
CANADA / JUDGMENT

L.A.F. v. E.H.D.

2015 BCSC 1450

COURT

Supreme Court of British Columbia

DECIDED

17 August 2015

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2015 BCSC 1450 L.A.F. v. E.H.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.A.F. v. E.H.D.,

2015 BCSC 1450

Date: 20150817

Docket: E140349

Registry: Vancouver

Between:

L.A.F.

Claimant

And

E.H.D.

Respondent

Before: The Honourable Madam Justice Baker

Reasons for Judgment

Counsel for the Claimant:

Ben J. Ingram

Appearing on his own behalf:

E.H.D.

Place and Dates of Trial:

Vancouver, B.C.

November 4-7, 21, 2014

Place and Date of Judgment:

Vancouver, B.C.

August 17, 2015

- [1] The claimant Ms. F and the respondent Mr. D began living together in a marriage-like relationship in March 1995, married in June 1998, and separated at the beginning of July 2012. They have three children. Their son CD was born in 2003 and is currently 12 years old; twins RD (son) and ED (daughter) were born in 2005 and are currently 9 years old.
- [2] At the start of trial I allowed Ms. F to amend her Notice of Family Claim to seek an unequal division of family property and family debt in the event that it was determined at trial that funds advanced to Ms. F by her mother were not excluded property.
- [3] The parties agree that they should be divorced. They disagree about the parenting arrangements for their three children. Mr. D is seeking an equal sharing of the children's time with the children alternating between their parents' homes on a weekly basis. Ms. F is seeking an order that her home be designated as the children's primary residence and that the children spend the majority of their time in her home, with a 10-day/4-day rotation. Both parties seek an order for child support in accordance with the Guidelines. Although a claim for spousal support was pleaded, neither party is pursuing that claim.
- [4] Mr. D is seeking an equal division of family assets and debts. Ms. F is seeking an order that certain funds she received from her parents are excluded property, being in the nature of an inheritance; or in the alternative, an order for unequal division of family assets and family debts. Ms. F seeks a permanent order incorporating the terms of an interim order made by Justice Wong on May 26, 2014 governing the manner in which the parties may communicate with each other.

PREVIOUS ORDERS

- [5] At the Judicial Case Conference held on May 26, 2014, Justice Wong ordered that the former family home be listed for sale. He ordered Mr. D to file an Amended Counterclaim. He made an order restraining Mr. D from communicating with Ms. F by text message except in the event of an emergency. He made an order that Mr. D use neutral language when communicating with Ms. F; and refrain from making personal comments about Ms. F and her family members. He ordered both parties to be respectful in their communications with each other.

FACTS

- [6] Ms. F was born in 1966 and was 48 years old at time of trial; Mr. D was born in 1957 and was 57 at time of trial.
- [7] Ms. F grew up in Fort St. John with her parents and two brothers. Her father died in 2008. Ms. F's mother, Mrs. F Sr., still lives in Fort St. John.
- [8] After completing high school in Fort St. John Ms. F took some community college courses, primarily advanced mathematics and design. At age 22 she moved to Vancouver and attended design school, supporting herself by working in restaurants.
- [9] Mr. D grew up in southern Ontario. When he was 17 he moved out of his parents' home and began working part-time while completing high school. After graduating from high school he worked at an oil refinery and then was hired by a television station in Hamilton, Ontario. In 1980 he moved to Vancouver and continued to work in TV as a camera assistant. In 1983 he moved to Scottsdale, Arizona where he married his first wife. He worked for a film production company in Arizona for two years after which he and his then spouse returned to Vancouver. They later divorced. On his return to Canada Mr. D resumed part-time work with his previous employer but also purchased his own sound equipment and began doing freelance work for various clients.
- [10] Ms. F and Mr. D met in November 1993 on a film set. Mr. D testified was working in sound on documentaries, TV series and feature films. Ms. F was working as a producer's assistant - providing administrative support on film locations; and doing research.
- [11] In March 1995 the parties began living together in rented accommodation in Vancouver. In 1997 they moved to rental accommodation on an island near the lower mainland. They married in June 1998.
- [12] In March 1999 the parties purchased the home on the island where they continued to reside until separation. Ms. F's father loaned the parties \$35,000 towards the purchase of the home; Mr. D's parents gave the parties \$40,000. The parties paid \$273,000 for the home, financing the balance of the purchase price with a conventional mortgage. Ms. F's father later agreed that the parties need not repay the \$35,000 loan and the sum became a gift.
- [13] During the marriage Mr. D experienced periods of depression. He regularly smoked marihuana and at times drank alcohol heavily. Mr. D testified that when he learned that Ms. F was expecting twins he had difficulty adjusting to the situation during the pregnancy. He drank more and his depression deepened. After the twins were born he found it difficult to cope.
- [14] When the twins were about two months old, Mr. D reached a low point - Ms. F characterized it as a breakdown. Mr. D decided to stop drinking alcohol but continued to smoke marihuana. Mr. D testified he used marihuana "socially". Ms. F testified that Mr. D's marihuana consumption increased significantly after Mr. D stopped drinking alcohol.

- [15] Mr. D obtained a referral to a psychiatrist. He saw the psychiatrist every week or every two weeks for a couple of years, and then less frequently for about seven years. The psychiatrist prescribed an anti-depressant medication and gradually increased the dosage. Mr. D found this medication helpful but in late 2011 and 2012 decided it was no longer helpful and after doing some research he gradually weaned himself off the medication over a period of 14 months.
- [16] Mr. D testified that after he stopped drinking and started seeing a psychiatrist he became a more engaged father, but was not as involved with caring for the children as he could have been because he felt he had to focus on himself and his self-esteem and self-respect. He testified that he did not help out around the home but did maintain the garden.
- [17] Ms. F testified that Mr. D essentially disengaged from the children for a period of about two and a half years after the twins were born. Mr. D did not disagree with this testimony.
- [18] In 2008 Ms. F's father became seriously ill and was admitted to hospital. Twenty years before, Ms. F's father had made a will in which he had left three sections of farmland divided among Ms. F and her two brothers. In the period between making his will in 1998 and 2008, Ms. F had disposed of the section of land bequeathed to Ms. F in the will. The family were all agreed that Ms. F's father had not intended to disinherit Ms. F and a new will was prepared to benefit all the adult children equally, but Mr. F Sr. was too ill to sign the new will. After Mr. F Sr.'s death in 2008, the original will was submitted for probate. Ms. F and her two brothers all renounced their interest in the estate, allowing the entire estate to pass to Mrs. F Sr., in order that she could then distribute the estate fairly to all three children.
- [19] The home occupied by the parties and their children was a small cottage with structural deficiencies. In 2008 Ms. F and Mr. D decided to renovate and expand the home. They hired an architect and a contractor and arranged for a loan from their bank to finance the renovations. In the summer of 2008 the family moved out of the home and into a "bed and breakfast" for the six months it took for the renovation to be substantially completed.
- [20] Ms. F handled most of the liaison with the contractor; and took primary responsibility for financial and budgetary decisions. Mr. D worked on the original design for the home; and also suggested changes to the design as the renovation went along. Unanticipated structural problems and changes to the plans once the renovation was underway meant the construction costs were much higher than the parties had originally anticipated. The estimated renovation cost of \$100,000 soared to \$370,000 and the parties ran out of money to complete the project.
- [21] In October 2008 Ms. F contacted her mother to ask for a loan. She told Mrs. F Sr. that she and Mr. D did not have sufficient funds to finish the renovations and their bank would not increase the mortgage. At the time, the parties were in debt to their contractor for more than \$110,000 for work already done and the contractor was concerned about being paid. Ms. F asked her mother to lend her \$140,000, to be repaid when the funds in her late father's estate were distributed. Mrs. F Sr. agreed. There is no dispute that at least \$88,901 of the funds

borrowed were used to pay for home renovation costs.

- [22] The parties and their children moved back into the home in October 2008.
- [23] In February 2010, Mrs. F Sr. distributed the funds from her late husband's estate to Ms. F and her two brothers. Ms. F received \$312,594. She sent her mother a cheque for \$147,000 to repay the loan of \$140,000 she had received in October 2008, plus \$7,000 interest. Ms. F used \$101,000 of the balance of the funds she received to pay down the mortgage on the home. She testified that this payment reduced the term of the mortgage by nine years.
- [24] During the marriage Ms. F was primarily responsible for household financial management. Mr. D had his own bank accounts, but Ms. F also assisted Mr. D with some of his work-related accounting, including GST remittances. The parties had a bookkeeper to handle their work billings and expense receipts until 2008 but after 2008 they could not afford to pay a bookkeeper. Ms. F asked Mr. D to keep track of his own receipts and she no longer took responsibility for ensuring that Mr. D's income tax returns were filed. Neither Ms. F nor Mr. D filed income tax returns for the years after 2008 until 2014. Ms. F filed her returns early in 2014. At time of trial Mr. D had only recently filed his tax returns for the tax years 2011, 2012 and 2013 and had not yet received notices of assessment. He had not yet filed tax returns for 2009 or 2010.
- [25] By 2012 the parties had been unhappy in their marriage for some years. The parties decided to separate. Mr. D found a small house to rent on the island and on July 1, 2012 he moved out of the family home. Ms. F remained in the home. At first the parties had no set schedule for sharing the children's time - they tried to be flexible, with Mr. D having the children about three days a week. Each party made their own child care arrangements. A completely fluid arrangement proved to be difficult, so the parties experimented with various schedules, including a "2-2-5" rotation. Ms. F did not want the children to spend fewer than two nights in a row at either parent's home.
- [26] There were periods of time during which Mr. D was not working very much and he offered to come back into the home to care for the children when Ms. F was working, if he was available. Ms. F declined this offer. I am not persuaded that her decision to do so was unreasonable. She testified she thought it would be confusing for the children to have Mr. D coming back into the home. Ms. F had been fortunate enough to find a caregiver who lived only minutes from her home but she had to commit to a regular caregiving schedule that could not be altered day by day. Ms. F was also concerned that Mr. D needed to be working more so he could continue to contribute to the children's expenses.
- [27] In the latter part of 2012 Mr. D entered into a new relationship. Mr. D testified that Ms. F began seeing someone in December 2013. Neither of their new partners testified at trial and little was said about them except that Ms. F's new partner had once had an argument with Mr. D when Mr. D was returning the children to Ms. F's home.

- [28] In July 2013 the parties began sharing the children's time equally, on a one-week on, one-week off rotation and this arrangement continued at time of trial. Exchanges take place Mondays at 3:30 p.m. during the school year. The children get off the school bus at the parent's home where they will spend the week. During the summer vacation the party who has the children drops them off at the other parent's home. Occasional difficulties have arisen but in general it appears this arrangement has worked for the parties. The parties should minimize conversation between them during exchanges.
- [29] When the parties separated they agreed to share equally the mortgage payments on the family home; and the children's expenses. Each party was to pay \$1,500 a month (\$375 weekly) to cover the mortgage. Soon after the parties separated Ms. F told Mr. D she thought they should sell the family home as soon as possible. She could not afford to pay the entire mortgage payment herself. She did not think Mr. D could afford to pay rent for separate accommodation (he was paying \$1,500 a month initially, later reduced to \$1,300) and also continue to pay half of the mortgage on the family home. However, Mr. D would not agree to sell. He said he wanted to keep the house until housing prices on the island went up.
- [30] In an e-mail exchange in July 2013 Mr. D said that although the U.S. economy was improving he believed it would take at least three more years before they could realize a reasonable profit on the sale of the home. He was proposing that the home be remortgaged for a five-year term.
- [31] In the fall of 2013 Mr. D told Ms. F that his current employment contract had come to an end. He wanted to arrange for a bank line of credit to use for living expenses. The bank would require the line of credit to be secured by a mortgage on the family home. Mr. D asked Ms. F to go to the bank and sign the necessary documents, which would have made her jointly liable on the line of credit; and reduce the equity in the family home. She declined to do this. She testified that Mr. D said the hiatus in his work might be temporary and she thought it was a bad idea to use equity in the home to pay daily living expenses. She believed Mr. D could find other work if he made a reasonable attempt - that there are always lulls in free-lance work and that he needed to look for other kinds of work - possibly outside the film industry - to fill the temporary gaps.
- [32] In December 2013 Mr. D notified Ms. F that he would no longer be contributing to the mortgage payments. There was a small reserve in the mortgage account Ms. F had set up due to the parties having contributed slightly more than required in the past, so Ms. F was able to continue to pay the mortgage payments for a further five months, but by May 2014 the mortgage was in default. Ms. F renewed her efforts to persuade Mr. D to list the home for sale. She asked him to list the property in February 2014 but Mr. D said he would not sign the listing agreement unless she signed a document agreeing that the sales proceeds would be divided equally, meaning Ms. F would give up any claim that the money she had received from her mother in 2010 was excluded property.

- [33] The parties attended a Judicial Case Conference in May 2014. The home had been recently appraised at \$640,000, although the 2014 assessed value was \$527,000. The mortgage had gone into default. Mr. D finally agreed to list the home for sale and Justice Wong made a consent order for joint conduct of sale. The home was listed for sale in June 2014. A conditional offer for \$730,000 was accepted but the buyers were unable to sell their home and the sale collapsed. At time of trial the property was listed for sale for \$749,000. Ms. F testified that to her knowledge, the average selling time for island properties was two years.
- [34] In July 2014 Ms. F was hired on a project that requires her to travel to the lower mainland five days a week. She leaves the house at 8:00 a.m. to catch a ferry and generally returns no later than 7:00 p.m. This was her schedule at time of trial.
- [35] Mr. D told the court at time of trial that his usual employment contract on a television series requires him to work between two and four days a week.

THE DIVORCE

- [36] The parties have now lived separate and apart for more than one year and I am satisfied there is no reasonable prospect of reconciliation. The parties have adequate means to support the children. I order that the parties be divorced, the divorce to take effect 31 days from the date of release of these Reasons.

THE SHARING ARRANGEMENTS FOR THE CHILDREN

- [37] In her Notice of Family Claim Ms. F has sought an order pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), that her home be designated as the children's primary residence; and that the court designate a "detailed parenting plan". She proposes a sharing arrangement that would provide for the children to reside with her for ten days, followed by four days with Mr. D. Mr. D has sought orders pursuant to both the Divorce Act and the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). He seeks an order continuing the one-week on/one-week off arrangement that has been in place since July 2013.
- [38] The parties are agreed that there should be an order for joint custody and joint guardianship pursuant to the Divorce Act. The parties continue to be joint guardians of the children pursuant to the FLA.
- [39] Neither parent provided the court with expert opinion evidence about the sharing arrangements believed to be in the best interest of the children. No "views of the child" reports were tendered.

- [40] It is clear from her testimony about the children that Ms. F is a competent, caring and committed parent and Mr. D did not dispute this. Mr. D testified that his children "are my inspiration". Although he seemed somewhat preoccupied with his "rights" as a parent, his description of the children's routine in his home indicates that despite the lack of interest he may have displayed when the twins were infants and toddlers, he is now an engaged and involved parent capable of providing competent care.
- [41] Ms. F testified that her wish to change the sharing arrangements stems from concerns she has about the children's emotional health and a desire for greater consistency in parenting.
- [42] At time of trial CD, the oldest child, was 11 years old and in Grade 6. Ms. F testified that CD had told her about instances of self-harm, including biting his own fingers very hard; and putting his fingers in a toaster.
- [43] Ms. F testified that CD told her that Mr. D has said negative things about her to the children, calling her a liar; saying she is cruel to him and trying to kill him by using the legal process; and insistent on having her own way.
- [44] In his communications with Ms. F post-separation; and in his testimony at trial and his approach to cross-examination of Ms. F, Mr. D demonstrated considerable animosity towards Ms. F. I am satisfied that it is more probable than not that Mr. D has spoken negatively about Ms. F to the children and/or in their presence. In one of his e-mails to Ms. F Mr. D admitted to having said to the children that Ms. F is a liar, although he claimed to have immediately retracted the statement.
- [45] During trial Mr. D revealed that he had been tape-recording conversations with his children. He had not disclosed any recordings prior to trial, although such recordings ought to have been disclosed. Counsel for Ms. F asked for the recordings to be produced and Mr. D did produce some recordings made most recently on his cellular phone.
- [46] One of the recordings was of a "family meeting" that took place while the trial was underway, during which Mr. D discussed with the children issues that had arisen during the first day of trial. Mr. D told CD, for example, that he had heard that CD had put his fingers in a toaster and he asked CD if it had something to do with the separation. The two younger children were present during this conversation.
- [47] Mr. D asked CD where he had done this and he replied "at the cottage", which I understand to be a reference to Mr. D's home. Mr. D asked CD if he had also done this at his mother's home. CD said, "Maybe". CD said he was just trying to hurt himself; that he does that sometimes; and that it usually happens when he is stressed. He said he does not know why he is stressed; but gets stressed when he is homesick. Mr. D asked CD if he gets stressed about "Dad?" or "Mom?" CD replied, "I don't know".

- [48] Ms. F also testified about concerns about RD's emotional health. Ms. F testified that RD is an extremely energetic and bright child who can be inclined to engage in high-risk behaviour and sometimes demonstrates low self-esteem. At the start of the school term in 2013 Ms. F discussed RD with his teacher, who agreed that RD would benefit from counselling and arranged for RD to have sessions with a school counsellor from the fall of 2013 until the spring of 2014. Ms. F believed the counselling had been of great benefit to RD.
- [49] Although the children have been spending one-half of their time in their father's care, Mr. D was not aware that RD had been regularly seeing a school counsellor. When he did learn about the counselling his response appears to have been anger with Ms. F for not informing him about the counselling rather than concern about why Ms. F and RD's teacher thought RD needed counselling.
- [50] Ms. F believes that RD would benefit from increased opportunities to engage in athletics, especially baseball, but Mr. D has complained in the past about having to take RD to games that were off-island. Mr. D also complained he could not afford to pay his share of the children's piano lessons. Mr. D testified that he does want the children to be involved in extra-curricular activities, but finds it difficult to bear the cost and to transport the children when he is working.
- [51] Ms. F testified that the parties' daughter, ED, has been struggling with the sharing arrangements and has told Ms. F that she would like to spend more time with her mother. Both parents testified that they were concerned that ED, who was 9 years old at time of trial, had begun defecating in her underpants on occasion. This had happened at both parents' homes, and at the home of friends. ED told Ms. F that her father had yelled at her and said that if she did not stop she would have to wear diapers. There is no evidence that ED has been referred to or recommended for counselling.
- [52] The parties have differences of opinion about some health, hygiene and dietary issues relating to the children. When the children were young the parties agreed that they would not vaccinate the children then; but would reconsider when the children were older. In 2013 the children were exposed to children with pertussis and the entire family had to take antibiotics as a preventive measure. In 2014 CD, who has asthma, contracted pertussis. Ms. F proposed to Mr. D that the children now be vaccinated but he said he wanted to do more research. At time of trial he remained reluctant to agree to vaccinations. Ms. F seeks authority to have the children vaccinated for common childhood diseases.
- [53] Ms. F and Mr. D maintain different dietary regimes for the children. At Mr. D's home the children are required to eat foods that are gluten and dairy-free although the children have no dietary allergies. Ms. F is concerned that RD is becoming slightly obsessive about the ingredients in foods. RD has commented recently that he is "fat" although he is not overweight.

- [54] Mr. D explained that he had a heart attack in September 2013 and had a stent inserted to clear a blocked artery. He said that after his heart attack he had to concern himself with the ingredients in food and the children have taken an interest as a result. It is clear that he takes a different and more restrictive approach to nutrition when the children are in his home, but I am not persuaded the children's diet is unhealthy or harmful in either home.
- [55] Ms. F also expressed concerns about the children having few if any showers during the weeks they spend in their father's home. Mr. D testified that the children generally had four showers during the week spent at his home; that he thought daily showers were not necessary; but that the children showered when needed and washed themselves on the days showers were not taken. The children will soon be of an age to decide on their own hygiene routines and I am not persuaded that daily showers or the lack thereof are a health issue.
- [56] Ms. F testified that she believes that having the children spend more time in her home would provide greater consistency for the children and also allow her to ensure that the children are regularly involved in and attend extracurricular activities - piano lessons and sports - that interest them.
- [57] In cross-examination, Mr. D asked Ms. F how she would be able to ensure the children participated in after-school activities given her long -11-hour - days of working and commuting. She replied that at times she could work from home; and that she could rely on her child care provider.
- [58] Mr. D testified about the musical instruments he has in his home that are available to the children, but I am satisfied they would also benefit from the opportunity to be involved in extracurricular activities outside the home; particularly in the case of RD.
- [59] I consider it more probable than not that Mr. D has been unable to disguise from the children his evident animosity towards Ms. F. Having read communications between the parties and having had the opportunity to assess Mr. D when he testified; and during his cross-examination of Ms. F, it appears that he has difficulty letting go of the past and focusing on moving forward.
- [60] Ms. F's conduct has also not been above reproach, although I am satisfied that she has moved on emotionally; and has no desire to engage in lengthy and painful analysis of the marriage and the reasons for its failure. There was an incident arising out of a dispute about where the children were to be dropped off where Ms. F made a rude gesture to Mr. D and yelled at him in front of the children, and Ms. F's new partner also spoke rudely and inappropriately to Mr. D. This incident resulted in both parties making a report to police - in my view, entirely unnecessary reports.
- [61] I am concerned that Mr. D appears - at least on occasion - to have unduly involved the children in discussions about this family law dispute; and that doing so may have been a source of stress for the children. In one of the conversations Mr. D recorded on his phone he talked to the children about the current sharing arrangements and whether they would like

to spend more time with one parent or the other. He said this discussion took place about a week before the trial commenced. He told the children that he and Ms. F would be going to court.

- [62] At some points in the recorded conversation the children sounded uncomfortable and even embarrassed. There was laughter that sounded forced and fake. Mr. D referred to both himself and Ms. F in the third person - as "Dad" and "Mom".
- [63] At one point, sounding quite subdued, CD said that he liked the schedule as it is because he would not want one parent to feel better than the other and the other parent to feel worse. The younger children adopted this statement. Mr. D told the children that if he had them with him less he would be sad. He told them he loved having them one week and then switching it up. At that point one of the children asked, "Can I please go?" and Mr. D replied to the effect, "Soon, we're just finishing up". He reiterated to the children that he liked the present sharing arrangements and was glad they did also.
- [64] I do not believe Mr. D's practice of tape-recording conversations with the children to be in their best interest. It was obvious listening to the tapes that the children felt uneasy and constrained. Children who are concerned about their parents' feelings are unlikely to state opinions that they know will be unwelcome or hurtful.
- [65] Mr. D maintained that Ms. F's interest in having the children spend more time with her is motivated by a desire to make him pay child support. I am satisfied she was motivated by her perception of a child-sharing regime that would benefit the children.
- [66] The evidence establishes, however, that Mr. D does have a close and loving relationship with the children, as does Ms. F. There is no reason to believe the children are not emotionally bonded to both parents.
- [67] Despite the concerns I have noted with some aspects of Mr. D's parenting, I am not persuaded that the change in the sharing arrangements proposed by Ms. F is in the children's best interest. The current regime, with the children spending alternating weeks in the two parents' homes, had been in place for more than 16 months at time of trial and it is reasonable to infer that it has continued post-trial. That arrangement - which the parties instituted by agreement - is clearly the "status quo".
- [68] Although I accept that the children are demonstrating signs of emotional distress on occasion, the evidence does not establish that the upset is directly related to or exacerbated by the current equal-sharing regime. ED's toileting problems have occurred in both homes, for example. There is no expert opinion evidence that suggests that a different time-sharing arrangement would result in less emotional upset. Adjusting to a new schedule would likely also cause upset for the children and given their concern about parental equality, they might also be distressed by their father's disappointment.

- [69] Despite the problems Ms. F testified about, the children appear to be coping overall and benefitting from a close relationship and regular contact with both parents. It is probable that the children's emotional upset is a response to the separation and the acrimony between their parents, rather than the specific sharing arrangements currently in place.
- [70] The arrangement proposed by Ms. F would result in the children spending significantly less time with their father - eight days out of each 28-day period, rather than the 14 days the children currently spend with their father. A gap of 10 days between visits with their father could eventually lead to a lessening of the parental bond between the children and Mr. D. Given Ms. F's current work schedule, it would also not provide the children with significantly more quality time with their mother. On eight of the 10 days that the children would spend in Ms. F's home under the proposed regime; she would be at work off-island from early morning until the evening. Ms. F would require child care before and after school on three additional days in each 14-day period, which would increase the expense of child care.
- [71] I order that the parties continue to share the children's time on a weekly rotation, with the exchange taking place on Mondays at the end of school during the school year. During any vacation period the parent having the children shall deliver the children to the other parent's home unless requested by e-mail at least 24 hours in advance to deliver the children to a different location on the island.
- [72] The children shall spend equal blocks of time with each parent during the school break. I understand the plan was that the children would be with Mr. D for the first week of spring break in 2015 and with Ms. F for the second week. If that occurred, then the reverse shall apply in 2016 and the parties shall alternate thereafter. The parties shall share the children's Christmas vacation equally, with the children spending Christmas day with one parent one year; and the other parent the next year. The parent who did not have the children on Christmas Day in 2014 shall have the children for Christmas Day in 2015; and alternate thereafter.
- [73] During the summer vacation, each parent shall have the right to have the children with him or her for two two-week periods in order that trips and holiday plans can be facilitated. Allowing each parent two periods of 14 consecutive days during the summer vacation will allow for the visit to Mrs. F Sr. in Fort St. John and a vacation for the children with Ms. F. Mr. D will have an equal opportunity to travel with the children to visit his family; or to vacation with the children if he chooses to do so.
- [74] Prior to May 1 each year, the parties shall attempt to reach agreement on which periods each will have the children during the school vacation. In the event that the parties are unable to reach agreement on the summer holiday weeks by May 1, then Mr. D may choose the first two-week period in 2016; Ms. F the second two-week period; Mr. D the third two-week period and Ms. F the fourth two-week period. If they are unable to reach agreement on holiday weeks in 2017, Ms. F may choose the first two-week period and alternate thereafter. The 14-day periods may not be combined; that is, the children must go to the other parent

for at least one week between a parent's two extended holiday periods, unless the parties agree otherwise in writing.

- [75] If either parent wishes to travel with the children outside of the Lower Mainland of British Columbia, he or she shall provide the other parent with an itinerary indicating where the children will be; and information about how and when the children may be contacted by telephone while away.
- [76] Either parent may travel with the children outside of British Columbia and Canada. The parties shall facilitate the children's travel by signing all necessary documentation to obtain and maintain passports for the children; and by providing written consent for a trip. The order about provision of itineraries and contact information applies to these trips also.

PARENTAL RESPONSIBILITIES - SECTION 41 OF THE FLA

- [77] Each parent/guardian shall separately have the responsibility to make day-to-day decisions affecting the children during his or her parenting time, pursuant to section 42(2) of the FLA. They shall both share the responsibilities enumerated in section 41, except that Ms. F shall have the sole right and responsibility pursuant to section 41 (f) to consent to vaccinations for the three children as she sees fit.
- [78] The parties shall attempt to agree on extra-curricular activities for the children but in the event they are unable to agree, Ms. F shall have the right and responsibility to choose the extra-curricular activities.
- [79] If, after consulting in good faith and attempting to reach agreement the parties are unable to reach agreement about the exercise of any of the other responsibilities enumerated in section 41, or any other issue affecting one or more of the children, either party may apply to the court for directions pursuant to section 49 of the FLA. I am not seized of any such application.

OTHER ORDERS

- [80] Both parents shall refrain from discussing the court proceedings with the children.
- [81] Neither shall allow the children to read these Reasons for Judgment or copies of any affidavits or other material filed in this family law proceeding.
- [82] Mr. D shall cease tape recording discussions with the children that relate in any way to issues in this family law dispute, including discussions about the sharing arrangements.

COMMUNICATIONS BETWEEN THE PARTIES

- [83] As noted at the start of these Reasons, at the JCC on May 26, 2014, Justice Wong made an order that Mr. D must use neutral language when communicating with Ms. F; must remove as many descriptors as possible; and must not make personal comments about life choices of Ms. F or about her family members. Ms. F is seeking a permanent order in similar terms. Mr. D submits that such an order is unnecessary.
- [84] Mr. D's bitterness towards Ms. F was evident throughout his testimony and in his cross-examination of her at trial. It was also evident in his e-mail and text communications with her.
- [85] Mr. D testified that Ms. F is highly controlling, manipulative, self-serving, uncooperative and vindictive. In my view, the evidence falls far short of establishing that Ms. F has these characteristics, although at times she has descended into the arena.
- [86] In contrast to his expressed views about Ms. F, Mr. D presented himself as highly virtuous. He described himself as honest, not vindictive; and testified he had been extremely cooperative in all aspects of childcare. He agreed that he had made some verbal attacks, but insisted he was only responding to verbal attacks by Ms. F. He regarded Ms. F's actions as deliberate provocations, intended to incite him. I am satisfied Mr. D has a skewed perspective about his own rectitude as well as Ms. F's conduct.
- [87] The parties have very different styles of communication and during the separation have not always been respectful of each other. Although neither party's conduct has been above reproach, Mr. D's communications with Ms. F have often consisted primarily of blaming and abuse, amounting at times to harassment. Mr. D agreed in cross-examination that following a failed attempt at mediation, he had followed Ms. F down the street, speaking to her in an aggressive manner and using inappropriate language.
- [88] At times during his testimony Mr. D appeared to acknowledge that some of his communications had been disrespectful and inappropriate. Often, however, he reverted to blaming Ms. F for having provoked him; or maintained that his conduct was justified by her conduct - that he was just defending himself.
- [89] Fairly early on Ms. F found that telephone calls with Mr. D generally descended into acrimony and she tried using a friend as an intermediary to avoid having to speak on the telephone with Mr. D. She could do little about the lengthy and disturbing e-mails and text messages that Mr. D continued to send.
- [90] Attached to an affidavit sworn by Ms. F on April 23, 2014 are several e-mails and text messages from Mr. D. Some examples taken from just one or two of these e-mails will suffice to demonstrate why Justice Wong granted the interim order on May 26, 2014.
- [91] In Mr. D's e-mail dated April 2, 2014 sent at 2:00 p.m. he wrote:

So take your legendary self-righteous "can do no wrong" attitude that is your signature and stick it up your ass. If you can find any room around the space your enormous ego fills there already .

Leave our children OUT of our personal conflicts. Cease demonizing me to them and get the intense psychotherapy that you need to begin resolving your serious psychological issues

The only fear I have for (the children) is that they will grow up to be anything like you. A cold hearted, vindictive, pathological liar with debilitating insecurities and an over-compensating ego

Fuck you!

[92] In an e-mail dated April 3, 2014 at 12:37 a.m., Mr. D wrote:

I was disgusted by what has become your characteristic behaviour since our separation. Blatantly vindictive actions and personal attacks motivated by your desperate need to control me.

[93] In his communications, Mr. D generally described himself as an exemplary parent and superior human being. In the April 2, 2014 e-mail he wrote:

I am a passionate, loving, and nurturing father, an excellent role model, and very attentive to my children's concerns and needs.

[94] In the April 3, 2014 e-mail he wrote:

As always, I set all personal differences between us aside when it comes to our children, to collaborate, cooperate, and co-parent with you for the well- being and love of each of them.

[95] In addition to abusive and negative comments, Mr. D often used his e-mails to provide a long and irrelevant commentary on his perspective on the entire marriage and its demise. Although Mr. D often stated in his communications that he was attempting to reach compromise and was willing to share the blame for conflict, the constant implication was that Ms. F was really the person at fault.

[96] At trial, Mr. D maintained that that his April e-mails were not offensive in any way. This testimony demonstrates a clear lack of insight on the part of Mr. D.

[97] In an e-mail sent April 27, 2014, Mr. D purported to apologize for the harsh words and criticisms he had "used against" her in the past year. He wrote that he realized that " my communications have been intentionally hurtful at times and may have caused you undue stress". He pledged that in future he would only communicate with her " in a civil and respectful manner".

[98] In that same letter, however, Mr. D went on to state that:

You have exercised excessive and undue control over me to the point where I have often felt helpless and unable to control my own destiny.

My autonomy as an individual .has been routinely subverted by your aggressive and unilateral actions.

My autonomy as well as my rights and freedoms as a parent and as an individual human being have been severely compromised by your actions.

I forgive you.

[99] I am persuaded that I should make an order regarding communications between the parties.

[100] I order that:

1. Until further order or agreement of the parties in writing, the Respondent is restrained from communicating by text message with the Claimant except in the event of an urgent matter relating to the children.
2. The Respondent must use neutral language when communicating with the Claimant and must remove as many descriptors as possible in his communications.
3. The Respondent must not make personal, disrespectful, or denigrating comments in his communications with the Claimant about the Claimant's life choices; or about members of her extended family.
4. The parties shall both refrain from making personal or denigrating comments to each other and remain respectful in their communications with other.

FAMILY PROPERTY

[101] At time of separation, the parties' major asset was the family home. The most recent appraisal at time of trial valued the home at \$640,000 with a mortgage of approximately \$495,000.

[102] The Scott Schedule prepared by counsel for Ms. F has valued the other family assets and debts at the date of separation. As there are minimal assets and no equalization payment is required with the exception of the family home, it is not a worthwhile use of time to attempt to trace these assets or the parties' debts to the date of trial. Accordingly, I order that the assets and debts other than the family home be valued at the date of separation - July 1, 2012 - or as close to that date as information is available.

[103] The parties owned two motor vehicles when they separated - a 1998 Toyota Sienna that Ms. F retained; and a 2008 Honda Fit retained by Mr. D. Ms. F has valued the Sienna at \$2,000 and the Fit at \$8,000 and Mr. D took no issue with these values in his testimony or submissions. Each party shall retain the vehicle in his or her possession.

[104] Ms. F had a chequing/savings account with a balance of \$4,299; a Plan 24 Savings account with a balance of \$9,558; a Vancity RRSP account with a balance of \$2,785 and a Canada Savings Bond of \$500.

[105] Mr. D took an advance against the mortgage of \$1,500 in June 2012. Ms. F received \$3,000 in March 2013.

- [106] Ms. F owed Canada Revenue Agency \$5,257 on July 1, 2012 and Mr. D owed CRS \$10,311. Ms. F owed HST of \$3,143.88 and had a Mastercard that had been used for family purposes with a balance of \$20,850.51.
- [107] Leaving the value of the family home aside for one moment, an equal sharing of the other assets and liabilities would result in Mr. D owing Ms. F an equalization payment of \$3,155. If Ms. F succeeds in relation to her claim for excluded property flowing into the family home, she does not seek payment of the \$3,155 from Mr. D. I make no order for an equalization payment in respect of these family assets and debts.
- [108] I turn now to a consideration of excluded property.
- [109] The parties are agreed that the \$40,000 advanced by Mr. D's family and the \$35,000 loaned and later gifted by Ms. F's father to assist the parties to purchase their home are excluded property under section 85 of the FLA.
- [110] The real issue between the parties in relation to division of property is whether the funds received from Ms. F's mother on February 5, 2010 are excluded property, and if so, how to account for the excluded property that was invested in the family home.
- [111] Ms. F received \$312,594 from her mother on February 5, 2010. I am satisfied that this was an inheritance from her father. I have set out the circumstances of her father's will and how the family took steps to ensure that Ms. F's father's estate was fairly divided between the three children. An inheritance is excluded family property pursuant to section 85(1)(b) of the FLA. Had I not reached this conclusion, I would have concluded that the funds were a gift to Ms. F from a third party (her mother); and therefore excluded family property pursuant to section 85(1)(b.1).
- [112] Of the funds received, I accept the evidence that no less than \$189,900 flowed directly into the cost of renovations to expand and improve the family home; and for a lump-sum mortgage reduction payment. Section 85(1)(g) of the FLA states that property derived from excluded property is also excluded property.
- [113] Adding the \$35,000 initially gifted to Ms. F by her father to the \$189,900, the value of Ms. F's excluded property that flowed in to the family home was \$224,900. Mr. D contributed \$40,000 of excluded property. The ratio of these two figures, rounded off, is 85% and 15%.
- [114] Mr. D submitted that the court should conclude that the funds given to Ms. F in 2010 were intended to be a gift to both of the parties. He relies on the decision in *Cabezas v. Maxim*, 2014 BCSC 767. In that case the respondent's parents had advanced money to pay off the mortgage on a home jointly owned by the parties. Based on the evidence before him, Chief Justice Hinkson concluded that the funds were given as a gift intended to benefit both the respondent and the claimant. In the alternative - and in my view this conclusion is obiter dicta - he stated that the presumption of advancement would have applied, absent evidence to rebut the presumption.

- [115] In my view, the facts in that case are quite different from the facts in this case. Here the funds advanced to Ms. F in 2010 were clearly intended to be in the nature of an inheritance. The funds were advanced to her alone. She chose to use some of the funds to pay construction costs and to make a lump sum payment on the mortgage. The evidence does not establish that Mrs. F Sr. intended Mr. D to receive any of the funds or to have any control over the use that Ms. F made of the funds. The funds advanced were not directed in any specific way. Cabezas does not assist the respondent.
- [116] Had I concluded that the funds advanced by Mrs. F Sr. to Ms. F in 2010 were not an inheritance or a gift from a third party, I would have concluded that it would be substantially unfair to award Ms. F only one-half of the equity in the family home. To do so would essentially rob her of her inheritance and ignore the significantly disproportionate contribution she made to the improvement of the property and the increase in equity resulting from a substantial reduction in the mortgage.
- [117] In order to fully satisfy the mortgage debt of \$495,000, pay real estate commission and other closing costs, and repay to the parties' the value of their excluded property contributions to the home, the property would have to sell for nearly \$800,000. It was appraised in March 2014 at \$640,000.
- [118] In the event that the property does not sell for enough to fully repay the parties for the value of their excluded property - and that seems highly probable - the net sales proceeds, after payment of the mortgage, real estate commission and other closing costs and adjustments, shall be divided between the parties on the basis of 85% to Ms. F and 15% to Mr. D.

INCOMES OF THE PARTIES

- [119] Both parties derive their income primarily from contract work. Neither party challenged the reasonableness of business expenses claimed by the other on his or her tax returns. Based on Ms. F's tax returns, she reported line 150 income of \$51,635 in 2012 and \$51,205 in 2013. She estimated her line 150 income in 2014 would be \$56,960. The average of these three years is \$53,266.
- [120] Based on Mr. D's tax returns, which had not yet been processed by CRA at time of trial, his line 150 income was \$48,750 in 2012 and \$49,091 in 2013. He estimated his 2014 income would be \$53,534. The average of these three years is \$50,458.
- [121] Based on a shared parenting regime, the Guidelines would indicate that Ms. F should pay Mr. D approximately \$58 a month in child support.

- [122] I am not persuaded, however, that Mr. D has been fully utilizing his capacity to earn income. He testified that in the past he has earned between \$60,000 and \$65,000. He did not testify about efforts to find additional employment, although it appears that in recent years he has worked only part-time. I conclude that if he chose to exert himself, Mr. D could earn at least as much as Ms. F. I therefore impute income to him of \$53,000. No child support is therefore payable.
- [123] The parties shall file their income tax returns on an annual basis, no later than April 30 of each year, and each party shall provide the other party with a copy of the complete filed return, including all schedules, within 21 days after filing. The parties shall also deliver copies of Notices of Assessment or Reassessment within 21 days of receipt of same.
- [124] If the parties' respective incomes indicate that child support is payable, the parties shall attempt to agree on the quantum of child support no later than June 30 each year, failing which either party is at liberty to apply for an order fixing quantum of support. I am not seized of any such application.
- [125] The parties shall share reasonable special and extraordinary expenses, as set out in section 7(1)(a) through (f) of the Guidelines, on a pro rata basis. At present that means such expenses shall be shared equally. The party having incurred an extraordinary expense shall provide a copy of a receipt or other proof of payment within 60 days or having incurred the expense and the other party shall provide reimbursement within the following 60 days.
- [126] Each party may claim one child as a dependent on his or income tax return annually and shall alternate claiming the third child as a dependent. The child tax benefit shall be shared equally between the parties. If only one party may apply for and receive the child tax benefit then Ms. F shall apply for the child tax benefit and pay one-half of the benefit to Mr. D when received.

COSTS

- [127] The parties did not make submissions about costs. If either party wishes to seek an order for costs, he or she shall submit written submissions; or arrange with Trial Scheduling for a short oral hearing, no later than November 30, 2015.

DIRECTIONS

- [128] If the parties require further directions in order to implement the orders made herein, they may either apply in writing, with appropriate notice to the other party; or arrange to appear before me for a short oral hearing.

"BAKER J."

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