
CANADA / JUDGMENT

Keith v. MacMillan

2014 BCSC 1352

COURT

Supreme Court of British Columbia

DECIDED

18 July 2014

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2014 BCSC 1352 Keith v. MacMillan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Keith v. MacMillan,

2014 BCSC 1352

Date: 20140718

Docket: 44346

Registry: Kamloops

Between:

Catherine Anne Keith

Claimant

And

Alan Kirk MacMillan

Respondent

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Claimant:

C.O. Soll

Counsel for the Respondent:

J. Mariona

Place and Date of Hearing:

Kamloops, B.C.

April 25, May 2, & 23, 2014

Place and Date of Judgment:

Kamloops, B.C.

July 18, 2014

INTRODUCTION

[1] Both parties have brought applications before the court. The claimant, Catherine Anne Keith ("Ms. Keith"), seeks final orders in respect of all issues in this family law case. Specifically, she seeks the following:

1. An Order that the parties shall share joint guardianship of Jedd Keith Kirk MacMillan, born July 16, 1998, and Alianne Keith MacMillan, bom June 29, 2000 ("the children"), with the Claimant having the primary care of the children. Parenting responsibilities between the parties shall be divided in the following manner:
 - a. the Claimant, who has the primary responsibility for the day-to-day care of the children, will have the obligation to advise the Respondent of any matters of a significant nature affecting the children;
 - b. the Claimant will have the obligation to discuss with the Respondent any significant decisions which have to be made with respect to the children, including significant decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the children, and then the Respondent will have the obligation to discuss these issues with the Claimant, and each parent will have the obligation to try to reach agreement with respect to those major decisions;
 - c. in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts, the Claimant will have the right to make such decision, and the Respondent will have the right to seek a review of any decision which that parent considers contrary to the best interests of the children; and
 - d. each parent will have the right to obtain information concerning the children directly from third parties, including teachers, counsellors, medical professionals, and third-party caregivers.
2. An Order that the Respondent shall have reasonable access to the children subject to the children's wishes and the directions of any psychologists or counsellors the children may see.

3. An Order that neither party shall take either of the children outside of the City of Kamloops without first providing the other parent with prior written notice.
4. An Order that the Claimant shall keep the following assets as her sole property absolutely:
 - a. the 2006 Nissan Frontier;
 - b. Quadrus Investment Services Ltd. SDRSP #509764399;
 - c. Quadrus Investment Services Ltd. SDRSP #509765453; and
 - d. Quadrus Group of Funds TFSA #30786172.
5. An Order that the Respondent shall keep the following assets as his sole property absolutely:
 - a. the 2002 GMC Pickup;
 - b. the 1967 Toyota Landcruiser; and
 - c. Quadrus Investment Services Ltd. SDRSP #509768767.
6. An Order that the balance in the Mackenzie Financial Corporation RESP-F held in the Claimant's name shall be divided evenly between the parties. Each party shall transfer his or her interest in the RESP into a new RESP to be managed by that party for the benefit of the children.
7. An Order that the Respondent shall pay to the Claimant the sum of \$1,647 each and every month for the support of the children. This child maintenance obligation shall commence June 1, 2010 and shall continue on the first day of each and every month thereafter so long as each child is a "child" as defined in the Family Law Act.
8. An Order that the Respondent shall pay to the Claimant the additional sum of \$198 each and every month as his share of the children's special and extraordinary expenses. This obligation shall commence February 1, 2014 and shall continue on the first day of each and every month thereafter so long as each child is a "child" as defined in the Family Law Act.
9. An Order that the Respondent's arrears for contribution to special and extraordinary expenses back to June 1, 2010 shall be fixed at the sum of \$4,932, in accordance with the following breakdown:
 - a. the sum of the sum of \$2,016 as his share of the children's special and extraordinary expenses in 2010;
 - b. the sum of the sum of \$1,464 as his share of the children's special and extraordinary expenses in 2011;
 - c. the sum of the sum of \$1,452 as his share of the children's special and extraordinary expenses in 2012;

10. An Order that the Respondent shall pay to the Claimant the sum of \$1,269 each and every month for the support of the Claimant. This spousal maintenance obligation shall commence January 1, 2013 and shall continue on the first day of each and every month thereafter.
11. An Order that the Respondent's arrears of spousal maintenance from June 1, 2010 to December 31, 2012 shall be fixed at the sum of \$16,656 in accordance with the following breakdown:
 - a. the sum of \$4,800 for the period from June 1, 2010 to December 31, 2010;
 - b. the sum of \$8,424 for the period from January 1, 2011 to December 31, 2011;
 - c. the sum of \$3,432 for the period from January 1, 2012 to December 31, 2012.
12. An Order that the property located at 532 Lister Road, Kamloops, B.C. more particularly known as PID: 007-876-343, Lot D, Sec 11, Twp 22, Rge 17, W6M, KDYD, Plan 20271 shall be listed for sale and sold with an agreed-upon realtor at an agreed-upon price. The sale proceeds shall be applied to:
 - a. the realtor's commission;
 - b. the usual adjustments between vendor and purchaser;
 - c. any registered financial encumbrances;
 - d. the balance owing on TD Canada Trust Line of Credit #06984504531; and
 - e. the balance owing on the CIBC Visa credit card held in the Claimant's name under card #4502310000486439.

\$9,597 of the net sale proceeds shall be credited to the Claimant to compensate her for the Respondent's share of the family debt under MBNA card number 5491980260943095. The balance of the sale proceeds shall be divided evenly between the parties.

13. The Claimant shall sign whatever documents are necessary to transfer her interest in Remote Environmental Services Ltd. to the Respondent.
14. Costs.
- [2] Her applications are brought pursuant to Rule 11-3 of the Supreme Court Family Rules [Family Rules].
- [3] The respondent, Alan Kirk MacMillan ("Mr. MacMillan"), is opposed to determination of nearly all of these issues by way of summary trial. Other than certain aspects of asset division and allocation of parenting responsibilities, matters to which he consents, Mr. MacMillan takes the position that a conventional trial must be held.

- [4] In his application, Mr. MacMillan seeks orders permitting him to take the children to counselling sessions and allowing him, on an interim and without prejudice basis, to have parenting time with them in accordance with their wishes. He further seeks an order that a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] be prepared at his own cost.
- [5] At the conclusion of the hearing of both applications, I granted Mr. MacMillan's application for a Views of the Child Report.
- [6] I have now conducted a comprehensive review of the materials filed, considered counsels' very thorough written and oral submissions, and considered the Views of the Child Report prepared by Bruce Stevens. For the reasons that follow, I am satisfied that these matters are not suitable for summary disposition under Rule 11-3.

BACKGROUND

Pre-Separation

- [7] Ms. Keith and Mr. MacMillan lived together in a marriage-like relationship from September of 1997 until October of 2009. They had two children - Jedd Keith Kirk MacMillan ("Jedd"), born July 16, 1998 and Alianne Keith MacMillan ("Alianne"), born June 29, 2000.

A. Employment

- [8] Mr. MacMillan is an environmental consultant. Throughout the marriage, he conducted his business through a corporation called Remote Environmental Services Ltd. He was the company's owner and only employee. He travelled frequently to job sites around the province and elsewhere around the world, often for extended periods of time. His income was used to support the family. Ms. Keith stayed home with the children and managed the company finances. She worked outside the home occasionally and sporadically.

B. Financial Management

- [9] The parties purchased their home at 532 Lister Road in Kamloops in 2000. Mr. MacMillan contends that Ms. Keith handled all of the family finances throughout their relationship and he was kept in the dark. Ms. Keith asserts that she was not solely entrusted with the family finances and that Mr. MacMillan was fully apprised of their financial situation.
- [10] At the time of separation, the parties held a mortgage on the home. Ms. Keith asserts that the parties also held a joint line of credit through TD Canada Trust with a balance of approximately \$19,000.00 and that those funds had been used for family expenses. Mr. MacMillan denies knowledge of this debt and disputes that it was incurred for family purposes.

- [11] Ms. Keith held an MBNA credit card with a balance of roughly \$19,000.00 in her name alone at the time of separation. She asserts that these funds were used to pay family expenses. Again, Mr. MacMillan claims to have had no knowledge of this debt and questions whether those funds were used for a family purpose.
- [12] For his part, Mr. MacMillan claims a CIBC line of credit in the company name as a family debt as well. At the time of separation, the balance was approximately \$60,000.00. Ms. Keith does not believe this debt was accumulated for family purposes.

C. Children

- [13] When the parties separated, Jedd was 11 years of age and Alianne was 9. Jedd has been diagnosed with Asperger's Syndrome and Attention Deficit Hyperactivity Disorder. Both children struggled with bullying in school.
- [14] While the parties agree that Ms. Keith was the primary caregiver, they disagree with respect to Mr. MacMillan's involvement. Ms. Keith asserts that he was away most of the time, but when he was home he was minimally involved, as he was usually at the lake drinking. Mr. MacMillan denies this allegation and asserts that there were significant periods of time when he was home. During those times, he claims to have been equally involved with parenting the children.
- [15] At the conclusion of submissions, I ordered a Views of the Child Report as requested by Mr. MacMillan. Registered Clinical Counsellor, Bruce Stevens interviewed the children separately on May 26 and 27, 2014. What the children reported about their pre-separation home life sheds new light on the picture painted from their parents' affidavits.
- [16] The children witnessed frequent arguing between their parents while they lived together as a family. Neither child was surprised by their parents' separation. In fact, Jedd was glad.
- [17] Both children report that Mr. MacMillan was an alcoholic with a terrible temper. Jedd was physically, verbally and emotionally abused by his father. Alianne witnessed this abuse. Both children witnessed Mr. MacMillan verbally abusing Ms. Keith. It is troubling that neither parent disclosed this abusive behaviour in their sworn affidavits.
- [18] Ms. Keith and Mr. MacMillan did report communication difficulties between them post-separation, but the children have great insight into the depth of these difficulties during the time they lived together as a family. It is apparent those difficulties run long and deep.

Post-Separation

A. General

- [19] Mr. MacMillan left the family home on October 1, 2009. Ms. Keith has remained in the home with the children since that time. She has continued to make the mortgage payments and maintain the home. Both parties now seek to sell the home, but cannot agree on the terms of sale, nor on how the proceeds ought to be divided.
- [20] Mr. MacMillan took a number of chattels from the home when he left. The parties disagree on the value of those items and no valuation has been done. Mr. MacMillan now seeks to have a number of chattels still within the home divided equally. Ms. Keith seeks to have each of them keep the chattels they currently have.
- [21] Ms. Keith commenced this action by way of writ of summons and statement of claim on June 3, 2010. Mr. MacMillan filed his statement of defence the following month. Ms. Keith sought joint custody and guardianship of the children with primary residence to her, spousal support and child support. In respect of property and debt, she sought the following relief:
- a) Partition and sale of the former family home and division of sale proceeds between them following payment of joint debts;
 - b) A declaration that Mr. MacMillan holds an interest in his assets in trust for her pursuant to a resulting or constructive trust;
 - c) A determination of the extent of her interest in the assets of Mr. MacMillan and an order compensating her for those interests; and
 - d) In the alternative, compensation on the basis of quantum meruit.
- [22] Other than joint guardianship, Mr. MacMillan opposed all of the relief sought.
- [23] In the four years that have passed since this action commenced, neither party has applied for any interim orders.

B. Employment

- [24] Mr. MacMillan has continued to work as an environmental consultant. In 2012, he dissolved the company through which he ran his business and incorporated a new company for that same purpose - R.E.S. Remote Environmental Services (2012) Ltd. Mr. MacMillan has engaged the services of an accountant to keep the company's books.
- [25] As the only employee of this company, its unaudited financial statements reflect that Mr. MacMillan has paid himself a salary (or dividends) each year. Ms. Keith asserts the post-expense, pre-tax income generated by the company, ought to be imputed to Mr. MacMillan for the purposes of calculating child and spousal support. Mr. MacMillan asserts that the income he pays himself, or an average of the income he has paid himself the preceding three or four years, ought to be used. He claims that it is necessary for him to leave the funds in the business to cover certain expenses and to compensate for "lean years" as they arise.

He also now asserts that as a result of lost contracts, his age and a medical condition, he is less able to earn income.

- [26] Ms. Keith is employed full time as a sports recreation coordinator for the Kamloops Indian Band. She earns roughly \$47,000.00 a year in employment income and receives approximately \$2,700.00 from the annual child tax benefit. She seeks spousal support from Mr. MacMillan.
- [27] Mr. MacMillan submits that Ms. Keith has not established entitlement to support. He asserts that this is not a case where Ms. Keith gave up a career or any economic opportunity as a result of family commitments. He has never paid spousal support. Ms. Keith seeks ongoing spousal support of \$1,245.00 per month and arrears from June 1, 2010 to March 31, 2014 in the amount of \$32,499.00.

C. Children

- [28] Since separation, the parties have been unable to co-parent successfully. They have tried mediation and counselling. Each blames the other for their lack of success.
- [29] The children, through the Views of the Child Report, once again provide a more realistic picture of the extent of their parents' dysfunction. They were each asked to rate how their parents "get along" on a scale of zero to ten, with zero representing "no cooperation - lots of arguing" and ten representing "cooperative - respectful communication". Jedd rated his parents at a "minus six" and Alianne rated them at "zero". Their communication, at least in front of their children, consists of loud verbal arguments. Alianne reports that her father belittles her mother a lot with swearing and name-calling. Her mother tells her that her father "isn't nice and he's not a good communicator".
- [30] Communication outside of the ears of their children occurs through email. Ms. Keith provides updates and information about the children's activities and lives. Mr. MacMillan complains that while he receives some information, he does not receive all of it. He also complains that he is not consulted ahead of time, simply informed. Ms. Keith disputes that she has omitted to inform him, pointing to email exchanges in her affidavit material. For his part, Mr. MacMillan claims that he may have accidentally deleted certain informative messages.
- [31] Ms. Keith has enrolled both children in many positive, healthy activities. They are both engaged in counselling. Jedd has a psychiatrist and does some distance learning outside of his regular school. Both children seem to be doing well. They both want to continue to live with their mother. Neither child wants to spend much time with their father and, if they do, they want it to be on their own terms. Neither Jedd nor Alianne want to be with each other when they visit Mr. MacMillan.

- [32] Alianne does not feel safe when she is alone with her father as a result of an incident of violence a few months ago where he shook her. She wants to visit with Mr. MacMillan on her own terms, in the presence of other people such as her older half-siblings, Caleb, Amber or Jeremy.
- [33] The children's numerous activities are expensive. Mr. MacMillan has contributed to some of those expenses over the years, but Ms. Keith asserts that he should not be given any credit for those contributions, as he has been significantly underpaying with respect to child support. She asserts that he owes her nearly \$7,000.00 in arrears for special and extraordinary expenses.
- [34] Mr. MacMillan, in reply, claims that no money is owing because he was either not consulted with respect to the activities or that he has paid his fair share for those that he was. Whether the parties are able to afford these activities is also at issue.
- [35] Mr. MacMillan has paid Ms. Keith child support in varying amounts most months since the time of separation. His payments have been based upon the income he pays himself. He currently pays \$1,200.00 per month. Ms. Keith claims, based on the company's available pre-tax income, that he has significantly underpaid for years and now seeks arrears in the amount of \$26,555.00. Mr. MacMillan, of course, denies owing these arrears, saying that if he did underpay it was a minimal amount, at most \$4,490.00.

SUITABILITY FOR SUMMARY TRIAL - LAW AND ANALYSIS

- [36] The relevant provisions of Rule 11-3 are:

Adjournment or dismissal

- (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
- (a) adjourn the summary trial application, or
 - (b) dismiss the summary trial application on the ground that
 - (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
 - (ii) the summary trial application will not assist the efficient resolution of the family law case.

Judgment

- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

[37] With respect to the issue of fact finding, Madam Justice Ballance summarized the law in *Bank of Montreal v. Fraser*, 2013 BCSC 2328, at paras. 26 through 32:

[26] Whether to proceed summarily is a matter for the discretion of the judge hearing the application. It has been observed that determining on which side of the line a particular case falls can be a matter of some delicacy: *North Fraser Harbour Commission v. Hardy BBT Ltd.*, [1994] B.C.J. No. 1672 (S.C.).

[27] The test for the suitability of summary disposition is not assessed by asking whether a full trial could conceivably turn something up or produce a different outcome. When an application for summary trial is made, the parties are expected to take every reasonable step to put themselves in the best possible position and adduce all evidence they believe is necessary for judgment: *R.G.H. v. British Columbia*, [2010] B.C.J. No. 806, 2010 BCCA 220.

[28] Being what it is, litigation almost invariably involves disputed facts.

[29] In *Cotton v. Wellsby* (1991), 59 B.C.L.R. (2d) 366 (C.A.), Madam Justice Southin cautioned against the use of the summary trial procedure when there are conflicting affidavits and the issues of who said what to whom and when are of significance. At p. 378, her Ladyship reminded:

Where such issues are crucial, the trial judge must be alive to the possibility that the case is simply not suitable for summary trial.

[30] It is settled principle that the existence of conflicting evidence, of itself, is not conclusive that a summary trial is unsuitable. The court is not precluded from finding the facts essential to decide the issues simply because material evidence is in conflict. So long as the judge is able to find the facts required to render judgment by reference to other evidence, the matter may well be amenable to summary determination even where there are conflicting affidavits on central issues: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R.366, 1985 CarswellBC 336 (C.A.); *Steen McVeigh v. Boeriu*, 2011 BCSC 400 at para. 49.

[31] That state of affairs is to be distinguished from the case where the only relevant evidence before the court on a material point is comprised of the conflicting testimony in the affidavits, and it is not possible for the court to decide the case summarily without making findings of credibility and ultimately preferring one affidavit over the other. In that situation, the general rule is that it is not appropriate to proceed summarily: *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.); *Cotton v. Wellsby*, *supra*; *Bouchal v. Slovakotour Inc.* (1993), 83 B.C.L.R. (2d) 103, 1993 CarswellBC 235 (C.A.); *Parker v. Campbell*, [2002] B.C.J. No. 1697 (S.C.).

- [32] Where the Court concludes there is insufficient evidence before it to decide the issues, it may adjourn the application and order that one or more deponents attend for cross-examination or that further affidavit material be filed. Another option is to simply decline to try the issues summarily and order a conventional trial: *Placer Development v. Skyline Explorations* (1985), 67 B.C.L.R. 366 (C.A.).
- [38] Even if the court concludes there is sufficient material to enable it to decide the issues summarily, it does not necessarily follow that the trial will proceed that way. The court must go on to consider whether, if in all of the circumstances, it would be unjust to do so. As Ballance J. wrote at para. 33 of *Bank of Montreal v. Fraser*:

The concept of whether it would be unjust to proceed summarily is to be given a broad meaning, taking into account the interests not only of the litigants at hand, but the interests of other persons as well: *Stoney Creek Indian Bank v. British Columbia* (1999), 69 B.C.L.R. (3d) 1 (C.A.), 1999 BCCA 527, 1999 CarswellBC 2166 (C.A.); leave to appeal refused (2000), [1999] S.C.C.A. No. 539, 2000 CarswellBC 1752, 2000 CarswellBC 1753 (S.C.C.); *Topgro Greenhouses Ltd. v. DeVries*, [2007] B.C.J. No. 883.

- [39] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989) 36 B.C.L.R. (2d) 202 (C.A.), McEachern C.J. outlined the factors that should inform the analysis of whether it would be unjust to give judgment on a summary application at para. 48:

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [40] Further factors for consideration include whether the litigation is extensive, the length of time for the summary trial, whether credibility is a crucial factor, whether there has been cross-examination of the deponents on conflicting affidavits, whether the summary trial will involve a substantial risk of wasting time and effort and produce unnecessary complexity and whether the application has potential for litigating in slices: *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263 affirmed by 2006 BCCA 369 at para. 12 and *Waters v. Michie*, 2011 BCSC 1083.

- [41] Many of the foregoing considerations are engaged in this case.

A. Amounts Involved

- [42] The amounts involved are not insignificant. Ms. Keith seeks in excess of \$70,000.00 for arrears of child support, spousal support and special and extraordinary expenses. She also seeks substantial spousal support on an ongoing basis and an increase in child support.

[43] With respect to assets, not much is at stake. However, the parties disagree on nearly \$100,000.00 worth of debt. These amounts are sizeable given the economic circumstances of the parties.

B. Urgency

[44] I was not advised of any particular or unusual urgency associated with this application other than Ms. Keith's repeated reminder that nothing has been done in the last four years. In this regard, I note that neither party has taken any steps to advance this litigation. No examinations for discovery have been held. Some documents may remain outstanding. The parties' failure to take steps in the last four years does not constitute urgency.

C. Number of and Complexity of Issues Raised (Splitting of Issues)

[45] I have identified the relief that both parties seek. As evidenced by their lengthy written submissions and several hours of oral submissions, that relief raises multiple legal issues. Some of the issues are interdependent. For example, division of assets and debts impacts Ms. Keith's claim for spousal support should she be found to be entitled. If the court is unable to determine on the basis of affidavit evidence adduced whether a certain debt is a family debt, this militates against addressing spousal support.

D. Conflicts in the Evidence

[46] As my brief review of the evidence reflects, both parties question the credibility of the other in multiple areas. Mr. MacMillan questions the adequacy of the documentary evidence. The following are some of the key issues where, to my mind, the state of the evidence and the conflicting affidavit evidence inhibits proper determinations.

i) Parental Responsibilities and Parenting Time of Mr. MacMillan

[47] These issues are to be determined pursuant to the provisions of the FLA. The relevant provisions include:

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;

- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;

- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

Parenting arrangements

40 (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.

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

Parental responsibilities

41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;

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

Exercise of parental responsibilities

43 (1) A child's guardian must exercise his or her parental responsibilities in the best interests of the child.

[48] Against this legal backdrop, one can quickly see where the state of the evidence inhibits a proper determination of issues surrounding care of the children. While each parent is a guardian of these children and purports to want to share parenting responsibilities equally, whether such a shared arrangement is in the best interests of the children is impossible to resolve on the evidence presented. Whether unsupervised parenting time for Mr. MacMillan is in the best interests of the children is also now an open question. The parties' evidence conflicts in material ways, but perhaps more importantly, it omits any discussion of family violence throughout the relationship. This issue was significantly raised by both children. Among other things, a court must consider all of the factors enumerated in s. 38 of the FLA in order to determine the children's best interests. Given the nature of the allegations made, it is my view that expert evidence would be of great assistance.

[49] As well, the children have shed new light on the depth of their parents' communication and co-parenting difficulties. Whether the parties' desire to share parenting responsibilities is in the best interests of the children is, again, impossible to resolve on the incomplete and contradictory evidence presented.

ii) Mr. MacMillan's Income

[50] Determining Mr. MacMillan's income for child support and spousal support (if necessary) purposes is complex. Sections 16 through 20 of the Federal Child Support Guidelines (the "Guidelines") all come into play. Each party seeks to put a different interpretation on the

unaudited corporate financial statements of his company. Credibility of Mr. MacMillan is at issue when he asserts for various reasons that pre-tax corporate income ought not to be used for the purposes of calculating support and that his business decisions are reasonable and prudent.

- [51] In conventional trials, courts are often faced with difficult determinations when considering ss. 18 and 19 of the Guidelines, due to insufficient financial evidence. Common sense can, in the right circumstances, be employed to address those deficiencies. I agree with Madam Justice Dorgan in *Ursel v. Ursel*, 2014 BCSC 1219, when she wrote at para. 29:

Generally speaking, where the payor spouse is the shareholder of a corporation, the payor should provide the corporation's full financial statements as well as the evidence necessary to meet the onus in *Hausmann*. Although it is not required, it can be useful to call experts to testify as to the financial needs of the business and the purpose and legitimacy of any expenses.

- [52] In this case, the court does not have the benefit of this type of evidence, which makes it difficult to assess the full extent of the pre-tax corporate income or the legitimacy of alleged business expenses. What makes the task even more difficult, if not impossible, is to try and assess these issues on the basis of challenged affidavit evidence.

iii) Spousal Support

- [53] Mr. MacMillan disputes Ms. Keith's entitlement. There are conflicts in the evidence with respect to the amount of time Mr. MacMillan spent parenting the children and what opportunities Ms. Keith may or may not have foregone in order to raise them. I am unable to resolve these conflicts as I am unable to assess credibility.
- [54] Even if I was able to resolve the entitlement issue, the issue of Mr. MacMillan's income still comes into play should entitlement be found.

iv) Division of Property and Debt

- [55] These issues are complex. The parties never married. They separated before the FLA came into effect and they have not consented to its application. The Family Relations Act, R.S.B.C. 1996, c. 128 does not apply. Accordingly, property division must be dealt with under the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA] and the principles of trust and unjust enrichment.
- [56] The PPA empowers the court to order the sale of property held by the parties in a joint tenancy upon such terms and conditions as the court deems just. In this case, the parties agree to the sale of the former family home, but disagree as to its terms. As well, each party wants certain debts to be characterized as family debts and to be settled out of the sale proceeds.
- [57] In order for either party to succeed in his or her claim for debt division, that party needs to show that the other party was unjustly enriched as a result of the accumulation of the debt. Once again, the parties disagree in their evidence with respect to basic principles. They each

allege that the other party has received a benefit and that he or she has been correspondently deprived. Further documentation may shed light on these issues, but those documents (some would cover periods of time prior to separation) may be difficult to obtain. I was not advised if any efforts to obtain them have been made.

- [58] While I have concluded that I am unable, on the whole of the evidence, to find facts necessary to decide the issues, even if I did conclude otherwise, I would decline to proceed on the basis that it would be unjust to do so.
- [59] I appreciate that Ms. Keith would like resolution to these matters, but I am required to take into account not only the interests of the parties, but the interests of the children as well. It would be unjust to determine such crucial issues as parenting responsibilities, parenting time for Mr. MacMillan, support and other financial issues on the basis of conflicting affidavit evidence. It is particularly inappropriate to determine the impact of the significant family violence the children have now disclosed in the absence of full and complete evidence. A conventional trial of the matter is necessary. This will cause delay in achieving final resolution of this case, but achieving a just resolution that is in the children's best interests cannot be sacrificed in the name of speed.
- [60] Accordingly, Ms. Keith's application for summary judgment is dismissed. I order that this matter proceed by way of a conventional trial. I would encourage the parties to avail themselves of all pre-trial discovery procedures.
- [61] This leaves two remaining issues. First, the parties have consented to certain orders. Second, Mr. MacMillan seeks an order that a s. 211 report be prepared.

CONSENT ORDERS

- [62] The parties agree to "sharing joint guardianship", but disagree on its terms. It is not in dispute that the parties are each guardians of the children, as that term is defined in the FLA. Allocation of parental responsibilities and issues surrounding Mr. MacMillan's parenting time will have to be determined at trial. On an interim basis, I will order, by the parties' consent, that Ms. Keith have primary care of the children, that neither party shall take the children outside of the City of Kamloops without first providing the other party with prior written notice, and that Mr. MacMillan's parenting time be on a without prejudice basis, in accordance with the wishes of the children and the directions of any psychologists, psychiatrists or counsellors the children may see.
- [63] With respect to division of certain assets, I order, by consent, the following:
1. Ms. Keith shall keep the following assets as her sole property absolutely:
 - a. the 2006 Nissan Frontier;
 - b. Quadras Investment Services Ltd. SDRSP #509764399;

- c. Quadrus Investment Services Ltd. SDRSP #509765453
- d. Quadrus Investment Services Ltd. TFSA #30786172
- 2. Mr. MacMillan shall keep the following assets as his sole property absolutely:
 - a. the 2002 GMC Pickup;
 - b. the 1967 Toyota Landcruiser; and
 - c. Quadrus Investment Services Ltd. DSRSP #509768767
- 3. The balance of the Mackenzie Financial Corporation RESP-F held in Ms. Keith's name shall be divided evenly between the parties. Each party shall transfer his or her interest in the RESP into a new RESP to be managed by that party for the benefit of the children;
- 4. The former family residence located at 532 Lister Road, Kamloops, B.C. shall be listed for sale and sold with an agreed-upon realtor at an agreed-upon price. The sale proceeds shall be applied to:
 - a) the realtor's commission;
 - b) the usual adjustments between vendor and purchaser;
 - c) any sums required to pay and discharge any registered financial encumbrances;
 - d) legal fees and disbursements for the sale; and
 - e) the remaining net sale proceeds shall be held in trust by counsel for Ms. Keith, in a separate, interest bearing trust account and will not be paid out of the trust account until written consent of both parties or further order of this court.
- 5. Pending sale of the former family residence:
 - a) Ms. Keith shall have exclusive occupancy of the property;
 - b) Ms. Keith shall be solely responsible for all expenses associated with the property;
 - c) Ms. Keith shall maintain the property in a condition that maximizes its marketability;
 - d) While the property is listed for sale, either party is at liberty to purchase the other party's interest in the property at fair market value.
- [64] Mr. MacMillan's application to be allowed to inspect the home upon 48 hours' notice is denied. He has not established the necessity for such a provision. As well, given the serious nature of the allegations of family violence, the less unnecessary contact between the parties the better.

SECTION 211 REPORT

[65] Mr. MacMillan seeks the preparation of this report at his own expense. Ms. Keith opposes such a report on the basis that it is unnecessary and would be disruptive to the children's lives.

[66] Section 211(1) provides:

Orders respecting reports

211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4[Care of and Time with Children], one or more of the following:

- (a) the needs of a child in relation to a family law dispute;
 - (b) the views of a child in relation to a family law dispute;
 - (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.
- (2) A person appointed under subsection (1)
- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
 - (b) unless each party consents, must not have had any previous connection with the parties.
- (3) An application under this section may be made without notice to any other person.
- (4) A person who carries out an assessment under this section must
- (a) prepare a report respecting the results of the assessment,
 - (b) unless the court orders otherwise, give a copy of the report to each party, and
 - (c) give a copy of the report to the court.
- (5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

[67] A broad and general approach should be taken to applications for s. 211 reports. The threshold justifying an order is quite low. In *Smith v. Smith*, 2014 BCSC 61, Mr. Justice Affleck observed the following at paras. 11 through 14:

[11] The only factor of importance for this Court on this application is an endeavour to determine the best interests of the children. I have no doubt the parties love their daughters and the difficulties of dealing with the present situation must be causing great emotional pain and turmoil. However, I am concerned that the strains between them have deprived them of the capacity to view their children's interests dispassionately. There may be compelling reasons why Jayden refuses to have any contact with her mother but that is a most unusual circumstance. Without an investigation of the reasons for that refusal by a person qualified to do so, this Court will not be in a position to come to an informed

decision on the present applications.

- [12] I echo the words of Mr. Justice Bernard quoted by Master Keighley, in *T.N. v. J.C.N.*, 2013 BCSC 1870 at para. 15, on hearing an application for a report to be prepared pursuant to s. 15 of the Family Relations Act, R.S.B.C., 1996, c. 128, which reports now are prepared pursuant to s. 211 of the Family Law Act. That paragraph reads as follows:
- [15] In the case of *Marsden v. Bercovitz*, unreported, Bernard J. said as follows at paras. 16-18:
16. In keeping with my reading of the cases cited by the appellant, I am strongly inclined to the view that a broad and generous approach ought to be taken to applications for s. 15 reports, and that the threshold justifying the ordering of such ought to be set quite low. It will, generally speaking, only be the cost of such a report which will raise a legitimate countervailing concern.
17. Section 15 reports are, almost invariably, a valuable source of information to a court faced with the onerous task of making fundamentally important decisions about the welfare of a child in the wake of marital breakdown. To the extent that there is an intrusion into the lives of the parties and the child, such is in my view far outweighed by the probative value of the evidence to issues which are of great significance to all concerned.
18. Basing decisions about matters of custody and access upon the evidence of two often antagonistic parents is, at best, very challenging. It is most certainly not desirable if it can be avoided. Section 15 reports introduce much needed elements of neutrality and objectivity into an emotionally-charged arena fraught with witness bias. Not surprisingly, parents fighting over custody and access are rarely, if ever, able to testify objectively about what is in their child's best interests. It is, perhaps, too much to ask. A s. 15 report is the answer.
- [13] It is possible the claimant father is not in a position to provide the guidance to Jayden that she needs if she is to overcome her aversion to her mother that Dr. Posthuma advises may happen with of the passage of time. In the claimant's affidavit No. 10 at para. 9 he deposes as follows:

It is now to the point where I feel that I am in an absolute 'Catch 22' situation. If I continue to encourage Jayden to talk to or to see the Respondent, Jayden gets very angry and upset with me. On the other hand, if I don't talk to Jayden about holidays with her mother or encourage her to talk to her mother, the Respondent accuses me of alienating Jayden from her. I also continue to encourage Jayden to read the books which I have given her about how to deal with her situation.

- [14] When there are indications that parents need assistance of which outside advice may provide and one or both apply to this Court, the Court will often intervene to obtain expert advice. This is an instance where intervention is appropriate. If the parties cannot agree on a person qualified to prepare a report pursuant to s. 211 of the Family Law Act they will be at liberty to apply. I will hear the application if the parties wish, and if necessary will do so by telephone. However, it may not be possible for me to be available and in that event the parties are entitled to apply in regular chambers. The report should provide an assessment

of all the factors set forth in s. 211(1) of the Family Law Act. The cost of the report will be shared equally by the parties.

- [68] I am troubled by the children's reports of significant family violence by Mr. MacMillan. He may not be in a position to provide guidance to or a safe environment for the children. There are indications that the parents in this case may need assistance in terms of outside advice or counselling. I have no doubt that the parties love their children. However, I am concerned, to borrow the words of Affleck J., that the significant and longstanding dysfunction between them may have deprived them of the capacity to view their children's best interests dispassionately. An expert report pursuant to s. 211 of the FLA will be a valuable source of information for the trial judge faced with the task of making crucial decisions about the welfare of these children. To the extent that such a report will intrude into the lives of the children and their parents, this is unfortunate. However, the benefit of such expert advice far outweighs any inconvenience or disruption it may cause.
- [69] There will be an order that a full s. 211 report be prepared, with the cost of such report to be borne entirely by Mr. MacMillan. If the parties cannot agree on a person qualified to prepare this report, they are at liberty to apply.

SUMMARY OF THE ORDERS MADE

1. Ms. Keith's application for judgment by way of a summary trial is dismissed. This matter will proceed by way of a conventional trial;
2. On an interim basis, by consent, Ms. Keith shall have primary care of the children;
3. On an interim basis, by consent, neither party shall take the children outside of the City of Kamloops without first providing the other party with prior written notice;
4. On an interim, without prejudice basis, Mr. MacMillan's parenting time with the children shall be in accordance with the wishes of the children and the directions of any psychologists, psychiatrists or counsellors the children may see;
5. By consent, Ms. Keith shall keep the following assets as her sole property absolutely:
 - a) the 2006 Nissan Frontier;
 - b) Quadras Investment Services Ltd. SDRSP #509764399;
 - c) Quadrus Investment Services Ltd. SDRSP #509765453
 - d) Quadrus Investment Services Ltd. TFSA #30786172
6. By consent, Mr. MacMillan shall keep the following assets as his sole property absolutely:
 - a) the 2002 GMC Pickup;
 - b) The 1967 Toyota Landcruiser; and

- c) Quadrus Investment Services Ltd. DSRSP #509768767
 - 7. By consent, the balance of the Mackenzie Financial Corporation RESP-F held in Ms. Keith's name shall be divided evenly between the parties. Each party shall transfer his or her interest in the RESP into a new RESP to be managed by that party for the benefit of the children;
 - 8. By consent, the former family residence located at 532 Lister Road, Kamloops, B.C. shall be listed for sale and sold with an agreed-upon realtor at an agreed-upon price. The sale proceeds shall be applied to:
 - a) the realtor's commission;
 - b) the usual adjustments between vendor and purchaser;
 - c) any sums required to pay and discharge any registered financial encumbrances.
 - d) legal fees and disbursements for the sale; and
 - e) the remaining net sale proceeds shall be held in trust by counsel for Ms. Keith in a separate, interest bearing trust account and will not be paid out of the trust account until written consent of both parties or further order of this court.
 - 9. Pending sale of the former family residence:
 - a) Ms. Keith shall have exclusive occupancy of the property;
 - b) Ms. Keith shall be solely responsible for all expenses associated with the property;
 - c) Ms. Keith shall maintain the property in a condition that maximizes its marketability;
 - d) While the property is listed for sale, either party is at liberty to purchase the other party's interest in the property at fair market value.
 - 10. A report shall be prepared by a mutually agreed upon qualified person pursuant to s. 211 of the FLA to address the needs and views of the children and the ability and willingness of the parties to satisfy the needs of the children. If the parties are unable to agree upon a qualified person, they are at liberty to apply to the court for a determination. The cost of this report is to be borne entirely by Mr. MacMillan.
- [70] If necessary, costs may be spoken to within 60 days of this decision as arranged through Supreme Court Scheduling.

"S.A. Donegan J."

DONEGAN J.

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