

[174] K.P. states that the following monthly support payments are generated by applying the Federal Child Support Guidelines and the mid-range for the Spousal Support Advisory Guidelines to these incomes for the stated periods; and, for the purposes of s. 7(2) of the Child Support Guidelines, the following percentage share for special expenses:

Period

Tax Year

Child

Spousal

% (s. 7(2))

Jan. 1, 2020 - May 1, 2020

2018

\$983

\$420

96

June 1, 2020 - May 1, 2021

2019

\$1016

\$514

98

June 2021

2020

\$1342

\$737

94

[175] However, the calculations do not include the actual s. 7 expenses which, when included in the calculation, changes the amount of spousal support suggested by the Spousal Support Advisory Guidelines. Nor does the calculation factor in non-repayable student grants that K.P. has received from both the governments of Alberta and Canada.

[176] I accept the analysis for the purposes of child support as the child support obligation is not affected by these omissions. On that basis, I would order that the total retroactive child support obligation, dating back to January 1, 2020 as sought by the K.P. is \$18,449 as follows:

Period

Tax Year

of Months

Monthly obligation

Total Child

Jan. 1, 2020 - May 1, 2020

2018

5

\$983

\$4,915

June 1, 2020 - May 1, 2021

2019

12

\$1,016

\$12,192

June 2021

2020

1

\$1,342

\$1,342

TOTAL

\$18,449

Past Spousal Support

[177] With regard to K.P.'s claim for retroactive spousal support, factoring in the non-repayable grants that she received through the student loan program materially affects the calculation. These grants include the following for the periods after separation:

Period

Alberta

Canada

Total Grant

Jan. 1, 2020 - May 1, 2020

\$3,000[2]

\$2,925

\$5,925

June 1, 2020 - May 1, 2021

\$6,000

\$16,350

\$22,350

June 2021

\$0

\$0

\$0

[178] In *T.E.Z. v. A.D.Z.*, 2011 BCSC 1256 at paras. 20-22, Master Young (as she then was) allocated the grant portion of a student loan to impute income for a payor spouse under the Federal Child Support Guidelines. In *Maynard v. Maynard* (26 January 1999), Victoria 97/0632 (B.C.S.C.) Justice Cowan held that that a court has a discretion to impute income to a payor spouse on the basis of a student loan. In *D.A. v. S.A.*, 2017 SKQB 108 at paras 83-84 the Court held that grant portions of a student loan should be included as income for the purposes of the Guidelines.

- [179] If the grants that K.P. received in the periods after separation are included as income for those periods, the DivorceMate calculation using the "with child support" formula indicates no value for spousal support at the low and mid-range. This is without factoring in the s. 7 expenses which, would further reduce the obligation.
- [180] I acknowledge the result of the application of the Spousal Support Advisory Guidelines does not determine entitlement to spousal support. A result that generates no support at the mid-range level does not necessarily mean that a spouse is not entitled to support. However, it can reflect on a payor's ability to pay, when the payor is already paying child support and s. 7 expenses: Spousal Support Advisory Guidelines: The Revised User's Guide, Canada (Department of Justice), 2017.
- [181] In view of the grants received by K.P., which have been for her sole benefit following separation, the past s. 7 expenses (discussed below), the fact that I have ordered child support retroactive to January 1, 2020, S.K.'s ability to pay, and the fact that S.K. will be required to incur expenses in the immediate future to exercise parenting time (in addition to the prospective child and spousal support orders I have made), I would not order spousal support retroactively to January 1, 2020.
- [182] Before leaving this point, I will comment on my use of the student grants to assess K.P.'s income at the time of the grant. I appreciate that K.P. has proposed to use the previous year's income to calculate the support obligations during the three periods set out in the above tables which I have done. By introducing the grant amounts, though, I am adding in revenues that K.P. received during the actual period. In this sense, I am joining actual revenues during the period (grants) with the income from the previous period. I consider the approach I have taken to be appropriate, though, because K.P. has already received and spent the grants and will not be receiving any further grants in the future. I have not factored in the grant amounts in calculating prospective spousal support.

Past Section 7 Expenses

- [183] K.P.'s evidence included receipts for all the children's s. 7 expenses for January 1, 2020 to June 21, 2021. These expenses related to before- and after-school care and school holiday care for Z.O.K., and pre-K program expenses for Z.A.K. They are exclusive of government child care subsidies. The expenses were not disputed and K.P.'s evidence on this was unchallenged. K.P. seeks an order that S.K. pay 95% of these expenses, being \$17,821.
- [184] However, the proposed 95% share does not take into account the non-repayable student grants K.P. has received during 2020 and 2021. If those are added to her income, it would lower S.K.'s percentage contribution to the total family income to 92% for the January to May 2020 period and down to 74% for the June 2020 to May 2021 period. I would apply those percentages to the periods in which the s. 7 expenses were incurred.

[185] Counsel for K.P. has helpfully listed all the s. 7 expenses by date in a table set out in K.P.'s written submissions. Applying these percentages to the applicable dates within that table, I order that S.K. pay \$14,663 towards these s. 7 expenses.

Credits for Payments Made

- [186] From this past obligation, S.K. must be given credit for payments he has made since separation. I agree with K.P.'s submission that the clearest way to calculate this credit on the evidence is to total up payments S.K. made for the monthly expenses of the White Rock condominium before it was sold and payments he made and credits received under the interim order made by Master Cameron on September 30, 2020 (the "Cameron Order"). Those monthly payments are set out in the Cameron Order itself. S.K. paid these monthly expenses before the Cameron Order was made and is to be credited for those payments also.
- [187] Moreover, since K.P. had the sole benefit of living in the former family home until it was sold, she proposes (as a concession to S.K.) that S.K. should be fully credited for these payments and not just the one-half of them he paid. Thus, K.P. proposes that credit for the "half" payments (mortgage, strata fees, property taxes, and insurance) made by S.K. should be doubled to address this.
- [188] Certain monthly payments as tallied in the Cameron Order must be excluded as S.K. did not pay those. These are the property taxes for October, November, and December and the strata fees for December. Those amounts were later paid out of the proceeds of the sale of the home. However, on the basis that K.P. has conceded that she should bear these costs having had the benefit of living in the family home, I would apportion S.K. a credit for half these expenses, that being \$226.93, from the proceeds of the money held in trust from the sale of the home. I will account for that credit later in these reasons.
- [189] Support payments under the Cameron Order, totaled \$6,484.28. The actual obligation, though, amounted to \$16,846.90 but, as of the date of trial, S.K. was in arrears on these payments in the amount of \$10,362.62 and a statement of arrears for this amount, issued by the Family Maintenance Enforcement Program, is in evidence.
- [190] Using the approach proposed by K.P., S.K. paid a total of \$22,394.16 in household expenses and \$6,484.28 in support payments for a total of \$28,878.44. This amount is to be credited to S.K.

Total Past Support Obligations

- [191] I have found that S.K. is obligated to pay \$18,499 for past child support and \$14,663 for past s. 7 expenses for a total of \$33,112 in past support obligations dating back to January 1, 2020. He is to be credited for having paid \$28,878.44. This leaves a balance of \$4,233.56. This balance is less than the \$16,340.99 sought by K.P. The difference is attributable to my decision not to order spousal support retroactively and to adjust S.K.'s percentage share of

the past s. 7 expenses. Both of those determinations flow directly from including the non-repayable student grant monies that K.P. received from Alberta and Canada during the relevant periods, post-separation, that were not included in her line 150 income.

Family Property and Debt

Property

- [192] The only family property of real significance was the White Rock condominium. That has now been sold and the net proceeds of \$129,930.60 (net of paying out the mortgage, property taxes, strata fees, and costs of sale) are held in K.P.'s lawyer's trust account. I am to determine how that money should be paid out, having regard to the family debt discussed below.
- [193] The other asset of the parties is their 2009 Land Rover vehicle. Much time was spent in S.K.'s cross-examination of K.P. on the value of this vehicle. K.P. maintains it is worth very little as there are considerable mechanical problems with it, as well as a broken windshield. She testified that the cost of repairs are more than the value of the car. She tendered evidence of quotes for the trade-in value of the Land Rover being no more than a few thousand dollars, as well as a Blue Book assessment for a vehicle of the same year in "fair condition" of \$7,511. K.P. argues their vehicle is in poor condition so it is worth less. She argues it should be valued at \$3,000.
- [194] S.K.'s evidence establishes that the major problem with the vehicle identified by K.P., the rear differential, has been fixed. He tendered in evidence listings for Land Rovers of the same or similar year with asking prices ranging from \$8,695 to \$13,000 but these all appear to be in better condition than the parties' vehicle. The rear differential was not the only problem with the vehicle identified in the mechanical inspection reports tendered by K.P. The vehicle continues to leak oil, the windshield is cracked, and K.P. testified the emergency brake is now not working. Notably, when D.C. was testifying for S.K., the subject of the Land Rover came up and D.C. remarked that the vehicle is always breaking down. D.C. is a mechanic who works for car dealership that sells another brand of cars.
- [195] Doing what I can with this evidence, I give the Land Rover a value of \$5,000. K.P. will be keeping the Land Rover so S.K. will receive a credit of \$2,500 for half the value of this asset.
- [196] At the date of separation, the parties had a positive balance of \$1,479.83 in their joint chequing account. S.K. should receive a credit for half this amount, being \$739.92.
- [197] The parties also have RESPs for each of Z.O.K (\$7,665.16) and Z.A.K. (\$5,270.63). K.P. seeks an order that the RESPs be placed in her name, to be held in trust for the children. S.K. did not oppose this and I therefore make that order.

Family Debts

G.R.'s Loan

- [198] K.P. seeks an order that the \$34,400 plus the balance owing on the \$6,000 advanced to the parties by G.R. be paid back from the proceeds of the sale of the White Rock condominium. As discussed earlier, G.R. advanced \$34,400 to the parties to help finance the purchase of the condo. He testified it was a loan that the parties would pay back once they sold condo. He also loaned them another \$6,000 to help with some credit card debt, of which they have repaid "\$400 or \$600" according to G.R.
- [199] S.K. argues the \$34,400 was a gift from G.R. and not a loan. He points to the fact that G.R. signed a letter to the Bank of Nova Scotia stating the money was "a gift and will never have to be repaid." He also argues that since G.R. is a close family friend - like a second father to K.P. - it makes sense that this would be gift. He argues the same thing about the \$6,000.
- [200] G.R. maintained the money was a loan notwithstanding his letter to the bank. He testified the bank required him to sign the letter although he did not explain why. In cross-examination, S.K. suggested it had something to do with a taxation requirement but I note that G.R.'s cheque was drawn from a Royal Bank account so it is not his bank that required the letter. Rather, I suspect the letter was required by the Bank of Nova Scotia to satisfy itself that S.K. and K.P. were not overextending themselves with debt when obtaining financing for the condo purchase.
- [201] In explaining why he signed the letter, G.R. said he had known K.P. for a very long time, knew that she and S.K. were "in a pickle" and he wanted to help them out. The bank required him to sign the letter so he signed it. Despite that, he maintained, as does K.P., that the parties were going to pay him back. I note that in addition to saying the money was a gift, the letter also states that S.K. is "an immediate family member" of G.R.'s which is also not true.
- [202] I found G.R. to be a credible witness and I accept his explanation of this loan and the letter. I do not accept that even a close family friend is likely to have gifted the parties almost \$35,000. I accept his evidence that he was loaning money in an informal way without interest to a close family friend to help with the purchase of their home and he was required to characterize it as a gift to satisfy the bank's concerns.
- [203] I note also the parties received other informal loans from family members whom they paid back. As discussed earlier, K.P.'s mother loaned them \$6,000 towards the down payment on their first home in Edmonton and the parties paid that back when they were able.
- [204] I also find that the further \$6,000 was advanced as a loan, particularly given that the parties have paid back \$400 or \$600 of it according to G.R. S.K. maintains that he did not repay it but he acknowledges that K.P. managed the family's money so he would not have knowledge of that payment in any event.

[205] The total amount loaned by G.R. was \$40,400. I find that \$500 (the mid range of the "\$400 or \$600") has been repaid, leaving a balance of \$39,900. I order that this amount be paid out to G.R. from the monies held in trust.

P.P.'s Debt

[206] P.P. testified that he loaned the parties money over the years. He described it as "\$1,000 here or \$2,000 there" when needed to pay bills. He said they usually paid him back slowly but they always paid. He acknowledged that some of these were gifts for which he did not expect repayment but others were loans and were repaid, albeit slowly. At present, he said the parties owe him \$7,000. He has not had a conversation with them about repayment but says he is always patient. He testified that in November 2019, he loaned the parties \$3,000 so that S.K. could fly back to Poland. At some point he discussed repayment with S.K. who told him he was going to inherit some money from his mother's estate in Poland and he would pay P.P. back as soon as he could.

[207] I am satisfied the \$7,000 was provided to the parties as a loan and I order that it be paid out to P.P. from the proceeds held in trust.

Student Loans

[208] S.K. argues he should not be responsible for K.P.'s student loan debt, but most of this debt, and all that K.P. claims as a family debt, was incurred during the marriage. *Bilawchuk v. Bilawchuk*, 2014 BCSC 2067 para. 30 clearly establishes that a student loan taken out during the marriage is a family debt. K.P. does not claim any portion of the student loan advanced after separation is a family debt and assumes full responsibility for that portion. I note, in addition to *Bilawchuk*, S.K. has benefited from the loan monies (as well as the grant portions) which have helped to support the family while K.P. has been in school, and K.P.'s education, funded through these loans, should place her in an economic position that will almost certainly relieve S.K. of spousal support obligations in the near future, and in no more than four years.

[209] S.K. argues that K.P. may qualify to have a portion of her loan forgiven and it would be unfair for him to be responsible for half a debt that may be forgiven. As part of the financial disclosure obligations I have ordered earlier, I order that K.P. immediately disclose to S.K. any changes in her student loan repayment obligations, including if any portion of the loans (Canada or Alberta) is forgiven. If it is, S.K. is entitled to receive from K.P. half of any forgiven amount, provided this is true loan forgiveness and not part of a taxable benefit K.P. might receive from an employer that would constitute part of her income as salary (see *Bilawchuk*, para. 32).

[210] Up to the date of separation, K.P. incurred student loan debt of \$105,000 (excluding the grant portion) as evidenced by the loan disbursement statements she put in evidence. Those statements show the dates on which loan and grant amounts were advanced and thus the post-separation amounts are easily identified and have been excluded from the overall debt. The debt remains in K.P.'s name only so I order that S.K. is responsible for paying K.P. half this amount, being \$52,500.

Joint Line of Credit and Credit Card

[211] As at separation, the parties had a balance of \$3,861.40 on their joint line of credit and a balance of \$5,158.22 on their credit card. K.P. paid these balances off after separation. The line of credit has been closed but she still uses the credit card for her personal use. S.K.'s name has been taken off the credit card. Under the Family Law Act, debts are to be assessed as at the date of hearing unless the court orders otherwise. Bilawchuk, para. 59 is authority for assessing the debt as at the date of separation where one party has unilaterally paid down the debt after separation. That is the case with the line of credit and the credit card. I therefore find that K.P. is entitled to recover from S.K. half the amounts owing on the line of credit and the credit card as at the date of separation, that being \$1,930.70 for the line of credit and \$2,579.11 for the credit card for a total of \$4,509.81.

Misappropriated Student Loan Draw

[212] Shortly after the parties separated, a draw on K.P.'s student loan was paid into the parties' joint account and shortly thereafter withdrawn by S.K. He acknowledges that he did this, not understanding it was K.P.'s student loan advance. He also acknowledges he has not repaid it. This totals \$2,630.25.

[213] Since this draw was post-separation, K.P. has not claimed it as a family debt. As such, she is solely responsible for its repayment. Thus, I order that S.K. compensate K.P. for the \$2,630.25 in student loan advance that he withdrew from the joint account.

Summary of S.K.'s Present Liability to K.P.

[214] The following is a summary of S.K.'s debits and credits as ordered above:

Item

Debit

Credit

Balance

Past Obligations

Past Child Support

(Jan 1, 2020-June 1, 2021)

(\$18,449)

Past section 7 expenses

(Jan 1, 2020-June 1, 2021)

(\$14,663)

Payments Made Under the Cameron Order

\$6,484.28

Household Expenses Paid by S.K.

\$22,394.16

One half of unpaid household expenses paid from proceeds of sale (Oct-Dec 2020 property taxes and Dec 2020 Strata fees)

\$226.93

Family Assets

Half the value of the Land Rover

\$2,500

Half the value of the joint chequing account at separation

\$739.92

Family Debts

Half the Student Loan Debt

(\$52,500)

Half the Joint Line of Credit and Credit Card

(\$4,509.81)

Misappropriated Student Loan Draw

(\$2,630.25)

Total Debits and Credits

(92,751.25)

32,346.29

Balance Owing to K.P.

\$60,404.96

Disbursement of the Monies in Trust

[215] Of the \$129,930.60 held in trust from the sale of the White Rock condo, I order that:

- a) \$39,900 be paid to G.R.
- b) \$7,000 be paid to P.P.

This leaves a balance in trust of \$83,030.60.

[216] Notionally, half of that amount, \$41,515.30, is attributable to each party. S.K.'s notional half is to be paid out to K.P. as a contribution towards the \$60,404.96 balance owing to her. This would then leave a final balance owing of \$18,889.66 (being \$60,404.96 minus \$41,515.30).

[217] K.P. seeks an order that this final balance of \$18,889.66 be paid "forthwith". However, in light of the fact that K.P. is not immediately required to repay the full student loan debt and, in fact, may have some short period of time before she needs to start making any payments on it, I would not order that S.K. pay the amount forthwith to the extent that this may preclude him from seeking out arrangements to pay this amount over time. In this regard, I have in mind that he will have ongoing child and spousal support obligations and anticipated expenses for exercising parenting time. He has also testified that he tried borrowing money to pay his arrears of child support but was unable to obtain a line of credit of more than \$20,000. Thus, he may require some time to pay the balance owing and, since K.P. will not be immediately required to repay the student loan, I see no reason to order S.K. to pay the balance "forthwith". To be clear, I order that S.K. pay the \$18,889.66 balance to K.P. but I will not include the term "forthwith" in the order.

Summary of Orders

[218] I therefore make the following orders. I leave it to counsel for K.P. to draft the order in proper form, reminding him that the order must specify the Act under which each order is made:

Divorce

- a) The parties are to be divorced, which is to take effect 31 days after the date of this order;

Relocation - Order made pursuant to s. 16.92 of the Divorce Act

- b) K.P. is permitted to relocate the children to the greater Edmonton area or to Grand Prairie, Alberta.

Parenting - Orders made under s. 16.1 through 16.4 of the Divorce Act

- c) The Children will reside primarily with K.P.
- d) S.K. will have the following parenting time:
 - i. One week during the children's spring holiday;

- ii. One week during the children's Christmas holiday;
- iii. Three weeks during the children's summer holiday in 2022 and four weeks during the children's summer holidays in 2023 and each summer holiday thereafter;
- iv. One week during July and/or August of 2021 before K.P. relocates the children to Alberta;
- v. On long-weekends, including holiday long weekends and those occasioned by professional development days at the children's school, as agreed between the parties, such agreement not to be unreasonably withheld;
- vi. Any other time, by agreement between the parties, such agreement not to be unreasonably withheld;
- e) S.K. will additionally have regular and frequent telephone or video contact with the children at times to be agreed between the parties, such agreement not to be unreasonably withheld;
- f) The parties will equally share the travel expenses to facilitate S.K.'s parenting time;
- g) In the interests of managing costs of and facilitating S.K.'s parenting time, S.K. may, at his sole discretion, exercise some or all of his parenting time in Alberta should he wish to travel there to do so. S.K. must make reasonable arrangements for the children's accommodation if they are to stay overnight with him in Alberta. If suitable accommodations cannot be arranged, he may exercise his parenting time from 9:00 a.m. to 7:00 p.m. each day.
- h) If S.K. decides to relocate to Alberta, he will have liberty to apply to vary the parenting time provisions of this order.
- i) The parties will share parental responsibilities. Each parent will have the duty to consult the other before making any significant parenting decision. In the event that the parties cannot come to agreement on a significant parenting decision, K.P. will have the final decision-making authority.
- j) Each party is entitled to request from the other party information about the children's well-being, including with respect of their health and education, or from any other person who is likely to have such information, and is entitled to be receive such information from the other party or other person or persons, subject to any applicable laws.

Income

- k) S.K. is found to be resident of British Columbia (having indicated he intends to remain here) and has an income of \$86,851.97 for the purposes of calculating child and spousal support, as well as s. 7 expenses;
- l) K.P. is found to be a resident of Albert and has an income of \$5,552.44 for the purposes of calculating child and spousal support, as well as s. 7 expenses;

- m) The parties will exchange T1 Tax returns and Notices of Assessment each year no later than June 1.
- n) In addition to the annual financial reporting requirement, each party must promptly report to one another any material change in their income that might affect child or spousal support obligations or entitlements.
- o) K.P. must also promptly report to S.K. any amount of her student loan debt that is forgiven by either the government of Canada or Alberta, and S.K. will be entitled to receive from K.P. half of any forgiven amount.

Child Support - Orders made pursuant to s. 15.1 of the Divorce Act

- p) Commencing July 1, 2021, S.K. will pay to K.P. the sum of \$1,342.00 on the first day of each month for the support of the following children, for so long as they remain entitled to support under the Divorce Act or the Family Law Act:
 - i. Z.O.K born April 2014;
 - ii. Z.A.K. born April 2016
- q) S.K. will pay 89% of the children's medical, dental and child care costs, along with any other agreed upon section 7 expenses;
- r) K.P. will pay 11% of the children's medical, dental and child-care costs, along with any other agreed upon section 7 expenses;
- s) The party incurring a section 7 expense will provide the other party with a copy of the receipt for the expense within 30 days of receiving the receipt.
- t) The parties will adjust the child support amount and proportionate share of section 7 expenses on June 1 each year based on the parties' most recent tax returns and at such other times throughout the year as may arise from the periodic disclosure of changes in income.

Spousal Support - Orders made pursuant to s. 15.1 of the Divorce Act

- u) S.K. will pay to K.P. the sum of \$350 on the first day of each month for the support of K.P. commencing July 1, 2021, to be reviewed on June 1, 2022 and each year thereafter with appropriate adjustments to address anticipated imminent changes in K.P.'s income.
- v) S.K. is at liberty to apply to vary the spousal support portion of this order at any time upon disclosure from K.P. of a significant change to her income as disclosed pursuant to paragraph (n) above or upon a material change in his income that may arise should he chose to relocate to Alberta to be closer to the children;

Fixing of Arrears

- w) As at June 30, 2021, S.K. has arrears of \$4,233.56. These will be attributable to the s. 7 expenses.

Davison of Family Property and Debt - Orders made pursuant to the Family Law Act

- x) The following sums will be paid from funds held in trust by counsel for K.P.:
- i. \$39,900 to G.R.
 - ii. \$7,000 to P.P.
 - iii. The balance, being \$83,030.60, to K.P.
- y) S.K. will pay to K.P. the additional sum of \$18,889.66 which is inclusive of arrears as fixed in paragraph (w) above.
- z) K.P. will hold the children's RESP in trust for the children for the purpose of their education.

[219] I order that the parties bear their own costs of this proceeding.

"Kirchner, J"

[1] https://www.justice.gc.ca/eng/rp-pr/fl-lf/spousal-epoux/ug_a1-gu_a1/PDF/ug_a1-gu_a1.pdf

[2] There was a further \$3,000 grant from Alberta paid on December 26, 2019, after the separation, but since it was before 2020 I have not included it in the calculations.

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Prepared on 29 October 2026 · Esheria