

CANADA / JUDGMENT

L.C. v. Y.S.

2023 BCSC 422

COURT

Supreme Court of British Columbia

DECIDED

21 March 2023

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2023 BCSC 422 L.C. v. Y.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

L.C. v. Y.S.,

2023 BCSC 422

Date: 20230321

Docket: E193402

Registry: Vancouver

Between:

L.C.

Claimant

And

Y.S.

Respondent

Before: The Honourable Madam Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

A. Grewal

Appearing on his own behalf:

Y.S.

Place and Dates of Trial/Hearing:

Vancouver, B.C.

January 16-20, January 23-27,

January 30-31, February 1-2, 2023

Place and Date of Judgment:

Vancouver, B.C.

March 21, 2023

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- [1] This a challenging high-conflict family law case that primarily concerns the parenting arrangements and the allocation of parenting responsibilities for the parties' three children as defined by the Family Law Act, S.B.C. 2011, c. 25 [FLA].

- [2] There are also certain financial issues, including the imputation of income for support purposes, as I will detail further below. However, it is apparent that the driving force behind this matter coming to trial is a fundamental disagreement between the parties as to what parenting arrangements are in the best interests of their children.

Overview

- [3] The parties are 49 and 50 years of age respectively.
- [4] Ms. C. was born and raised in Canada.
- [5] Mr. S. was born in Israel. He immigrated to Canada after completing his military service in Israel.
- [6] They met via a Jewish dating website while Mr. S. was living in the Victoria area of British Columbia and commenced cohabitation shortly thereafter in Ms. C.'s rented accommodation in Vancouver.
- [7] The parties were then married in a religious ceremony on January 25, 2009 in a Jewish synagogue. They were never civilly married. As such, all relief granted is pursuant to the FLA or the common law as the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) is not applicable. Importantly, their religious marriage is recognized in Israel and by Jewish law. There is a process to obtain a religious divorce known as a "get" or "gett" (the "Get") in Jewish law. I will return to this later.
- [8] There are three children (the "Children") born of the relationship as noted above. A. and S. are twin daughters who were born in May 2009. They are currently 13 years of age. D. is the sole son who was born in June 2014. D. is currently 8 years of age.
- [9] The Children are all Canadian citizens and have resided in Canada for their entire lives.
- [10] When the order arising from these reasons for judgment is drafted, it shall include the Children's specific birthdates in the preamble. I have omitted them from the reasons for judgment to help respect the privacy interests of the Children.
- [11] Both parties are actively involved in the Jewish faith. Mr. S.'s preferred language is Hebrew and it is obvious from the totality of his evidence, as I will review subsequently, that his faith is very important to him. Ms. C. is employed with an organization connected to the Jewish faith and her role involves supporting mental health in the community serviced by this organization. While Ms. C.'s connection to Judaism in her evidence, other than her employment, was not quite as overt as with Mr. S., I am satisfied that this was a faith-based family and that they made a collective decision prior to separation to bring their children up in the Jewish faith by, inter alia, having them regularly attend the synagogue and enrolling them in Jewish faith-based private schools. The Children remain, as I will detail, in Jewish faith-based private schools. Mr. S. communicates primarily in Hebrew with the Children to allow them to practice and/or develop their language skills in this regard.

- [12] There were challenges in the relationship. Both parties acknowledge this. Mr. S. was not willing to end the relationship, however, and so it was Ms. C. who took the initiative in this regard.
- [13] The parties ultimately separated on July 3, 2019.
- [14] At that point, Ms. C. moved into subsidized housing operated by an organization operated by a non-profit Jewish community society. The residence remains within the boundaries of the City of Vancouver.
- [15] Initially, and as I will return to, Mr. S. remained in the former family residence.
- [16] Mr. S. subsequently moved to North Vancouver where he resides with his current romantic partner, S.T. The home in which Mr. S. and S.T. reside is owned by S.T.'s parents. They currently only occupy a portion of that residence and a portion of it is occupied by third-party tenants.
- [17] Mr. S. testified his relationship with S.T. is a positive and committed one. His cohabitation with her is thus not unexpected and I conclude beneficial to him. There are some challenges currently with the living arrangements when the Children are in his care, which I will address in due course.
- [18] Further, although Ms. C. and Mr. S. do technically now reside in different municipalities, the commute time between their residence is reasonable, particularly in the context of the Lower Mainland. Further, depending on traffic issues that may arise from time to time, I accept, the commute time may actually be less than when they lived in differing parts of the City of Vancouver.

Litigation Chronology

- [19] Ms. C. commenced these proceedings on December 17, 2019.
- [20] The matter was brought before Justice Marzari that same day, at which time Justice Marzari granted a time-limited protection order (the "Protection Order") against Mr. S.
- [21] One consequence of the Protection Order was that it precluded Mr. S. from attending at his synagogue of choice. It is apparent, as I will return to further, that this was of significant upset to Mr. S., having regard to his close association to his faith. However, it is necessary to appreciate that the conduct of Mr. S. leading up to the Protection Order was not acceptable and the Protection Order did not preclude Mr. S. from attending at a synagogue. It was importantly limited to the specific synagogue which is in extremely close proximity to Ms. C.'s place of employment. Further, unlike in smaller communities where there may only be one place of worship available, the parties resided in the Lower Mainland at the material time and so there were other options available to Mr. S., even if they may not have been his first choice.

- [22] Following service of the notice of family claim, Mr. S. filed a response to family claim on December 30, 2019.
- [23] Subsequently the Protection Order was varied by Justice Mayer of this Court on January 2, 2020. The variation permitted Mr. S. to attend his preferred synagogue. The Protection Order, as varied by Justice Mayer, was ultimately allowed to lapse pursuant to its terms and no further Protection Order has been sought or is being sought at trial.
- [24] On March 3, 2020, the parties, with the benefit of independent legal advice, were able to successfully reach a mediated agreement which put into place an interim parenting arrangement for the Children. There have been issues with this interim agreement, as I will touch on below, but "generally speaking" this is the framework that has been in place since March of 2020. It involves Mr. S. having alternating weekend parenting time and one weekday evening (but not overnight) parenting time.
- [25] Ms. C. then brought an application in this proceeding for interim financial matters, namely interim child support and the interim sale of the former family residence. This residence was a condo located in the west end of the City of Vancouver. To again prioritize the privacy interests of the Children and in light of the fact that it has been sold, I will not identify the specific address and will simply refer to it by the defined term of the "Former Family Residence". The address and legal description shall be inserted into the order arising from my reasons for judgment.
- [26] There were certain delays in having the above-mentioned application brought by Ms. C. heard in this Court. It was ultimately heard on February 4, 2022 by Justice Wilkinson. In oral reasons for judgment released on February 23, 2022, interim child support was ordered in the amount of \$1,422 per month based upon an income for Mr. S. of \$70,000 per annum pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. Justice Wilkinson also ordered the interim sale of the Former Family Residence on specified terms. There was no order for increased parenting time for Mr. S. with the Children despite his request for same.
- [27] Specifically, the terms of the order of Justice Wilkinson provide as follows:
1. The Respondent's application filed October 6, 2021 to vary the parenting time is dismissed.
 2. Pursuant to the Family Law Act s. 97(2)(d) and/or the Supreme Court Family Rules Rule 15-8 that the family home, located at , legally described as:

(herein the "Family Home")

be sold on the following terms:
 - a. Within 7 days of this order, the Parties shall agree to a joint realtor, and in the event the Parties are unable to agree to a realtor, the Claimant is at liberty to appoint a realtor of her choosing;

- b. Within 14 days of retaining a realtor, the Family Home will be jointly listed for sale at a price agreed to between the Parties in consultation with the realtor, and in the event the Parties cannot agree to a listing price, the Family Home shall be listed at the price recommended by the realtor;
- c. The listing price may be adjusted, in consultation with the realtor, if necessary, no less than every 30 days;
- d. The Parties shall have joint conduct of the sale and shall each promptly be informed of and provided with a copy in writing of all offers made for the purchase of the Family Home;
- e. The Respondent shall permit any duly authorized agent on behalf of the Parties to inspect, appraise, or show to any prospective purchaser the subject property, including the interior of the premises, at all reasonable times, and to post signs on the subject property stating that it is offered for sale;
- f. The Respondent shall fully cooperate with the listing, sale and maintenance of the Family Home;
- g. The listing agent will be instructed to advise all offerors that any offer made shall be open for acceptance for at least 7 days;
- h. Any offer accepted shall provide a closing date of no longer than 45 days after acceptance, unless the Parties agree otherwise;
- i. If an offer received is acceptable to one party, that party shall advise the other within 24 hours, and the other party shall advise within 24 hours whether they accept the offer;
- j. Either party is at liberty to execute the contract for purchase and sale, on the basis that it is "subject to court approval";
- k. Upon the sale of the Family Home, the proceeds shall be disbursed as follows:
 - i. Firstly, the property taxes and all necessary and proper adjustments between the vendors and the purchaser(s);
 - ii. Secondly, to the payment of real estate commission and legal fees and disbursements in respect of the sale;
 - iii. Thirdly, to the payment in full of the mortgage secured by a first mortgage against the property, including an interest to the date of payment, and any prepayment penalty; and
 - iv. Fourthly, the remaining balance shall be payable to the Claimant's lawyer in trust, to be held in trust subject to a further court order or agreement of the Parties. Either party retains the right to seek interim distribution from the court.
- l. The Claimant shall have the right to enter into the Family Home on 24 hours notice to the Respondent to inspect the property with the jointly retained realtor; and

- m. The Parties are at liberty to seek further directions In respect of any matter involving the conduct of the sale as ordered herein, including to seek court approval of any sale, and vesting order, should the Parties disagree to any issue regarding the sale;
 3. Pursuant to s. 90 of the Family Law Act, the Respondent shall continue to pay all expenses related to the Family Home until the completion of the sale of the property
 4. Paragraph 1 of the Notice of Application of the Respondent filed October 6, 2021 (court document 68) to vary parenting time is dismissed.
 5. The Respondent will pay the Claimant, on an interim basis, the sum of \$1,422 per month in child support commencing February 1, 2022 based on an imputed annual income of \$70,000 pursuant to the Family Law Act.
 6. A full Section 211 report under the Family Law Act will be prepared by a psychologist, with respect to the views and needs of the children and ability and willingness of the parties to meet those needs. Payment for preparation of the s. 211 report is to be made from the proceeds of sale of the family home held in trust, unless otherwise agreed to by the parties or further order of the court.
 7. All other relief sought by the Claimant in the Notice of Application filed October 4, 2021 is adjourned generally.
 8. Claimant's counsel is to draft the Order and the signature of the Respondent is dispensed with.
 9. Costs to the Claimant in the cause.
- [28] Both parties have filed F8 financial statements throughout the course of this proceeding. The most recent financial statements were filed shortly before trial in December 2022. Although there are some issues with the F8 financial statements, I am satisfied that both parties have made appropriate efforts to try and comply with their disclosure obligations under the Supreme Court Family Rules to enable this matter to proceed to trial. This is notwithstanding that the document disclosure from Mr. S., apart from a current F8 financial statement, has been sparse. This conclusion is not to endorse a reluctance to comply with the requisite disclosure obligations (this is the scourge of family law: *Mossey v. Argue*, 2013 BCSC 2078 at paras. 25-26), but a recognition that this particular family case does not rise or fall on the documents. The viva voce evidence of the parties and lay witnesses, together with cross-examination of those witnesses, allowed me to obtain the information I required to make the necessary findings of fact.
- [29] The final note I will make before turning to a summary of the issues is to recognize that I permitted an amendment to the notice of family claim in the course of the trial to allow Ms. C. to seek orders compelling Mr. S. to participate in and facilitate obtaining a Get, which in simple terms is a religious divorce specific to Judaism.

[30] I allowed the amendment to the pleadings on the trite principle that amendments are permitted in the course of trial (G.G. v. M.A., 2013 BCSC 1834 at paras. 12-13) and because there was no prejudice in this case. Specifically, both parties are clearly aware of the "Get" issue and it was addressed in the trial management conference brief of Ms. C. The much more challenging issue, as I will address at the conclusion of my reasons, is how this Court has jurisdiction to facilitate the process, particularly given the controversy in the submissions over whether the "Get" can be obtained in British Columbia or must be obtained in Israel.

Summary of Relief Sought

[31] The matters in issue in this proceeding can be summarized as follows:

- a) guardianship;
- b) allocation of parental responsibilities;
- c) parenting time;
- d) travel with the Children
- e) determination of Guidelines income;
- f) prospective child support;
- g) retroactive child support;
- h) special and extraordinary expenses;
- i) spousal support;
- j) division of family property;
- k) conduct orders; and
- l) the Get.

Weight of Evidence Generally

[32] Throughout the 14 days of this trial, there was a considerable body of evidence tendered. I have, as I indicated to counsel for Ms. C. and to Mr. S. directly, disallowed certain evidence on the basis of admissibility at first instance. There were other portions of the evidence which I allowed to be admitted subject to my ultimate decision as to the weight, if any, to be given to said evidence. I am going to specifically turn to the issue of credibility in due course. Beyond that, however, I am not going to go through the exercise of addressing each and every one of these examples to indicate the weight attributed to each of them as it would make these reasons for judgment prohibitively long and delay the overdue conclusion of this matter, which I consider to not be in the best interests of the Children.

[33] However, in accordance with my caution to counsel and Mr. S. at trial, I am live to this issue and where highly probative to a material issue, I will address it directly in my summary of the evidence set forth below.

[34] I am also very live, as discussed at trial, with the principle from *Brown v. Dunn* and how it factors into my role as the finder of fact in this matter.

Summary of Evidence Provided at Trial

[35] Ms. C. testified and was cross-examined at trial. As I will touch on below, having regard to the nature of the relationship between the parties, I could observe that being cross-examined by Mr. S. was difficult for her at times.

[36] The other witnesses tendered by Ms. C. were as follows:

- a) D.C. - Ms. C.'s former stepmother;
- b) L.C.Q. - friend and co-worker of Ms. C.;
- c) M.R. - very close friend of Ms. C.;
- d) M.C. - Ms. C.'s brother; and
- e) T.D. - work supervisor and acquaintance of Ms. C.

[37] Mr. S. testified and was cross-examined at trial. Mr. S. did not call any other witnesses, providing the explanation that individuals who would provide supportive evidence either did not want to testify, were not comfortable testifying or were unavailable.

[38] Given the length of the trial and the interrelationship between certain issues, I have opted to generally incorporate my findings of fact into the course of my reasons, including in relation to the assessment of credibility, as opposed to setting out an overly long narrative of the evidence. There are, however, certain portions of the evidence which are relevant and not otherwise addressed. I will address those points at this juncture.

[39] The evidence of Ms. C. is that Mr. S. made explicitly clear to her after the separation that she had to choose between "war and peace". Peace was reconciling and continuing the family unit and war was continuing with the separation. As Ms. C. did not agree to reconcile, "war" was declared. Although relations have notably improved since the Protection Order of Justice Marzari in December 2019, there is still an escalated level of conflict present.

[40] One of the sources of the level of conflict is that A. and S. have exhibited a tendency to align with one parent and those allegiances have shifted over the period since separation. Originally A. aligned with Mr. S. and lived with him exclusively. For a period of time S. then aligned with Mr. S. and lived with him exclusively. S. then returned to following the mediated parenting schedule, but Ms. C. believes that Mr. S. favours S. because of her alignment with him to the detriment of A, who is now more closely aligned with her. D. appears to be caught in the middle of these dynamics.

- [41] As part of the declaration of war referred to, Ms. C. gave evidence as to certain conduct of Mr. S. which is material to understanding the family dynamics. This included various text messages which were entered into evidence. I am not going to repeat them all into the record verbatim. I will note that they support Ms. C.'s evidence that Mr. S. has repeatedly called her names, including calling her a "whore" in Hebrew, referring her to as a "kapo" (a term I was advised and accept refers to Jewish persons who helped or were at least sympathetic to the Nazi party during World War II) and alleged on multiple occasions that she is "anti-Semite". Given the family's commitment to their faith, I accept these assertions were made with the intention to inflict emotional harm to Ms. C.
- [42] On the issue of anti-Semitism, one of the most concerning points of the evidence was Mr. S.'s belief that Ms. C. engaged in anti-Semitic behaviour by obtaining the Protection Order as it briefly, until varied, precluded him from his preferred synagogue. His belief in this concept is so strong that he made efforts to have Ms. C. charged criminally in Israel. I will come back later to the fact that he imprudently had discussions about this issue with D. present. However, even leaving that conduct apart, Ms. C.'s conduct in seeking interim relief of this Court pursuant to the FLA in a scenario where there was found to be family violence cannot be considered anti-Semitic. I accept rather that the intention of Ms. C. was to simply try to bring a state of calm to the family unit and that by virtue of the location of her place of work, it did very temporarily interfere with Mr. S.'s ability to attend at his preferred synagogue.
- [43] In a similar vein, Mr. S. also gave evidence that he wishes to have Ms. C. declared a "rebel woman" in Israel as a result of her decision to leave the relationship. I understand that part of the justification for seeking such status is to avoid the obligation to provide compensation to Ms. C. pursuant to their Jewish marriage contract. However, when advised that Ms. C. would not seek financial remedies against Mr. S. other than those sought in this family law proceeding, Mr. S. was still ambivalent, at best, as to whether he still wanted to pursue the "rebel woman" declaration. I found this portion of Mr. S.'s evidence concerning as it quite acutely articulates how he regards Ms. C. and his lack of respect for her.
- [44] In contrast to this, Mr. S. was clear that he does not think Ms. C. is a bad parent. Consistent with this, Mr. S.'s evidence on what he thought were some questionable parenting decisions by Ms. C. was limited. Ms. C. provided some more specific examples about her concerns about Mr. S., but willingly conceded that he loves the Children and that they love him. Her concerns arise out of what she considers to be destabilizing behaviour and, at times, clouded judgment on the part of Mr. S.
- [45] Another point of the evidence I wish to note for the record is that Mr. S. has stated in writing that he will take a child or the Children to Israel and disappear. Given that Mr. S.'s brother moved to Canada to support him and he is engaged in a committed relationship with a new partner who has strong ties to Canada, I do not consider these threats to have any actual merit. However, what Mr. S. does seem to fail to appreciate is that Ms. C. is not in the same position as the Court to assess this conduct objectively and without emotion. She was

understandably upset by the inappropriate suggestion by Mr. S. that he would remove the Children (or any of them) from the jurisdiction without her consent.

- [46] I will further comment on the relationship between Mr. S.'s new partner with the children in the context of my interview of the Children. It is, as I will note, generally positive. However, the decision of Mr. S. to first introduce S.T. to the Children on the first Mother's Day after the parties separated was, at best, ill-advised. More significantly, I conclude it was, in this case, intentionally intended to cause upset to Ms. C. There were various other more appropriate days or occasions where this could have occurred. Fortunately, S.T. and her family do appear to provide a positive and stabilizing dynamic for Mr. S. and these types of poor decisions are far less frequent since they commenced cohabitating.
- [47] Ms. C. has also engaged in conduct which is to be discouraged. Despite the conduct of Mr. S. which she testified regarding, she attended at the Former Family Residence without a neutral third party. A disagreement ensued and Ms. C. testifies that she intentionally dropped a glass which broke and shattered. Mr. S. testified that Ms. C. tossed the glass and it shattered. Some of the glass particles apparently struck Mr. S.'s brother and a police report was filed. Mr. S. did concede that Ms. C. did not actually throw the glass because his brother was sitting in close proximity to D. as they were playing video games and he acknowledges that she would not throw an item at D. However, I accept that on this point Mr. S.'s evidence is likely closer to the actual version of events as the probability of simply dropping a glass and the shards travelling into an entirely separate room seem very low. Further, the entire incident could have been avoided if Ms. S. had not intentionally broken the glass, regardless of whether there was forward motion or not.
- [48] Both parties and certain of the lay witnesses gave evidence as to the language the Children use towards their parents and each other. The Court is not oblivious to the challenges of parenting teenagers and the fact that they might occasionally use a curse word is not cause for significant concern. Not recommended; but not generally significantly concerning. However, the evidence I heard was that the Children, including on occasion, D. (who is still just 8) will use very specific cursive language directly towards their parents (generally Ms. C.) and to each other. I also heard evidence that S. will "bark" (like a dog) at Ms. C. This is overall consistent with the unhealthy dynamic which has developed in the family unit since separation and is something which I have considered in making my assessment of their best interests in due course.

Observations as to the Conduct of the Trial

- [49] Being a self-represented litigant can be challenging. Being a self-represented litigant in a high-conflict parenting case can be particularly difficult. Notwithstanding these challenges, I believe that appropriate steps were taken to ensure that Mr. S. was given a reasonable opportunity to present his side of the case, although the Court did have to be firm on various occasions as the appropriate conduct of a trial. In return, Mr. S. was generally respectful in addressing the court, respectful in his interactions with the clerk of the court and notably,

very punctual.

- [50] In this vein, I do also want to recognize that Mr. Grewal, counsel for Ms. C., was very polite and respectful to Mr. S. throughout this lengthy trial. There were obviously challenges and disagreements that arose, predominately during cross-examination, but that is realistically inherent in the adversarial process. When outside of the bounds of cross-examination but otherwise in the courtroom and especially when dealing with procedural matters, it was noted by the Court that Mr. Grewal was pragmatic, fair and took no paltry advantage. Had this not been the case and greater judicial oversight/case management required, what was already a long high-conflict family trial would have become a very long high-conflict family trial. The conduct of counsel is thus recognized by the Court and appreciated.

Credibility - The Law

- [51] Before detailing certain key conflicts in the evidence, I will note that credibility plays a key part in the assessment of the evidence in this trial.
- [52] The assessment of credibility by the trial judge is a nuanced analysis. It is also, ultimately, fact specific. However, various justices of this Court have outlined certain factors to be considered when addressing this issue which are very helpful. Having regard to the significance of this issue to the trial, I am going refer to four decisions of the court which I consider relevant and applicable.
- [53] The first is the seminal decision in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. In *Bradshaw*, Justice Dillon wrote the following oft-quoted passage on credibility:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) ; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).
- [54] There are three recent decisions which follow *Bradshaw* that are also instructive.
- [55] In *M.L. v. R.H.*, 2022 BCSC 1580 at para. 25, Justice Wilkinson helpfully summarized *Bradshaw* as the following list of factors:

1. Is the witness able to resist the influence of interest in modifying their recollection?
2. Does the witness' evidence harmonize with independent evidence that has been accepted?
3. Does the witness change their evidence during examination for discovery, direct examination and cross-examination, or is it otherwise inconsistent in their recollections?
4. Does the witness' evidence seem generally unreasonable, impossible, or unlikely?
5. What demeanour did the witness exhibit when testifying?

[56] In *S.B.F. v. D.G.F.*, 2022 BCSC 2231, Justice Murray cited Bradshaw and adopted a helpful statement on the distinction between credibility and reliability from the Ontario Court of Appeal:

[29] The distinction between reliable evidence and credible evidence was discussed by Doherty J.A. in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.) at p. 526:

Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[57] Finally, in *L.M. v. K.M.*, 2022 BCSC 689 at paras. 275-82, Justice Fleming sets out a comprehensive review of the credibility issue with reference to Bradshaw. Recognizing that the overall review is instructive, albeit done in a factually distinguishable case, I will note in particular the following paragraphs:

[275] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they recall.

[276] Credibility and reliability are not all or nothing concepts. The trier of fact may believe some, all, or none of a witness's evidence and attach different weights to different part of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

[277] The proper approach to assessing the truthfulness of any interested witness was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357, with these words:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Assessment of the Credibility of the Parties

- [58] Applying the foregoing legal framework, I find that Ms. C. was an overall truthful and credible witness. Her presentation on direct examination was generally thoughtful, reflective and, with some exceptions, she was generally only led by counsel on non-contentious issues. I did make note of these areas where I noted some leading by counsel for Ms. C., even though Mr. S. did not raise objection as the lack of an objection does need to be put into some context by virtue of the fact that he did not have counsel.
- [59] There were also some aspects of the delivery of Ms. C.'s testimony and her responsiveness to questions on cross-examination that would potentially give rise for some concern. These primarily relate to her general defensiveness and, at limited times, to being somewhat argumentative. However, I conclude those are generally due to the fact that Mr. S. was self-represented and this was particularly challenging for Ms. C., having regard to the nature of the relationship between the parties.
- [60] The exception to the foregoing comments is that I have concluded, on the balance of the evidence, that Ms. C. intentionally minimized the role that Mr. S. has played with the Children. This is expressly not to say that Ms. C. was not within her rights to seek a protection order when Mr. S.'s post-separation conduct was inappropriate and, I find, escalating. The Protection Order served its purpose and although the interactions between the parties are still very difficult, they deescalated to a manageable level in short order.
- [61] The concern I have with respect to Ms. C.'s evidence is regarding Mr. S.'s pre-separation interactions with the Children. As I will set out below in addressing Mr. S.'s evidence, I accept that Mr. S. has always been a devoted and loving father. There is no evidence whatsoever of inappropriate discipline, inappropriate contact or neglect. Mr. S. is definitely regimented in his ways in terms of his schedule of attending the gym, listening to the news at some length on a daily basis, retiring early to bed and rising early and so forth. Ms. C. presents as far less regimented and more flexible. However, the Children are familiar with the differing personalities of their parents. Being regimented is also not, within reason, detrimental to the best interests of the Children.
- [62] The evidence also confirms that Mr. S. enjoyed active play with the Children and would very regularly spend time with them at parks and playgrounds. This active play was to their benefit. Mr. S. was also regularly the one who took the Children, particularly A. and S, to the synagogue on a weekly basis. These interactions provided Ms. C. some relief from her role as the primary caregiver, even if she was otherwise engaged in domestic tasks in the home in the absence of the Children at times.

- [63] Summarizing the foregoing, I find the evidence of Ms. C. intentionally minimized the importance of Mr. S.'s role in the Children's pre-separation lives based her feelings of him as a spouse and upon her feelings regarding his post-separation behaviour in support of the orders she seeks at this trial, most notably seeking an order requiring his time with the Children to be supervised (even if temporarily or subject to further review).
- [64] As it respects the credibility of Mr. S., he stated more than once during the trial that he always tells the truth. In relation to his evidence regarding his interactions with the Children, I do generally accept that this is correct. This does not excuse behaviours from Mr. S. which have been very inappropriate. This includes his communications with Ms. C. and his desire to bring either A. or S. onto "his side". Parenting, whether pre-separation or post-separation, is not war. Children should not be placed in a position where they feel they have to choose sides.
- [65] I also have concerns about the recall of Mr. S. about certain events. He did state on multiple occasions that he has an excellent memory. That I accept is generally true. He did have a particularly detailed recollection of various events. A. had better and more detailed recollection of those events than Ms. C. often had. However, at times during cross-examination when being pressed on an issue regarding his conduct, Mr. S.'s ability to recall appeared to change. Had this been an isolated incident, it would not be particularly noteworthy as having an excellent memory does not require a witness to remember everything about every event which might be material. However, it occurred on several occasions and in circumstances where Mr. S.'s inability to recall was favourable to his position in this litigation.
- [66] In this regard, I also have concerns about the credibility of Mr. S. relating to his various explanations that written communications were being taken out of context because they were written in English, whereas Mr. S.'s primary and preferred language of communication is Hebrew. I do accept that Hebrew is his primary and preferred language. This was not challenged. However, Mr. S. is fluent in multiple languages by his own account. He is clearly an intelligent individual and while there were occasionally turns of phrase or terms of art he struggled with, he was generally very able to conduct a 14-day Supreme Court trial in English before this Court without any assistance other than his brother who was present in the gallery most days to, I understand, make notes. I thus conclude that Mr. S. is being less than fully truthful in trying to explain away his statements simply on the basis that they are being misinterpreted or misconstrued because they are in English.
- [67] In the same vein, Mr. S. acknowledged having in his possession copious amounts of text communications between him and Ms. C. The exact amount varied but it was acknowledged consistently to be in excess of tens of thousands of pages. Despite this, Mr. S. did not tender any of these communications as evidence as part of his case. In other circumstances, this might not be of note since the texts were sent to Ms. C. However, the texts tendered by Ms. C. as part of her claim were of poor quality. Indeed, many of Ms. C's texts or reply texts to Mr. S. were completely or almost completely ineligible due to the quality of the

reproduction. Had Mr. S. sought to bring a fulsome and reliable record of these exchanges, or to put some of his remarks into context, it was within his ability to do so.

- [68] I also conclude that Mr. S. is not being truthful as it relates to his ability to earn an income. While I accept, as detailed, that Mr. S. was involved in a motor vehicle accident in 2018 and has been diagnosed with type 2 diabetes, his evidence as to his inability to work beyond his recycling efforts was less than convincing. I do note in this regard, however, that Mr. S. has paid all of the interim support which was ordered and he expressly stated on the record that he would pay whatever support was ordered in respect of the Children. His motive for minimizing his income-earning potential is thus somewhat unclear. Nonetheless, this an area of Mr. S.'s evidence which I find to be unreliable. I also do not accept that his reluctance to make financial disclosure can be adequately explained by his desire for privacy.
- [69] I further shall address the concern, specifically raised at trial, that Mr. S. admitted he had communication with a rabbi about an issue relevant to the litigation, namely the ability to obtain a Get in Canada, during the course of his cross-examination. This is despite my having been very specific and deliberate in my instructions as to the prohibition against discussing any matter relating to the litigation on each occasion when court stood down during the course of his cross-examination. This was not acceptable and undermines the respect for the court process. It was not inadvertent and could have been subject to sanction had I not concluded the discussion was limited to a narrow issue I had already heard evidence on.
- [70] The final point I would address is the submission by Ms. C.'s counsel regarding the fact that Mr. S. did come across as sarcastic at times, both in conducting his cross-examinations and during his own cross-examinations. Ms. C., however, agreed with the proposition that this is consistent with his general personality. As such, while I have factored certain responses of Mr. S.'s of this nature into my overall findings of fact, I am not prepared to find that his sarcastic tone in and of itself negatively impacts his credibility. It is a situation-specific analysis.

Assessment of the Credibility of the Lay Witnesses

- [71] The evidence of each of the lay witnesses tendered as part of Ms. C.'s case was relatively brief.
- [72] D.C. is the former stepmother of Ms. C. D.C. testified by video from out of the country while on vacation. She is generally employed as a correctional officer. Her evidence was presented in a straightforward and cohesive way. D.C. interestingly appeared to have no animus towards Mr. S. and acknowledged that he had been an engaged father prior to separation. D.C. did testify to one incident that upset her which occurred in the presence of the Children shortly after separation. D.C.'s upset to this incident was not inappropriate. She was simply attempting to assist Ms. C. by being a neutral party delivering certain personal property that belonged to Mr. S. and he spoke to her unkindly and rudely. I thus accept her evidence as being credible.

- [73] L.C.Q. is a co-worker and friend of Ms. C. Her interaction with Mr. S. was limited to a single interaction at their shared workplace. Mr. S. denies recalling having ever met her. The interaction L.C.Q. referred to involved Mr. S. arriving to receive the Children into his care. D, who was quite young at the time, had sustained an injury to his face from another child while in third-party child care. According to L.C.Q., Mr. S. presented at Ms. C.'s place of work somewhat aggressively and placed his hand on D's face and inspected the injury in a manner that made him wince.
- [74] In this circumstance, I accept that L.C.Q. is being truthful in her recollection of the event. However, I also have to take into consideration the other evidence which is very consistent with the fact that Mr. S. does not use physical discipline with the Children. Accordingly, I find that this is a situation where Mr. S. was being overly reactive to a situation involving D, which presentation is not inconsistent with his presentation generally. However, I cannot find it was a situation where there was any intent to cause harm or even further discomfort to D.
- [75] M.R. is a very close friend of Ms. C. She is currently employed a teacher by a school district in British Columbia. Her friendship with Ms. C. started back in 2000 and continues to be strong to this day. M.R. has spent extensive time with the Children, both prior to and post-separation. There was even a relatively brief period of time when A. and S. were in their toddler years where she provided regular child care and was compensated for her child care. Apart from that, she has spent considerable time with the children but more in the role of what I would colloquially describe as a "pseudo-aunt".
- [76] M.R. made various observations about Mr. S.'s conduct with her time spent in the family. Her primary observations were of Mr. S.'s negative treatment of Ms. C., his use of cursive language and in particular his criticisms of Ms. C. She testified that she found Mr. S. physically intimidating but never witnessed any physical abuse to any family members. While M.R. did provide some evidence about negative comments made to the Children at times, specifically A. and S, her evidence focused primarily on her concerns of the treatment by Mr. S. towards Ms. C. She confirmed on cross-examination by Mr. S. that she, as a teacher, is aware of her obligation to report child protection concerns the Ministry of Children and Family Services. She never made such a report regarding Mr. S. or the Children generally despite her observations.
- [77] M.R. has provided some financial support to Ms. C. following the separation. Her recollection was that in or about \$2,000. She does not consider it a loan. She also testified she has also bought groceries and other items as needed for the Children from time to time and simply did not even keep track of these purchases. M.R. is clearly a positive support for Ms. C. and for the Children. I also find her observations as to the family dynamics are reliable based on the totality of the evidence I have heard. However, I conclude that given the separation and her alignment with Ms. C. that her concerns about Mr. S.'s interactions with the Children are more heightened now than they were at the time and colours her evidence somewhat.

- [78] M.C. is the brother of Ms. C. They have a younger sibling who did not testify. They clearly have a close relationship. For a sustained period prior to separation, M.C. lived in the same strata complex as the parties. He was a very regular attendee at their home. Mr. S. and M.C. engaged in certain joint endeavours together, such as Mr. S. aiding M.C. by providing his electrical expertise in building a food truck. M.C. and Mr. S. though do not, on the basis of both their evidence, appear to have been ever particularly close. Mr. S. thought M.C. was around their home too frequently and M.C. thought Mr. S. was, and these are my words to paraphrase the evidence of M.C., rude and standoffish. Using the above credibility analysis, I accept there is a genuine ring truth to both of these statements in the overall context of the evidence.
- [79] Importantly, however, M.C. has been a significant supporter of Ms. C. since separation. That has included emotional support, financial support and, when available having regard to his work schedule, assistance with the Children. As I will also address in my summary of my judicial interview of the Children, I conclude M.C. is an important member of the Children's extended family support system and the fact that he is quite obviously not a "fan" of Mr. S. does not mean his ongoing involvement is for improper purposes or negatively affecting the Children.
- [80] T.D. only testified very briefly. Her evidence that she was copied on an email authored and distributed by Mr. S. about Ms. C. after their separation was not challenged. I accept that this evidence is true. The contents of the email, which was entered into evidence, did not present Ms. C. in a positive light to recipients of the email. I, for the reasons of attempting to maintain anonymity, will not detail what the contents of the email or who the recipients were in these reasons for judgment. There is no challenge to T.D.'s credibility and she has no interest in this litigation.
- [81] I further accept that Ms. C. found the involvement of individuals in her place of work in her separation, such as T.D., to be uncomfortable and it was clearly unnecessary.

The Judicial Interview of the Children

- [82] On February 23, 2022, Justice Wilkinson ordered that there be an assessment prepared pursuant to s. 211 of the FLA.
- [83] It is a trite proposition that s. 211 assessments act as the "eyes and ears" of the court and are of significant assistance when dealing with high-conflict parenting matter such as this one: *Banni v. Muir*, 2016 BCSC 2194 at para. 37.
- [84] Unfortunately, a s. 211 report was never prepared despite the order of Justice Wilkinson.
- [85] Although fairly limited evidence was led on this point, I conclude this is primarily for two reasons:

- a) Mr. S. was initially not responsive to the request for his position on the list of s. 211 report authors proposed by counsel for Ms. C. Ms. C., however, could have addressed this quite simply with an application to the court to appoint one of said experts proposed; and
 - b) More significantly, the sale of the Former Family Residence took longer than anticipated and thus the funds anticipated to be utilized for this purpose were not available until mid-December 2022 when it was no longer feasible to obtain a s. 211 assessment given the January 2023 trial date.
- [86] Having regard to the high-conflict nature of the parenting issues and the lack of reliable evidence as to the views of the Children, which are an important factor in the best interest analysis under s. 37 of the FLA, I exercised my *parens patriae* jurisdiction to order a judicial interview of the children.
- [87] In exercising this jurisdiction, I considered the caution of Justice Martinson regarding judge interviews in *L.E.G. v. A.G.*, 2002 BCSC 1455:
- [25] Concerns about the judge interview have been raised that go beyond procedural safeguard questions. Judges usually are not trained to interview children in a way that allows them to accurately assess the real wishes of the child. Judge's lack knowledge about developmental differences in cognitive, language and emotional capacities in children. From a clinical perspective, being interviewed in chambers can be far from a relaxing experience for children. Rather, it can be a formidable and inherently stressful experience for most children. . . .
- [26] A judge may not be able to obtain accurate information in one relatively short meeting. . . . There is an added concern that the judge may think that he or she has received accurate information when the information is not, in fact, accurate. . . .
- [88] Despite recognizing this caution and acknowledging that the s. 211 assessment by an individual with expertise in child development and parent-child relationships would have been preferable, I did not consider it appropriate to make significant decisions which will impact the lives of A, S. and D. without giving them some opportunity to give the Court their view on these matters. Particularly given the fact that the evidence about their views by Ms. C. and Mr. S. was not consistent in some very material respects.
- [89] In order to accommodate the mid-term exam schedule of A. and S, and with the consent of the parties, I conducted this interview between the conclusion of the direct examination of Mr. S. and the cross-examination of Mr. S. While not entirely ideal, I am satisfied it was in the best interests of the Children and allowed me an opportunity to interview them when they were not stressed about being absent from school at a critical time.
- [90] Pursuant to my directions, the parties jointly brought the Children into the courtroom and I briefly introduced myself and provided a limited overview of the process. I then excused the parties and counsel for Ms. C. and met with all the Children jointly to further explain the interview process, including the confidentiality of the process. I further made clear that the

ultimate decision was for me as the judge but that I wanted to at least give them the opportunity to have a voice in decisions being made about them. Finally, I told the Children that they were not obliged to speak with me, but all independently indicated a willingness to do so.

- [91] In order to not suggest any unfairness or bias, I had the Children pull numbers out of a hat to determine the order of their individual interviews. In accordance with traditional board game rules, I allowed D, as the youngest, to have first pick from the hat. There was no quarrel or resistance about this and indeed A. voluntarily allowed D. to trade numbers with her after selection as he told her wanted to be the first. A's maturity in this regard was noted by the Court.
- [92] All of the Children were polite, respectful and fulsomely participated in the interviews in an age-appropriate manner.
- [93] Having regard to the dynamics of the family, and what I explained to the Children about the confidentiality of the process, I am not going to recite in significant detail all that which the Children advised me. The transcripts of my interviews with them are, per my order, sealed unless there is an appeal of my final order.
- [94] However, as they factor significantly into my s. 37 analysis of the best interests of the Children, there are certain key take-away points that must be noted for the record in these reasons for judgment:
- a) The Children all have a strong bond with both parents and could identify unique positive aspects of their relationship with both parents;
 - b) All of the Children confirmed that they feel safe in the presence of either parent;
 - c) Although it is clear that the Children have at times heard the other parent speak negatively about the other to them or in their presence, they all independently denied that this is an ongoing issue. Their comments as to who engaged in such behaviour were interesting in that they indicated while it was not a regular or ongoing occurrence, it was Ms. C. who was, on balance, primarily the parent who engages in this behaviour when it happens;
 - d) The living arrangements, at present, at the home which Mr. S. shares with his common law partner, S.T., are less than optimal given that they all have to share the living room for their sleeping space and completion of homework. The Children, especially A. and S., would like their own living space. In this regard, I am prepared to take judicial notice of the fact that it is not unreasonable for 13-year old girls to desire to have their own rooms or at minimum, some private space;
 - e) All of the Children report a generally positive relationship with their uncle M.C., with one of them indicating that he is their "best friend" and another commenting very positively on their shared interests;

- f) Two of the Children report a positive relationship with Mr. S.'s partner, S.T. One of the Children reports less of a bond with S.T. but could not identify any particular reason, concern or incident which underlies this. It appears to me more of a situation of this child, understandably given their age and maturity, simply preferring that Mr. S. had not re-partnered versus any actual substantive concern with S.T. or her interactions with the Children. This is also consistent with the fact that Ms. C. did not raise concerns in her evidence as S.T.'s involvement with the Children apart from referencing the fact that the Children share the living room in her home as I addressed above;
- g) Both A. and S. acknowledged there is often conflict between them and that this frequently leads to fighting. They both agreed, using somewhat different language, that this tension usually dissipates in a relatively short period of time but can be quite intense in the moment. It is a material and ongoing issue. For this reason, both A. and S. enjoy spending time with one parent in the absence of the other. This desire for "one-on-one time" is not generally problematic. I do have concerns, however, that there is a history of seeking to align with a parent to the detriment of their relationship with the other parent and their relationship with their twin sibling. I cannot ignore this dynamic in my consideration of the best interests of the Children;
- h) All of the Children further acknowledged that there is also some conflict at times between all S, A. and D. This, however, appears to be much more in the nature of fairly typical sibling conflict and D. finding himself in the position of being the little brother to two fairly strong-willed older sisters. This also appears to happen at both homes;
- i) A. is very academically motivated and athletically inclined. She conveyed very articulately to me that she finds the current parenting arrangement difficult at times because she finds it challenging to have enough time to study, particularly without her own living space at Mr. S.'s home. She also finds it burdensome to carry her sporting equipment back and forth between the parties' homes along with her other belongings. A. prefers to be in one home in her room at Ms. C.'s with "her things" so that she can focus on her studies and her sports. A. thus expressed a desire to have some autonomy in deciding when she attends for parenting time with Mr. S. A's rationale for seeking this autonomy was, in my view, not unreasonable having regard to the reasons she provided. Further, A. was not critical of Mr. S. and made clear she enjoys spending time with him. She just does, however, prefer that I consider giving her some autonomy for the reasons indicated.
- [95] Lastly, and importantly, all of the Children confirmed with me, in their own words, that the parties had complied with my direction to advise the Children as to my wish to meet with them and to consult A. and S. as to their school schedules for best availability, but not to discuss the substantive content of the interview. Stated another way, there was nothing from my interviews that suggested that the Children had been coached by either party.

Best Interests of the Children Analysis

[96] The only consideration for this Court in addressing the parenting and guardianship arrangements for the Children is the best interests of the children.

[97] The FLA sets out the following in s. 37(1):

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.

[98] In s. 37(2), the FLA sets out factors for the court to consider in assessing the best interests of the Children:

- (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.

[99] Each case turns on what is in the best interests of the child in the particular circumstances: J.F.C. v. A.O.C, 2022 BCSC 294 at para.33. While J.F.C. considered both the Divorce Act and the FLA, this principle is just as apt in a case such as this where only the FLA applies (see para. 26).

Findings of Fact Relevant to the Parenting Issues with the Children

- [100] As a starting point, it is clear that both parties love the Children. It is also clear that the Children love both parties. Challenges, beyond those associated with separation generally, have arisen particularly as a result of some of the conduct of Mr. S. following the separation.
- [101] Even though he conceded that the relationship was a somewhat unhappy one in the years leading up to separation, Mr. S. was extremely upset that Ms. C. made the decision to separate. Although that anger appears to have tempered somewhat over time and Mr. S. is now happily involved in another relationship, he readily admitted that he is not yet in a place to apologize to Ms. C. for his post-separation conduct. This is a point of concern.
- [102] I turn now to the specific analysis of the s. 37(2) factors in this specific factual matrix.
- a) The Children's health and emotional well being
- [103] I accept that there have been challenges for the Children in the post-separation period. Each of A. and S. resided exclusively with Mr. S. for several months at times due to familial conflict and there is the dynamic, I as have referenced, about each "taking sides". This was understandably difficult. There are also concerns about dysregulated behaviours, particularly from A. and S, upon return from spending parenting time with Mr. S.
- [104] D. was also unnecessarily involved in adult matters by the extremely poor decision of Mr. S. to take a call from a prosecutor or the police (his evidence was unclear on this point) regarding his criminal allegations against Ms. C. in Israel. Although this conversation was in Hebrew, D. understood enough of it to be concerned, despite his age, about the possible incarceration of his mother in Israel. This demonstrated very poor judgment on the part of Mr. S.
- [105] However, while I accept Ms. C's evidence about the parenting challenges she is managing as entirely credible, the Children are generally functioning quite well. Both A. and S. acknowledge there is conflict between them. Despite being twins, they have very different personalities. The parties acknowledge this and A. and S. independently recognize this. Both, however, are pursuing their individual interests and are generally content with the status quo subject to my above comments.
- [106] D. has had some behavioural issues at school, which are acknowledged by both parties, but D. does not appear inappropriately aligned with either party. The parties will need to address these behavioural concerns regarding D. going forward within the context of the orders that I have made regarding allocation of parenting responsibilities and my conduct orders regarding communication.
- [107] However, I ultimately do not conclude, on the balance of the evidence, that these concerns support a finding, on the balance of probabilities, that there is a concern for the state of the Children's emotional health and well being whilst in the care of either parent.

- [108] As I will return to, however, this conclusion does not necessarily endorse an equal parenting arrangement. It simply recognizes that each of the parties parent the Children differently. While there are clearly things that can be improved upon in both households as they navigate their post-separation journey and the increasing maturity of the Children, the Children's health and emotional well being is being adequately addressed in both households.
- b) The Children's views, unless it would be inappropriate to consider them
- [109] As set out above, I conducted a judicial interview of each of the Children. I will not reiterate my observations gleaned in those interviews at this juncture.
- [110] In conducting the interviews, I relied not only on the authority of s. 37(2)(b), but also on Article 12 of the United Nations Convention on the Rights of the Child, November 20, 1989, Can T.S. 1992 No. 3. Article 12 provides that parties to the convention, which include Canada, will ensure that children capable of forming their own views have the right to express those views freely in all matters affecting them. It further provides that children impacted by judicial proceedings must have the opportunity to be heard in those proceedings.
- [111] Further, I reference the relatively recent decision of the Supreme Court of Canada in *Michel v. Graydon*, 2020 SCC 24. While Michel dealt primarily with child support issues, Justice Martin underscored the importance of access to justice for children in his concurring reasons, with which Chief Justice Wagner agreed:
- [77] . . . The status of children has changed dramatically from the times when children were viewed as property and the payment of monies for their upkeep was grounded more in grace and generosity than legal duty. Today, children are viewed as individuals who, as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society's full protection. . . .
- c) The nature and strength of the relationships between the Children and significant persons in the Children's lives
- [112] The Children all have a strong relationship with both of their parents. I have already made that finding of fact. Although Ms. C. has been the primary caregiver, that has not diminished their bond with Mr. S. This is to be expected, having regard to the more traditional roles that the parties assumed when the Children were young and the practical fact that they spent more time with Ms. C. However, the time that they spent with Mr. S. when he was not at work was also important and allowed them to form a close bond with him.
- [113] In saying this, I do refence my above findings that the conduct of Mr. S. in his interactions involving or around the Children were not always ideal. Parents are not, however, held to a standard of perfection in family law proceedings. Having occasional moments of intemperance cannot forever be held to the detriment of that parent if there are not

ongoing concerns. This comment is equally applicable to Ms. C. regarding the evidence as to her efforts in separating A. and S. when they were having a physical altercation fairly recently (the exact date was not actually put into evidence but my general understanding was that it was in the summer of 2022). In retrospect, the situation could have likely been deescalated with the assistance of Ms. C. before it reached a point of a physical altercation. However, I accept Ms. C.'s evidence that her efforts to intervene were intended to keep A. and S. from harming each other rather than cause them harm. Further, while I did not have them line up for comparison, having met with A. and S, my general observation is that A. is taller than Ms. C. and S. is smaller in stature but still approximately the same height as I am. There were thus limited options available to Ms. C. to attempt to separate A. and S. once the altercation started and she did not use inappropriate force.

[114] Rather, the concern I have in considering this factor is the conduct of Mr. S. in seeking to align the Children with him or pit them as against each other in the case of A. and S. This is very clearly not to their benefit.

[115] It is also not helpful to Ms. C.'s role as the primary caregiver under the current parenting arrangement for Mr. S. to undermine her parental authority by granting the Children privileges which Ms. C. has refused. In saying this, I am not discouraging Mr. S. from assisting Ms. C. in transporting the Children to and from events or otherwise facilitating their participation in events that are important to them. That clearly is to their benefit and is encouraged. However, it is to the detriment of the Children when Mr. S. undermines Ms. C.'s parental responsibilities by acceding to a request by the Children which Ms. C. has already not unreasonably denied.

d) The history of the Children's care

[116] Ms. C. was a stay-at-home parent from the time A. and S. were born in 2009, until she returned to the workforce in 2017. She was thus, as I have recognized, the primary caregiver of the Children even though Mr. S. was, as I have also found, an involved father. There were also some periods of time when, due to the recognized variable nature of his employment as an electrician, Mr. S. was also at home as opposed to working outside the home. This does not change my finding of fact that Ms. C. was the primary caregiver during these material times.

[117] Since separation, Mr. S. has continued, with limited exception, to be the primary caregiver for the Children. The exceptions were those periods of time when each of A. and S. stayed exclusively with Mr. S. Of significance, while I cannot conclude that Mr. S. precluded Ms. C. from having parenting time with A. or S. during these times, he clearly did not make active efforts to facilitate it. In contrast, apart from the period initially following separation and around the time of obtaining of the Protection Order, Ms. C. has generally not obstructed or denied Mr. S. parenting time with the Children. The issues with A. not attending some or all of her parenting time are, in my view, not a situation where Ms. C. is denying Mr. S. parenting time but rather a situation where A. has chosen, for the reasons indicated above,

to sometimes remain at Ms. C.'s home or abbreviate her time at Mr. S.'s residence during Mr. S.'s scheduled parenting time.

e) The Children's need for stability, given the Children's ages and stages of development

[118] This is a particularly key consideration for the court in applying the s. 37 analysis.

[119] The separation of the parties and their transition to two households has been difficult for the Children and very difficult for certain of the Children at certain times. That is apparent from the evidence of virtually every witness at trial.

[120] For this reason, I think it is critical that there be a status quo parenting regime in place which the parties commit to and respect. I have, as I will detail, given A. and S. some autonomy within the overall parenting schedule in an effort to craft an arrangement which I believe will be in the Children's best interests and continue to foster their relationships with both parties and with each other as siblings without emboldening them beyond their level of maturity.

[121] Said another way for the benefit of the parties, I have taken considerable effort to create a parenting regime which I think addresses all of the relevant factors under s. 37 of the FLA. However, I have given particular weight to this factor as I conclude that general stability with some limited permitted flexibility within the overall parenting regime will be to the benefit of the Children.

f) The ability of each person who is a guardian or seeks guardianship of the Children, or who has or seeks parental responsibilities, parenting time or contact with the Children, to exercise his or her responsibilities

[122] Both parents are capable of caring for the Children when in their care and exercising parental responsibilities in relation to the Children.

[123] Apart from becoming involved in the conflict between the parties following the separation, there is no evidence of any harm of any significance to the Children and no concerns raised by other party about the other having issues with substance use or misuse that would impair their ability to exercise their parenting responsibilities.

[124] However, as I will address below when making an order as to the exercise of parenting responsibilities, I do think that the level of communication between the parties is so poor that a true co-parenting model requiring the joint exercise of parenting responsibilities is simply not feasible. I have crafted my order on this premise.

g) The impact of any family violence on the Children's safety, security or well-being, whether the family violence is directed toward the Children or another family member

[125] Family violence is a key consideration in this case.

[126] Section 1 of the FLA defines "family violence" as follows:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[127] I note that this definition is broad, indicating that the intent of the FLA is to provide protection to a very broad range of vulnerable people: *C.A.B. v. M.S.B.*, 2015 BCPC 12 at para. 17 and *J.S.R. v. P.K.R.*, 2017 BCSC 928 at para. 170.

[128] In *B.H.C. v. F.G.J.P.*, 2017 BCPC 378, Judge Malfair helpfully summarized the past interpretation of family violence in the jurisprudence:

- [7] The purpose of these provisions is to recognize the danger to vulnerable family members that can arise in often-volatile relationships and to ensure that courts have the means of ensuring the safety of those who are at risk. The broad and inclusive definition of "family violence" recognizes harm which can extend beyond the infliction of purely physical violence (*Morgadhino v. Morgadinho*, 2014 BCSC 192 at par. 59).
- [8] The provisions of the FLA relating to family violence are intended to address a serious social issue and to protect children and spouses from actual harm or danger. Their meaning and application should not be stretched to the point they become just another weapon in a largely financial war between the parties: (*L.S. v. G.S.*, 2014 BCSC 187, *aff'd* 2014 BCCA 334 at para. 26).
- [9] Where it is alleged a parent's (non-violent) actions constitute family violence towards a child, the court must be careful not to label that conduct as "family violence" where there is no evidence the child has suffered any physical or emotional harm as a result of the parents' conduct (*C.L.M. v. M.J.S.*, 2017 BCSC 799 at par. 365).

- [129] It is not suggested that Mr. S. has been physically violent with either Ms. C. or any of the Children. Even L.C.Q.'s evidence about her observation at M.C.'s workplace with D. was, at most, consistent with Mr. S. having a lack of empathy. The circumstances were such that I, as noted, accept Mr. S. was not intentionally intending to cause physical harm to D.
- [130] Mr. S. is of the view that Ms. C. has previously made allegations to third parties that he was in some way sexually inappropriate with A. and S, although the details of these purported allegations were extremely vague. In any event, Ms. C. is very firm in her position that she never made any such allegations and that she has no concern at all about Mr. S. having behaved in a sexually inappropriate manner. This ends this issue and I will not mention it further.
- [131] The family violence in this case is that which is contemplated in subsection (d) of the definition of family violence in s. 1 in the FLA - the psychological or emotional abuse of a family member.
- [132] Mr. S. was very upset after Ms. C. decided to end the relationship. He was even more upset that she sought to take the Children "from him", even though she had been the primary caregiver to them during the relationship and was simply moving to a new residence in the same city. Being upset about these matters is genuinely understandable. However, the conduct of Mr. S. went beyond that of understandable upset and constituted family violence as defined above.
- [133] Ms. C. tolerated and endured this family violence for a number of months before finally seeking the assistance of the court by applying for and obtaining the Protection Order from Justice Marzari in December 2019 as detailed above.
- [134] Mr. S. is unhappy that the Protection Order resulted in him not seeing the Children for a brief period of time. What Mr. S. fails to fully appreciate, however, is that the Protection Order was found necessary by this Court based on his conduct. Ms. C. did not just abscond with the Children or employ some other type of strongly discouraged "self-help" remedy. She, with the assistance of counsel, followed the appropriate process to seek relief from the court and that relief was granted. In any event, Mr. S. resumed having time with the Children in a relatively short period of time.
- [135] Although the conduct of Mr. S. has improved significantly, resulting in the Protection Order (as subsequently varied) being allowed to lapse and no further protection order being sought, there are still live family violence issues which have to be accounted for in the analysis of the Children's best interests, particularly having regard to the factors set forth in s. 38 of the FLA. Of significance, there is a mandatory obligation on the court to consider the s. 38 factors when making a determination for the purposes of ss. 37(2)(g) and (h). I have not specifically enumerated the s. 38 factors but have instead incorporated them into my overall assessment as required the FLA.

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 Children and meet the Children's needs

[136] This factor is closely intertwined with my above conclusion regarding the conduct of Mr. S. constituting family violence. I will not repeat those findings here. I will simply say that there have been occasions when the family violence I have identified has impacted upon Mr. S.'s ability to understand and meet the Children's emotional and psychological needs. There is no concern that their physical safety and other needs are not appropriately met by Mr. S.

i) The appropriateness of an arrangement that would require the Children's guardians to cooperate on issues affecting the Children, including whether requiring cooperation would increase any risks to the safety, security and well-being of the Children or other family members

[137] I have again already largely considered this factor as it relates to the division of parenting responsibilities. Cooperation between the parties is lacking in this case. Decisions need to be made on issues pertaining to the Children and the orders I will be making with respect to allocation of parenting responsibilities and conduct orders pertaining to method of communication shall, in my view, adequately address any concerns in this regard.

j) Any civil or criminal proceeding relevant to the Children's safety, security or well-being

[138] There have never been any criminal or civil proceedings between the parties.

[139] The evidence of Mr. S. as to his desire to potentially pursue claims of these nature against Ms. C. in Israel despite her being a Canadian citizen are concerning. However, no such proceedings have actually been commenced and may never actually be commenced. The threat of initiating such proceedings is more appropriately considered, in my view, in my conclusion that there has been psychological and emotional abuse which constitutes family violence as defined in s. 1(d) of the FLA.

Conclusion Regarding Ongoing Parenting Arrangements

[140] Having set out my conclusions regarding the application of the s. 37 factors in considering the best interests of the Children above, with reference to the s. 38 factors, I recognize that the position of the parties on the issue of ongoing parenting time arrangements vary dramatically.

[141] Ms. C. seeks an order that Mr. S. be limited to having supervised parenting time only; albeit conceding that the supervision requirement could be subject to a time-limited review by this Court.

[142] Mr. S. on the other hand, seeks equal parenting time, preferably on a week-on week-off schedule.

- [143] In my view, neither proposal satisfies the best interests of the Children in accordance with my analysis of ss. 37 and 38 of the FLA.
- [144] Before setting out my conclusion, I want to comment on the unique and exceptional circumstances which warrant an order for supervised parenting time, particularly in a situation with children of this age who are, I am satisfied, age-appropriately mature and capable of expressing their views on matters of concern. Whether a perceived concern is legitimate is situation specific and may be the product of them unreasonably reacting to the imposition of rules and household expectations is very live with the Court. However, I am satisfied that they are all comfortable with and capable of expressing their views and concerns as necessary.
- [145] In *M.P. v. P.P.*, 2022 BCSC 1511, Justice Gomery comprehensively canvassed the issue of when supervised parenting time is appropriate. Specifically, Justice Gomery stated as follows:
- [29] The parties agree that the authorities establish that, while the court may order that parenting take place under supervision, supervision orders should only be made in exceptional circumstances; *F.K. v. M.K.*, 2010 BCSC 563 at paras. 147-148. An order for supervised access has been described as "just one small step away from a complete termination of the parent-child relationship"; *V.S.J. v. L.J.G.* (2004), 5 R.F.L. (6th) 319, at para. 1.
- [30] The cases accept that even a history of controlling, aggressive, and violent conduct on the part of one parent towards the other parent does not necessarily place the child at risk; *K.H.D. v. O.O.M.*, 2021 BCSC 1808 at paras. 49-56. As always, the focus is on the best interests of the child. However, it is necessary to bear in mind the harm that children may suffer from exposure to family violence, even if it is not directed at them, and even if it is something they do not see, but only hear about; *Barendregt* at paras. 143-146.
- [146] This passage refers to Justice Griffin's decision in *F.K. v. M.K.*, 2010 BCSC 563, which is also instructive. Justice Griffin outlined the relevant considerations when considering supervised parenting time as follows:
- [145] Numerous legal authorities have commented on the appropriate considerations for imposing terms of supervision on a parent's access.
- [146] In *K.M.E. v. D.M.Z.* [1996] B.C.J. No. 464 (S.C.), Quijano J. stated at para. 21:
- ...Although previous authorities have held that, as a rule, supervised access ought not to be employed as a long-term access arrangement, this is not a firm rule as the court must always be concerned to achieve a result that is in the best interest of the child, and therefore each case will turn on its own facts.

[147] In *V.S.J. v. L.J.G.*, [2004] O.T.C. 460 (S.C.J.), the court found that an order for supervised access, like termination of access, requires evidence of exceptional circumstances as it is just one small step away from a complete termination of the parent-child relationship: at para. 1. At paragraph 135, the court set out factors most commonly considered by the courts in terminating access:

1. Long term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress and or fear. See *M.(B.P.) v. M.(B.L.D.E.)*, supra; *Stewart v. Bachman*, [2003] O.J. No. 433 (Sup.Ct.); *Studley v. O'Laughlin*, [2000] N.S.J. No. 210 (N.S.S.C.) (Fam.Div.); *Dixon v. Hinsley*, [2001] O.J. No. 3707.
2. History of violence; unpredictable, uncontrollable behaviour; alcohol, drug abuse which has been witnessed by the child and/or presents a risk to the child's safety and well being. See *Jafari v. Dadar*, supra; *Maxwell v. Maxwell*, [1986] N.B.J. No. 769 (N.B.Q.B.); *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (N.S.C.A.); *Studley v. O'Laughlin*, supra.
3. Extreme parental alienation which has resulted in changes of custody and, at times, no access orders to the former custodial parent. See *Tremblay v. Tremblay* (1987), 10 R.F.L. (3d) 166; *Reeves v. Reeves*, [2001] O.J. No. 308 (Sup.Ct.).
4. Ongoing severe denigration of the other parent. See *Frost v. Allen*, [1995] M.J. No. 111 (Man.Q.B.); *Gorgichuk v. Gorgichuk*, supra.
5. Lack of relationship or attachment between noncustodial parent and child. See *Studley v. O'Laughlin*, supra; *M.(B.P.) v. M.(B.L.D.E.)*, supra.
6. Neglect or abuse to a child on the access visits. See *Maxwell v. Maxwell*, supra.
7. Older children's wishes and preferences to terminate access. See *Gorgichuk v. Gorgichuk*, supra; *Frost v. Allen*, supra; *Dixon v. Hinsley*, supra; *Pavao v. Pavao*, [2000] O.J. No. 1010 (Sup.Ct.).

[148] At paragraph 137, the court in *V.S.J. v. L.J.G.* found that those factors listed above would also be relevant to a consideration of supervised access. The court also stated:

...It is possible through a supervision order to do the following: protect children from risk of harm; continue or promote the parent/child relationship; direct the access parent to engage in programming, counselling or treatment to deal with issues relevant to parenting; create a bridge between no relationship and a normal parenting relationship; and, avoid or reduce the conflict between parents and thus, the impact upon children.

[149] At paragraph 143 of *V.S.J. v. L.J.G.*, the court stated that when terminating or restricting access, it is necessary for the court to weigh and balance numerous factors in the context of the child's best interests including:

1. The maximum contact principle;

2. The right of a child to know and have a relationship with each parent;
3. A limitation of a consideration of parental conduct to that conduct which impacts on the child;
4. The risk of harm: emotional, physical and sexual;
5. The nature of the relationship between the parents and its impact on the child;
6. The nature of the relationship and attachment between the access parent and the child; and,
7. The commitment of the access parent to the child.

[150] In *Merkand v. Merkand*, [2006] O.J. No. 528 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 117, the Court found that an order for indefinite supervised access, providing neither transition to unsupervised access nor a fixed review date should be made in rare circumstances. The Court also found that a trial judge's order which did not provide for these does not preclude the parent with access from seeking leave to vary the terms of the access in the future upon proof of a material change in circumstances.

[147] Based on the evidence before me, I am satisfied, as noted, that there is no history of physical violence, sexual abuse or any concerns as to substance use or misuse. There are also no issues of neglect and the Children's views were unanimously in support of continuing parenting time with Mr. S. Further, while some of the conduct of the parties, particularly Mr. S., in aligning with A. or S. or arguably favoring A. or S. for periods of time is concerning, these were relatively brief in duration compared to the overall duration of the separation and I cannot conclude that they approach the standard of extreme parental alienation referred to.

[148] Further, as noted above, although the Children have been exposed inevitably to some negative comments about one parent by or in the presence of the other, none of them cited this as a significant or ongoing issue.

[149] The primary factor which is applicable here, based on the foregoing law, is harassment and harmful behaviours by Mr. S. towards Ms. C. His manner of communicating and interacting with Ms. C. following the separation was wholly inappropriate. I have made this clear. Whilst I accept that he was upset about the breakdown of the family unit and its consequences, that does not excuse his conduct.

[150] Again, as I have noted, Ms. C. was thus well within her rights to apply for and obtain a protection order based on that conduct and its emotional consequences for the Children.

[151] Although some conduct persisted, at times, after the issuance of the Protection Order, it was significantly restrained in comparison and it appears that said conduct has now largely abated.

- [152] In drawing this conclusion, I am again not in any way condoning the communications sent by Mr. S. to Ms. C. following the separation. Many of them were inappropriate and should not have been sent. They are not excused by the emotional upset arising from the separation. However, I am accepting, based on the passage of time and the ages of the Children, that they do not warrant an order that that Mr. S.'s parenting time with the Children be supervised.
- [153] Further, while I did not canvass the subject of supervised parenting time directly with the Children as I did not consider it appropriate in the circumstances to do so, they all indicated they had no safety concerns and I am prepared to infer from the Children's responses to my other questions that they wish to have parenting time with Mr. S. in the normal course.
- [154] On the basis of the foregoing, I am not prepared to order supervised parenting time; even on a time-limited basis. Thus, the role of this Court is to determine the schedule upon which that parenting time shall occur.
- [155] In this regard, and for the reasons set out regarding my analysis of the relevant factors under ss. 37 and 38 of the FLA, I am not prepared to order that there be an equal parenting schedule.
- [156] In drafting the prospective parenting order, I am also taking into consideration the fact that the current Wednesday evening parenting time does not appear to be working well for anyone other than possibly D. who by virtue of his age and personality seems to be generally willing to adapt to whatever parenting schedule he is told he is to follow.
- [157] Having regard to all of circumstances, as outlined above, I have concluded that it is appropriate to continue to see the Children reside primarily with Ms. C. but will extend Mr. S.'s parenting time in alternating weeks such that he has the Children in his care, subject to my further comments, for five out of every 14 nights.
- [158] I am further going to order, subject to the terms set out below, that the Children may have an overnight visit with Mr. S. during Ms. C.'s parenting time alternating Thursdays which will bring up his parenting time to, potentially, six out of every 14 nights.
- [159] Specifically, I make the following orders pursuant to s. 45 of the FLA:
1. Except as otherwise specified, during the school year, Mr. S. will have the Children from Wednesday after school until drop off at school on Monday morning on alternating weeks.
 2. Mr. S. shall have overnight parenting time with D. on Thursdays after school until drop off at school on Friday morning during the week where the Children are primarily resident with Ms. C. Either A. or S. or both shall also be given the opportunity to accompany D. for this overnight parenting time but they will not be required to do so if they have engagements with school, sporting events/practices or other commitments.

3. The regular parenting schedule shall be suspended during the school break that occurs in December each year. The school break shall be divided equally between the parties. Ms. C. shall have the choice of whether she wants the first or second week in even years and Mr. S. shall have the same choice in odd years. The parties shall communicate their choice of weeks in writing by October 15 of each year.
4. The regular parenting schedule shall be suspended during the school March or "spring" break. Ms. C. shall have the first week and Mr. S. shall have the second week. This schedule will not alternate to provide some consistency for the parties and the Children to make plans.
5. The regular parenting schedule shall be suspended, in part, during the school summer vacation to allow each Mr. S. and Ms. C. to have an uninterrupted 14-day period of parenting time in which to travel with the Children. Mr. S. shall have first choice of his two-week block in odd years and Ms. C. shall have her first choice her two-week block in even years. Each party must communicate their choice to the other in writing by March 31 of each year. This should give sufficient time to take into consideration any camps or other special plans the Children may have for the summer months.
6. The regular parenting schedule shall not be suspended or altered for Jewish high holidays. While recognizing that these events are of notable significance to the parties and the Children given their faith, the fact that these dates vary from year to year creates difficulty in trying to coordinate and balance with the regular parenting schedule. In this regard, I specifically reviewed the calendar until 2025 and I can already foresee multiple conflicts. Despite the significance of these events, this degree of uncertainty is not in the best interests of the Children. As I will set out below, the parties remain free to make their own arrangements for these holidays but subject to written agreement, the regular parenting schedule or the holiday parenting schedule, whichever is applicable, will govern. It may be that in a given year one parent has the benefit of celebrating more of these holidays, but I conclude that will generally be balanced over the long term if one takes a big-picture approach.

[160] Further, there shall be a specific term that all of these orders are subject to variation based upon written agreement of the parties. That written agreement can be through email. This will allow the parties some flexibility to adjust the parenting schedule as the Children age and due to obligations that the parties may have outside of parenting.

[161] In making the foregoing orders, I am very cognizant that Children's views are relevant, having regard to their maturity and other considerations. There is a reason this is a specifically enumerated factor under s. 37(2)(b) of the FLA. These orders are not intended to endorse the blanket proposition that children can simply "walk with their feet" or "drive the bus". However, as the parties have been unable to agree on a parenting plan for the Children, the Court has been required to fashion one. I have made considerable efforts to try and fashion one that balances all of the relevant considerations under ss. 37 and 38 of

the FLA, including the views of the children, with the intention it will be complied with and the hope that compliance with it will assist in reducing the conflict in both households and between the Children.

Guardianship and Parenting Responsibilities

- [162] Both parties are presumptive guardians of the Children pursuant to s. 39 of the FLA. This was not disputed. I shall thus make an order confirming that the parties are both guardians of the Children and a further order that, in the event of the passing of either parent while any of the Children remain under the age of majority, the surviving parent shall be the sole guardian of the Children.
- [163] As both parties are guardians, the next issue to address is the allocation of parental responsibilities under s. 41 of the FLA.
- [164] In light of the obvious communication challenges between the parties, the shared exercise of parenting responsibilities is not practical, as I have identified above. At present, the parties are effectively parallel parenting and the Children, A. and S, particularly, are being used as messengers.
- [165] Given that the Children shall remain primarily resident with Ms. C. pursuant to the parenting plan I have crafted, I conclude it is appropriate that Ms. C. shall have final decision-making authority when exercising the parenting responsibilities for all major decisions. Ms. C. shall, however, have an obligation to consult with Mr. S. before exercising that authority. I will address their method of communication in the form of a conduct order.
- [166] Each party shall still obviously be entitled to exercise the day to day parental responsibilities when the Children are in their care.
- [167] Finally, for major decisions where Ms. C. has exercised her final decision-making authority, Mr. S. retains his right of review pursuant to s. 49 of the FLA.

Travel

- [168] The parties travelled with the Children during the relationship, including to Israel.
- [169] Mr. S. in particular has expressed an interest in future travel with the Children.
- [170] Within the confines of the parenting schedule, or as such schedule as may be modified by the parties pursuant to a written agreement, this travel is likely in the Children's best interests and should not be discouraged.
- [171] To facilitate this, I am going to make the following orders:
1. Notice of any travel outside of Canada must be given in writing no less than 60 days before the proposed date of departure unless otherwise agreed.

2. The notice must include the proposed destination and the proposed dates of travel. It must also include an alternate telephone contact in the event the travelling parent cannot be reached on their cellular phone. The notice shall be accompanied by a travel consent form.
3. The parent receiving the notice shall respond within seven days as to whether they consent to the travel. Consent shall not be unreasonably withheld.
4. If the travel is consented to, the parent receiving the notice shall return a signed travel consent form with 14 days of receiving the notice.
5. As the primary resident parent, Ms. C. shall hold all passports for the Children but shall provide them in a timely way for all approved travel with Mr. S.
6. Mr. S. shall return the passports to Ms. C. within seven days of any approved travel.

Conduct Orders

- [172] The parties do not communicate well. This will already be apparent from a review of these reasons for judgment. They would strongly benefit from receiving or continuing to receive some counselling or other professional support as to how best to communicate with each other regarding the Children, particularly since D. is still only 8 years of age and there are many years of parenting remaining.
- [173] However, family resources are limited and the cost of living in the Lower Mainland is high. As such, I am not going to order that they engage in such counselling. It is made as a recommendation only.
- [174] It is clear, however, that parameters on communication must be set in order to avoid a retreat back into the period immediately following separation where the communication on behalf of Mr. S. was wholly inappropriate and necessitated the court's intervention through the Protection Order. Mr. S. is also entitled to be notified by Ms. C. about material events involving the Children when they are in his care and not have to rely on that information being relayed by one of the Children.
- [175] I shall make the following conduct orders pursuant to s. 222 of the FLA:
1. The parties will not disparage each other in front of the Children.
 2. The parties shall put the best interests of the Children before their own.
 3. The parties shall encourage the Children to have a good relationship with the other parent and speak to the Children about the other parent in a positive and respectful manner.
 4. The parties will make a genuine effort to maintain polite, respectful communications with each other and to refrain from any negative or hostile criticism, communication or argument in front of the Children or in any public forum.

5. Mr. S. will not engage the Children to pass any messages to Ms. C., which includes having the Children pass child support payments to Ms. C. Ms. C. will not engage the Children to pass any messages to Mr. S.
6. The parties will only communicate with each other by text message or email.
7. The parties' emails or text messages to each other and to the Children must deal only with issues concerning the Children.
8. Mr. S. will not include any commentary on Ms. C., the parties' separation or this litigation in any public forum, including social media.
9. Ms. C. will not include any commentary on Mr. S., the parties' separation or this litigation in any public forum, including social media.
10. The parties will not interrogate the Children about the other parent or their time spent with the other parent.
11. The parties will not discuss any inappropriate adult, court or legal matters with the Children.

Determination of Guidelines Income

[176] In order to assess child and spousal support, I must determine an income under the Guidelines ("Guideline Income") for each party.

[177] Ms. C. has been a T4 salaried employee since she returned to the workforce. There is no suggestion that she has any other possible sources of income or that she is not reporting all of her income. Having regard to her Master's degree, it was submitted by Mr. S. that she is not necessarily employed in a capacity that fully maximizes her income-earning capacity. For the purposes of spousal support, I have taken this into consideration.

[178] For the purposes of child support, and s. 7 special and extraordinary expenses under the Guidelines, Ms. C.'s Guideline Income is as follows:

- a) 2017 - \$23,321
- b) 2018 - \$26,743
- c) 2019 - \$36,209
- d) 2020 - \$25,137
- e) 2021 - \$36,979.

- [179] Further, according to her Form F8 financial statement sworn December 22, 2022, her anticipated employment income for 2022 was \$36,805. Having regard to the nature of her employment and her pattern of income, I accept this as accurate. Ms. C. also receives the Child Tax Benefit and BC Family Bonus which currently amount to an additional \$20,614.93 per annum.
- [180] In light of my conclusion that the Children will be primarily resident with Ms. C., Ms. C. will continue to be eligible for said benefits although their quantum may change from time to time and with the age of the Children.
- [181] Mr. S. served in the military in Israel before moving to British Columbia prior to the relationship.
- [182] Mr. S. admits to be trained as an electrician and having worked generally in that capacity during the course of the parties' relationship. He denies holding his red seal designation as an electrician. However, his evidence was that due to his military background, he often took on a leadership role in the projects where he was employed and that this resulted in him earning somewhat greater income than might otherwise been available to him.
- [183] Mr. S.'s reported taxable income in the last 7 taxation years was as follows:
- a) 2016 - \$76,188
 - b) 2017 - \$63,355
 - c) 2018 - \$65,992
 - d) 2019 - \$73,614
 - e) 2020 - \$44,237
 - f) 2021 - \$5,200
 - g) 2022 - \$0.00.
- [184] If one considers Mr. S.'s reported pattern of income for the years 2016 to 2020, it results in an average income of \$64,667.
- [185] In this regard, I refer to the decision of our Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246, which stands for the proposition that the application of averaging to income determination is very fact-specific and depends on fairly calculating the amount of income reasonably available to pay child support. Section 19 of the Guidelines gives the court a broad discretion: para. 23. Under that discretion, the court may consider a five-year average if appropriate in the circumstances, including if the payor's income is fluctuating: paras. 35-37.

- [186] Mr. S. is also engaged in the practice of gathering bottles, cans and other recyclable materials. He has been doing so since in or about 2006. His evidence was that he currently generates approximately \$1,000 per month, or \$12,000 per year, from these efforts.
- [187] Mr. S. does not report the revenue received from his recycling efforts on his tax returns. For the reasons I will set forth, I conclude that it is clearly income. The question though is whether it ought to be grossed up to reflect the fact that it is not subject to taxation.
- [188] This raises an interesting legal question, on which no caselaw was referred to me (apart from law on the general imputation of income principles under s. 19 of the Guidelines). There was no other caselaw which I could locate through my own, albeit not entirely exhaustive, research on this issue.
- [189] As a starting point therefore, s. 19 of the Guidelines provides as follows:

Imputing income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

- [190] Although I could not find any cases directly on point, s. 19 of the Guidelines clearly recognizes that it is not entirely fair to compare a payor of support who reports every dollar of their income and pays tax on that income to an individual who does not report all of

their income for taxation purposes. There is no requirement that this conduct be done with bad faith. The most obvious example in this regard is a payor who receives non-taxable disability benefits. There is no misconduct inherent in the receipt of benefits to which one may be entitled which are not subject to taxation. However, those benefits are appropriately grossed up when calculating support to put those payors on par with individuals who do report their income and pay tax accordingly.

- [191] A. more common and often vexing example is where individuals who are self-employed claim deductions against their income for expenses that may have a personal component or provide a personal benefit not directly tied to their self-employment. These expenses may not be scrutinized when assessing the payor's tax filings, but it again may be necessary to add back some or all of these expenses to the payor's Guideline Income to put them on par with payors who are not self-employed and do not have the ability to claim the same deductions.
- [192] In making the above comments, I want to make specific reference to the Court of Appeal's direction on this issue in *Marquez v. Zapiola*, 2013 BCCA 433:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).
- [193] It is, as I referenced before, also important to recognize that a finding of bad faith is not necessary to impute income: *Yeung v. Silva*, 2016 BCSC 1682 at para. 46.

- [194] In this case, I accept that it does not constitute income to return one's own recycling. A deposit is paid at the time of purchase and deposit is returned when the item is recycled. It is a net gain analysis. Further, when one hosts a private social event and invitees were to bring their own beverage containers which the host then recycles, I cannot see this as constituting income. The host likely provided some benefits to the guest commensurate to the value of recycling the containers and the host's recycling of the containers is environmentally advantageous. Stated another way, it would seem very unusual for each individual at a private social function to come equipped with their own recycling bags. Where a social host in this situation returns the recycling and potentially obtains a refund which may slightly exceed their costs associated with the social function, I cannot accept that this would be treated as constituting part of their Guideline Income for support purposes. And even if it was, it would be a very nominal amount.
- [195] Where one recycles materials which they did not purchase and which did not come into their possession through a similar social host scenario described above or where the recycling maybe solely for charitable purposes, the analysis is different. In these situations, it must be considered whether the recycling efforts are being done on a "for-profit" basis.
- [196] In this case, Ms. C. misunderstood a question that was being asked of her by Mr. S. during cross-examination. However, the answer to the question she thought she was being asked quite firmly rebutted any suggestion that Mr. S. is or was a regular consumer of alcoholic beverages. Her paraphrased response to the question she mistakenly thought was being asked, said with somewhat of a chuckle, was "you are not a drinker". This was consistent with the other evidence tendered at the trial by Ms. C. - which while critical of Mr. S.'s conduct in other respects in no way even remotely suggested a concern about alcohol use or misuse.
- [197] With this factual background, it is simply implausible that Mr. S. is purchasing a sufficient amount of beverages for personal use or hosting enough social events in his relatively small square footage accommodation to generate \$12,000 per annum in recycling.
- [198] In these specific circumstances, I have to conclude that Mr. S. is generating income from his recycling efforts and that this must be included in the analysis of determining his effective Guideline Income.
- [199] Further, the overarching principle for imputing income under s. 19(1)(a) is that of reasonableness, having regard to the needs of the child or children and the earning capacity of the spouse: *T.K. v. R.J.H.A.*, 2015 BCCA 8 at para. 81.
- [200] Given that Mr. S. has not reported on his T1 Personal Income Tax Returns, I have absolutely no evidence as to what the expenses associated with this income would be. I am going to take judicial notice that time and perseverance are likely the greatest generator of this income but there are some modest expenses such as bags, gas, plastic gloves and so forth.

- [201] Having regard to this, my conclusion in this regard is that I find Mr. S. is capable of earning \$10,000 per annum as a result of his recycling efforts and that this amount needs to be grossed up to put it on par with taxable income.
- [202] Apart from his recycling efforts, Mr. S. was, as noted above, historically employed as an electrician. There were some fluctuations in his income, but those fluctuations were generally within a fairly modest range and appeared consistent with the reality that working in construction does have, for most individuals in the industry, some degree of ebb and flow due to the nature of the industry. This was not strongly challenged by counsel for Ms. C. who proposed an average Guideline Income of \$70,000 be utilized.
- [203] The difficulty is that Mr. S. has not been employed or self employed as an electrician since 2020.
- [204] Further, in 2022, Mr. S. reported \$0 in employment income.
- [205] Despite this, Mr. S. did pay interim child support for the Children in accordance with the order of Justice Wilkinson in the amount \$1,422 per month. The manner in which he paid this support is a matter upon which I will address in due course and there is a live issue as to retroactive adjustment; but it is conceded Mr. S. paid the court ordered interim support since the date the order was made.
- [206] When asked, however, on cross-examination as to who it was that he did not earn any income 2022 but still managed to pay his child support, he provided a somewhat remarkable answer. Specifically, Mr. S. testified that he was not employed because he was occupied watching all 22 seasons of the American television show "Law & Order" in order to prepare to be self-represented at this trial.
- [207] An obiter comment this Court has for other individuals who find themselves having to be self-represented in family law matters is that attending at a British Columbia courthouse to watch a justice of this court preside over a family trial is very likely more effective and far less time-consuming trial preparation. Simply put, the actual process of conducting a family trial in British Columbia is markedly different than what a court looks like on television, particularly American crime-based television.
- [208] I thus find that Mr. S.'s explanation for how he spent his time in 2022 is creative but not objectionably reasonable having regard to his obligation to use his skillset to generate an income to appropriately provide support for the Children.
- [209] A further complicating factor in considering this issue is that Mr. S. was involved in a motor vehicle accident in late 2018. That matter is set for trial, I was advised, in May of 2023. I infer that there is a claim for past loss of wages along with other heads of damages being sought but the actual evidence tendered on this was scant.

- [210] I am certainly not in a position to make any findings of fact as to the extent of the injuries Mr. S. sustained in the motor vehicle accident. That will be the sole purview of the trial judge in that action.
- [211] I do accept that Mr. S. was involved in a motor vehicle accident and is receiving ongoing treatment in this regard.
- [212] Mr. S. has also fairly recently been diagnosed with type 2 diabetes. I do have confirmation of this of this in a letter dated August 12, 2021 from his family physician, Dr. E. Cadesky. Although not properly tendered as an expert report, I ultimately agreed to accept certain portions of this letter as admissible for the truth of their contents in the circumstances. It was marked as Exhibit 4.
- [213] Specifically, I note the following paragraphs from Exhibit 4:
- 4) [Mr. S.] is now a 48 year old man trained [as an] electrician whose medical history includes type 2 diabetes mellitus ("diabetes"), psoriasis, and a concussion suffered in a car accident [in] December 2018.
- ...
- 6) [Mr. S.] was next seen on May 6, 2020 for diabetes care and follow up of left knee inflammation after a fall. He had received intravenous antibiotics in case of infection, but consultation with the rheumatologist Dr. Kam Shojania suggested a purely inflammatory cause.
- ...
- 12) On April 12, 2021 I called [Mr. S.] to review his positive COVID test from the previous day.
- ...
- 16) The concussion [Mr. S.] suffered in December 2018 caused intermittent headaches but there was no report that they were frequent or severe enough to impair him from working between January 2020 and present.
- 17) [Mr. S.'s] left knee monoarthritis after the fall in April 2020 did impair him from working due to pain and limited range of motion.
- 18) Since January 2020 Mr. S. has successfully controlled his diabetes and there have been no reports of hyper- or hypoglycemic episodes that impacted his ability to work.
- 19) Neither the skin lesions nor the plantar wart impacted [Mr. S.'s] ability to work [these visits are noted earlier in the letter as being in October 2020 and July 2021].
- [214] In making the following findings of fact, I also note for purposes of the record that at one point during the trial Mr. S. became quite visibly unwell in a short period of time approaching the lunch break. He advised the Court, and I am paraphrasing in this regard, that his blood sugars were off, that he was not feeling himself and that he needed to take his

medicine. Court was adjourned somewhat early for the morning and when court resumed in the afternoon, Mr. S. was in much improved form and able to continue with the trial. This event appeared, from my observation, entirely genuine and consistent with the fact that he is dealing with the challenges of managing his blood sugars associated with his diagnosis of type 2 diabetes. I have no concern that this was contrived or feigned for some perceived strategic advantage.

- [215] However, although I accept that Mr. S. was involved in a car accident that may have resulted in injuries and is dealing with the management of his diagnosis of type 2 diabetes, I have no evidence before me whatsoever which supports a conclusion that Mr. S. is unable to work.
- [216] To the contrary, I accept that Mr. S. has been historically capable of earning an income of \$70,000 per annum. I make this finding recognizing the fact that Mr. S. does have health challenges which may result in him having to be absent from work or require certain workplace accommodations which address these challenges. I also recognize that Mr. S. acknowledges that he has the ability to earn at least \$1,000 per month from his recycling efforts. This is revenue that, as noted above, Mr. S. does not report on his tax return. If it was reported, it would be subject to taxation. Having regard to all of these factors, I am satisfied that Mr. S.'s imputed Guideline Income shall, pursuant to s. 19 of the Guidelines, be set by this Court at \$70,000.
- [217] In the event that all of the Children attended for the parenting time ordered, Mr. S. could potentially argue for a set-off of child support under s. 9 of the Guidelines.
- [218] I raise this as Mr. S. is, as noted, self-represented and did not specifically make an express argument on this point as Mr. S.'s focus was on his submission that there should be equal parenting time for all the Children.
- [219] In my view, and having regard to the circumstances, particularly having regard to the prescribed opportunities I have given to A. and S. to exercise autonomy over the parenting schedule, I conclude that the parenting schedule which I have ordered does not meet the threshold required by s. 9 of the Guidelines. To do so would require a slavish counting of hours over the course of a year. This practice has been discouraged: *Berry v. Hart*, 2003 BCCA 659 at para. 10.
- [220] Rather, the Children shall be considered primarily resident with Ms. C. for child support purposes and I shall set child support accordingly. In reaching this conclusion, I also do not want there to be any motivation by either parent to interfere with the parenting regime which I have, upon reasoned reflection, decided to implement. That just would exacerbate the challenges the Children have had to handle given the circumstances of the separation and subsequent events, and would be detrimental to their best interests.

[221] Accordingly, I shall order that commencing March 1, 2023 and continuing on the 1st of each month thereafter unless varied by written agreement of the parties or further court order, Mr. S. shall pay Ms. C. basic child support for A, S. and D. in the amount of \$1,422 per month.

Variation or Review Child Support

[222] As is always the case, child support is subject to variation based upon a material change in circumstances: *Willick v. Willick*, [1994] 3 S.C.R. 670. This is also expressly contemplated in s. 152 of the FLA.

[223] Further, the Guidelines specifically permit a parent to seek financial disclosure from the other upon written request: Guidelines, s. 25.

[224] However, given that I have founded my order for child support on the basis of an imputed income, I do not consider this an appropriate situation to make a mandatory exchange of tax returns and a corresponding mandatory annual review of child support. The cost of doing same is likely, absent a material change in circumstances, more than any possible adjustment to child support having regard to Mr. S.'s historical income pattern.

Section 7 Expenses

[225] Turning to s. 7 expenses, the Children, as noted, all attend private religious schools. The parties are each eligible for subsidies for that tuition based upon their own individual circumstances and, I understand, provide certain financial information to determine what subsidy they are eligible for on an annual basis. As such, I am not going to order that there be a proportionate sharing of the tuition for the Children under s. 7 of the Guidelines. That would simply further complicate matters.

[226] Rather, I shall order that the parties will each be responsible for their own respective portion of the Children's private school tuition without contribution from the other.

[227] Apart from private school tuition, the s. 7 expenses of the Children are quite modest. One way of dealing with this would be to have the parties agree on the expenses with a proviso that consent not be unreasonably withheld. The difficulty with this order in these circumstances is that it renders it effectively unenforceable through the Family Maintenance Enforcement Program ("FMEP") as FMEP is not in a position to determine where consent is or is not unreasonably withheld. This means the issue would have to come back before the court.

- [228] In the circumstances, having regard to the parties' Guideline Incomes and the limited nature of the s. 7 expenses for the Children other than their tuition which I have separately addressed, I consider it appropriate to fix a monthly amount for s. 7 expenses which shall be added to Mr. S.'s monthly child support. Ms. C. can then collect that amount through FMEP and spend it on s. 7 expenses at her discretion without need for consultation and reporting.
- [229] Specifically, I order that in addition to his obligation to pay basic child support, Mr. S. shall pay the sum of \$128 per month commencing March 1, 2023 and continuing on the 1st of each month thereafter as his contribution to the Children's s. 7 expenses. This will bring his total child support obligation, apart from his independent contribution to private school tuition, to \$1,550 per month.
- [230] In addition to this obligation to pay \$1,550 per month, the parties are of course able to agree, in writing, to share additional expenses for the Children. This might include, for example, participation at the Maccabiah Games in Israel, an activity which I heard evidence at trial that A. might wish to participate in. However, that will have to be a decision that the parties make jointly based upon their resources, other resources which may be available (fundraising, bursaries, subsidies, contributions from the child) and the benefit to the child from the expense. I am not prepared to presumptively order that anything beyond the \$128 contribution to special expenses and separate payment of private school tuition falls within the scope of s. 7, having regard to the means of the parties and the needs of the Children.
- [231] Finally, it is clear that post-secondary education is a real possibility for the Children. A. in particular appears to have lofty educational goals. However, given the ages of the Children it is simply not possible to foresee what their possible post-secondary plans will be, what the anticipated costs will be, what scholarships or bursaries may be available, what the parties' incomes may be at that time and so forth.
- [232] As such, I am making no order with respect to the proportionate sharing of future post-secondary expenses on the basis that each party remains at liberty to bring this issue before the court in the future as the Children mature and once there is evidence available to be tendered to allow a fulsome consideration and proper determination.

Form of Payment of Ongoing Child Support

- [233] Since ordered to do so by Justice Wilkinson, Mr. S. has made all his required interim child support payments as noted above.
- [234] However, the means of which he has done so are problematic. Specifically, with what I understand to be the exception of three months (it is possible it is now four months but this distinction is immaterial) where he paid via e-transfer, Mr. S. has paid his child support by sending cash with the Children.

- [235] Further, the cash is not large bills discretely placed in an envelope and tucked in the pocket of a backpack. Rather, Mr. S. has paid child support in the form of predominately, if not exclusively, \$5 bills which are duct taped together in a bundle. Considering the amount of support, the bundle is quite large and I have photographic evidence before me demonstrating this.
- [236] This manner of payment in cash using the Children as a courier is notwithstanding that Ms. C. has enrolled in FMEP.
- [237] Suffice to say, this conduct runs directly afoul of one of the key concepts taught in the Parenting After Separation course and is not condoned by this Court.
- [238] I am thus going to specifically order that, effective March 1, 2023, Mr. S. shall pay his child support and s. 7 expense contribution to Ms. C. exclusively via e-transfer or directly to FMEP, which entity shall then be responsible for remitting the funds to Ms. C. Either is acceptable and Mr. S. may determine which option he prefers or is more convenient to him. Under no circumstances going forward should the child support be paid via or through the Children.

Retroactive Child Support

- [239] Mr. S. voluntarily only made one child support payment in the amount of \$500 between the date of separation and the interim order of Justice Wilkinson.
- [240] Mr. S. has, again as noted, made all the child support payments since the interim order of Justice Wilkinson.
- [241] Further, I heard evidence that the application for interim child support was adjourned on multiple occasions due to a lack of court resources/court time but that Mr. S. did attend in court on each occasion when the matter was scheduled.
- [242] The application for interim child support was also not filed until October 4, 2021.
- [243] In noting this, I recognize that Mr. S. was formally on notice of a claim for child support effective upon service of the notice of family claim.
- [244] However, I also accept Mr. S.'s evidence that he was waiting for the court to tell him what to pay as child support and since that time has respected the order made by making his payments, albeit his method of doing so was problematic.
- [245] The law on retroactive child support is very well settled by the Supreme Court of Canada where there is an agreement or court order in place. The success of an application for a retroactive change in support depends on the occurrence of a material change in circumstances from when the original amount was set: *D.B.S. v. S.R.G.*, 2006 SCC 37; *Colucci v. Colucci*, 2021 SCC 24.

- [246] It is more complicated in this type of situation where there is a delay in bringing on an application for interim support between the commencement of proceedings and trial.
- [247] Balancing all of the relevant factors and the primary considerations, I find that there was no blameworthy conduct apart from not voluntarily paying support. Mr. S. has made the requisite basic financial disclosure and Ms. C. was aware of his Guideline Income generally in any event. Although there were variations from year to year in Mr. S.'s income prior to separation, his income (apart from recycling efforts) was all reported and the nature of working in the construction industry inevitably gave rise to some fluctuations.
- [248] The other key consideration is the Children's circumstances during the material time when retroactive support is being sought. This was a challenging time for the Children emotionally as I have already addressed. There is no doubt that they occasionally wanted for items that were financially outside of the family budget, particularly given the change in family circumstances. However, there is no evidence before me that the Children were notably financially disadvantaged. They continued to attend private school and participate in activities of their choosing. Each parent provided housing, clothing and other necessary items for them. Mr. S., while having the benefit of remaining in the Former Family Residence after separation, was paying for the costs associated with that residence, and was not otherwise living an extravagant or luxurious lifestyle to the detriment of the Children.
- [249] In this regard, I do note that Ms. C. is not seeking to impute additional income to Mr. S. beyond that imputed by Justice Wilkinson. So this is not a situation where an arguably low income was used for interim support on a "rough justice" analysis: *Kozek v. Kozek*, 2009 BCSC 1663 at para. 11. Rather, the Guideline Income for interim support here is the same as the income sought for final order purposes.
- [250] The final factor to address is financial hardship of the payor upon making a retroactive award for child support. There is a finite pool of funds from the sale proceeds of the Former Family Residence available for distribution. Ms. C. seeks in addition to claims relating to the division of those net sale proceeds, spousal support. Her spousal support claim, as I will address below, has merit. However, I conclude that in all of the specific circumstances of this case, it would be a hardship to Mr. S. to impute him a Guideline Income for prospective support, order him to pay spousal support and obligate him to pay retroactive child support in a situation where there is no evidence that the needs of the Children, who are the individuals entitled to the right of support, were not adequately being met while the issue of interim support was pending determination by the court.
- [251] On the basis of the foregoing, the claims by Ms. C. for retroactive child support, both basic child support and contribution to s. 7 expenses, are dismissed.

[252] I presume it is obvious, but for the record and given that Mr. S. is self-represented, all voluntary payments that Mr. S. made prior to the order of Justice Wilkinson shall be retained by Ms. C.

Sale of the Former Family Residence

[253] Upon separation, as indicated, Ms. C. moved out of the Former Family Residence and Mr. S. continued to reside there and was solely responsible for the costs associated with same.

[254] Mr. S. was disinclined to agree to the sale of the Former Family Residence. He acknowledged as much. Given its location, he had a vision that it should be maintained for the future benefit of the Children. However, that simply was not realistic or practicable.

[255] As such, an order was ultimately obtained for the sale of the Former Family Residence.

[256] There were some challenges with the listing process and I accept that these challenges, combined with the delay in listing the property at first instance, may have possibly resulted in some loss in value of the property due to changing market conditions.

[257] However, I have no evidence to possibly quantify any such loss and the conduct of Mr. S. in this regard was somewhat difficult but not egregious.

[258] I also must underscore the high threshold which applies for making an order of unequal division under s. 95. This was very succinctly stated by the Court of Appeal in *Singh v. Singh*, 2020 BCCA 21:

[134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.

[259] As such, I cannot conclude that the process of listing and sale of the Former Family Residence can ground a claim for unequal division on the basis of significant unfairness under s. 95 of the FLA.

Properties in Israel

[260] Both parties also allege that the other holds some form of ownership interest in real property in Israel.

[261] The evidence in this regard was not satisfactory to make any finding, on the requisite balance of probabilities, that either party currently holds a legal or beneficial interest in any properties in Israel.

- [262] The evidence does indicate that both parties have potential contingent future interests in properties in Israel which they may ultimately receive by inheritance or right of survivorship. However, as of the date of separation, which is the relevant triggering event under the FLA, I am not satisfied that either party has proven, again on a balance of probabilities, that the other actually held a legal or beneficial interest in any property in Israel as at the date of separation.
- [263] Further, even if I am wrong in that conclusion, neither party lead any reliable evidence whatsoever as to the value of these interests and so I have not taken any possible Israeli property interests into consideration in dividing the family property pursuant to Part 5 of the FLA or as being capable of grounding a claim for unequal division on the basis of significant unfairness under s. 95 of the FLA.

Division of Family Property

- [264] On the basis of the foregoing conclusions, I am going to proceed with equally dividing the family property between Ms. C. and Mr. S. pursuant to s. 81 of the FLA.
- [265] I recognize that both parties may consider this to be unfair. I do not agree. Even if equal division is unfair, that is not enough to deviate from the presumption in favour of equal division. This Court only has the discretion to deviate in the event of significant unfairness: Singh at paras. 129-34. No such significant unfairness exists in this case.
- [266] Turning then to the practical mechanics of the equal division of the parties' family property.
- [267] The Former Family Residence was ultimately sold on or about December 12, 2022. The net sale proceeds of approximately \$325,000 are held in trust by counsel for Ms. C. I say approximately as there were some developments during trial to pay out some modest sums to the real estate agent for out-of-pocket expenses and the return of some additional funds. There is also interest accruing. The sum total of these adjustments is in the range of approximately \$2,000 and I again confirm that I do not consider them to be material to my conclusion as to whether equal division of the net sale proceeds is fair or significantly unfair.
- [268] The final asset to be dealt with is a pin that belonged to Mr. S.'s grandmother. Ms. C. is in possession of the pin currently. She maintains it was a gift. On the basis of the evidence, it is clear Mr. S. provided the pin to Ms. C. She did not acquire it by inappropriate or dishonest means. However, I also cannot conclude that Mr. S. actually intended to gift the pin to Ms. C. in the manner that the law defines a gift. Specifically, a gift is irrevocable in law and equity: McKendry v. McKendry, 2017 BCCA 48 at paras. 31-33.

- [269] Having regard to the sentimental value of this pin to Mr. S., I accept that it was provided to Ms. C. for her use during the relationship and that upon the dissolution of the relationship, it should be returned to Mr. S. Mr. S. can decide in the future how he wishes to deal with the pin so as to preserve the heirloom within the family.
- [270] Ms. C. shall thus be ordered to provide the pin to her counsel within 30 days of these reasons for judgment and Mr. S. shall make arrangements with her counsel to pick up the pin from his office, including signing an acknowledgement of receipt. I expressly do not want the pin sent with any of the Children during parenting exchanges.
- [271] In the alternative, in the event my conclusion regarding the intention to gift or not to gift the pin is incorrect, there is no reliable evidence before me as to the fair market value of this pin. Rather, I conclude that it has sentimental value alone and as such it does not factor into my overall division of family property.

CPP

- [272] Apart from fairly nominal amounts in their personal bank accounts which the parties shall retain without claim by the other, the sole remaining asset are their contributions to the Canada Pension Plan during the relationship.
- [273] Canada Pension Plan credits are presumptively equally divisible. Having regard to the traditional nature of the parties' relationship, I can see no reason why this would be departed from. In addition, no submission in this regard was made at trial.
- [274] Accordingly, I shall order that the parties' Canada Pension Plan credits between January 25, 2009 and July 3, 2019 shall be equally divided and that the parties shall provide the other, or their counsel, with any information or documents necessary to implement this division within 30 days of any written request for same.
- [275] I recognize that I have utilized the date of the parties' religious marriage instead of the date of cohabitation and that cohabitation may have, on the somewhat vague evidence of the parties, actually started a month or so prior. I consider this distinction immaterial in these specific circumstances and have exercised my discretion to utilize the date of their religious marriage ceremony as the relevant date of official cohabitation. This is also consistent with the pleadings of Ms. C., who is the party that will benefit most, I presume, from the division of CPP benefits given her time spent out of the workforce caring for the Children. Fortunately, there is no controversy over the date of separation and the end date for benefit splitting can be simply set as July 3, 2019.

Spousal Support

- [276] Sections 161 and 162 of the FLA provide the framework for this Court to make awards of spousal support in marriage-like relationships. Specifically, ss. 161 and 162 provide as follows:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[277] The seminal case on entitlement in this province is *Chutter v. Chutter*, 2008 BCCA 507. Its principles are well known, so I will only briefly refer to the following passages:

[47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).

[48] The claim for spousal support in this case was advanced on compensatory and non-compensatory support principles.

[49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (*Bracklow*, at para. 27; *Moge*, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (*Bracklow*, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (*Moge*, at 864).

- [278] Turning to the facts, Ms. C. obtained a Master's degree prior to the birth of A. and S.
- [279] It was a very difficult pregnancy and Ms. C. was on bedrest for substantially all of her pregnancy, had to go undergo a high-risk surgery and ultimately delivered the twins, A. and S, prematurely.
- [280] There were then certain health challenges arising from their premature birth on top of the obligations of being the primary caregiver to two infants.
- [281] There was a period of mild reprieve when A. and S. were through their toddler years before Ms. C. became pregnant with D. who, as noted, was born in June 2014, roughly 5 years after A. and S.
- [282] Ms. C. then did not return to work until 2017.
- [283] I am satisfied that Ms. C. remained out of the workforce to be the primary caregiver of the Children whilst Mr. S. was acting as the sole breadwinner for the family during this time was a joint decision. The cost of child care would have also been a significant drain on the family finances, probably offsetting a fairly significant portion of Ms. C.'s income, at the very least in the early years.
- [284] As a result of this joint family decision, Ms. C. did not have the opportunity to pursue career opportunities that may have been available to her having regard to her level of education. This was to her detriment. As such, I conclude that Ms. C. has established a prima facie entitlement to spousal support on a compensatory basis.
- [285] I cannot conclude, however, as suggested by counsel for Ms. C. that Ms. C. advanced the career of Mr. S. apart from acting as the primary caregiver for the Children. Mr. S. was already trained as an electrician when the parties met. His income in the years leading up to separation was fairly consistent. He generally had work hours that allowed him to be home in the late afternoon and be engaged with the Children. But for the role of Ms. C., Mr. S. would have had to incur child care costs for the Children when he was working and they were not at school. Those costs would not have been insignificant as I have noted above. However, Mr. S. would still have been able to maintain the same type of employment.
- [286] Ms. C. has, as noted, returned to the workforce. She is employed on a full-time basis in a job that she appears to enjoy. She provides a valuable role in the community working to facilitate access to mental health services.
- [287] Her income in 2017 was approximately \$23,000. It has risen over the years to approximately \$36,000 at present but not in a way one would generally find commensurate with her level of education, particularly given that she works full-time (or hours that would hover at best at very slightly below full-time).
- [288] A further complicating factor is that based upon the parties' incomes and the child support I ordered, the Spousal Support Advisory Guidelines provide a range of \$0 to \$0. This is without even taking into consideration the parties' contributions to the private school costs

for the Children and the other s. 7 expenses which I have summarily fixed. This would otherwise impact the parties' net disposal incomes which is an important component of determining the appropriate quantum of spousal support but cannot reduce the range below \$0.

[289] One option in the circumstances would be to have Mr. S. pay nominal spousal support of \$1 per month until such time as there was a material change in in the parties' financial circumstances, including a reduction in child support, which would permit an application by Ms. C. to vary the quantum of spousal support.

[290] Having regard to the challenging relationship between the parties, however, I have concluded that this is not the most appropriate remedy in the circumstances. It will almost inevitably bring the parties back to court and consume resources better utilized for the Children.

[291] Instead, I have concluded that, given my finding of entitlement to spousal support and my concerns about complicating ongoing interactions between the parties, it is appropriate to make a lump sum spousal support award which will, inter alia, assist in facilitating a clean break between the parties on this issue.

[292] I reach this conclusion primarily for three reasons:

- a) Firstly, as I have made clear on multiple occasions in these reasons, the parties do not communicate well and their interactions are difficult. Requiring payment of ongoing support on a monthly basis, in addition to child support, is likely not going to assist in improving the relationship between the parties who still need to co-parent in accordance with my other orders;
- b) Secondly, I have based my support calculations on an imputed Guideline Income for Mr. S. The reality is that Mr. S. does not currently actually earn this income. As such, the tax deductibility of periodic support is not beneficial to Mr. S.; and
- c) Thirdly, Ms. C. is gainfully employed on a full-time basis. If she receives periodic spousal support, she must pay tax on payments. This does not make practical sense given that there is not, in this particular situation, the present ability to claim the corresponding tax deduction.

[293] The caselaw further confirms that I have the discretion to award lump sum support in circumstances where it is appropriate: *Parton v. Parton*, 2018 BCCA 273 at paras. 46-47.

[294] In terms of the quantum of lump support, Ms. C. is well-educated. She is also, as noted, employed on a full-time basis. She is only 49 years of age and there was no evidence led of any medical issues or medical concerns apart from long resolved issues during her pregnancy with A. and S. Rather, the entitlement to support is grounded solely in the fact that Ms. S. did take some significant time out of the workforce to be the primary caregiver for the Children and this resulted in certain financial disadvantage.

[295] Having run various different DivorceMate calculations, I have concluded that the fairest approach is to calculate the lump sum spousal support at \$25,000. This is based primarily on the following inputs which I conclude, in my discretion, to be the most informative having regard to all the circumstances. In reaching this conclusion, I recognize that the DivorceMate calculations are wholly dependent upon the data used and acknowledge that the Spousal Support Advisory Guidelines provide for a range of support and where support, if entitlement is found, varies within that range. The two scenarios I found most instructive are as follows:

- a) Mr. S. has a Guideline Income of \$70,000 and Ms. C. has a Guideline Income of \$36,000. The duration is the mid-point of seven years and ten months. Mr. S.'s basic child support obligation is excluded from the inputs. The range of lump sum spousal support is from \$29,983 to \$40,096 with the mid-point being \$35,084; and
- b) Mr. S. has a Guideline Income of \$70,000 and Ms. C. as a Guideline Income of \$0. The duration is the mid-point of seven years and ten months. Mr. S.'s basic child support obligation of \$1,422 is included in the inputs. The range of lump sum spousal support is from \$2,014 to \$28,819 with a mid-point being \$15,305.

[296] As set out above, I have concluded that lump sum spousal support is appropriate pursuant to ss. 161-162 of the FLA. However, I also have the jurisdiction to make an order for the unequal division of family property in this circumstance, pursuant to s. 95(3) of the FLA. That provision of the FLA provides as follows:

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].

...

- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[297] In this regard, I refer to *Cook v. Cook*, 2021 BCCA 194 which has a helpful summary of the s. 95(3) principles at para. 51. Parton also addresses this issue in a more general way.

- [298] The lump sum spousal support of \$25,000 shall be paid out of Mr. S.'s equal share of the net sale proceeds of the Former Family Residence prior to the distribution of those proceeds to the parties. As lump sum spousal support, these amounts are not taxable in the hands of Ms. C. as their tax treatment has already been considered in determining the quantum of the award.

The Get

- [299] Although there was no expert evidence on this issue, which would have been very helpful to the Court, the Court did allow, as indicated above, an amendment to the notice of family claim during the course of trial to seek orders related to obtaining a Get.
- [300] On the basis of the evidence provided by each party and based on judicial notice of this issue, I understand and accept that Get is a writ of Jewish divorce which terminates a Jewish marriage and enables the former husband and wife to remarry freely under Jewish law. It is a 12-line document, written by hand by a professionally trained scribe under the proper supervision of a Bet Din, or Rabbinic Court (which is a Jewish ecclesiastical court consisting of three rabbis), and signed by two witnesses. Under Jewish law, a Get is presented by a husband to his wife. When she acquires the document, both of them are released from all marital obligations. As I understand, a party must still fulfill the obligations and restrictions stemming from divorce under Jewish or secular law, such as support payments, and custody arrangements.
- [301] To be clear, this court obviously does not have jurisdiction to grant the Get. The question is whether this court has the ability to make orders which require Mr. S. to take the steps necessary to obtain the Get given that Ms. C. is not able to compel Mr. S. to obtain the Get under the FLA as she would under the Divorce Act (assuming she met the criteria for divorce set out in s. 8 of that statute - which is readily apparent she would, upon the pronouncement of my orders relating to the Children and recognizing that it is apparent there is no prospect of reconciliation).
- [302] Further, were the parties civilly married in Canada, the Divorce Act would also provide a remedy to address the religious divorce issue. Specifically, s. 21.1(3) empowers the court to make orders that facilitate a spouse taking the necessary steps to obtain a religious divorce.
- [303] In *Bruker v. Marcovitz*, 2007 SCC 54, the Supreme Court of Canada considered this provision of the Divorce Act in relation to the process of obtaining a Get. Specifically, Justice Abella on behalf of the Court stated as follows:
- [3] A get is a Jewish divorce. Only a husband can give one. A wife cannot obtain a get unless her husband agrees to give it. Under Jewish law, he does so by "releasing" his wife from the marriage and authorizing her to remarry. The process takes place before three rabbis in what is known as a beth din, or rabbinical court.

- [4] The husband must voluntarily give the get and the wife consent to receive it. When he does not, she is without religious recourse, retaining the status of his wife and unable to remarry until he decides, in his absolute discretion, to divorce her. She is known as an agunah or "chained wife". Any children she would have on civil remarriage would be considered "illegitimate" under Jewish law.
- [5] For an observant Jewish woman in Canada, this presents a dichotomous scenario: under Canadian law, she is free to divorce her husband regardless of his consent; under Jewish law, however, she remains married to him unless he gives his consent. This means that while she can remarry under Canadian law, she is prevented from remarrying in accordance with her religion. The inability to do so, for many Jewish women, results in the loss of their ability to remarry at all.
- [6] The vast majority of Jewish husbands freely give their wives a get. Those who do not, however, represent a long-standing source of concern and frustration in Jewish communities (Talia Einhorn, "Jewish Divorce in the International Arena", in J. Basedow et al., eds., *Private Law in the International Arena: From National Conflict Rules Towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000), 135; H. Patrick Glenn, "Where Heavens Meet: The Compelling of Religious Divorces" (1980), 28 *Am. J. Comp. L.* 1; M. D. A. Freeman, "Jews and the Law of Divorce in England" (1981), 4 *Jewish L. Ann.* 276; Bernard J. Meislin, "Pursuit of the Wife's Right to a 'Get' in United States and Canadian Courts" (1981), 4 *Jewish L. Ann.* 250; Mark Washofsky, "The Recalcitrant Husband: The Problem of Definition" (1981), 4 *Jewish L. Ann.* 144; M. Chigier, "Ruminations Over the Agunah Problem" (1981), 4 *Jewish L. Ann.* 207; Shlomo Riskin, *A Jewish Woman's Right to Divorce: A Halakhic History and a Solution for the Agunah* (2006); Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (2001); and J. David Bleich, "Jewish Divorce: Judicial Misconceptions and Possible Means of Civil Enforcement" (1984), 16 *Conn. L. Rev.* 201).
- [7] In response to these concerns, after consultation with the leaders of 50 religious groups in Canada and with the specific agreement of the Roman Catholic, Presbyterian and Anglican churches, in 1990 the then Minister of Justice, Doug Lewis, introduced amendments to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), Bill C-61, giving a court discretionary authority to prevent a spouse from obtaining relief under the Act if that spouse refused to remove a barrier to religious remarriage (s. 21.1). At second reading, the Minister outlined the motivation for these amendments, explaining:

The bill before us today is an amendment to the Divorce Act which would provide a court with discretionary powers to preclude a spouse from obtaining relief or proceeding under the Divorce Act where that spouse refuses to remove a barrier to religious remarriage and where the power to remove the barrier to religious remarriage lies solely with that person. Where the court is satisfied that the spouse who refuses to remove the barrier has genuine grounds of a religious or conscientious nature for doing so, it need not exercise its discretion to grant the remedy provided for in this legislation.

... A spouse should not be able to refuse to participate in a Jewish religious divorce -- called a Get -- in order to obtain concessions in a civil divorce. The Get should not be used as a bargaining tool for child custody and access or monetary support.

... I am concerned about protecting the integrity of the Divorce Act and preventing persons from avoiding the application of the principles contained in the act. For example, a wife may feel compelled to agree to custody arrangements which are not truly in the best interests of a couple's child in order to obtain a Get.

I want to take a few minutes to describe briefly the dilemma certain Jewish persons face because of their religious divorce procedures. In the Jewish religion divorce is accomplished by the delivery of a Get from the husband and its acceptance by the wife in the presence of a Rabbinical Court. According to the Jewish religious traditions, the procedure cannot be changed. Without a Get, a Jewish woman cannot remarry in her own faith. Children of a subsequent civil marriage suffer religious disabilities. While difficult remarriage within the Jewish faith for a man in the same circumstances is not impossible.

...

... the government is moving where it can and where it is brought to the government's attention to eliminate sexism and gender bias in the law. ...

...

It is the case that in some religions, the Roman Catholic, Greek Orthodox and Islam, annulment or divorce may proceed more easily and faster if the couple agree.

However, in all these cases, the authority to grant the annulment or divorce rests with the religious tribunal, not the couple.

An un-co-operative spouse may delay a decision, but ultimately he or she cannot prevent the religious tribunal from rendering its decision.

In these religions, the spouse initiating the action can ask the religious authorities to deal with this problem.

The Jewish spouse does not have that recourse.

(House of Commons Debates, vol. VI, 2nd Sess., 34th Parl., February 15, 1990, at pp. 8375-77)

[8] At third reading of these amendments, Kim Campbell, who succeeded Mr. Lewis as Minister of Justice, confirmed the policy rationale for this legislative initiative:

The purpose of this bill is to assist Jewish citizens whose spouses are withholding a religious divorce, which is called a get, in order to obtain concessions in a civil divorce. ...

...

The consequences to women deprived of a get and loyal to their faith are severe. They may not remarry within their faith, even though civilly divorced. If they do remarry, children from a second civil marriage are considered illegitimate and restricted from practising their religion. Such consequences to a religious person leave them open to blackmail from the spouse withholding the get. For example, the spouse could say, "Give up your claim for support or custody of the children and I will offer the get." Even those not contemplating a second marriage find it uncomfortable to be considered married within their religion to someone they have divorced civilly.

The vast majority of adherents to the Jewish faith condemn as unfair this practice of bargaining with the get. Yet they are powerless to amend the situation. Persuasion by rabbis has often proved ineffective. Since the dispersion of the Jews there is no central Jewish authority to amend the Jewish legal code, . . . which governs the get. Nor is there any modern-day authority within rabbinical courts to enforce the offer and receipt of gets. Full support for Bill C-61 was expressed by major Jewish organizations who attended the hearings before the legislative committee. Representatives of the three Parties praised the bill and quickly passed two minor technical amendments.

. . .

As well, the Toronto Board of Orthodox Rabbis . . . endorsed the legislation and the two amendments.

. . .

[Translation]

Bill C-61 will enable Canada's Jewish community to preserve its traditions without destabilizing models of family life. It also ensures that the principles of the Divorce Act with respect to alimony and custody are applied equally to all Canadians.

(House of Commons Debates, vol. VIII, 2nd Sess., 34th Parl., May 4, 1990, at pp. 11033-34)

[9] For many years, civil courts have attempted to remedy, or compensate for, the husband's recalcitrance in refusing to provide a get to his wife. They are often faced with assertions by the husband that such interventions are a violation of his freedom of religion.

[304] The public policy considerations addressed by the Supreme Court of Canada are equally applicable here. However, as a result of the fact that the parties did not civilly marry, I cannot avail myself of the provisions of the Divorce Act.

[305] Further, counsel for Ms. C. was not able to provide any case authority which addressed the issue of obtaining a Get in a marriage-like relationship where the Divorce Act does not apply, except that in Ontario, ss. 2(4) and 2(6) of the Family Law Act, R.S.O. 1990, c. F.3 provides the court with powers similar to those set out in the Divorce Act.

- [306] Upon the Court undertaking some of its own research during the course of the trial, I did locate two quite recent British Columbia authorities which address the issue of religious divorces. Copies of those cases were provided to counsel for Ms. C. and to Mr. S. to allow them to make submissions on them, if they so elected, prior to the conclusion of the trial.
- [307] In *Zargarian-Tala v. Bayat-Mokhtari*, 2019 BCSC 448, Justice Gomery considered the court's jurisdiction to grant injunctive relief and restrain foreign proceedings. In regard to injunctive relief, Justice Gomery stated as follows:
- [54] Personal jurisdiction being established, s. 39(1) of the Law and Equity Act, R.S.B.C. 1996, c. 253, confers on this Court a broad power to grant injunctions, including mandatory injunctions, "in all cases in which it appears to the court to be just or convenient that the order should be made". In an appropriate case, an order may be made to restrain or govern the conduct of legal proceedings in another jurisdiction: *Quigg v. Quigg*, 2018 BCSC 853 at paras. 38-54. This is an aspect of the court's power to restrain the conduct of a person properly before the court no matter where in the world that conduct takes place: *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34 at para. 38.
- [308] Justice Gomery further found that a Canadian citizen and resident who is party to a Canadian family law proceeding is entitled to have their civil status, including their ability to remarry, determined by the Canadian court: *Zargarian-Tala* at para. 72. To do so, the court may make supplementary orders giving effect to the Canadian court's determination that a couple has been divorced. This may be done even though such a determination may deprive a party from unjust advantages flowing from the application of foreign law contrary to fundamental precepts of public policy.
- [309] Justice Gomery further engaged in a principled analysis, considering the merits of the wife's claim, including whether it was unjust to deprive the husband of the advantages accruing to him under Iranian law, and balancing the benefits and burdens, before ultimately ordering the husband to execute and provide the wife documents to allow her to apply for an obtain an Islamic Iranian Divorce. There is a comprehensive summary of case law at paras. 60-70 of *Zargarian-Tala*.
- [310] Additionally, in *Kariminia v. Nasser*, 2018 BCSC 695, Justice Forth heard an application for, inter alia, an order compelling the claimant to take certain steps such that an Iranian divorce could be granted. The respondent had attempted to obtain a divorce in Iran, but was prevented from doing so by the claimant. Touching on s. 15 of the Charter, Justice Forth set out as follows:
- [50] Pursuant to s. 15 of the Charter, "[t]he promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *R. v. Kapp*, 2008 SCC 41 at para. 15, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 171. Discrimination, on the other hand, perpetuates or promotes "the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian

society, equally deserving of concern, respect, and consideration": Quebec (Attorney General) v. A, 2013 SCC 5 at para. 417, McLachlin C.J.C.

- [51] With these principles in mind, I find that it is against Canadian public policy to recognize that the right to the parties' Islamic Iranian divorce is exclusively the claimant's, as a man. As discussed, such a finding would effectively restrict the respondent from visiting her aging mother and disabled sister in Iran. This is unwarranted in light of Canadian views and jurisprudence on the equality of sexes, and the harm to the respondent is an injustice that offends Canadian morality.
- [52] The parties are divorced by order of this Court, and there is no basis for the claimant's failure to grant the Islamic Iranian divorce.
- [53] I accordingly order that the claimant shall execute the necessary documents required for an Islamic Iranian divorce, and immediately send them to the Embassy of Pakistan, Interests Section of the Islamic Republic of Iran, 1250 23rd St. N.W. Suite #200 Washington, DC 20037, along with all costs associated with obtaining this divorce. The claimant will takes these steps within 14 days of this order being personally served upon him.
- [311] Having regard to the foregoing case authority, I am satisfied that I do have the jurisdiction to make orders which facilitate the obtaining of a Get. To decline to do so would be to the prejudice of Ms. C. who is, as described above, entirely dependent upon the participation and cooperation of Mr. S. in this regard.
- [312] The orders which I shall make in this regard are as follows:
1. Upon being provided with 14 days' notice by Ms. C. that she has made the necessary arrangements for the Get hearing, which notice shall include the date, time and address, Mr. S. shall attend at that day, at that time and at that location.
 2. Upon attending at the specified date, time and location, Mr. S. shall not unreasonably refuse to consent to the Get hearing.
 3. Mr. S. shall further be obliged to not unreasonably withhold consent to the signing of any and all documents necessary for or relating to Get.
 4. With the consent of Ms. C., any financial compensation which might be owing by Mr. S. to Ms. C. pursuant to their religious marriage contract are waived and the financial issues as between the parties are addressed exclusively within this family law proceeding and as set out in these reasons for judgment.
 5. Ms. S. shall have leave to seek further orders or directions from the Court as may be required, if necessary, to obtain the Get.

Costs

- [313] Costs of an action are in the discretion of the trial judge.

[314] Rule 16-1(7) of the Supreme Court Family Rules states the general principle that costs are awarded to the successful party:

Costs to follow event

(7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[315] The standard of "success" required to be awarded the costs of an action under R. 16-1(7) is "substantial success". The Court of Appeal in *Harras* described the substantial success standard:

[48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

[45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.

[49] It is important to emphasize that the evaluation of substantial or divided success is not a mechanical, mathematical exercise. It seems apparent – as stated in my reasons on the main appeal – that the judge was not aware of the precise effect of her order on the support issue. Nevertheless, it is clear from her reasons that she considered that enough time was expended on the insurance issue to warrant an order that the parties bear their own costs. In my view, it would not be appropriate to interfere with the judge's order on costs, regardless of whether any misapprehension occurred.

[316] In this case, neither counsel for Ms. C. or Mr. S. was fulsomely able to make submissions as to costs as neither was obviously aware of what orders I would make on the multiple issues which were before the Court for determination. The number of issues for consideration is reflected in the length of these reasons for judgment.

[317] In these circumstances, I do not consider it to be fair to exercise my discretion to make an award in respect of costs without allowing the parties the opportunity to make submissions as to substantial success, mixed success and so forth.

[318] There shall thus be an order that either party shall be at liberty to submit a requisition to appear back before me to a schedule hearing to determine the issue of costs in this proceeding within 30 days of the release of these reasons for judgment. Without further leave of the court, that hearing shall not exceed two hours and the parties will be at liberty to file written submissions not exceeding 10 pages, excluding appendices, if they so choose. The scheduling of the actual hearing will be at the discretion of Supreme Court Scheduling based on the availability of counsel, the parties and the court. However, as ordered, a request to appear back must be filed within 30 days of the release of these reasons for judgment if an oral hearing is sought. If there is no requisition received within 30 days, I will issue supplementary reasons on costs without the benefit of submissions in due course.

"Hardwick J."

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