
CANADA / JUDGMENT

Larkin v. Glase

2008 BCSC 387

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 387 Larkin v. Glase

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Larkin v. Glase,

2008 BCSC 387

Date: 20080331

Docket: E062371

Registry: Vancouver

Between:

Eileen Ann Glase

aka Eileen Ann Larkin

Plaintiff

And:

Howard Mervyn Glase

Defendant

Before: The Honourable Mr. Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:

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Date and Place of Trial/Hearing:

October 1-5, 11-12, 15-18, 24-26, 29-31,
and November 1-2, 5-7, 19-20, 2007

Vancouver, B.C.

Table of Contents

I. Introduction.....	3
II. Background.....	3
A. Introduction.....	3
B. History of the Action.....	5
C. Children's Circumstances.....	8
1. The Plaintiff's Evidence.....	8
2. Section 15 Report.....	18
3. Evidence of Donna Trasolini.....	29
4. Evidence of Kathy Uegster.....	30
5. The Defendant's Evidence.....	31
6. Evidence of Wen Lin Yuen.....	31
D. Condition, Means, Needs and Other Circumstances of the Parties.....	31
1. Plaintiff's Evidence.....	31
2. The Defendant's Evidence.....	31
E. Other Evidence.....	31
1. Evidence of Jennifer Hawn.....	31
2. Evidence of Sally Budd.....	31
3. Evidence of Daisy Wong.....	31
4. Testimony of Tyler Hassman.....	31
5. Admitted Facts.....	31
III. Parties' Submissions.....	31

A. Plaintiff's Submissions.....	31
1. Defendant's Credibility and Reliability.....	31
2. Custody and Moving to PEI.....	31
3. Circumstances During the Marriage.....	31
4. Spousal and Child Support.....	31
5. Contempt of Court.....	31
6. Asset Division.....	31
B. Defendant's Submissions.....	31
1. Custody, Access and Guardianship.....	31
2. The family assets and finances.....	31
3. Income.....	31
4. Non-responsiveness of the Plaintiff:.....	31
5. Miscellaneous.....	31
C. The Plaintiff's Reply.....	31
IV. Conclusions.....	31
A. Credibility.....	31
B. Custody and Guardianship.....	31
C. Mobility and Access.....	31
D. Income of the Defendant and the Plaintiff and child and spousal support.....	31
E. Division of Assets.....	31
F. Contempt.....	31
G. Divorce.....	31
V. Summary of Orders.....	31
VI. Costs.....	31

I. Introduction

- [1] The plaintiff and the defendant were married on July 30, 1994 in Charlottetown, Prince Edward Island ("PEI"). They separated in March 2006. There are four children of the marriage; A.M. born March 17, 1996; B.H. born July 22, 1997; D.M. born April 1, 1999; and Z.K. born November 3, 2000. All four children reside with the plaintiff in the former

matrimonial home and attend school nearby. The key issues in this action are determination of the custody of and access to the four children; determination of the defendant's income and the amount of child and spousal support; the plaintiff's application to move to PEI with the children; and unequal division of family assets in order for the plaintiff to become and remain self-sufficient. There are a number of sub-issues, the more important of which are the determination of whether the defendant is in contempt of court and the plaintiff's claim for special costs.

II. Background

A. Introduction

- [2] The plaintiff comes from a large PEI family and her parents, siblings and many nephews and nieces continue to reside there. She has no family in Vancouver.
- [3] The plaintiff finished high school in PEI and subsequently graduated with a degree in nursing from the University of New Brunswick.
- [4] At the time of the marriage, the plaintiff had approximately \$20,000-\$30,000 in RRSPs and the defendant owned a car. Thus, neither brought any substantial assets into the marriage. Following their marriage, the parties lived in Montreal, but after the birth of their first child they moved to Kansas, where the second child was born. The plaintiff remained on maternity leave from the birth of the first child until the parties moved from Kansas to Oakfield, Ontario following the sale of the defendant's interest in a publishing business. Following the birth of their third child in April 1999, the parties moved to Vancouver, where their fourth child was born in November 2000.
- [5] Throughout the course of the marriage, the plaintiff and the defendant devoted their intellectual abilities to the businesses which they ran. Although the plaintiff was primarily a "stay at home mom" and provided most of the children's day-to-day care, the defendant was also very actively involved in the children's lives in spite of the day-to-day demands of his business and the need to travel.
- [6] Three of the four children have some learning challenges, but all four are intelligent and healthy otherwise. Whatever challenges the three children have, they have been treated and managed with learning programs, tutoring and therapy.
- [7] Throughout the marriage, the parties' businesses have always been medical/health related, and the plaintiff's medical training has combined with the defendant's flair for marketing to produce some highly successful enterprises. Nevertheless, the physical and mental demands of these endeavours placed considerable pressure on the plaintiff and the defendant and at times, their relationship was volatile.

- [8] During the opening statement, the plaintiff's counsel advised that the issues before the Court were the custody, guardianship and residence of, and access to the children, as well as child and spousal support, and reapportionment of the family assets in the plaintiff's favour.
- [9] The plaintiff seeks an order awarding her sole custody and guardianship and permitting her to move with the four children to PEI. She is content to allow the defendant reasonable general access to the children during school holidays and in the springtime, summer, and Christmas, both in British Columbia and in PEI.
- [10] The plaintiff asks for child support consistent with the defendant's income as determined under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines") as well as a contribution to the children's special or extraordinary expenses under s. 7 of the same. The plaintiff also asks for an order that the defendant provide security for future child support payments.
- [11] Further, the plaintiff asks that child support and s. 7 extraordinary expenses arrears under the order of Pitfield J. of October 30, 2006 should be determined, as should the spousal support arrears under the order of Ross J. of December 19, 2006
- [12] The plaintiff asks that the family assets be reapportioned taking into account, among other factors, the length of the marriage, her role during the marriage, and her need to become and remain economically self-sufficient. The plaintiff says that the most significant family assets are the former matrimonial home owned jointly by the parties and the defendant's shareholdings in various corporate entities.
- [13] Finally, the plaintiff asks for an order under the Name Act, R.S.B.C. 1996, c. 328, and for special costs.
- [14] The defendant opposes the plaintiff's claim for sole custody and guardianship of the children and the reapportionment of family assets in the plaintiff's favour, and argues with the amount of spousal and child support she claims. Instead, the defendant is seeking an order of joint custody and joint guardianship, and an equal division of the family assets once they have been determined.

B. History of the Action

- [15] Following the separation of the parties on or about March 22, 2006, the plaintiff filed her writ and Statement of Claim on July 7, 2006 and the defendant filed his Statement of Defence and Counterclaim on September 11, 2006. Mutual restraining orders were obtained by consent on August 28, 2006 pursuant to s. 67 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"). These orders were amended by consent on November 21, 2006 to allow the plaintiff \$5,000 to purchase or lease a vehicle.
- [16] The issues between the parties were not reduced at the judicial case conference held on October 2, 2006 and a 10-day trial was scheduled to commence on September 24, 2007. In the meantime, the plaintiff's application for interim spousal and child support was heard in

chambers on October 30, 2006 before Mr. Justice Pitfield, who found that the defendant's Guidelines income was \$400,000. He set interim child support at \$7,790 per month retroactive to June 1, 2006. As well, Pitfield J. ordered the defendant to pay \$980 per month toward the children's s. 7 expenses comprising childcare expenses of \$400 per month, medications of \$210 per month, and tutoring of \$370 per month. Pitfield J. adjourned the spousal support portion of the application to December 19, 2006.

- [17] The defendant applied to stay or vary the order of Pitfield J. but when the matter was heard in chambers on December 19, 2006 before Madam Justice Ross J. the defendant's application was dismissed and he was ordered to pay interim spousal support of \$4,189 per month retroactive to November 1, 2006. Ross J. assessed the defendant's income to be between \$250,000 and \$325,000. As well, Ross J. ordered the plaintiff to have exclusive occupation of the former matrimonial home with mutual restrictions on the parties not to molest, annoy, harass, or communicate with each other, or to attend at the residence of the other, except for the purpose of discussing the children. Further, the children's pickup and drop off locations were to be at the curb at either parent's residence. Those orders were only a small indication of the level of animosity that has developed between the parties following their separation.
- [18] The defendant filed notice of appeal of both support orders but did not proceed with the appeals.
- [19] In the spring of 2007, the plaintiff applied for liberty to move with the children from British Columbia to PEI, and for a contempt order against the defendant for wilfully disobeying the orders of Pitfield and Ross JJ. by failing to in pay excess of \$120,000 in spousal and child support.
- [20] On April 12, 2007, Master Bolton ordered, by consent, an extension of time for the defendant to respond to the plaintiff's application, and on April 18, 2007, Master Donaldson heard the relocation and contempt applications. He, of course, did not have jurisdiction on the contempt application, but refused the relocation application and ordered interim joint custody of the children with the primary residence with the plaintiff. As well, Master Donaldson ordered interim joint guardianship along the lines of the "Master Joyce Model" and awarded the plaintiff costs in any event of the cause. The contempt application was adjourned to the trial.
- [21] Because of the continuing disagreements over the custody, guardianship, and access, on May 31, 2007, Master Tokarek ordered that a s. 15 custody and access report to be prepared by Dr. Peggy Koopman, with costs to be paid by the defendant.
- [22] On July 17, 2007, Madam Justice Dillon, by consent, allowed the plaintiff to travel with the children to PEI in July and August 2007. The order also provided for defendant's access to the children at other specified times.

- [23] There were continuing difficulties with the production of documents in spite of a consent order dated July 24, 2007, which required the defendant to produce his documents by July 31, 2007. During the trial, approximately three days were devoted to dealing with the plaintiff's objection to the defendant's attempt to introduce documents, photographs, and other items into evidence that had not been disclosed in any of his lists of documents. I upheld the plaintiff's counsel's objection and ruled that none of the undisclosed documents the defendant sought to introduce could be used save by agreement of counsel or by plaintiff's counsel on cross examination of the defendant or his witnesses, and if plaintiff's counsel did use any of the evidence so introduced, then they would be subject to re-examination by the defendant's counsel.
- [24] The former matrimonial home is the subject of foreclosure proceedings by CIBC and an order nisi was pronounced on July 31, 2007 by Master Keighley. The arrears on the mortgage are \$545,170.58, with a per diem of \$83.89. The last day for redemption was originally set to be January 31, 2008.
- [25] Both parties are defendants in another action in which their children's former private school is suing them for non-payment of tuition for the 2005 and 2006 school years. The claim is for \$37,000 plus interest and costs.
- [26] It appears that sometime in August 2007 the defendant's second counsel of record withdrew from the case and on August 20, 2007, the defendant, acting in person, applied to adjourn the trial scheduled to begin on September 24, 2007. Mr. Justice Myers adjourned the trial for one week to October 1, 2007, and also ordered the defendant to produce outstanding documents. As noted, many of the documents were not produced by the defendant prior to the commencement of trial.
- [27] The defendant's present counsel came on late in the course of this action and had approximately three weeks to prepare.
- [28] The collection of interlocutory orders described above provides but one indication of how highly contentious this litigation has been. The defendant is in a substantial state of non-compliance with the support orders and he had been in non-compliance with the disclosure orders.
- [29] The s. 15 report prepared by Dr. Koopman was delivered on September 28, 2007 (the "Report"). In greatly simplified terms, Dr. Koopman opined that absent a "sustainable monthly sum" for the plaintiff, she would be justified in moving with the children to PEI as the "second best alternative in order to sustain herself and the children."

C. Children's Circumstances

1. The Plaintiff's Evidence

- [30] Three of the four children have minor medical problems and require some assistance because of learning disabilities. The fourth (youngest) child was an early reader and does very well in school if she is constantly challenged.
- [31] The plaintiff described the first-born child, A.M., as more athletic than scholarly. By Grade 3, she was diagnosed with developmental dyslexia and the parties enrolled her in the Orton Gillingham program designed to treat the child's fine motor skills. This has apparently greatly helped her progress. The child has also been tutored once a week at a cost of \$50 per session. The plaintiff testified that it is her intention and desire to continue with this tutoring because of the beneficial results for the child.
- [32] The second child, B.H., presently in Grade 5, was recognized to have emotional issues in Grade 2 and was subsequently diagnosed with the Attention Deficit Hyperactivity Disorder ("ADHD"), which is mainly manifested by his impulsivity and lack of attention. The child did much better in smaller class sizes and he has been prescribed medication that has assisted in helping with his coping abilities. In addition to the ADHD, B.H. suffers from mild asthma and has eczema.
- [33] The third child, D.M., was diagnosed as having phonemic difficulties, which cause difficulties in perceiving sounds and in writing. She was a late reader and has also benefited from the tutoring provided by the same tutor as for her older sibling. D.M. also suffers from mild eczema.
- [34] The fourth child, Z.K., as noted, was an early reader and has excellent academic results and, other than suffering from mild asthma, has no difficulties.
- [35] The plaintiff testified that each of the children did much better in smaller classes and originally all four attended an independent parochial school, but later went to another private school. The plaintiff testified that the defendant was not enthusiastic about the parochial school and caused the children to be enrolled in the private school in the fall and early spring of 2005-2006.
- [36] Regrettably, the tuition fees at the private school have not been paid since around the time of the separation and the school is suing the parties for the arrears. With that financial difficulty, the children were re-enrolled in the independent parochial school, which costs \$4,000 a year plus donations. As well, school requires the parents to work at least 40 hours per year at the school.
- [37] The plaintiff testified that the children live a short drive from the school and the youngest child sings in the school choir.

- [38] Prior to the separation, the family was involved in a variety of activities including being members of the Arbutus Club, primarily for the children's sake, to allow them to be involved at the same time and same place in a variety of activities. During the summer months, the children were involved in St. George's bike camp and swimming camps, holidayed in PEI, and the family enjoyed boating. The children also took music lessons at home at a cost of \$320 per month.
- [39] The plaintiff testified that she did the vast majority of shopping, meal planning and housework and, as a primarily "stay at home" mom, she was in close contact with the children and their counsellors and accordingly provided most of the help with their homework, assisted by the defendant when his travel commitments allowed. She testified that the defendant seemed satisfied with her efforts concerning the home and the children, and that she kept him informed of all of her research regarding the assistance they could provide to the children or the various programs that could help them.
- [40] The plaintiff testified that she had some help at home, which allowed her to work with the defendant on some of the companies. The defendant's business required that he often traveled during the workweek, but he was home most weekends. Accordingly, it was the plaintiff who tended to the children's baths, bedtime and hygiene, although the defendant would read them bedtime stories when he was in town. She also testified that in 2005 she obtained employment with a pharmaceutical company, which provided the family with a good income to supplement the already substantial income of the defendant, and also provided the plaintiff with a vehicle. She says that following the separation, with the increasing stress and burden and the lack of support from the defendant, she was obliged to take disability leave from her employment.
- [41] As part of the plaintiff's case, she adduced a wide variety of documents dealing with the children's education, development and treatment, and of course bonding assessments. It appears that with the various programs in place to assist the children, they are doing very well in their schooling. The plaintiff has developed a consistent routine for the children's schoolwork and bedtimes, and testified that this consistency helps them.
- [42] The plaintiff testified that the children have a large number of friends in the neighbourhood and at the school, and that they are fully involved in school and neighbourhood activities. The plaintiff acknowledged that the best place for the children is Vancouver as it provides a consistent environment close to their friends, church, and school.
- [43] Nevertheless, the plaintiff testified that she wants to live with the children in PEI primarily because her relationship with the defendant has become extremely acrimonious, and also because for her and the children to stay here the defendant has to support them both physically and financially and he has failed to do so.
- a) The Defendant's Acrimonious and Abusive Behaviour

- [44] The plaintiff testified that prior to the separation, the defendant was supportive of her efforts on behalf of the children and accepted her role as the primary caregiver. She testified that since the separation he has become aggressive and abusive. He has threatened bankruptcy and by failing to pay the support as ordered he has allowed the house to go into foreclosure. He has threatened her personally, threatened to report her to the Ministry of Children and Families, and has failed to comply with numerous court orders.
- [45] The plaintiff's evidence was that the defendant's attitude had changed considerably in the spring of 2006. He stopped coming to the children's events and was "disconnecting" from the children. At the time, it was the plaintiff's belief that the defendant's actions were consistent with "a bipolar narcissistic personality", an opinion that had tentatively been expressed to her by her doctor. It is the plaintiff's belief that the defendant was being vindictive and self-centred and tried to punish or hurt her.
- [46] The plaintiff testified to a number of abusive and aggressive episodes.
- [47] The plaintiff produced a number of tape recordings of voicemail messages left by the defendant on the plaintiff's home telephone between early November 2006 and the late summer of 2007. These were transcribed, more or less accurately, and they are obviously filled with anger, sarcasm, and frequent obscenities in describing either the plaintiff or her conduct. In these messages, the defendant called the plaintiff pathetic and threatened costly legal action that would put her and the children out of the home. During some of these messages, the children could clearly be heard in the background and the plaintiff correctly believes that the messages could and most likely have been heard by the children.
- [48] The plaintiff testified to two episodes when she needed to call for police assistance to deal with the defendant's behaviour.
- [49] In August 2006, some four months after the separation, when to the defendant's knowledge she and the children were at Whistler, she received a telephone call from the housesitter informing her that the defendant had entered the house and was on the plaintiff's computer. The plaintiff spoke with the defendant on the telephone and asked him to get off the computer and leave the house. When he hung up the telephone, she called the police and they attended.
- [50] The plaintiff testified that after the August 2006 episode, she started to receive copies of emails sent by the defendant to various unidentified individuals. The edited version of these messages was adduced at trial and certain portions of them described the plaintiff in unflattering terms and in one instance threatened to have the home computer seized by the police because it was company property.
- [51] On November 3, 2006, the plaintiff was hosting the sixth birthday party for Z.K. and it had been arranged that the defendant was to have the children starting at 6:30 that evening. She testified that at 6:45 the defendant rang the doorbell and when she opened the door he appeared angry and said to her: "you are so f!@#ng screwed. I'm going to make sure I wring

you dry. I sold MD for \$1800." When the plaintiff asked the defendant to wait in the car, he pushed past her saying to get out of his way. The plaintiff described the defendant as "really enraged" and she called 911. This incident was witnessed by a mutual friend Jessica O'Brain.

- [52] Jessica O'Brain is a mother of five children, the youngest of whom is friends with two of the parties' children. She testified that prior to the parties' separation in March 2006, she saw the family quite often and that from her observations it was the plaintiff who was primarily attending to the children's needs. She and her family also vacationed with the parties five years prior.
- [53] Her version of the November 3, 2006 events was consistent with the plaintiff's account. Ms. O'Brain knew that the defendant would be coming and when the doorbell rang, she was in the kitchen. Ms. O'Brain testified that the defendant demanded that the plaintiff get the children ready and when the plaintiff asked the defendant to wait outside, he refused. Ms. O'Brain described the defendant as "very angry" and using the "f-word" in a tone that was very threatening. She testified that the defendant said words to the effect of "I can really screw you around." When the plaintiff again asked the defendant to leave the house, he moved past her and into the basement and because Ms. O'Brain did not feel comfortable with the defendant going there alone, she too went down and heard the defendant speak in an angry and threatening manner. Ms. O'Brain was so concerned about the plaintiff that she remained overnight at the house and was present when the defendant came to the door the next day to pick up the children. She testified that the defendant apologized for the plaintiff's behaviour the previous night in spite of the fact that she did not hear the plaintiff say or do anything inappropriate.
- [54] Ms. O'Brain conceded that it is challenging to single parent this many children, but said that in her opinion the plaintiff has genuine affection for children and has always put their needs first. She described the plaintiff as committed, reliable, and loving.
- [55] The plaintiff adduced an email sent to her by the defendant in relation to the November 2006 episode. He berated the plaintiff for involving the police, particularly one female officer who had attended, in the following language:

you convinced the small minded female constable and that was it -- she is hardly qualified to expose an opinion -- that is why (I) and laughed and talked her into the ground!!! Really is that what you need to feel in control --that was the take at the Saturday soccer matches -- how angry and twisted you are to do this to the kids and their friends (thank heavens [sic] they are not friends of mine). Tried reading this and relating -- I will make you accountable to my children; your backwards PEI alcohol upbringing will not damage their potential. You look like your mother on Saturday -- out of it, haggard, and pathetic like she finished off a week of drinking.

- [56] The plaintiff also testified about an incident in January 2007, at the office of Dr. Weiss, the children's therapist and counsellor, when the defendant, in the presence of B.H., walked past her shaking his head and saying, "you're nothing but a psychotic bitch". At this time, B.H., who has been diagnosed with ADHD and emotional issues, was having difficulty adjusting to the change in medications following a medication holiday and Dr. Weiss was working hard to get the medication level under control.
- [57] The plaintiff testified that the defendant has also threatened her friends and people who tried to help her. While he had access to the plaintiff's computer in August 2006, he discovered that one of the plaintiff's uncles had provided an opinion on some insurance owned by the defendant. The defendant then told the plaintiff that he was going to report her uncle for breach of confidentiality. On another occasion, the defendant had threatened to sue a good friend of the plaintiff who is a chartered accountant and who had been giving advice to the plaintiff.
- b) Practical and Financial Support
- [58] The plaintiff's other major complaint about the defendant, also underlying her claim for support and for permission to move to PEI, is his lack of reliability and consistency. She was quite emotional in testifying to her difficulties, explaining that she has "four babies with special needs" and that the defendant does not agree with her childcare efforts since the separation. Whereas before the separation he had an unshakable appreciation of her efforts, she says that now she can do no right in his eyes. Accordingly, she needs the support that can be offered by her family in PEI.
- [59] The plaintiff testified to a number of specific financial problems that she feels were caused by the defendant. She testified that he did not pay the mortgage on the matrimonial home and it is now being foreclosed. As a result, she has no place to live with the four children and pets because "no one would rent to us." He is not supporting her or the children and has refused to acquire an "AlphaSmart keyboard" which would be of a great assistance for two of the children. In November 2006, when the plaintiff's employment contract with a pharmaceutical company ended and she could no longer use the company car, her lawyer wrote to the defendant's lawyer asking for \$5,000 in order to make a downpayment on a leased vehicle. When the defendant did not respond, the plaintiff had to resort to an application for a court order, which eventually went by consent.
- [60] The plaintiff testified to a number of concerns and difficulties regarding the unpredictability or unreliability of the defendant.
- [61] The plaintiff detailed the children's weekly schedule, including how she drives them to school every day except Thursday and how she participates in their after school activities. She testified that shortly after the separation, the defendant committed to having the children on Wednesdays after school and on alternating weekends, and that she informed him of the children's schedule and activities. The access schedule was originally set up so that the defendant could pick up the children from school at 3:00 p.m., but more recently

the plaintiff picks up the children and the defendant picks them up from her house.

- [62] The plaintiff complained that the defendant has moved three times since the separation and is currently living with another woman in a four-bedroom apartment. She testified that the defendant now wants her to pick up the children from his apartment because he says "I'm not a taxi driver."
- [63] The plaintiff testified that she has spent a large amount of time trying to arrange things to suit the defendant. For example, she adduced a number of emails she has sent to the defendant trying to arrange for him to be with the children, and even enclosed a link to the children's online calendar. However, she says that her efforts were wasted as he is not reliable and arrangements have to change all the time.
- [64] It is clear from the plaintiff's emails that the parties do not agree on the appropriate parenting requirements. Several of the emails concern the defendant discussing the plaintiff's plans with the children and the plaintiff's requests that he not do so until the plans have been finalized. The defendant responded that he would continue to speak with the children.
- [65] She testified to a number of problems that she encountered in her efforts to work with the plaintiff to jointly take care of the children. For example, on April 21, 2006, the defendant agreed to look after the children. The plaintiff later learned that he had taken the children to his office for a poker game and that the next morning they had slept-in and were late for school. In another example, she said that in the summer of 2007 he was supposed to pick up one of the children from a game at 1:00 p.m. but telephoned her at 2:00 p.m. to advise her that his airplane had just landed.
- [66] After the separation, the parties called on a facilitator, Allyson Jones, to assist in setting up an access schedule. Unfortunately, the facilitator's efforts came to naught when the defendant failed to set up subsequent meetings.
- [67] The plaintiff is also concerned about the defendant's mother who lived with the parties from December 2003, when she came to British Columbia to get rehabilitation for her alcoholism. In March 2005, she "fell off the wagon" and returned to rehab for a period of time. She returned to live with the parties during the Christmas of 2005 before moving into her own apartment in Vancouver in January 2006. The plaintiff's concern is that the defendant's mother drinks unpredictably and "drops off" suddenly when she has been drinking because alcohol hits her fast and hard. The plaintiff testified that although the defendant shared her concerns in the past, he now allows his mother to babysit.
- [68] The plaintiff testified that she is concerned that the defendant was not supportive of her efforts to have Dr. Weiss continue treating B.H. She testified that notwithstanding the long history that B.H. had with Dr. Weiss, the defendant emailed her saying he was looking for another specialist to treat the child. The plaintiff says that this is another example of the lack of support and cooperation that has made life difficult for her and the children.

- [69] The plaintiff summarizes her attitude toward the defendant by saying that she is having an incredibly difficult time raising the four children as it is, and having the defendant, who used to support and help her now work against her, act unpredictably, and constantly fight her, makes her life and the children's life impossible.
- c) Plaintiff's Reasons for Moving to PEI
- [70] The plaintiff testified that she has been trying to make the world right for her four children and the defendant has never asked if there was something that he could do to assist. Rather, the lack of financial support has significantly complicated her life and she says that she is extremely worried about the financial circumstances of her and the children.
- [71] She testified that if she were to move to PEI, she could buy a mortgage-free home, which would cost less than \$200,000, and live much less expensively than in Vancouver. In contrast, any Vancouver housing suitable for the plaintiff, the children, and their pets, would require an investment of more than a million dollars. She testified that the parties already own a home there, specifically a cottage that the parties purchased in August 1998 to spend extensive amounts of time there with the children (the "PEI Cottage"). Prior to the separation, the parties and the children went to PEI for four to seven weeks every summer.
- [72] The plaintiff testified that she has a large family and a social support network in PEI. This network comprises two sisters, two aunts and uncles, and many cousins, some of whom are in their teens. There is an excellent community school nearby with small class sizes. Importantly, the school offers extensive resources for children with learning disabilities and there is a gifted student program at the school. The school offers much more physical education than the present parochial school, and has music classes twice per week. The plaintiff believes that the quality of education is at the same level as at the private school that the children previously attended.
- [73] In reference to medical care available in PEI, the plaintiff testified that a Dr. Macfarlane has already agreed to take on the children and the plaintiff, and that there is an ADHD clinic nearby. The PEI Cottage is approximately 15 minutes drive from Charlottetown and there are tutors available on the island at a cost of \$40 per hour.
- [74] In Vancouver, although she has been trying to find employment, it is difficult for her as the primary caregiver of children with special medical and developmental needs. She testified that with the support of the family and the availability of inexpensive childcare and schooling, she would be able to work in PEI. In fact, she testified that she has already been offered a job as a nurse in the intensive care unit of the Charlottetown Hospital, which includes on-the-job training to bring her skills up to the correct levels.
- [75] The plaintiff says that the children enjoy their time in PEI and are very happy visiting with the vast family that lives on the Island, and especially the cousins. Although the children have begged the plaintiff to take them to PEI for another vacation, she maintained that she did not discuss her plans to relocate there.

[76] The plaintiff and the children are regular church attendees both in Vancouver and PEI. Prior to the separation, the defendant was ambivalent about the plaintiff's church attendance, but now refers to her church as "mummy's cult". One of the children reported that the defendant thought that the Jesus story was stupid and the plaintiff believes that even if the defendant did not say such a thing, it is an indication that his attitude is being transferred to the children.

[77] The plaintiff prepared a list of anticipated expenses if she was living in PEI, which would be substantially lower than her monthly living expenses in Vancouver. Her expense list included \$600 per month for "vacation", which would be an allowance for the defendant to come and visit.

2. Section 15 Report

a) Overview of the Report

[78] As ordered by Master Tokarek on May 31, 2007, Dr. Peggy Koopman prepared the Report. Dr. Koopman is a registered psychologist with extensive experience in these matters. The Report is lengthy and thorough and includes a review of the Reasons for Judgment of Mr. Justice Pitfield, Madam Justice Ross, Master Donaldson, and Master Tokarek, as well as the twelve affidavits sworn by the parties.

[79] Further, she reviewed the educational plans for each of the four children and reports from their school; the reports and notes of the child therapists and their tutor; certain email exchanges between the parties; a psychological assessment report of one of the children by Dr. Edward Shen, and an occupational therapist assessment of one of the children. As well, Dr. Koopman interviewed the plaintiff on five occasions and the defendant on four occasions, and met with the children at the parties' respective homes. Dr. Koopman interviewed various other individuals, including a parenting counsellor, a child therapist, and the business partner of the defendant.

[80] In Dr. Koopman's summary and observations, several passages are particularly noteworthy. For example, Dr. Koopman wrote that the parties, which for years had appeared to be role models for parenting as a team, are now:

destroying the fabric of their marriage and their parenting cooperation through mistrust and financial matters and their lack of respect for each other has severely impacted their children's emotional security and the bonding they have felt since birth to both parents.

[81] Dr. Koopman also observed that:

both clients love their children but are enraged one with the other. Each parent indicates to the writer that all they want is peace and to move forward but they are mired down in negativity that is impacting their children as much and probably more than themselves. Both parents have acted out inappropriately around their children regarding their negative feelings for the other parent. The writer and their child therapist, Barbara Tredger, but heard and witnessed the children's reactions to this unsolicited information.

[82] Later, writing of the unresolved resentments that have built up during the marriage, Dr. Koopman wrote:

capturing the children has become the last power move either can conflict on the other and unfortunately they are doing just that. Each has mentioned that the other is engaging in 'payback time'. The defendant has stated that throughout his marriage, when things became heated, he was threatened with removal of his children to PEI and now he is facing his worst fears. Ms. Larkin's worst fear are realized when she loses her family home, has no job and does not believe that Mr. Larkin will be there for them financially.

[83] Dr. Koopman made a number of recommendations. Under the heading Education and Medical Needs, she noted that while three of the four children require special assistance with their learning disabilities, in her opinion their current needs are not as severe as they were at the time of the initial diagnosis. She noted that all of the children are doing well in school and their changing needs could likely be accommodated in any good school system with time and appropriate resources.

[84] With reference to the learning disabilities and the prospect of a move to PEI, Dr. Koopman opined that one of the key traits of learning disabled children is their lack of flexibility and need for consistency and structure. Change is not tolerated well and although the children are familiar with PEI, they had not been to school there. Dr. Koopman opined that a move risked upsetting the children because by moving into an unfamiliar situation they would have to adapt, and if they were to initially struggle academically, they may suffer a blow to their self-esteem, which has been preserved in their present school situation. Further, one of the children is gifted and needs to be challenged academically, and Dr. Koopman was concerned that the child may lose interest in school and not reach her potential if the family moves to PEI. Finally, Dr. Koopman observed that there were no Catholic schools in PEI and the children had become accustomed to religion being a significant part of their day-to-day life. She felt, however, that they could remain an active part in the Catholic community in PEI, particularly as the rest of the plaintiff's family is active within the church.

[85] Turning to the children's psychological state, Dr. Koopman noted that:

There appears no one associated with this family who does not believe that the children have been severely impacted by the separation of their parents. There is some disagreement on which parent had been the most denigrating of the other in the presence or earshot of the children.

[86] It was Dr. Koopman's impression that both parents have contributed more than their share to the children's exposure and knowledge of the parties' difficulties and this is producing anxiety and increasing the children's sense of accountability, unresolved stress and divided loyalties.

[87] While each child had told Dr. Koopman of their love for PEI and the relatives who lived there, each had also told Dr. Koopman that they did not want to move to PEI because they would not see their father as much. Each of the children (and one in particular) strongly expressed a desire to spend more time with their father. Dr. Koopman found it obvious that the plaintiff's plan for the defendant's monthly visits to PEI was not feasible due to time constraints and reduced finances.

[88] Dr. Koopman then expressed the following opinion:

These children are closely bonded to both parents. They have never lived without both of them in their lives for very long. The parents, as being described, present different but complementary styles to their children's lives and formed a balance that they have profited from. Everyone that was interviewed by the writer and the writer's own observation is that these children are delightful but also individuals. They have obviously been fostered and nurtured to be who they are by both parents and have therefore been able to bring forth their individualities and have been validated conjointly by both parents. A sudden lack of one parent and a lack of these important balancing agents can be very detrimental to the children's development of identity and personal security, eg. one parent has almost disappeared from their lives, they can be certain that the other will not also be taken from them. If they move to PEI the children will very likely suffered grief and loss over not being with their father. They have already demonstrated emotional problems over the separation and frustration in not being with both parents equally. If the next move is taken in which they see the father considerably less and he has less input into their lives some significant altercations in my view can take place that may well cause serious adjustment problems in different ways to each of the children.

Having said all of the above, sustainability cannot be ignored for this mother with four children. The writer of this report is not a forensic accountant and it is not my task nor should I venture into that area. However, if the best alternative is for the children to remain in the Lower Mainland, then a financial consultant or court ordered secured sum each month must be in place so that this mother can plan a future for her children. I do not get the impression that Ms. Larkin is unwillingly to work to support her children but she is afraid that she may not able to do so to a level necessary

The writer believes that these children need both parents. The parents in the past have provided a good balance and style, personality and parenting. It is the opinion of the writer that this can happen again in a 50/50 parenting arrangement. The children have fully furnished and decorated rooms with appropriate personal toys and welcoming situation in each of the parent's homes. Also, if they were leave to the Lower Mainland for PEI, they would also be leaving a new but needed relationship [the defendant's girlfriend] who has been somewhat of a port in the storm

for them and would be a loss as well.

This equally shared 50/50 parenting arrangement is in alignment with what the children have told the writer more than once that they desire. The writer has seen this plan worked with other families on a two-week basis in each home. Weekly changes for young children can be more disruptive. The increase in time from the defendant with his children could take place over the next two months in the opinion of the writer if all else can be resolved regarding finances.

The writer cannot state strongly enough however that this plan, which I believe is best for the children's emotional health, will only work if the parties, especially the defendant, will commit to a reasonable feasible, permanent and unchangeable financial support regime that his wife and children can count on. Insisting Ms. Larkin should work when she may take months perhaps a year to find suitable employment is not reasonable.

It is the clinical opinion of the writer that if the defendant and the court cannot arrive at a reasonable, but not lavish, sustainable monthly sum for Ms. Larkin, then she would be justified to move to PEI with the children as the second best alternative in order to sustain herself and her children.

[emphasis added]

b) Evidence of Barbara Tredger

[89] Barbara Tredger is a child and family therapist called by the plaintiff to testify as to her dealings with the children. I found her to be qualified as an expert in child and family therapy. Ms. Tredger has worked with all four children over a span of 24 sessions, mostly one hour long, although some were shorter. As well, she met regularly with the plaintiff and twice with the defendant. She testified that her method is to allow the children to express themselves and to help them develop coping skills. It was the plaintiff who made the children's appointments and, after her exposure to both parties, Ms. Tredger described the parents as being in the high conflict category. Generally, her observations of the children were that they were very sad about the separation of their parents whom they love, and the children were anxious overall. They felt more comfortable with their mother and had some difficulties with their father's anger.

[90] Ms. Tredger was of the opinion that the children were involved in the differences between their parents and two of the children said that their father had said bad things about their mother. She did not recall a child saying that their mother had said anything similar. All four children expressed the fear of their father's anger and said that they felt that they had to be on their best behaviour around him. Ms. Tredger said that when children are unable to feel safe, they will often try to please a parent and ignore their own needs, and she saw this phenomenon between the children and their father. Ms. Tredger reported that all of the children said they were more comfortable with their mother and that they could talk to her about things that were bothering them. All of the children said that their mother took care of things such as getting them to appointments and making sure that they had the things

necessary for school and homework. Three of the children said that they did not have the same level of comfort with their father and reported that they would not tell their father certain things for a fear he would get mad. In Ms. Tredger's opinion, this reticence makes a child either frustrated or angry, but causes them to act in compliance with what is expected by the parent. Each of the children told her that "Dad gets angry a lot" and "blast[s] off at people", and one of the children reported that "Dad tells lies about Mum and then does the same thing".

- [91] Ms. Tredger explained the various devices and tools she used to make the children feel at ease and demonstrate their feelings. She also interpreted and deciphered her notes of interviews and meetings with the children, which were produced and formed part of the evidence.
- [92] Ms. Tredger said that she worked with the parents during this process and spoke with each of them of the continuing hostility between them and its effect on the children. She testified that she told the parents how to support their children and of their need for stability, especially in the light of the hostility they were witnessing. Ms. Tredger was of the opinion that notwithstanding her two meetings with the defendant on August 15, 2006 and March 14, 2007, the children's perception of their father did not change. It was her sense that the children felt more comfortable when cared for by their mother.
- [93] Dr. Koopman reported that Ms. Tredger had told her that "she believes that the children love their father and want to be with him but that to some extent this is successful because their mother provides the environment and stability in which a positive father-child relationship can take place". Ms. Tredger explained that what she meant was that the children are able to have a relationship with their father only because of the stability that they have in their mother's environment. Further, Ms. Tredger felt that the children were having more difficulties in the year following the separation due to the continuing hostility and resulting stress. Ms. Tredger told Dr. Koopman that, in her opinion, the children needed stability and consistency, which is central to their coping with the situation, and that they were able to get more of this from their mother. Ms. Tredger denied telling Dr. Koopman that it was her feeling that both parents had acted inappropriately. Rather, she said that it was the defendant who has been acting inappropriately.
- [94] Ms. Tredger did not think that the children's relationships with the parents were balanced. While they already feel secure with their mother, they are still building a relationship with their father. Ms. Tredger disagreed with the suggestion that the children's stress is the result of not being with both parents. Rather, it was her opinion that the children's stress was the result of the hostility between the parents.

- [95] Ms. Tredger believed that Dr. Koopman did not understand her opinion of the importance of stability that the mother provides for the children and how that helps them to build their relationship with their father. She did not agree that a 50/50 parenting arrangement was the best arrangement at the present time, particularly because it is the stability of the mother that offsets the father's hostility.
- [96] Ms. Tredger was of the opinion that a move to a new community would be unsettling for the children, although they do have some familiarity with PEI and with the plaintiff's family there, and it may be less of a change for them than if they were obliged to move to an entirely different community.
- [97] On cross-examination, Ms. Tredger agreed that as long as there is a dispute raging between the parents, the most she can do is to help the children to cope. In describing her play therapy, Ms. Tredger stated that the object was working with the children and their feelings. She observes and takes notes of these sessions, and if she senses that a child is "hurting" she helps the child express his or her feelings. Ms. Tredger denied that one of the children told her that their mother said bad things about their father, but she agreed that the children still have issues and she hopes that they would feel less stress as long as the parents continue to deal civilly with each other.
- [98] Ms. Tredger was asked whether testifying represented a conflict of interest because she was disclosing what the children had said to her in the presence of the parents. She did not seem very comfortable with this issue, but on re-examination she testified that if neither parent relays any part of her testimony to the children, there would be no breach of trust and she could continue to treat the children. On re-examination, she also stressed that what was important for the children was for her to tell the Court about their secured attachment to their mother during the period of chaos they are going through.

c) Evidence of Dr. Posthuma

- [99] Dr. Allan Posthuma provided expert evidence reply to the Report. His report was prepared at the behest of the plaintiff, focusing on whether Dr. Koopman's recommendation for shared residency is in the best interests of the children and supported by her findings, and whether a move to PEI would be detrimental to the children's best interests.
- [100] In addition to reviewing the Report, Dr. Posthuma reviewed Ms. Tredger's records and report, Dr. Koopman's clinical records, and the oral reasons for judgment of Master Tokarek. He provided the following written opinion:

Special needs children typically differed from normal children in that it is very important for consistency of parenting and schooling programs that have been designed to address their special needs. Typically, one of the greatest challenges to the treating psychologist or counsellor is being able to achieve agreement and cooperation between the parents, and between the parents, the school and other community organizations in which the children might be involved. This is not easily achieved even with the most reasonable and cooperative parents. It is an area

that has rightly identified by Master Tokarek as important in a section 15 assessment.

Ms. Tredger's letters indicate that these children have not been doing well since the marital breakdown because of the stress between their parents. She also identifies and her clinical records confirm that the father is involving the children [in] the conflict and demeaning their mother. She believes that the children's mother, on the other hand, tries to keep the children out of the dispute, but the children attempt to 'spy' on the mother. She also identifies that the children appeared to feel more comfortable and safer with their mother than their father. Her records of the children's comments describes the father as an angry, intimidating, man. These comments as well as the clinical records of Dr. Koopman and her report would indicate that these parents are not cooperative with each other with regards to their children's needs .

These and other statements contained in Dr. Koopman's report provide a consistent theme of the lack of communication and cooperation between the parents with regards to child raising issues. Because these are special needs children, this lack of cooperation is very important in deciding custody and access issues in a section 15 report. Dr. Koopman departs from this line of reasoning in the second full paragraph on page 28 of her report when she recommends a 50/50 parenting arrangement, and states that:

The parents in the past have provided a good balance and style, personality and parenting.

It is not clear in her report where the balance has existed unless one is arguing what the difference between the parents provided balance. However, it is not a balance that is important in raising children, especially special needs children, it is consistency and parenting approaches. It is the opinion of this writer that Dr. Koopman's report does not support her recommendations on page 28.

One further shortcoming of Dr. Koopman's report for this family is that she failed to administer psychology testing of these special needs children. Aside from specific test of intellectual and emotional functioning that she could have given to the children there are tests completed by the parents and teachers that would have added objective evidence on which parent had a better understanding of each child as well as how the children were functioning, both emotionally and cognitively.

With regards to the relocation issue, Dr. Koopman's report appears to be focused on the potential mediation role of the defendant's partner, Ms. Wong and the potential financial support that the defendant will provide in the future, providing that he has 50/50 shared residency of the children. Again, this logic fails to address what is important in the needs of these children .While it is, of course, axiomatic as stated by Ms. Tredger and Dr. Koopman the children need both parents this assumes that both parents are working together providing consistency and care. Failing this, it is then important to ensure that the primary caregiver (parent) is not being stressed by the other parent to the extent that the welfare of the children is jeopardized.

[101] Dr. Posthuma considered Dr. Koopman's reference to plaintiff's large and very supportive extended family in PEI, and concluded:

in terms of the relocation, with the courts can establish that the mother has been the primary caregiver and that the information contained in Dr. Koopman's report with regards to the circumstances in PEI are correct, then relocation would be in these children's best interests, and certainly, preferably to the children remaining in Vancouver exposed to ongoing parental conflict and the undermining of consistent parenting practices. The arguments provided by Dr. Koopman against relocation do not seem supported by her own fact pattern.

d) Evidence of Dr. Koopman

- [102] Dr. Peggy Koopman was essentially the Court's witness with liberty to both counsel to cross examine her. I held that she was qualified to express an opinion as an expert in forensic psychology. Overall, she was emphatic in stating that the Report was based solely on the interests of the children, rather than any concerns that the parties would obey court orders.
- [103] She testified that there were little if any differences in the way that the parties described the children, although she said that the plaintiff was very focused on their special needs and programs, while the defendant spoke of the children's personalities. She stated that the plaintiff gave her the impression of wanting to ensure that absolutely everything about her position was recited to Dr. Koopman, which she agreed could be a good thing or a bad thing.
- [104] In her view, both parents were "mired in negativity", but in acknowledging his own faults or the good aspects of the plaintiff the defendant appeared to be more flexible. She found that the plaintiff harboured anger toward the defendant, being at times frustrated and cheerfully angry, saying things like "how can he do this", "I feel abandoned", and "he doesn't care for us". She testified that although the plaintiff certainly felt that she was a victim, she did not see herself in a "victim stance" and was not relying on self-pity. She testified that she saw no sign of narcissism or bipolar disorder in the defendant. Her clinical impression was that the defendant was sincere during their interviews; however, she did agree that she never totally assumes that people are telling her the truth. Although she would be concerned if she knew that the defendant had lied under oath, she said that in a clinical situation she could ascertain genuine feelings.
- [105] Referring to the opinion expressed in her report, that "capturing the children has become the last power move either can inflict on the other and unfortunately they are doing just that", she opined that the parents have chosen the children's location as their battleground. She acknowledged that the word "captured" may have not been the best word to use, but otherwise remained firm.
- [106] Dr. Koopman opined that the defendant's derogatory comments about the plaintiff and the threats were primarily in response to the plaintiff's plans to move to PEI. She was concerned about the voicemails and emails, particularly the threats of continuing legal actions and to "run you dry" and she agreed that it would be a serious concern for her if the defendant continued this kind of conduct after he had met with Dr. Koopman. Nevertheless, she had the opinion that the defendant's conduct was not a pattern of long

standing abuse.

- [107] She said that in their interviews each child had emphasized that they wanted to see their father and to see him more often. However, it was her impression that the plaintiff was more in touch with the children's needs and her role was to fulfill those needs as the primary caregiver. She said that she saw no expressions of fear of their father by the children.
- [108] Dr. Koopman agreed that she commented favourably about Ms. Wong, the defendant's girlfriend, because she felt that the children had established a rapport with her and she took a very active role as a "friend" and not as a parent. However, she also acknowledged that Ms. Wong had not told her of fights with the defendant or that she felt overwhelmed with step-parenting.
- [109] Dr. Koopman testified that the fact the children have friends in Vancouver was an important factor in arriving at her conclusion that a move would affect the children, and would exacerbate their learning problems. She said that the children are bright children in spite of their learning problems and they need consistency and predictability. She felt that the fact that they are not handicapped, but are very nice children, did not happen by accident; rather it is because they have been very well taken care of and have had every opportunity including tutoring, lessons, activities, and this pattern should not be disrupted.
- [110] However, she reluctantly agreed that if there had to be a move, it was in the best interests of the children to be with the mother because she assumed the full-time parenting role since the separation. She said that while full-time living with their father would be disruptive of the children's lives, she strongly believed that it was very much in the children's best interests to spend equal amounts of time with each parent.
- [111] Dr. Koopman agreed that the plaintiff's concerns about the children's short and long-term futures were sincere, particularly if the house had to be sold and if there were insufficient money from the defendant to sustain the children. She further agreed that if a move has to be made because of insufficient financial resources to live in Vancouver, it is better to do it now rather than to wait until after the plaintiff and the children had moved into a rental home in a different neighbourhood.
- [112] In response to Dr. Posthuma's report, Dr. Koopman believed that its major failing was that Dr. Posthuma had had no direct dealing with the children. She also disagreed that there was any historic lack of communication and cooperation between the parents, although she acknowledged that there certainly was now. She also disagreed that she lacked sufficient information about the children.

3. Evidence of Donna Trasolini

- [113] Mrs. Trasolini is the plaintiff's neighbour (the defendant's former neighbour) and the mother of four children who attend the same parochial school as the parties' children. She has been very active in the school since 1993.
- [114] Mrs. Trasolini testified that the plaintiff has been on two school committees with her and has participated in fieldtrips with the class. The defendant on the other hand has not. Mrs. Trasolini goes to every school assembly, which is held on Monday mornings, as well as to the Friday morning mass, and she said that the plaintiff is very often at both events. Starting in January 2007, Mrs. Trasolini started to see the defendant at a few of the Monday assemblies, but acknowledged that not many parents attend them. She often sees the plaintiff and occasionally the defendant at teacher's meetings.
- [115] Mrs. Trasolini testified that when the plaintiff and the defendant were living together, she would see the plaintiff almost every day with her children and they carpoled together. She did not see the defendant because he worked most of the time. She described the plaintiff as an "awesome mom", one who fully participates in the children's activities. The plaintiff, she says, is always the first to volunteer and she is very caring and attentive with children. Mrs. Trasolini testified that she had often seen the defendant until about November 2004, but not much afterwards. Mrs. Trasolini said that she had never heard the plaintiff say anything negative about the defendant or the defendant's girlfriend in front of the children.

4. Evidence of Kathy Uegster

- [116] Kathy Uegster counselled the defendant following the breakdown of the marriage. She has a Master's Degree in counselling from the University of British Columbia and has been a practicing counsellor since 1996. Although she mostly sees children in stressful situations, she also sees parents in conjunction with their children. She has counselled the defendant since November 2006 and generally sees him once a month, with the last session being in July 2007. She testified that the defendant had expressed to her a number of concerns including the impact on the children's health of parental discord and arguments; his reduced contact with the children and what effect that would have on his relationship with them; and what parenting and step-parenting methods and support would be advisable for the children.
- [117] Ms. Uegster testified that the defendant expressed emotions of sadness for the children, despair, a sense of powerlessness and anxiety, as well as anger directed at both the plaintiff and himself. She testified that the defendant was someone who needed an empathic ear in order for his defences to be lowered thus allowing him to see himself more clearly.
- [118] She testified that the defendant described the plaintiff as a "stay at home mother" of their four children, three of whom had some learning difficulties. He described to her the conflicts in the marriage; that he had met Ms. Wong approximately a year before the separation and a relationship developed between them; and that he had admitted to the plaintiff that he had been seeing someone else.

- [119] Ms. Uegster said that the defendant described his parenting style as abrupt and the plaintiff's style of parenting as firm but fair, consistent, loving and compassionate.
- [120] Ms. Uegster has met with the defendant's girlfriend, Ms. Wong, and testified that she expressed to Ms. Uegster feelings of being overwhelmed by the four young children and with step-parenting. She testified that Ms. Wong told her that the defendant was quick to criticize and yelled at the children. She also testified that Ms. Wong had told her that she and the defendant had been fighting.
- [121] Ms. Uegster testified that she and Ms. Tredger have met and discussed the case.
- [122] On cross-examination by the plaintiff's counsel, Ms. Uegster testified that she generally accepts what clients tell her. She had not heard from the defendant that the plaintiff had given him ample access. She agreed that if the defendant continued to treat the plaintiff poorly in spite of her counselling, then the counselling was not helpful.
- [123] Ms. Uegster agreed that it would not appropriate for one parent to talk to the children about moving until that issue was settled and that she would have not advised the defendant to discuss that issue with the children. However, on re-examination, Ms. Uegster said that if the children bring up the topic of moving, then it was appropriate and good for the parent to speak with them about that.

5. The Defendant's Evidence

- [124] In the opening sequence of the defendant's evidence in chief, he spoke passionately of his love for the children and described the attributes of each child in considerable detail. It was clear that the defendant is deeply involved with the children and wishes to remain a significant part their lives.
- [125] The defendant spoke of the youngest child Z.K. as being "super", very gifted, at the top of her class, having a great appetite for learning and a wonderful sense of humour.
- [126] The defendant explained that D.K. "floats in her relationship" and accordingly he tries to pay extra attention to her. He described her as shy and not keen to speak, especially in the company of strangers. She is gifted in sports, and excels in gym class, as well as in swimming and diving. She excels in one-on-one situations and uses a "neat thread of humour to get through her challenges".
- [127] He testified that B.H., the only boy in the family, has "benefited from a doting mother" and a "full-on dad", and is a boy who lives in a "sea of pink". The boy loves sports and this helps him with his problems.
- [128] He described A.M., the first-born, as a true reflection of her parents. She was also described as very gifted child with a high intellect, love of reading, and a great desire to do well. The defendant described her as adoring her school, including the religious instruction. She is a child in transition between preteen and teen.

- [129] In testifying about the children's learning problems, the defendant stated that Z.K. needs challenges and has to be given advanced materials and experiences. D.M. has some phonemic problems, which are further hampered by her braces. D.M.'s math skills are below norm and her reading skills are a little challenged, but this, he believes, can be dealt with by practice. B.H. has ADHD, which the defendant described as mild to moderate. Although B.H. is meeting his curriculum requirements, he continues to need focus and is helped by his medications. Finally, A.M. has "indications of dyslexia". The defendant acknowledged that the plaintiff did a great job in researching this condition and getting the necessary help. Shortly before the defendant testified, he attended a parent-teacher interview and now believes that A.M. is progressing excellently. Accordingly, the defendant was firm in his testimony and belief that the AlphaSmart keyboard requested by the plaintiff was not a necessary item. The defendant was fortified in his position by the fact that A.M. had scored 22/25 on a recent test, placing her in the top 5% of her peers.
- [130] The defendant testified that prior to the separation the family was very active and the children were very involved in soccer, T-ball, skiing, and arts and crafts. He said that the plaintiff would typically drop off the children at an activity and he would pick them up, so that he was "very, very involved" with the children and their activities.
- [131] The defendant testified that after the breakdown of the marriage toward the end of 2006, he eventually went to see a counsellor, Kathy Uegster. He testified that he went to see her because his world changed drastically and to tried to learn how to handle the children's awkward questions; "how to handle the children's anger at me"; how to introduce the children properly to Ms. Wong; and how to meet the children's needs. The defendant testified that "we failed them miserably at our marriage but we did a great job of raising the children". To further his parenting skills, the defendant testified that he took the "parenting after separation" course also at the end of 2006.
- [132] The defendant said that the four children know his girlfriend, Daisy Wong, with whom he has been living since December 2006. Ms. Wong was an employee of one of his companies and that is where the children first met her. The defendant says that the children have a beneficial relationship with Ms. Wong.
- [133] In regards to the role of religion in his life, the defendant said that it had played no part in his childhood, but that he and the plaintiff had made a commitment to raise the children in a Catholic school system and that commitment continues. However, he said that he has made it abundantly clear that he is not a Catholic and had never participated in the church. Instead, the defendant says he has an interest in the Dalai Lama and has shared this interest with two of the children when they asked.
- [134] The defendant spoke of the difference in parenting styles between himself and the plaintiff. He described the plaintiff as having a rich appetite to read and learn and that she was the driving force behind the two of them taking courses over the years. However, he complained that the plaintiff took ownership of issues or facts, and a difference in opinion

would result in a conflict between them. He said that if he stuck to his opinion, the plaintiff's emotions would rapidly escalate and she would call him names. He was not a match for her in an argument and for the most part tried to avoid arguments. On the other hand, he described himself as an emotional role model for the children, in contrast to the plaintiff who was highly organized and rule based.

- [135] The defendant testified to past arguments, some of which were physical. He said that both of them used bad language in order to impress the argument or opinion and said that they were "desensitized" to foul language. He said that their arguments were sometimes public and she had yelled at him in his office. He said that the two of them built up a nasty disposition toward each other, such that it eventually got to a point where he believed that their relationship could not be fixed, especially when he saw that the children were mimicking their tones. With the benefit of hindsight brought about through counselling, he has gained some insights in his conduct and attitude and concluded that they were self-destructive.
- [136] The defendant disputed the plaintiff's evidence that he rarely attended parent-teacher interviews, although he acknowledged that his business travel prior to the separation had limited his involvement. However, he said that his travel schedule has changed drastically since June 2006 such that he had only taken four trips in the preceding 12 months, and now has full control of when and how long he will be away on business. With reference to these business trips, the defendant testified that they would typically be for two or three days. He testified that he had traveled significantly more prior to 2006, as was required by one of his companies.
- [137] The defendant testified that although he has moved three times since the separation, he has now been living in the same residence for a considerable period of time. Although both he and Ms. Wong work full time, he argued that because he can now control his business travel, he can have the children living with him. He emphatically stated that he could take a four-day weekend once a month so that he could have the children with him. He also stated that either he or Ms. Wong, who works at UBC near the children's school, can pick up the children from school.
- [138] The defendant acknowledged and he and Ms. Wong have seen a relationship counsellor and they do have "disagreements including one complaint from Ms. Wong that the defendant was still posting his name on an internet dating service".
- [139] With reference to the Report, the defendant agreed that although it contained some factual errors, he agreed with its conclusions overall. In particular, he said that both he and the children were overjoyed that the Report recommended a 50/50 custody arrangement, but he felt that a two weeks on, two weeks off, was too long for the children to be away from either parent. He proposed the summers to be divided equally as should other school breaks, alternating Christmas eves, and the spring break. I believe that it is a cause of some concern that the defendant disclosed the contents of the Report to the children.

a) Response to Allegations of Inappropriate Behaviour and Lack of Support

[140] The defendant testified to the emails and voicemail messages sent by him to the plaintiff and acknowledged them as being horrific to hear and deeply embarrassing: a real "window in the wrongs I have committed".

[141] The defendant explained his role in the events at the birthday party in November 2006. He said that he was there fully expecting to pick up the children, but when the plaintiff opened the door and said that he was behind the "eight-ball and to pay up and if necessary to sell one of the companies", he yelled at her and they "had words". He did not recall threatening her although he agreed he likely would have sworn at her. When the police arrived, he described this as "one of the most embarrassing moments in my life". He acknowledged that it was a distressing event, but he said it was distressing for everyone. After he left the plaintiff's house and went to his residence, he was met by the police and admitted to them that he had been drinking. He said that he had four drinks.

[142] I note that he related a significantly different story at his examination for discovery and in his December 13, 2006 affidavit, where he stated that he did not yell at or threaten the plaintiff, and that he had not been drinking except for the one beer after work:

the police did ask me whether I had been drinking, and, as far as I was aware, accepted my response that I had a beer after work, which is in fact all I had to drink that day.

[143] Although at the examination for discovery he denied telling the plaintiff that he was going to sell MD Analytics for \$1,800, on cross-examination he agreed that he had probably, flippantly, told the plaintiff that.

[144] In relation to the episode at Dr. Weiss's office, he testified at his examination for discovery on July 5, 2007 that he had recently called the plaintiff a "psychotic bitch".

[145] At the trial, the defendant testified that he erred in this answer. However, he maintained that he was justified in making that comment because of the "psychotic representation she did in that office". Further, when counsel pressed him as to the appropriateness of and circumstances surrounding that encounter, he reaffirmed that he had called her a psychotic bitch. He explained his behaviour, testifying that he spoke in a very sarcastic tone as the result of the humiliation he had endured during the meeting.

[146] The defendant acknowledged that it was not advisable to discuss scheduling with the children; to make schedule changes unilaterally; to badmouth the other parent; or to swear at the other parent in front of the children. He said that, "We have heated interactions" and "I've potentially overreacted". He expressed an intention of looking into methods of dealing with such overreactions explaining that the trial had been one of the most penetrating experiences he has had and it has had a huge impact on him and on how he will act in the future. He testified that his behaviour toward the plaintiff has improved and maintained that the nasty emails he has sent to her were a small percentage of the many emails that have been exchanged. He agreed that he knew as early as June 2006 that the plaintiff was

complaining of his actions, and specifically on July 24, 2006, when she had let him know that his anger was increasing. He agreed that in spite of the fact that the plaintiff obtained a restraining order in November 2006, he still sent a number of nasty emails.

- [147] The defendant agreed that he reduced the plaintiff to tears when he had called her dumb or pathetic or swore at her. He also agreed that he had read the plaintiff's earlier affidavits and knew that since the spring of 2006 she was on stress leave and knew that his conduct was having a significant impact upon her. This was especially so after he took the "parenting after separation" course and learned that this kind of conduct was detrimental to him, the plaintiff, and the children.
- [148] The defendant also testified that he was aware that his threats of sending the police to pick up the computer would cause the plaintiff distress, as would his threats to report her and Dr. Weiss to children's services, or report her uncle for breach of confidentiality. He also acknowledged that he threatened to report the plaintiff's friend, chartered accountant Ms. McGinley, to the Institute of Chartered Accountants because he had heard that Ms. McGinley had made comments about how one of his companies, Gotham, ran its books. He also agreed that he had threatened to have the plaintiff's counsel removed as counsel sometime during the summer of 2007 and he knew that this also caused the plaintiff distress. He admitted that he told the plaintiff that he was going to report her doctor to the medical board for saying that he was bipolar and narcissistic.
- [149] At his examination for discovery, the defendant stated that the children have never witnessed him saying bad things about the plaintiff in her absence. However, on cross examination, he agreed that since the separation he had sworn at the plaintiff in front of the children. He maintained that he told her to "shut up bitch", but that this was not in front of the children. He acknowledged that he had said the following to the plaintiff: "You are an absolutely sick demented person"; "you are a pathetic little rat"; "you are absolutely pathetic and a f---g headcase; "I'm glad to drag the case through the courts"; and "you're f---g twisted". He ultimately agreed that he had said "some bad things about her" in front of the children and he has not counted the number of times, but he has now dedicated himself to make sure that it never happens again.
- [150] The defendant also acknowledged that he read Ms. Tredger's April 2007 letter in which she wrote that the children reported to her that he was saying bad things about their mother. Nevertheless, at his examination for discovery, the defendant denied that he was aware that the children had voiced a concern about him taking badly about their mother in front of them.
- [151] With respect to B.H.'s medications episode, particularly the plaintiff's allegations that he was uncooperative and made things worse, the defendant testified that he attributed B.H.'s difficulties with his medication to the plaintiff's initiative in taking him off his medications in the summer and again at Christmas of 2006. He testified that B.H. was having many difficulties with his medications in the fall of 2006, but he understood this and recognized

the side affects of nausea and headaches. However, he said that the child's symptoms were getting worse and by January 2007, B.H. was having a full meltdown.

[152] The defendant testified that Dr. Weiss had emailed him on January 19, 2007, advising him that his agreement was required in order for her to continue to treat the children:

if you prefer [B.H.]'s treatment to another psychiatrist, please let me know prior to the appointment on the 22nd in which case I will cancel it. Vicky, please print this email for the chart. This appointment is cancelled unless we hear back from Howard that he consents to treatment and wishes [B.H.] to remain in treatment in the clinic and under my care.

The defendant testified that the exchange of emails between him and the plaintiff was because both he and the plaintiff had spoken about whether Dr. Weiss should be the one to treat the children, and that there was a mutual decision to investigate others. However, there was never any mention by him to Dr. Weiss that he did not want her to continue treating the children. The plaintiff had sent an email to the defendant asking him to reply to Dr. Weiss as soon as possible, particularly because of the meltdown that B.H. had the night before, and indicating how important the next meeting with Dr. Weiss was. The defendant testified that he replied with an email agreeing to the appointment.

[153] The defendant also testified that during these events he and the plaintiff had a number of telephone conversations, including one where he told her that he had made a complaint about her to the child welfare office because she had not dropped off the child's medications. He agreed on cross-examination that he had lied to the plaintiff when he told her that.

[154] The defendant knew that the plaintiff did not want the defendant's mother to baby-sit the children in his absence because of a concern regarding her alcoholism. The defendant described his mother as a recovering alcoholic with "a bit of history" and that she had been charged with theft and impaired driving on a number of occasions. The defendant stated that he would never leave his children with his mother if she were "on edge" or had been drinking and he had written to the plaintiff on April 17, 2006 agreeing that she would not babysit. In spite of this, he agreed that he had his mother look after the children in his absence, particularly in the summer of 2006.

[155] At his examination for discovery, the defendant admitted that his first response with the children when angry was to yell. On cross-examination, he said that this was not a true answer, explaining that "it depends on the situation". Nevertheless, he said that yelling was a technique he uses to get the children's attention.

[156] With reference to discussing the potential move to PEI with the children, the defendant admitted that he had spoken with them, but said it was only in response to their questions. He testified that he told them that if they moved to PEI he would not be able to move his company there. He maintained that he only speaks with the children about these things when they raise their concerns and he further agreed that it would be bad parenting to tell

the children about holiday plans or a potential move before it was settled. He acknowledged that the plaintiff had repeatedly asked him to stop talking to the children about a potential move to PEI.

[157] The defendant conceded that he opposes the children's therapy with Barbara Tredger and stated it would be his intention to take steps to prevent the children from going back to her because he believes that Ms. Tredger is in a conflict of interest.

b) Allegation that the Plaintiff did not keep the Defendant Informed of Children's Schedules

[158] The defendant testified that the plaintiff breached the order of Master Donaldson by failing to keep him informed of the children's plans or doctors' visits. This assertion was extensively challenged on cross-examination and he admitted that the plaintiff had in fact kept him informed.

[159] When the plaintiff's email of March 24, 2006 informing him of the children's school schedule was shown to him, he replied that he did not know why the plaintiff thought it was necessary to send it because it was just two days after the separation. He acknowledged that the plaintiff had emailed him on March 28, 2006 advising of school activities and suggesting that he get on the school's email list. He acknowledged that it was not the plaintiff's responsibility to keep him informed, and that he was able to do it himself. He also acknowledged that the March 28 email asked for his travel plans and that the plaintiff had emailed him numerous times asking for his summer plans, including an email on June 19, 2006, which detailed the plaintiff's plans for the summer. He acknowledged that he did not provide a summer schedule to the plaintiff.

[160] The defendant also acknowledged that he had received an email from the plaintiff on April 29, 2006, informing him of certain events that the children had either been involved in or that were upcoming, and inviting the defendant to participate.

[161] On cross-examination, he was referred to events in July 2006 when the plaintiff's counsel wrote to the defendant's then counsel listing the periods of time when the plaintiff would be away with the children and once again asking the defendant's counsel if the defendant's work and travel schedule for the summer were available, "so further arrangements may be made". The defendant's solicitor did not reply until more than two weeks later, advising that the defendant would prefer that the time at Keats Island be four days rather than a full week and that he was planning to be with the children the week of August 27 - September 4. Although it took more than two weeks for the defendant's response, and this was the first time that he had actually responded, he testified that there were constant communications between him and the plaintiff.

- [162] In the same vein, at the examination for discovery, he stated that he had always communicated successfully with the plaintiff. However, on cross-examination, he acknowledged that "we do not always have successful conversations on the phone". He explained the discrepancy by saying that he probably spoke too quickly at the examination for discovery and that the original answer was false.
- [163] On September 18, 2006, the plaintiff sent a lengthy email to the defendant informing him of a meeting she had at the school, particularly with two of A.M.'s teachers who were concerned about her. The email gave a fairly detailed account of that meeting and the teacher's recommendations for the child, including that it was important for her to learn keyboarding over the next year because "written output is really important through Grades 5-6 and 7". The plaintiff mentioned the type of keyboarding computer that was recommended (AlphaSmart keyboard) and asked if the defendant had the ability to research this product through his office and get a good price for it. When the defendant was asked about this email, he agreed that the plaintiff had sent it, but said that the plaintiff had not allowed him to go to the children's school and in fact went so far as to tell the school that there was a restraining order against him. When counsel questioned this answer and asked the defendant to elaborate, he only said, "I apologize - I think I misspoke".
- [164] The defendant also acknowledged that on October 16, 2006 the plaintiff sent him an email asking him to confirm his travel schedule for three weeks so that she could make child care arrangements for when he would be out of the city and the children would be staying full time with the plaintiff. In fact, this email was subsequent to the defendant informing the Court that he was able to confirm his travel schedule.
- [165] Further, the defendant agreed that the plaintiff had recommended a number of times that the defendant could meet with the children's therapist, Ms. Tredger. This contradicted his answers at the examination for discovery where he denied that the plaintiff encouraged him to see Ms. Tredger.
- [166] Despite admitting on cross-examination that the plaintiff had kept him informed, the defendant continued to maintain it was not a gross exaggeration to say that he was not kept informed during the summer of 2006.
- c) Response to the Plaintiff's Reasons for Moving to PEI
- [167] The defendant staunchly believes that the plaintiff and the children can continue to live in Vancouver. He testified that he believes that she will have approximately \$500,000 from the proceeds of the sale of the former matrimonial home, and that together with the support he would pay based on an income of \$178,000, as well as her own income, there should be sufficient funds for her and the children to live within their means. He encourages the plaintiff to go back to University to get her Master's degree in nursing, as he believes that it would be very rewarding for her.

[168] On cross-examination, the defendant agreed that MD Analytics has clients in both Toronto and Montreal and that its business has grown exponentially there since 2002. However, he firmly rejected the suggestion that it would be possible for him to move east to carry out his work.

6. Evidence of Wen Lin Yuen

[169] The defendant called Wen Lin Yuen, his former employee. The defendant's counsel had earlier advised that she was being called to give evidence of her observations of the plaintiff at the defendant's office, including an embarrassing scene when the plaintiff accused her of having an affair with the defendant.

[170] Ms. Yuen testified that one night the plaintiff had called her at her apartment and asked to speak to her husband. When Ms. Yuen said that her husband was not there, the plaintiff told her not to lie to her. Ms Yuen testified the plaintiff called her six or seven times that night. She denied that the plaintiff had ever directly accused her of having an affair with the defendant or that there had been a scene at the office.

D. Condition, Means, Needs and Other Circumstances of the Parties

1. Plaintiff's Evidence

a) Family Assets

[171] The plaintiff filed a Schedule of Assets and Liabilities, commonly known as the Scott Schedule, in which she described the family assets, their estimated current value, ownership, particulars of acquisition, and her position as to their distribution or disposition. The plaintiff listed the following family assets:

- 1) the former matrimonial home on West 34th Ave in Vancouver, acquired in 2003, with a current value of \$1,670,000, based on a July 24, 2007 appraisal and currently under foreclosure;
- 2) the PEI Cottage, acquired in 1999 and equally owned by the parties, with a 2006 appraised value of \$150,000;
- 3) a variety of other personal property, including an interest in a 34-foot motor vessel, a speedboat and a trailer;
- 4) several minor life insurance policies, bank accounts, and a stock portfolio(s); and
- 5) unvalued shares in five private companies: Med-Ink Communications Inc.; Gotham OHC Inc.; MD Analytics Inc.; On Res Systems Inc.; and ROI Communications Inc.

[172] The plaintiff puts the total known value of these assets, not counting the shares in the private companies, at approximately \$1,980,500. Against these assets, there are liabilities totalling approximately \$852,000, comprising:

- 1) the mortgage on the former matrimonial home of approximately \$550,000;
 - 2) a CIBC line of credit of approximately \$128,300;
 - 3) a personal loan of approximately \$51,000;
 - 4) a personal line of credit of approximately \$20,000; and
 - 5) miscellaneous overdrafts, credit card accounts, the monies owing to the private school, and other personal loans.
- [173] One of the liabilities, which the plaintiff says is a family debt, was in fact used by the defendant to pay off certain credit card debts incurred for the purposes of his businesses.
- [174] The plaintiff estimates the parties' net worth, exclusive of the value of the private companies, to be approximately \$1 million dollars.
- [175] The plaintiff is particularly interested in keeping the PEI Cottage because it provides a ready-made home for her and the children if they are allowed to move to PEI, the children have spent most of their summers there since they were born, and it is in the midst of her very large extended family.
- [176] The plaintiff gave evidence about the businesses in which she and the defendant or the defendant alone have been involved since moving to British Columbia. These include skincareguide.com, Gotham, MD Analytics, ROI Communications, ONREZ Systems, Endpoint Communications, Physicansamples.com, and Med Inc. She described the businesses as follows:
- 1) The defendant owns Gotham with his business partner Tyler Hassman, who is the technical genius to the defendant's business genius.
 - 2) MD Analytics is a medical market research survey vehicle. Both the plaintiff and the defendant earned income from this company, at least until the plaintiff started her employment with the pharmaceutical company in the fall of 2005. The defendant was very excited about the company and informed her that it generated more profit than Gotham in 2005.
 - 3) ROI Communications is owned equally by Mr. Hassman and the defendant, but the plaintiff was vague as to what its actual function was.
 - 4) ONREZ Systems was a reservation system for small boutique hotels acquired by Gotham in October 2005.
 - 5) Endpoint Communications is a health care company, but again the plaintiff was unsure of its activities.
 - 6) Physicansamples.com, created presumably in the fall of 2005, is a partnership between the defendant and Mr. Hassman, but again the plaintiff was uncertain as to its activities.

7) Med Inc. is owned by the parties and was used by them to do medical consulting. The plaintiff's fees were billed through Med Inc.

b) Employment and Income

[177] Although the plaintiff is or was a qualified nurse, her professional nursing career ended with the births of the children, particularly after the family moved to Vancouver in January 2000. Since that time, she has primarily stayed at home with the young children; the youngest was born in Vancouver in November 2000.

[178] However, in 2000, she did do some part-time computer work for the defendant's company until she started working at one of the defendant's businesses called IParenting.com. The plaintiff received no employment income from this business, as it never made money, although another company, Gotham, funded the start-up costs. As noted earlier, she found work with a pharmaceutical company in November 2005. This work was not connected to the defendant's companies. She worked under a 12-month contract paying \$65,000 annually plus a car allowance. She worked at this job until June 2006, when her doctor put her on disability due to depression brought about by the break-up of the marriage. Until her contract expired in November 25, 2006, the plaintiff received disability income of 65% of her salary or approximately \$630 per week. With the end of the contract, the use of the company car ended as well.

[179] After the disability income ended in November 2006, she received sickness employment benefits until March 2007, when they were replaced with regular Employment Insurance benefits of \$370 per week. These continued until August 4, 2007, from which point on she has had no income even though she started to work for a skin care products company selling skin care products from home.

[180] The plaintiff has applied for nursing positions and is registered with the College of Registered Nurses of British Columbia and with the Association of Registered Nurses of PEI. Although the plaintiff is licensed to work as a nurse, she has not worked in a hospital since 1989. However, as noted above, the plaintiff had been offered a job as a nurse in the Charlottetown hospital. The plaintiff testified that she continues to upgrade her skills, including recertifying for CPR in February 2007 and taking a two-day course on advance life support in April 2007. She testified that she requires 18 months and \$2,300 to complete the upgrade of her qualifications. She had asked for this amount from the defendant, but to no avail.

[181] As well, the plaintiff applied again at the pharmaceutical company where she was employed in 2005/2006, but it has "downsized" and no longer has a position for her. The plaintiff has also applied at various pharmaceutical companies but has had no responses. She has left her resume with the Coastal Health Authority, the Provincial Healthcare, Fraser Health Authority and all of the metropolitan Vancouver hospitals, but as of the date of trial she had no offers.

- [182] One further option for the plaintiff is to enrol in a Master's in Nursing program. Although this would require two years of study, it would ultimately result in a higher income for her.
- [183] During 2006, the plaintiff reported income from the pharmaceutical company and from the income splitting arrangement between her and the defendant through MD Analytics. The plaintiff's 2006 tax return was done by the company accountant, who also prepared her Record of Employment, which showed her last day of work for the company to be May 31, 2006. The plaintiff disputed that Record of Employment, and advised the accountant that she had not worked for the company in 2006, and accordingly filed her 2006 tax return showing only her income from the pharmaceutical company, her disability, and her employment insurance income.
- [184] With respect to the Record of Employment, I note that defendant's October 26, 2006 affidavit showed that he and the plaintiff had split incomes until July 2006 when she stopped carrying out any duties. When asked whether that was false, the defendant admitted that it was false "as it reads".
- [185] The plaintiff testified that until August 2007, the only defendant's income tax return she had received was for 2005 and it showed a Line 150 Income of \$392,836.52.
- [186] In preparation for this litigation and the trial, the plaintiff was obliged to make an application to compel the defendant to produce his 2003, 2004 and 2006 income tax returns. On July 24, 2007, Master Taylor ordered the defendant to produce those income tax returns together with Notices of Assessment or Reassessment, as well as a large volume of other documents. I note that many of the documents which had been ordered to be produced by July 31, 2007, were not produced as ordered and were only produced much later, in some cases shortly before trial.

c) Expenses

- [187] The plaintiff's Form 89 financial statement sworn September 5, 2007 reports monthly expenses of \$10,179.01 per year, but that is based upon a move to PEI and paying a small mortgage on a cottage which the parties own there. Other expenses, similarly, are predicated upon such a move. An earlier Form 89 sworn July 7, 2006 reflected the pre-separation spending, including \$2,100 per month for a full-time nanny. The plaintiff testified that she is currently assisted in childcare by an au pair who is living with her. The au pair is a student from Mexico and "covers" for the plaintiff when she has to take one child to an activity and leave the others at home. The au pair works about 15 hours a week and is paid \$100 per week.
- [188] The children's activities, both pre and post-separation, were extensive and expensive. The first Form 89 had included a sample of the children's recreational activities before the separation, for which the plaintiff testified that she bore and bears responsibility. When childcare, school uniforms, lunches, field trips, supplies, tutoring, birthday parties, recreation and counselling are included (to name but a few of the items listed), the direct

children's expenses come to \$3,270 per month. When the plaintiff's application for interim spousal and child support came before Pitfield J. in the fall of 2006, her Form 89 expenses were \$28,897.02 per year. Even when Pitfield J. directed her to provide a list of the "bare necessities", the total amount was reduced to \$13,979 per year.

- [189] The plaintiff testified that the parties enjoyed an affluent lifestyle during their marriage, with their motor vehicles, cell phones and airtime, various electronic entertainment devices, home computers, and even some "fine wines and scotch", all paid for by the defendant's companies. They took golf trips and the company provided free hockey tickets in the reds section as well as playoff tickets, which the parties and their children sometimes used. They enjoyed many restaurant meals, both with and without the children. One of the companies, Gotham, paid for some ski tickets and some dinners at Whistler when the plaintiff and the defendant were there with the defendant's business partner and his girlfriend.
- [190] The plaintiff testified that they used motorboats for family purposes, although their ownership was shared with the defendant's business partner. The larger boat was expensive to operate with two 380-litre fuel tanks that required \$500 of fuel for a day of cruising. As an example of the expensive trips the parties took on the boat, the plaintiff described one trip to Desolation Sound in the summer of 2005, for which she believed that the fuel cost between \$3,000 and \$4,000.
- [191] The plaintiff has not used boats since the separation, but described how the children and the defendant used the larger boat for a 10-day trip to the Gulf Islands and the Vancouver Island in the summer of 2006. Further, she testified that the defendant and his girlfriend used the boat to go to Desolation Sound in 2006.

2. The Defendant's Evidence

- [192] The defendant testified of the financial pressures that were on him prior to the separation, describing the parties' circumstances as a "financial train wreck" because they were always at a negative financial balance. He said that they were pre-spending profits and the two of them made some ill-informed decisions, which put pressure on his businesses and his business partner. As a result, there were pressures to meet expenses, pay creditors, renovate the house, and send the children on trips. He said that between 2003 and 2005, both he and the plaintiff collaborated in trying to get the best for the children, but in late 2005, when he started to put a break on their activities and expenses, and challenging the plaintiff on her plans, there was discord and hostility and private and public arguments.

a) Family Assets

- [193] The defendant's disclosed debts include the mortgage on the former matrimonial home of \$548,000, unpaid property taxes of \$5,204, the mortgage of \$53,000 on the PEI Cottage, a line of credit of \$121,000, and loans owed by the defendant to Gotham of \$117,000. The unsecured debts totalling \$214,515.01 include a personal loan from Tyler Hassman of

approximately \$50,000, the debts owing to the private school and the Arbutus Club of approximately \$39,000, two other lines of credit totalling approximately \$20,500, and an American Express card debt of \$33,000. The defendant testified that the American Express debt was for his personal card, which he had used for business purposes prior to the separation. He also has a MasterCard debt of \$4,500, which he testified was incurred after the separation.

- [194] With respect to the PEI Cottage, the defendant acknowledged that it was a huge part of the children's lives and was very important to them. However, he also testified that his "historical position" had always been to sell the property and pay off the family debts. He explained that it is not possible for him to move his businesses to PEI and he cannot commute between Vancouver and PEI because of the four-hour time difference and the 6,000 km distance.
- [195] With respect to the former matrimonial home, the defendant testified that although his initial position was that the children should continue to live there, he now believes that it should be sold and the proceeds used to pay off the parties' debts, including the mortgage on the PEI Cottage.
- [196] The defendant gave a corporate history of the companies, including Med Inc., ProMed, WebofCare, Gotham, SkinCareguide, ROI, I-Parenting, MD Analytics, and OnRez, and described the role that he and his partner Mr. Hassman and the plaintiff have played. The gist of his evidence was that some of the companies are dormant, others produce little money, and the businesses are generally not as profitable as they were before the separation.
- [197] The defendant maintained that his financial circumstances have declined since January 2007, although he conceded that he is working hard to make MD Analytics a success and that it was doing "moderately well", although most of the money it makes is going back into the company. He conceded that "some months [MD] Analytic had more assets than liabilities".
- [198] The defendant testified that financial pressures continued after the separation one of the companies, Gotham, lost a substantial contract resulting in a serious blow to the company's finances. Before Pitfield J., he had given evidence that Gotham was defunct and was unable to pay anything to the defendant. As will be seen below, his subsequent testimony and other evidence contradicts these assertions.
- [199] The defendant was questioned about the legal entanglements between Gotham and a U.S. company with which it had a contract and he acknowledged that ROI Communications was incorporated in order to protect Gotham's revenues and assets in the event that the lawsuit went against it. Similarly, MD Analytics Inc. was created to protect Gotham's revenues and assets, that is, to make it judgment proof.

- [200] At trial, the defendant testified that MD Analytics was not in a position to be sold. This contradicted his earlier answers at the examination for discovery that the company was for sale. On cross-examination, he acknowledged that the examination for discovery answers were true and that he could sell this company. Specifically, he testified that a related company, OnRez, would still exist because Gotham owns 85% of it.
- [201] The defendant had purchased a one-third interest in the 32-foot powerboat in 2004 at a cost of \$30,000. He gave equivocal evidence as to whose idea it was to buy the boat, his or Mr. Hassman, however, he eventually acknowledged that it was his idea. Initially he, Mr. Hassman, and one Stan Springer, were the owners. Mr. Hassman and the defendant are now the sole owners having bought out Mr. Springer. In response to the plaintiff's testimony about his use of the boat and the cost of the fuel, the defendant testified that fuel costs vary depending upon the wind and weather, but that a return trip to Desolation Sound would cost between \$450 and \$600.
- [202] The defendant agreed that in the past year the boat has been used more for personal use than for corporate business and that in the summer of 2007, he, Ms. Wong and the four children used it to sail to Poet's Cove. The defendant also testified that the boat was used for a corporate getaway in February 2007.
- [203] He testified that the moorage for the boat costs \$36 to \$40 a day, and that he pays for gas personally. He agreed that there was nothing preventing him from selling his half-interest in the boat except finding a buyer who would want to share the boat with Mr. Hassman.
- [204] With reference to the fact that the motor boat was moved to False Creek Marina after the separation, increasing the moorage cost, the defendant explained that it was a "corporate decision to acquire a corporate membership" for \$10,000, although he was not sure which company actually bought the membership.

b) Employment and Income

- [205] The defendant's September 7, 2006 Form 89 showed an income of \$150,000 but did not reveal that the company was paying his rent of \$2,400 per month which, if annualized, would increase his income to \$180,000. The defendant's April 13, 2007 affidavit deposed to 2006 income of \$227,399. The defendant's September 28, 2007 Form 89 showed a bi-weekly income of \$7,450 or \$178,800 annually.
- [206] On cross-examination, the defendant first testified that his income in November 2006 was higher than it was in January 2007, but later acknowledged that his income increased in January from \$150,000 to \$178,000 per annum. The increase was agreed to with his business partner Mr. Hassman because instead of paying the defendant's rent, as the company been doing since June 2006, he would now get more cash in hand to pay the \$7,000 a month that he wanted to pay to the plaintiff to provide for the children.

- [207] On cross-examination, the defendant professed to have no memory of his former counsel informing Ross J. that his income was \$182,000, although he stated that his salary was \$150,000 and there were bonuses.
- [208] The defendant referred to a letter dated October 26, 2006 from Michelle Kinakin, Gotham's senior accountant, in which she reported that his 2005 T4 showed income of \$276,247.15, including \$3,247.07 for taxable benefits relating to the company vehicle. He also had a taxable dividend in 2005 of approximately \$116,590 (grossed-up value) value, which was allocated to his shareholder loan account, reducing the outstanding balance. She wrote that the dividend was a "journal entry" and there was no actual cash payment to the defendant.
- [209] The defendant also referred to a letter dated March 3, 2005, from Gotham's comptroller, who wrote to CIBC setting out the compensation paid to the defendant and the plaintiff. She wrote that the defendant was a 49% shareholder of Gotham, and that the plaintiff was an employee of MD Analytics. In 2004, the defendant withdrew a total of \$301,705 from Gotham, comprising \$154,646 in salary, consulting fees and bonuses, and a further \$147,059 in shareholder draws. For 2005, the defendant's annual salary would be \$115,000 exclusive of any bonuses or other withdrawals. As for the plaintiff, as an employee of MD Analytics, her salary for 2005 would be \$35,000. It appears that the salary paid to the plaintiff was a form of income splitting.
- [210] One of the documents introduced by the defendant was a computer printout of his cumulative compensation from January 1, 2002 to October 31, 2006. The compensation, consulting and salary expense, and bonuses totalled \$834,940.58, averaging approximately \$200,000 per year.
- [211] The defendant testified that he could not recall if, in September 2006, he had told the plaintiff he was not able to take any funds from the companies over his basic salary. However, in his examination for discovery on July 16, 2007, he acknowledged that he did not know if that "absolutely true" and "I may have taken more than that". Pressed further, the defendant acknowledged that what he had told the plaintiff was "false - potentially".
- [212] Although the defendant testified at his examination for discovery that he and his business partner Mr. Hassman shared the income from the companies equally, he disagreed with this at trial, testifying that they took equal salaries but different shareholder loans or commissions. He acknowledged that Mr. Hassman and he decide what each will take and that Mr. Hassman has been taking more money from the company since 2006 to equalize Mr. Hassman's income from the companies with that of the defendant. Further, he acknowledged that in 2007, Mr. Hassman has been taking bonuses designed to offset the difference in their shareholder loans.
- [213] The defendant agreed that there had been no disclosure of the amount of money that Mr. Hassman had taken from the company and, when asked whether Mr. Hassman was taking \$9,000 every two weeks, the defendant replied that he did not recall those details.

- [214] Between November 2006 (the first month following the order of Pitfield J.) and April 2007, the defendant was aware that Mr. Hassman took over \$250,000 from MD Analytics in spite of his testimony that the company was still in the developmental stage and needed all of its gross revenues. He testified that the increase in draws by Mr. Hassman was not connected in any way to the order of Pitfield J. because he and Mr. Hassman had discussed the increase over the summer and Mr. Hassman had informed him of his own financial commitments, including the fact that Mr. Hassman had bought a condominium for his mother. Mrs. Hassman also did some work for MD Analytics.
- [215] The defendant acknowledged that the financial statements of MD Analytics and Gotham show that for the period commencing November 15, 2006, Mr. Hassman's monthly income from Gotham went from \$6,837 to \$9,057 (in spite of the fact that he testified that Gotham was more or less defunct). The defendant acknowledged that there were probably other distributions to Mr. Hassman before April 2007, but he did not mention them in his affidavit because "we were very focused on [my] situation and not Mr. Hassman's". Exhibits 26 and 27, the general ledgers of Gotham and MD Analytics, were put to the defendant on cross-examination and he acknowledged that Mr. Hassman received \$5,000 from Gotham on December 31, 2006 and \$21,000 on November 1, 2006. This was in addition to the \$37,000 he took on December 15, 2006 and the \$20,000 on December 29, 2006, as well as the \$35,000 on February 2, 2007, \$10,000 on February 15, 2007, \$11,260 on March 14, 2007 and \$12,386 on April 10, 2007 from the companies. All, or most of these draws, were signed for by the defendant. The last cheque was signed a week before the defendant swore his affidavit for the April 2007 court appearance. He agreed that he had not informed the Court of those draws. In total, the defendant agreed that since November 1, 2006 Mr. Hassman has received in excess of \$115,000 in addition to his increased salary.
- [216] The defendant acknowledged that when the matter was before Ross J. he informed her that Gotham was no longer able to pay anything. The defendant admitted that he did not want or ask for any money to meet his obligations, including the court orders. Rather, the payments from Gotham were to allow Mr. Hassman to get up to parity with him, although the defendant said he was not aware or did not know if Mr. Hassman had achieved parity because "I haven't asked him."
- [217] Despite the fact that the defendant deposed in his April 13, 2007 affidavit that his 2006 income was \$227,399, which would have resulted in child support payments of \$4,596 per month, not including s. 7 expenses, he did not start paying even this reduced amount.
- c) Expenses
- [218] With reference to the expenses showed on his first Form 89, the defendant acknowledged that the total of \$22,933 was not a correct figure, explaining that the form was used "almost as a forecasting" of his expenses. In his affidavit sworn April 20, 2007, the defendant did not qualify that it was a forecast of expenses.

- [219] The defendant's later Form 89 declared monthly expenses of \$17,845.58. There is little to attract particular attention other than a monthly gift allowance of \$450 and a gas and oil expense of \$320.
- [220] The defendant swore an affidavit on November 24, 2006 in support of an application to vary the child support order made by Pitfield J. and in support of his position opposing the plaintiff's spousal support application. He acknowledged that the affidavit and the attachments were an attempt to show that he could not pay the amount ordered. Exhibit C to this affidavit, his adjusted or restated expenses, showed bare necessities expenses of \$5,097, including \$400 per month RESPs payment and debt management payments. In addition, he deposed to child support payments of \$8,770 for total monthly expenditures of \$14,477. The defendant testified that he had paid a number of these expenses in priority to the ordered child support payments, including charitable donations of \$50 and payments to his mother of \$300 per month. Further, he acknowledged that he was not actually paying the MSP premiums of \$160 per month, the dental care expenses of \$200 per month, \$400 into the RESP, \$805 on the lines of credit, or \$350 per month life insurance for which the plaintiff was the beneficiary, and was not spending \$100 on gifts. He also could not recall when he stopped making payments on his American Express debt.
- [221] The defendant was cross-examined on his claimed charitable donations and said that he donated when people came to the door even though his apartment building provides no public access. He then said that he meant that people sometimes canvas in the lobby. In his July 31, 2007 affidavit, he deposed that he had not made charitable donations since May 2006. He said that he meant that he had made no "significant" charitable donations since May 2006.
- [222] In his Form 89 sworn September 28, 2007, the defendant deposed that he paid his mother \$250 per month and in his first Form 89 he had sworn that he gave her \$625 per month, but in fact, he had never actually paid her that money. On cross examination, he testified that since November 2006 he has been paying his mother \$300 per month, "about the same as before the separation"
- [223] During the examination for discovery, the defendant testified that, generally speaking, Exhibit C to his November 24, 2006 affidavit was a realistic estimate of his expenses, but acknowledged that the claim of expenses of \$100 a month for his clothing was "overly stated". Further, the claimed expenses of \$65 per month for drugs was not "completely true", but he explained that he believed that he was paying for some of B.H.'s medication.
- [224] As indicated above, the company paid for the defendant's apartment rental from June 2006 until February 2007, after which he started paying the rent himself. The defendant agreed that his standard of living has not drastically reduced since separation.
- [225] The defendant drives a new Land Rover, which he leased on August 23, 2006, retailing for \$72,540 on a lease of \$1,122.16 per month over a 48-month period, with a lease-end option purchased price of \$34,437.60. This value takes into account the trade-in of his 2004 Range

Rover with a noted value of \$66,904.85. The defendant agreed that the Range Rover was a luxury vehicle and probably too expensive. He explained the trade-in by saying that after the separation he discovered that he needed more than five seats because he was driving the children more as a single parent than before (the Land Rover is a seven-seat model). He also testified that he "flipped the old lease without any increase in monthly costs of approximately \$1100". However, on cross-examination, he agreed that the Land Rover cost an additional \$150 per month. The defendant testified that his company pays for the lease on this vehicle, but 35% of the cost is attributed to him as a taxable benefit. He also testified that Gotham pays for Mr. Hassman's vehicle, a 2007 BMW costing \$1,444 monthly.

- [226] Although he testified at the examination for discovery that the car expenses were paid for by the company except for his gas, Exhibit C to his November 24, 2006 affidavit claims \$100 for repairs and maintenance.
- [227] In a letter from plaintiff's counsel to the defendant's former counsel dated January 2007, the defendant was asked to keep all receipts and account for all of his monthly spending. On cross-examination, the defendant acknowledged that he knew that the plaintiff took issue with the amount of money he was spending on himself and that he knew that he was supposed to save the receipts and account for all of his monthly spending, but chose not to do so.
- [228] The defendant testified that his company pays for his business meals and travel, providing a per diem of \$100 per day when he is away at conferences. The company also provides two hockey season tickets at a cost of \$8,900 each, but he said these were primarily used by staff or to entertain clients. He conceded that in the past he and his partner have sold unused tickets to scalpers and retained the cash. However, since late 2006, these proceeds have been returned to the company for a credit.
- [229] The defendant testified that before the first child support order was made by Pitfield J., he had been paying \$10,000 per month to the plaintiff. Nevertheless, after the order of Mr. Justice Pitfield, he paid less money to the plaintiff and explained this as the result of running out of money on a line of credit.
- [230] The defendant testified that he was now paying \$7,000 per month to the plaintiff and has provided post-dated cheques. On cross-examination, the defendant stated that some of the February and March 2007 support payments had not been cashed by the plaintiff. He understood the reason for this to be because the plaintiff thought it might jeopardize her employment insurance payments, but he only learned that she did not cash these cheques in April 2007. He testified that when he learned of this, he gave the plaintiff another cheque for \$10,500, but he was not sure of the date.
- [231] Although he said that he was paying all that he could, in his April 13, 2007 affidavit he deposed that he intended to increase the payments. He testified that between March 2006 and the trial, he had paid approximately \$185,000 to the plaintiff, but that amount included the payment of \$7,000 made shortly before the trial began, the Employment Insurance

benefits received by the plaintiff, and the rent that she received from renting a portion of the former matrimonial home. He testified that the support orders made by Pitfield and Ross JJ. required him to pay \$186,000, so the actual amount the plaintiff received during that time was only \$1,000 less. He maintained that he can continue to pay \$7,000 per month to the plaintiff, but cannot afford to increase this amount as he has "run out of credit". He says that he has "maxed out" his MasterCard at \$10,000, and he owes \$34,000 on the American Express Card.

- [232] The defendant acknowledged that in February and March 2007 he received an increased salary of \$15,000 per month, the company paid his rent, and Ms. Wong contributed \$600 per month toward their living expenses, giving him a total of \$18,000 per month for those two months. The defendant acknowledged that although his monthly income increased and expenses decreased, he had not paid any of these extra funds to the plaintiff.
- [233] The defendant offered an explanation for why he was not able to comply with the orders of Pitfield and Ross JJ. He stated that since the orders he has borrowed \$39,500 from Mr. Hassman and they "looked into" allowing the defendant to take extra money in order to meet the court orders, but because Gotham's major contract ended in June 2006, Gotham was "pretty much dormant" and did not have the funds. The defendant agreed that in October 2006 he informed the Court that Gotham was pretty well defunct and that it was his only source of income; that in the fall of 2006 none of the companies he was involved with had money; and, in the spring, MD Analytics was not in a positive cash flow position to pay any additional money.
- [234] The defendant testified that he used the \$39,500 borrowed from Mr. Hassman "primarily for legal fees" and not to pay the court-ordered support. This was necessary because he wanted to get his side of the case before the court. Reluctantly, the defendant agreed that he made the choice to pay legal fees rather than the support ordered by the court.
- [235] On cross-examination, plaintiff's counsel took the defendant through his credit card statements, including a number of admittedly discretionary, unnecessary and luxury expenses. These included expensive recreational travel (alone and with Ms. Wong), hotels and restaurants, electronics, and furniture. The defendant agreed that on several occasions he had sufficient cash, which could have been used to help the plaintiff meet her expenses.

E. Other Evidence

1. Evidence of Jennifer Hawn

- [236] The defendant called Jennifer Hawn, who had been the financial manager of MD Analytics since May 2007. Ms. Hawn is responsible for the accounting department and does MD Analytics' books. She testified that on the 15th and 30th of every month, she issues a cheque for \$3,500 for the defendant, and that in October 2007 she issued a number of post-dated cheques. She opined that these were the support payments made by the defendant to the plaintiff.

- [237] In reference to the financial affairs of Gotham, she testified that that company had no taxable income, but suffered losses over the past two years. She also testified that MD Analytics lost approximately \$19,000 in the 2006 fiscal year and she projected a loss of \$120,000 for 2007. On cross-examination, she acknowledged that MD Analytics was a growing company and testified to a number of issues with company's expenses, including \$1,867 per month spent on hockey tickets and improper deduction of "recoverable meals". She further testified that the partners' vehicles and furniture expenses were paid through Gotham, and she believed that Mr. Hassman paid for the boat moorage personally, but the company paid for the False Creek Yacht Clubhouse when the company used it for entertainment purposes.
- [238] She testified that since May 2007, the defendant has received no money from MD Analytics over and above his salary. Finally, she testified that as far as she knew the defendant did not receive a per diem when he traveled.
- [239] She agreed that the defendant's partner, Mr. Hassman, had taken two \$15,000 quarterly bonuses in 2007, but she was not aware that Mr. Hassman took a \$35,000 draw for his RRSP contribution.
- [240] Ms. Hawn said that Mr. Hassman travels more than the defendant and Mr. Hassman's mother is on the payroll of MD Analytics, having started in May 2007.

2. Evidence of Sally Budd

- [241] Sally Budd has been the Executive Vice-President of MD Analytics for the past three and one-half years. She has extensive experience in the pharmaceutical industry (over 20 years) and started with MD Analytics when it was in its infancy. She said that it has very much been a building process.
- [242] Ms. Budd gave evidence on whether it would be possible for the defendant to work in eastern Canada, away from the MD Analytics' head office. The plaintiff had referred to Ms. Budd working for MD Analytics while she was on extensive leaves in Germany. Ms. Budd explained that although she had been to Germany four times when her husband was posted there, it would not have been possible to remain employed by MD Analytics while staying in Germany.
- [243] Ms. Budd also testified that MD Analytics has a "gold seal" membership in an industry organization, which indicates that it has the very highest recognition for credibility and reliability. She said that the company has a very conservative approach in dealing with expenses and it looks for the most economical way of operating. She said that the principals, Ms. Hassman and the defendant, are quite different: Mr. Hassman is more methodical, "a detail man", and the defendant is more the visionary and "the people man" in the company.

- [244] Ms. Budd testified that the defendant has not traveled much in the last 12 months and that the other employees have built their work schedules around his Wednesday afternoons with the children. She had seen the defendant with his children in the office and heard him speak to them and saw them once at the office for a Christmas party. She testified that she had never heard the defendant yell at the children. Rather, he had a nice way of settling them.
- [245] Ms. Budd has known the plaintiff since she started to work for the company and indeed she said that the plaintiff had worked on a particular file with Ms. Budd. The plaintiff was "quite frequently in and out of the office" and she testified that she once heard an intense argument between the plaintiff and the defendant.
- [246] Ms. Budd was questioned as to the job opportunities available for the plaintiff, presumably because it was Ms. Budd's evidence that she had over 20 years experience in the pharmaceutical business. In Ms. Budd's opinion, the plaintiff had a number of job opportunities available to her in the pharmaceutical industry because she "certainly has the skill set".

3. Evidence of Daisy Wong

- [247] Daisy Way Wong, the defendant's girlfriend, testified that she was formerly employed at Gotham. Ms. Wong has a Bachelor of Science and Sociology degree from the University of British Columbia and prior to her employment at Gotham she had worked in hotels. Ms. Wong has or does contract work for the Ministry of Children and Family Development, teaching children life skills, particularly children with difficulties such as ADHD. Ms. Wong also works for a biotech company, organizing their travel arrangements. She likes that job and would not move to PEI with the defendant.
- [248] Ms. Wong denied that she and the defendant had fights, per se, because "his wall comes up". She also denied that she told Ms. Uegster that the defendant was quick to criticize and yelled at the children.
- [249] She testified that the children see them "teasing each other" and say that they are more playful than mom and dad. Ms. Wong agreed that she had told Ms. Uegster that the situation was overwhelming because she was a single person before her relationship with the defendant and was able to relax after work. Now, with the children, it is busy all the time. She testified that she tells the children that she is their friend and not their mother. She and the defendant share the housework and the defendant does certain things that Ms. Wong hates to do. She said that in the last year the defendant has become much more patient and more capable of multi-tasking.

[250] Ms. Wong said that the children seem sad, quiet, and not interactive, before returning to their mother. Ms. Wong would prefer it if she and the plaintiff could be friends or at least respect each other. She said that she did not like it when the defendant said bad things to her about the plaintiff. Ms. Wong described each of the children and it was obvious to me that she was very fond of them.

[251] In reference to sharing expenses with the defendant, Ms. Wong testified that she pays "about \$200 per week for food", \$600 towards the rent, and pays for the house insurance. She has credit card debts of approximately \$20,000.

[252] My impression of Ms. Wong was that she was candid and indeed guileless and has a rather unique forthright personality.

4. Testimony of Tyler Hassman

[253] Tyler Hassman testified that he is a 51% shareholder of MD Analytics and Gotham. He has a marketing diploma from Saskatchewan and he and the defendant met in 1999 at a company known as WebofCare.com

[254] He testified that over the two months preceding the trial the defendant has been more or less consumed with preparing for it, and he has seen the defendant perhaps a total of 16 hours during that time. He said that prior to the separation, the defendant worked approximately the same hours as he, from 8:00 am until about 10:00 pm or 11:00 pm.

[255] Mr. Hassman testified that he loaned the defendant approximately \$40,000, which has not been repaid. Mr. Hassman described the defendant as the "big idea man" who is not so good on details. The defendant primarily does new product development, while Mr. Hassman is involved in the operations and management.

[256] Mr. Hassman described each of the companies in which he and the defendant are involved. Gotham was created to be the Canadian representative of a U.S. company, WebMD. MD Analytics started as a subsidiary of Gotham in July 2003, but it became a separate entity in the fall of 2006. Fifteen percent of Gotham was owned by a third party, but later purchased by Mr. Hassman and the defendant for approximately \$135,000 to \$150,000. Mr. Hassman persuaded the defendant to buy out the third party, but, regrettably, after one year of operations the company still had not met its sales targets. Neither he nor the defendant has sufficient time to motivate the staff. Mr. Hassman was of the opinion that the company was not worth what they paid for it.

[257] Mr. Hassman said that the businesses had not all been 50/50 between him and the defendant. Gotham started out 60% for Mr. Hassman and 40% for the defendant, but ended up being 51/49, respectively, sometime after 2000. MD Analytics is owned 51/49, OnRez 50/50, and ROI-Gotham 50/50.

- [258] ROI Parenting was the company in which the plaintiff was the primary manager and Mr. Hassman was her partner. He said that the plaintiff developed the business through I-Parenting (US) and hired the staff. Mr. Hassman testified that the company was not successful because the timing was bad and the dot com meltdown affected the business.
- [259] Mr. Hassman testified that although Gotham had a significant client base of between 30,000-50,000 doctors across Canada, they were badly managing it by overspending, particularly on personal expenses. He testified that they were pre-selling advertising space and using that for bonuses without leaving sufficient money to operate the company for the subsequent years. Their troubles were exacerbated when their main partner decided to cancel a contract with Gotham in the summer of 2006 having bought another Canadian company. While they owe approximately \$120,000 to this company, they hope to offset that amount via compensation for improperly terminating the contract. Because Gotham signed a non-compete clause with this company, Mr. Hassman and the defendant decided to use ROI to be the recipient of any monies flowing from Gotham and with that they started to wind down Gotham's operations while at the same time assuring the company that Gotham was no longer active.
- [260] Mr. Hassman described Gotham as their flagship, which had opened a lot of business doors for them. However, when the contract ended with the US partner, it presented significant difficulties. Simultaneously, MD Analytics was starting up and he and the defendant began focusing on it. In early 2006, they combined the revenues of the two companies. He testified that he and the defendant were overspending prior to losing the contract, but now they are restructuring.
- [261] A further complication is that MD Analytics now has a major competitor in British Columbia, Angus Reid, which has more money and has already hired five of MD Analytics' staff, one of whom was selling \$600,000 annually. As a result, MD Analytics has had to increase staff salaries. However, he disagreed with the defendant's testimony that MD Analytics is "currently in the development stage", describing it as an established company. He further testified that MD Analytics has overdue accounts payable of \$200,000.
- [262] He testified that although since March 2006 the defendant has been spending more time on his personal affairs and has not been as active in the business, he is still being paid as a full-time managing partner.
- [263] As for MD Analytics' future plans, Mr. Hassman testified that they wanted to add qualitative research to their business. This would require doubling the office space at a cost of \$250,000, and spending \$150,000 on equipment, all of which would have to be self-financed, juggling their revenues. However, he testified that for the year ending July 2007, MD Analytics is projecting a loss of \$130,000, and any expansion would be financed by the company revenues and Mr. Hassman's personal investment.

- [264] Mr. Hassman acknowledged that both he and the defendant were overdrawing from Gotham and stated that their accountants had strongly urged them to stop doing so because the draws would be treated as income for tax purposes. He testified that the defendant and the plaintiff have overdrawn and have not repaid \$100,000 from Gotham. In the event that the company is audited and the shareholder loan is deemed as income, the taxes and penalty would be far greater.
- [265] Mr. Hassman testified about the boat he owns jointly with the defendant and estimated its value at approximately \$60,000. Mr. Hassman pays for the boat moorage at False Creek. He said that they purchased the boat to entertain clients but also for their personal pleasure. The initial cost of \$10,000 for moorage at False Creek was paid by Gotham during the summer of 2006.
- [266] He testified that the defendant could not work from a different city because they work as a team. Mr. Hassman confirmed Ms. Budd's testimony that it was not possible for the defendant to work in another part of the world. He said that although they had made arrangements for the defendant to have more time off to be with the children, it would be impossible for the defendant to take a week or a month off because he plays such an important role in the human relations aspect of the office. He described the defendant as the "compassionate one", able to deal with office staff management, and "the idea man" who was necessary in the office environment. However, he agreed that it would be possible for the defendant to take a week off every quarter in order to visit with children if they move to PEI, but only if it included vacation time.
- [267] Although MD Analytics has hired an employee in Montréal (a city that the plaintiff suggested as a possible location for the defendant), she is bilingual and they expect her to generate about \$1 million in revenue by the end of a year.
- [268] On cross-examination, Mr. Hassman indicated that the defendant traveled three or four times in 2007, and acknowledged that both he and the defendant relied on their Blackberries and cell phones to communicate at all times.
- [269] He testified that the plaintiff has always been involved on some level in the company, but that she stopped coming to the office about the time of the separation. He did not recall the plaintiff having any arguments with anyone in the office except for him, and their first argument was when they were starting up ROI. He said that the plaintiff was loud, yelling and screaming at him and his proposal that he have the majority of the shares. He testified that the plaintiff said that she and her husband had "made him" and that she would do whatever she could to destroy him. The plaintiff has denied these allegations, although she acknowledged that there was a debate about the business arrangements at one point.
- [270] In the fall of 2006, Mr. Hassman testified that the defendant told him of the court orders for child and spousal support. Mr. Hassman said that the ordered amount far exceeded what the company was paying or could afford to pay the defendant. He testified that the defendant receives \$178,000 a year, while Mr. Hassman gets \$209,000 plus commission and

bonuses. He receives more than the defendant does because he has been putting more time in the business during the last 18 months, and because he had brought in a number of key customers which entitled him to a bonus. He said that the defendant has always taken more money as shareholder loans, \$50,000 - \$75,000 more than Mr. Hassman. He agreed that in November 2006 he directed that his salary be increased, even though by late 2006 neither Gotham nor MD Analytics were in a position to pay that amount of money. He acknowledged that his monthly income of \$18,000 had continued to date.

[271] Mr. Hassman disagreed with the defendant's affidavit that stated that the plaintiff had been employed by Gotham until July 2006. He also disagreed with the defendant's evidence describing the plaintiff as a "stay at home mom". Mr. Hassman said that both the plaintiff and the defendant were being paid to split the income between them, but following the separation, the defendant kept the entire \$150,000 per year salary. This was because the plaintiff "had stopped being a 'consultant'" and was employed by Pfizer, had a Pfizer car, and Mr. Hassman thought it was no longer appropriate to have the income split. He said that the plaintiff had stopped doing any consulting work for the companies by early 2006.

[272] Mr. Hassman agreed that the plaintiff had called him about the employment cheques, which had been issued to her after the separation, and he had informed her by email that they were paid according to the CRA rules as the defendant had told him it was support.

[273] Finally, Mr. Hassman admitted that he had drawn \$57,000 from Gotham after he had informed Gotham's lawyers and the US partner that Gotham had no money to pay the debt owing to WebMD.

5. Admitted Facts

[274] The final evidence to consider consists of the parties' admissions, some of which require restating or have not been referred to earlier in these Reasons. The parties admit:

- 1) From July 1, 2006 until April 30, 2007, either Gotham or ROI paid the defendant's personal rent of \$2,400 per month.
- 2) After the consent asset freezing order of August 28, 2006, the defendant took a bonus of \$8,432.58 without the consent of the plaintiff and used the money to pay his legal fees.
- 3) During the marriage, the plaintiff was the parent primarily responsible for the children's meals and school lunches.
- 4) During the marriage, save for when the plaintiff and the defendant lived in Oakville, Ontario, the defendant was employed full-time and has been employed full-time since the separation.
- 5) A.M. has been diagnosed with development dyslexia, visual motor integration difficulties, and mathematical computation difficulties.

- 6) B.H. has been diagnosed with ADHD, has visual, motor, and integration difficulties, as well as asthma and allergies to mould and tree pollen.
- 7) D.M. has been diagnosed with eczema, and has phonemic awareness difficulties and mathematical computation difficulties.
- 8) Z.K. is a gifted learner, but has been diagnosed with asthma.

III. Parties' Submissions

A. Plaintiff's Submissions

1. Defendant's Credibility and Reliability

- [275] The plaintiff argues that the defendant's evidence is "completely unreliable" and neither his evidence nor the defendant himself can be trusted.
- [276] The plaintiff stresses the fact that the defendant has breached every court order, that he and Mr. Hassman have demonstrated a willingness to make Gotham judgment-proof to defeat creditors, and that they rearranged income from their companies to make it appear that Mr. Hassman is making more money than the defendant. Counsel argued that there is no doubt that the defendant is in contempt of court for failing to follow orders. Furthermore, the defendant has been lying to the plaintiff from the start and has lied under oath in various affidavits and on the stand. On cross-examination, he repeatedly admitted that evidence he gave at the examination for discovery or in his affidavits was false.
- [277] In addition to lying on the stand and in his affidavits, the plaintiff notes that the defendant has previously misrepresented his academic credentials on a number of occasions, including in an application to obtain a U.S. work visa.
- [278] The plaintiff also notes that the defendant is willing to lie not just to benefit himself, but also to hurt the plaintiff. For example, at his examination for discovery, he denied that the plaintiff had encouraged him to see Ms. Tredger and said that he had initiated his follow up appointments with her himself. However, on cross-examination, he admitted that on several occasions the plaintiff had encouraged him to see Ms. Tredger to follow up the children's program. He admitted that his evidence on the examination for discovery was false.
- ##### 2. Custody and Moving to PEI
- ###### a) Facts
- [279] In her overview, the plaintiff stated that the case presents two distinct custodial scenarios: the plaintiff moving to PEI with the children, with permission of this Court; or remaining in British Columbia.

[280] The plaintiff argues that the evidence clearly supports her position concerning custody, guardianship and access. Mrs. Trasolini and Ms. O'Brain, the parties' mutual friends and/or neighbours who had known the parties since they moved into the former matrimonial home, provided objective evidence of the plaintiff's sound and loving parenting and her active involvement in the children's lives. This is contrasted with the fact that the defendant called no evidence of his pre-separation involvement in the children's lives and his own evidence at the trial demonstrated that he was not as involved as he believed he was. In particular, the plaintiff points to the fact that the defendant has said that the children have no special needs. Given the defendant's attitude towards the children's counsellor Dr. Weiss, the plaintiff argues that the children are doing well in spite of the defendant's attitude and conduct, but surely as a tribute to her parenting skills.

[281] The plaintiff also stresses the evidence of Ms. Tredger who has worked with the parties and the children for a significant period of time and consistently confirmed that it is the plaintiff who has been looking after the children and providing them with a sense of safety, stability and security, both before and after the separation. On the other hand, the defendant's behaviour has caused the children to fear losing him and his behaviour has not changed even after he had met with Ms. Tredger and she relayed the children's concerns.

[282] The plaintiff stresses that the situation in British Columbia is not sustainable, particularly in the light of the long-term plan required to properly raise these children. She focused on several key issues:

- the equity remaining in the matrimonial home and the PEI cottage is approximately \$900,000, which will have to be shared with the defendant;
- both parties are facing significant legal bills;
- the shared equity less the legal bills will be insufficient to afford housing for the plaintiff and the children in the Lower Mainland;
- living in British Columbia and relying on the defendant, the plaintiff is at substantial risk because the defendant has a history of not paying support and ignoring court orders, particularly the support orders of Pitfield and Ross JJ., which he has ignored completely;
- in any case, the defendant claims that he cannot pay more than \$7,000 per month in total child and spousal support; and
- the worst thing for the children's best interests is to remain in Vancouver but have to move periodically because of insufficient funds for proper housing.

[283] The plaintiff argues that there is every reason for her to move to PEI with the children, and few reasons to stay here. In short, whereas in PEI the plaintiff and the children will enjoy the moral, financial and practical support of her very large extended family, with access to adequate affordable housing, as well as educational, spiritual, medical and financial resources, and the plaintiff will have secure but flexible employment with a starting salary

of approximately \$48,000 plus benefits, here she must rely on the defendant's willingness to obey court orders, as is reflected in his behaviour before and during the trial.

- [284] Furthermore, the plaintiff argues that if she stays here with the children, she will have to deal with the defendant's abusive behaviour (exemplified by the police incidents, answering machine messages, and legal and financial threats directed at the plaintiff and her friends), lack of parenting support, and lack of communications. His abusive behaviour is underscored by the names that he had called the plaintiff, including "an absolutely sick demented person", "a pathetic little rat", "absolutely pathetic", "a f!@# head case", and "f!@# twisted", and the fact that he has not taken full responsibility for his actions and has tried to make up excuses for his behaviour. His lack of parenting abilities and scheduling problems are exemplified by the fact that despite the generous access schedule made up by the plaintiff and which the defendant apparently agreed to, he has only made himself available for two Saturday visits in September, October, and November. The plaintiff submits that there are very real risks that the plaintiff as well as the children will suffer continued stress at the hands of the defendant if they are to remain here.
- [285] The plaintiff also points to the fact that since the separation she has been the one who has been trying to resolve their matrimonial affairs and get the defendant to participate in parenting their children. Importantly, in doing so, the plaintiff has fully abided by all rules and court orders, whereas the defendant has consistently ignored them. She notes that he even refused to provide his schedule to the plaintiff so that an access schedule could be set up. While he has attempted to blame this lack of communication on his former counsel, evidence at the trial showed that this claim was false. The plaintiff further notes that while the defendant has tried to blame his lack of access to the children on the plaintiff's scheduling, his own evidence has shown that he chose to take trips with Ms. Wong rather than to spend time with the children.
- [286] The plaintiff submits that the evidence clearly demonstrates that the defendant has no capacity to properly co-parent the children. Notwithstanding that he took a Parenting After Separation course in 2006, and has been seeing Ms. Uegster since November 2006, his conduct toward the plaintiff, frequently in the presence of the children, clearly demonstrates that he is not capable of co-parenting and is not able to manage his anger.
- [287] While the plaintiff strongly urges the Court to allow her to move with the children to PEI, she acknowledges that the best option for the children is to remain in Vancouver. However, she says that staying in Vancouver would only be possible if life here were sustainable: there was no conflict with the defendant and he did not constantly interfere with her parenting; and there was a guarantee of long term, adequate support sufficient to provide stable housing for the plaintiff and the children without depleting her few remaining assets. She argues that none of these conditions exists at this point and this is not likely to change. Therefore, she submits that the move to PEI is the best option.

[288] The plaintiff relies in part on Ms. Tredger's evidence that if the children have to move out of their present community, a move to PEI may be better than a move to a different Vancouver community because they already have a level of familiarity with PEI as well as a network of family and friends. The plaintiff stresses that Ms. Tredger believed that the impact of a move on children's relationship with the defendant would be minimal if each parent speaks about it in a positive manner and assures the children that they are going to support them in making the move and continue to be a presence in their lives. Thus, the onus is on the defendant to communicate with the children and demonstrate to them that he has a clear intention to stay connected with them and to see them.

[289] The plaintiff is critical of the Report and its failure to take into account the presence of Ms. Wong in the defendant's life. Although Dr. Koopman found that Ms. Wong was a positive factor in the children's lives, she did not note that she was not willing to move to PEI. The plaintiff submits that the benefit of the children's relationship with Ms. Wong should not override the importance of the children's relationship with their friends and family in PEI. Furthermore, the plaintiff submits that Dr. Koopman has spent very little time with the children and Ms. Wong together, and she was not aware that Ms. Wong and the defendant fight or that she is concerned about the defendant's yelling at and criticizing the children.

[290] The plaintiff submits that if they are to remain in Vancouver, a 50/50 division of time is not in the best interests of the children. The children should be primarily with the plaintiff because the relationship with her provides them with the necessary sense of safety and security, and ultimately helps them spend time with their father.

b) Law on Custody and Guardianship

[291] The plaintiff submits that the evidence demonstrates that it is in the children's best interests that she be awarded sole custody and guardianship, and that the children reside primarily with her, whether in PEI or in Vancouver, with reasonable and generous access to the defendant. The plaintiff relies on s. 16 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) (the "DA"), which requires the court to take into consideration only the best interests of the child and the past conduct of any person only if it is relevant to the ability of that person to parent a child. The plaintiff acknowledges that in making a custody decision, the court should give effect to the principle that a child should have as much contact with each parent as is consistent with the child's best interest.

[292] A similar focus is found in s. 24 of the FRA, which sets out the factors to be considered by the court when making an order regarding custody, access and guardianship:

- (a) the health and emotional well being of the child including any special needs for care and treatment;
- (b) if appropriate, the views of the child;
- (c) the love, affection and similar ties that exist between the child and other persons;

- (d) education and training for the child;
- (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

[293] The plaintiff says that these factors also apply to an order for joint guardianship: *Dhillon v. Dhillon*, [1998] B.C.J. No. 1820 ¶11 (S.C.).

[294] The weight to be given to the views of the child under s. 24(b) of the FRA depends on the age of the child and the reasons why the child wants to live with a particular custodial parent: *Gullet v. Gullet*, 2001 BCSC 1207.

[295] The plaintiff submits that several factors are particularly important to the custody decision in this case:

- the plaintiff has always been the children's primary caregiver and has demonstrated an ability to make appropriate parenting decisions;
- the children have a strong attachment to her and she provides them with a sense of safety, stability and security;
- the defendant's conduct and its effect upon the children, particularly his hostile and aggressive conduct towards the plaintiff, his inability to parent cooperatively, and his behaviour towards the children;
- the children's special needs; and
- the children's ties to PEI and the community.

[296] The plaintiff argues that the defendant's conduct has had an adverse emotional impact upon the children's wellbeing and has also caused her considerable anguish, which in turn affected the children. The plaintiff argues that the defendant's conduct affects his capacity to parent and his ability to appropriately exercise the rights and duties of a guardian or custodial parent. Relying on *Van de Perre v. Edwards*, 2001 SCC 60 ¶23, the plaintiff submits that the defendant cannot be entrusted to foster a relationship between the children and the non-custodial parent.

[297] The plaintiff submits that she has the greater understanding of the children's needs and is best able to address those needs personally and by seeking appropriate professional assistance and implementing recommended programs. She particularly notes that she has followed Ms. Tredger recommendations to minimize the impact of the separation on the children and ensure their wellbeing. The defendant, on the other hand, does not have an adequate understanding of the children's needs (exemplified by his insistence that A.M. and B.H. do not need AlphaSmart keyboards) and has failed to recognize or adequately address his inappropriate behaviour.

[298] She further argues that she has demonstrated that she is willing to put the children's needs first, while the defendant's lack of deference and respect for her make joint custody impossible.

[299] Plaintiff refers to the decision of Mr. Justice Joyce in *Jordan v. Jordan*, 2001 BCSC 1058 ¶20-21, where he discussed some of the factors that establish the best interests of the child:

20 I am satisfied that the ability of the parents to communicate and cooperate remains an important factor when considering the best interests of a child. That is apparent from the decision in *Robinson v Filyk* itself as well as from the decision in *Ness v. Ness* (1999), 43 R.F.L. (4th) 363 (B.C.C.A.). It is not the only factor to be considered, however.

21 In my view, some other factors that are relevant to this enquiry include: (i) the ability of each parent to make proper decisions for the child; (ii) the extent to which the child will reside with each parent; (iii) the geographic distance between the parents' homes; (iv) the extent to which the parties' "parenting styles" may differ and, consequently, the extent to which their different parenting styles may provide the opportunity for disagreement; (v) the harm that may be caused to the child if the parents' disagreement on issues creates an atmosphere of conflict; and (vi) the nature of the disagreements in the past, particularly whether they relate to "access issues" that are likely to be resolved by the court order or whether they concern matters of child rearing that are likely to continue to arise. These are not necessarily all of the factors that have a bearing on what sort of custody order is in the best interests of the particular child but they are, I think, some of the important ones.

[300] The plaintiff submits that the factors set out above very strongly militate against an order for joint guardianship and joint custody.

[301] The plaintiff says that although the roles of a step-parent or partner are to be considered in a deciding custody and guardianship, the court's objective is to determine the parenting abilities of the specific person who will ultimately receive custody: *Van de Perre*, ¶25 and 30. The plaintiff says that the issue before the Court is the defendant's personal ability and capacity to act as a parent, and although the support provided by Ms. Wong is a factor to be considered in assessing the defendant's parenting ability, it is not an overriding factor. The plaintiff argues that Dr. Koopman placed undue weight on Ms. Wong's support in arriving at the recommendation that the plaintiff and the children should remain in Vancouver. She particularly notes that the permanency of the defendant's relationship with Ms. Wong is uncertain. They have been living together for about a year and although Ms. Wong testified that she would like the defendant to ask her to marry, there is no evidence that they will commit to marry in the near future. Additionally, the fact that Ms. Wong feels overwhelmed in the role of a step-parent to four young children with special needs should also concern the Court. Her role in the lives of the children and her relationship with the defendant is in marked contrast to the extensive support that the plaintiff will receive from her family in PEI.

[302] The plaintiff cites the decision of Mr. Justice Parrett in Poulin v. Poulin, [1993] B.C.J. No. 1054 ¶19; [1993] W.D.F.L. 1259 (S.C.):

For joint guardianship and joint custody to work there must be a level of mutual respect, an ability to communicate, and a vision to see, independent of their own interests, the best interests of the children. While these qualities are present, the parents can function jointly while minimizing their own conflict to ease the burden imposed on and adjustment required of the children. Such a process maintains the relationship with both parents, but the key to its success the absence of the conflict between the parents which adds immeasurably to the difficult adjustments faced by the children. Where these qualities are absent, joint custody and joint guardianship is a recipe for disaster, placing the children at the centre of the conflict, prolonging it and removing any process of effective decision-making.

[emphasis added]

Poulin factors affecting joint custody and joint guardianship decisions were referred to by Madam Justice Ross in Taylor v. Taylor, 2003 BCSC 1862 ¶36.

[303] Finally, the plaintiff relies on the decision of our Court of Appeal in Stewart v. Stewart (1994), 2 R.F.L. (4th) 53, 41 B.C.A.C. 213, holding that joint custody requires maturity on the part of each parent, and approving the words of the Ontario Court of Appeal in Kruger v. Kruger (1979), 11 R.F.L. (2d) 52 ¶60 (Ont. C.A.):

Above all, it requires a willingness by both parents to work together to ensure the success of the arrangement. Such a willingness must be sincere and genuine; by its very nature it is not something that can be imposed by a court on two persons, one or both of whom may be unwilling or reluctant to accept it in all its implications. Like marriage itself if it is to succeed it is an arrangement that has to be worked out by two persons who are determined, of their own will and in good faith, to make it work. : see also Taylor v. Taylor 2003 B.C.J. No. 2825; Hidlebaugh v. Hidlebaugh 2000 B.C.J. No. 1019 (B.C.S.C.); Dhillon; and Yim v. Fam 2003 B.C.J. No. 1474.

c) Law on Mobility

[304] On the issue of mobility, the plaintiff submits that the children's best interests are absolutely "paramount" and are the only relevant consideration. However, each case turns upon its own unique circumstances. The plaintiff relies upon the decision of the Supreme Court of Canada in Gordon v. Goertz, [1996] 2 S.C.R. 27 ¶49, which set out the relevant factors:

1. The existing custody arrangement and the relationship between the children and the custodial parent.
2. The existing access arrangement and the relationship between the children and the access parent.
3. The desirability of maximizing contact between the children and both parents.

4. The views of the children.
5. The custodial parents reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the children.
6. The disruption to the children given a change in custody.
7. The disruption to the children consequent on removal from the family, schools and the community they have come to know.

[305] The plaintiff submits that the effect of Gordon is threefold. First, the motives for relocation, relevant only in the context of accessing the parent's ability to meet the needs of the child, are relevant both on initial custody and on variation applications. Second, while Gordon reaffirmed the significance of s. 16(10) of the DA (the willingness of a parent to facilitate contact), the Court also held that this consideration was subordinate to the overall consideration of the best interests of the child. Finally, in analyzing a relocation application, Gordon respects a parent's decision to live and work where he or she chooses barring any improper motive.

[306] In *One v. One*, 2000 BCSC 1584 ¶24, 81 B.C.L.R. (3d) 315, Mr. Justice Burnyeat reviewed British Columbia post-Gordon case law dealing with the best interests of a child and arrived at 12 relevant factors:

When reviewing requests for changes in custody and access and in reviewing the question of whether the children should be moved where such a move may make access more difficult, courts in British Columbia have looked at a multitude of issues in determining what is in the best interests of the children. A review of those decisions produces the following 12 factors which have been reviewed in deciding what is in the best interests of the children:

- (a) parenting capabilities of and children's relationship with parents and new partners:
- (b) employment security and prospects of each spouse and, where appropriate, their partner:
- (c) access to and support of extended family:
- (d) difficulty of exercising proposed access and quality of proposed access if move is allowed:
- (e) effect upon children's academic situation:
- (f) psychological/emotional well-being of children:
- (g) disruption of children's existing social and community support and routines:
- (h) desirability of proposed new family unit for children:
- (i) relative parenting capabilities of either parent and respective ability to discharge their parenting responsibilities:
- (j) child's relationship with both parents:

(k) separation of siblings:

(l) retraining/educational opportunities for moving parent:

[case references omitted]

[307] The plaintiff submits that when its Court considers the factors enunciated in *Gordon and One*, it is in the best interests of the children that she be permitted to move with them to PEI.

[308] The plaintiff submits that the defendant has the ability to ensure that he remains involved in the children's lives, and he has testified that he has the will to do so. The defendant continues to travel for business to eastern Canada, to places that are but a very short trip away from PEI. The defendant testified that he could work a three-day week if he wished, and he can accumulate his days off and take them in one long period of time. The plaintiff argues that if arrangements were made for Sally Budd, a key employee of the company, to work for the company during her prolonged stays in Germany, then surely similar arrangements can be made for the defendant to visit his children in PEI.

[309] The plaintiff refers to a number of cases, with similar facts, which support her position: *S. (M.J.) v. S. (L.)*, 2001 BCSC 820; *Cousens v. Ruddy*, 2002 BCSC 20, 28 R.F.L. (5th) 255; *Gullet*; and *Carmichael v. Douglas*, 2003 BCSC 611, 37 R.F.L. (5th) 259. She argues that *Gullet* is particularly germane to the issues before this Court. In *Gullet*, the court found that the plaintiff had advanced a credible reason for wanting to relocate and the reasons had no bearing on her abilities as a parent. Although she had been the children's primary caregiver, the father had attempted to mislead the court on that issue and his negative comments regarding the plaintiff reflected an ongoing hostility and a confrontational attitude. The court concluded that it was in the children's best interests that they remain with the plaintiff when she moves.

3. Circumstances During the Marriage

[310] Regarding the parties' financial circumstances during the marriage, the plaintiff argues that they had few if any significant assets at the time of the marriage and started out as peers. During the marriage, they worked together on a number of healthcare-related companies, including Med Ink, for which the defendant has neither filed nor produced any tax returns or financial statements since 2004. The defendant was extensively involved in Gotham and it achieved over \$2 million in sales until the summer of 2006. Although Gotham appears to be dormant right now, it continues to pay the defendant's and Mr. Hassman's expenses. The plaintiff was extensively involved in IParenting.com, but received no remuneration and the company failed after about one year of activity.

[311] The plaintiff argues that although the defendant described the parties' financial circumstances as a "financial train wreck" that he was trying to stop against the financial demands of the plaintiff, the parties in fact regularly discussed expenses and the defendant told the plaintiff that "money would be available". Furthermore, substantial expenditures were initiated by him, such as enrolling the children in a private school and acquiring an interest in a luxury boat.

[312] The plaintiff argues that it was the defendant who was the fan of "high living", and continues to enjoy a similar lifestyle after the separation, driving an expensive car, engaging in expensive travel, and attending hockey and football games. On the other hand, the plaintiff has to resort to live-in students and Employment Insurance benefits to make ends meet. The defendant has chosen to spend money on himself to maintain his lifestyle rather than provide support to the plaintiff as ordered by the court.

4. Spousal and Child Support

[313] At the outset, the plaintiff argued that the defendant's attitude toward the plaintiff's financial requirements is utterly unrealistic. He testified that he makes \$10,000 per month, not counting various other bonuses and perks provided by his companies, and he only has the children part time, yet expects the plaintiff, who cares for the children full time, to "get by" on \$7,000.

a) Defendant's Income and Expense

[314] The plaintiff asserts that in the 12 months prior to the trial, the defendant and Mr. Hassman together have taken \$600,000 from the companies, and have received numerous other expensive perks such as luxury car leases and rent paid by the companies. For example, Gotham has paid the defendant's lease on a four-bedroom condominium in downtown Vancouver and pays the lease on his new Land Rover. Because the defendant and Mr. Hassman are equal partners, the plaintiff argues that an income of \$300,000 should be imputed to the defendant.

[315] However, the plaintiff also points to the fact that even if such income is imputed, the defendant's history demonstrates that getting him to pay ordered support will be difficult. This is demonstrated by the fact that the defendant should have paid the plaintiff \$199,000 in support from November 1, 2006 to October 1, 2007, but has only paid \$68,200. This is despite the fact that he has not appealed the support orders.

[316] The plaintiff asks the Court to draw an adverse inference and conclude that there is more money available in the companies than disclosed. The plaintiff points to the fact that after the support orders, Mr. Hassman was paid bonuses totalling \$145,646 and he drew \$21,000 on account of his shareholder's loan on November 1, 2006. Further, Mr. Hassman's vehicle lease and insurance cost approximately \$19,865 each year and, at a minimum, between November 1, 2006 and October 31, 2007. Mr. Hassman has received approximately \$403,000 from the companies. The companies' general ledgers were produced only up to the end of

May 2007, and no reason was given for why complete and updated documents were not produced.

- [317] The plaintiff further argues that debt payment and shareholder loan equalization should be added to the defendant's income for the purposes of calculating amounts of child and spousal support.
- [318] On the subject of expenses, the plaintiff notes that the defendant's evidence was inconsistent, self-serving and at times admittedly false. For example, he gave three different stories regarding charitable donations that he apparently makes, including swearing an affidavit in July 2007 deposing that he had made no charitable donations since October 2006. Similarly, while he has sworn on his September 28, 2007 Form 89 that he paid his mother \$625 per month, he admitted on cross-examination that he has never provided this sum to his mother. The defendant has also failed to keep and deliver an accounting of his monthly spending.
- [319] The plaintiff notes that the defendant has also presented self-serving and inaccurate stories of corporate expenses. For example, while Ms. Hawn testified that ROI Communications had no current employees, was not an active company and did not require any travel, the defendant's evidence showed that he took Ms. Wong on an expensive getaway in Washington State as an ROI employee. The defendant also failed to disclose on his first Form 89 that his rent was paid by Gotham.
- [320] The plaintiff submits that the defendant's income, for the purpose of setting spousal and child support, must be determined under ss. 16 and 17(1) of the Guidelines, which provide that a spouse's annual income should be determined initially with reference to his tax-return income, but also allows the court to consider the spouse's income over the past three years and determine an amount that is fair and reasonable in the light of any pattern of income, fluctuation in income, or receipt of a non-recurring amount during those years. Dividend income is included in the spouse's income under s. 16 of the Guidelines. Further, the court may impute income to a spouse where it concludes that a spouse is unreasonably deducting expenses from his income. The plaintiff argues that a deductible expense accepted by the Canada Revenue Agency ("CRA") is not always an appropriate expense under the Guidelines and the onus is on the spouse reducing their income to prove the appropriateness of a deduction: see *Dornick v. Dornick* (1999), 1 R.F.L. (5th) 37, 130 B.C.A.C. 273 and *Edwards v. Edwards*, 2005 BCSC 1227.
- [321] The plaintiff submits that the defendant has claimed a large number of unreasonable personal expenses that should not be deducted from his income. The plaintiff points to the following expense entries in the general ledgers of the defendant's companies:
- \$14,252 and \$27,921 for hockey tickets in 2006 and 2007;
 - approximately \$24,000 in each of 2005 and 2006 for vehicles for the defendant and Mr. Hassman;

- over \$1,300 per month for lease and insurance on the defendant's Land Rover;
- \$1,884 for a visit by the plaintiff and Ms. Wong to Poet's Cove in 2007;
- \$4,674 for entertainment expenses in Whistler in 2006;
- \$7,019 and \$7,310 for "other entertainment expense" and "other entertainment" in 2005;
- over \$36,000 for meals in 2005 and 2006; and
- \$27,254 for the defendant for travel in 2006.

[322] Simply because the CRA accepts certain expenses as deductible business expenses, does not mean that the court should include them in a determination of the payor's Guidelines income: Edwards.

b) Section 7 Children's Extraordinary Expenses

[323] The children's extraordinary school expenses are \$17,840 per year or \$1,486.67 per month, comprising (on an annual basis): base school fees of \$6,450; additional fees of \$1,550; and children's uniforms, hot lunches at school, and field trips to a total of \$9,840.

[324] A.M. and D.M. require a tutor who costs \$50 per hour, a total of \$4,000 per year or \$333 per month. Furthermore, A.M. and B.H. require an AlphaSmart keyboard, costing \$1,000. This is a non-recurring expense.

[325] B.H. requires two medications to manage his ADHD, a cost that is only partially covered by the defendant's medical plan. The out of pocket cost of these medications is \$960 per year or \$80 per month.

[326] A.M. plays a musical instrument in the school band and the plaintiff has been renting the instrument on a rent-to-own basis at a monthly cost of \$24.50 per month or \$294 per year.

[327] The children clearly benefit from counselling sessions with Ms. Tredger and the plaintiff submits that it is in their best interests that these sessions continue. Based on each child attending one monthly counselling session, the cost is approximately \$3,360 per year or \$280.00 per month.

[328] Both D.M. and Z. K. require orthodontic treatment, which started in September 2007. The cost of dental insurance for the two children is \$5,640 per year or \$470 per month. In September 2007, the plaintiff paid \$1,900 for the children's orthodontics.

[329] Finally, the plaintiff currently receives childcare assistance from an au pair at a cost of \$400 per month. This amount is less than the usual au pair cost of \$600 per month or \$7,200 per year. However, should the plaintiff return to school or have full-time employment, she would need the assistance of a full-time nanny, one who is capable of helping the plaintiff with driving the children to and from school and their other activities. The cost of this service is \$30,000 per year or \$2,500 per month.

[330] The plaintiff argues that if she and the children move to PEI, there would be no need for an au pair or a nanny, AlphaSmart keyboards would be provided to the children at no cost, and there would be no tuition fees. Thus, the plaintiff's extraordinary expenses would be reduced to approximately \$1,187.50 per month or \$14,250 per year.

[331] The plaintiff's extraordinary expenses are summarized in the following tables:

Monthly Expenses

With an

au pair

With a

nanny

In PEI

School expenses (total)

\$1,486.67

\$1,486.67

\$0.00

Tutor

\$333.33

\$333.33

\$333.33

Out-of-pocket medications

\$80.00

\$80.00

\$80.00

Musical instrument rent-to-own

\$24.50

\$24.50

\$24.50

Counselling

\$280.00

\$280.00

\$280.00

Children's dental insurance

\$470.00

\$470.00

\$470.00

Au pair (ordinary cost)

\$600.00

\$0.00

\$0.00

Full-time nanny

\$0.00

\$2,500.00

\$0.00

Total monthly extraordinary expenses

\$3,274.50

\$5,174.50

\$1,187.83

Yearly extraordinary expenses

\$39,290.00

\$62,090.00

\$14,250.00

One Time Extraordinary Expenses

AlphaSmart keyboard for two children

\$1,000.00

Orthodontics cost

\$1,900.00

Total

\$2,900.00

[332] It must be noted that the plaintiff's submissions total her monthly s. 7 expenses at \$3,357.83 with an au pair and \$5,257.83 with a nanny, apparently erroneously including the one-time cost of the AlphaSmart keyboards as an annual s. 7 expense. She does not include the cost of the AlphaSmart keyboards in the PEI s. 7 expenses presumably because, according to her testimony, they are provided to the students in PEI free of charge. The figures in the table above are adjusted for this error.

c) Law on Spousal Support

[333] In making a spousal support order, the factors and objectives to be considered by the court are set out in s. 15.2 of the DA, and here the plaintiff relies particularly upon ss. 15.2(4) and (6) which provide:

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[334] The plaintiff submits that where, as here, she has assumed the traditional homemaker role, she has suffered a disadvantage and is entitled to both compensatory and needs based spousal support: *Moge v. Moge*, [1992] 3 S.C.R. 813 ¶64-70. Further, an equitable distribution of the financial consequences of the marriage breakdown may be determined by asset division, spousal support, or both: *Moge*, ¶83. To compensate the plaintiff for the economic disadvantage suffered by her by the end of the marriage, the court can both reapportion assets and award spousal support: *Tedham v. Tedham* 2005 BCCA 502, 20 R.F.L.

(6th) 217.

[335] The plaintiff argues that it is now well settled law in British Columbia that the Spousal Support Advisory Guidelines: A Draft Proposal (the "SSAG") are to be used to determine the appropriate amount of spousal support and it is an error, in the absence of exceptional circumstances, not to award an amount within the range provided: *Redpath v. Redpath*, 2006 BCCA 338. The plaintiff argues that in the case at bar there are no exceptional circumstances to justify a departure from the SSAG.

[336] With respect to her own income, she went on disability stress leave in the summer of 2006 and then received Employment Insurance benefits from December 2006 until August 2007. While she has tried to find nursing jobs in Vancouver, she has been unsuccessful, in large part due to her childcare obligations. She has been offered a secure and well-paying job in PEI where her childcare obligations would be greatly assisted by the support of her large extended family. Furthermore, the PEI job would provide on-the-job training to re-qualify her as a clinical nurse.

[337] The plaintiff presents several scenarios for her entitlement to spousal and child support (per month) under the SSAG and the Guidelines, which I have summarized in the following table:

Scenario

Plaintiff's Income

Defendant's Income

Base Child Support

Section 7 expenses

Spousal Support

Plaintiff in school (s. 7 expenses \$63,094/year including a nanny)

0

\$250,000

\$5,015

\$5,048

\$613 -

\$1,063

0

\$300,000

\$5,940

\$4,869

\$1,499 -

\$2,310

0

\$350,000

\$6,865

\$4,574

\$2,704 -

4,383

Plaintiff in school (s. 7 expenses \$40,294 including an au pair)

0

\$250,000

\$5,015

\$3,019

\$1,674 -

\$2,566

0

\$300,000

\$5,940

\$2,838

\$2,877 -

\$4,426

0

\$350,000

\$6,865

\$2,780

\$4,497 -

\$5,571

Employed in PEI (s. 7 expenses \$14,254)

\$48,000

\$250,000

\$5,015

\$842

\$2,664 -

\$3,792

\$48,000

\$300,000

\$5,940

\$846

\$3,722 -

\$4,999

\$48,000

\$350,000

\$6,865

\$848

\$4,782 -

\$6,214

[338] I note two problems with the plaintiff's child and spousal support calculations presented in Schedule C to her written argument. First, the calculations mistakenly include the one-time AlphaSmart keyboard costs, as discussed above. Second, it is uncertain why the amount payable by the husband for s. 7 extraordinary expenses varies with his income when her own income is nil. Per s. 7(2) of the Guidelines, extraordinary expenses are presumptively split between the parents in proportion to their respective income. Accordingly, if the plaintiff has no income, the defendant will presumably be responsible for 100% of the extraordinary expenses, unless he can demonstrate a reason why that distribution is unfair. It also seems to me that paragraphs 334-336 of the plaintiff's argument, dealing with the scenario of the plaintiff's move to PEI, mistakenly refer to s. 7 expenses of \$40,294, rather than \$14,254. The following table contains the plaintiff's scenarios adjusted for those errors:

Scenario

Plaintiff's Income

Defendant's Income

Base Child Support

Section 7 expenses

Total Child Support

Spousal Support

Plaintiff in school (s. 7 expenses \$62,094/year including a nanny)

0

\$250,000

\$5,015

\$5,174

\$10,189

\$708 -

\$1,169

0

\$300,000

\$5,940

\$5,174

\$11,114

\$1,578 -

\$2,437

0

\$350,000

\$6,865

\$5,174

\$12,039

\$2,799 -

4,469

Plaintiff in school (s. 7 expenses \$39,294 including an au pair)

0

\$250,000

\$5,015

\$3,274

\$8,289

\$1,769 -

\$2,708

0

\$300,000

\$5,940

\$3,274

\$9,214

\$2,976 -

\$4,498

0

\$350,000

\$6,865

\$3,274

\$10,139

\$4,544 -

\$5,631

Employed in PEI (s. 7 expenses \$14,254)

\$48,000

\$250,000

\$5,015

\$997

\$6,012

\$2,479 -

\$3,561

\$48,000

\$300,000

\$5,940

\$1,024

\$6,964

\$3,464 -

\$4,717

\$48,000

\$350,000

\$6,865

\$1,044

\$7,909

\$4,466 -

\$5,883

5. Contempt of Court

[339] The plaintiff made extensive submissions about various breaches of court orders that prima facie place the defendant in clear contempt of court.

[340] Although the plaintiff requested information on Mr. Hassman's income in order to demonstrate that the companies have financial resources to pay the support sought, the defendant refused to produce this information until May 2007.

[341] The defendant repeatedly swore affidavits that MD Analytics could not pay bonuses, and yet the evidence disclosed that Mr. Hassman was in fact paid significant bonuses. In particular, since the order of Pitfield J. on October 30, 2006, and despite the evidence of apparently lower corporate incomes, Mr. Hassman has taken \$403,000 from the companies, including \$57,000 from Gotham, \$217,390 from MD Analytics, and a luxury car lease paid by the companies. While the defendant deposed in his affidavits (April 13 and 20, 2007) that there was no money available in the companies, he later signed the cheques paying the above amounts to Mr. Hassman.

[342] Despite the orders of Pitfield and Ross JJ., the defendant has continued to spend large sums of money on himself, and directed his companies to do the same, instead of paying ordered support. The plaintiff has provided numerous examples of actions and expenses undertaken by the defendant rather than pay the support to the plaintiff including:

- Within weeks of the support order made by Pitfield J. on October 30, 2006, the defendant arranged for a lease of a four-bedroom condominium in downtown Vancouver and directed Gotham to pay his rent.
- He chose to pay down his various debts and made larger than minimum payments.
- He left funds in his bank account for several months in the spring of 2007.
- He gave money to his mother, purchased furnishings for his condominium, bought clothes for himself, and paid his own counsellor, all in priority to the court ordered payments.
- He bought tickets to B.C. Lion's games, took trips on his own and with Ms. Wong and the children, also in priority to complying with the court orders.

[343] Finally, the plaintiff stresses the singular failure of the defendant to comply with the demands and court orders for production of documents. Despite the admitted availability of these documents, he has either failed to produce them at all or produced them at the last possible minute, including some produced on the last day of cross-examination.

[344] In support of her argument that the defendant must be found in contempt of court, the plaintiff relies on the decision of Madame Justice Huddart (as she then was) in *Manolescu v. Manolescu* (1991), 31 R.F.L. (3d) 421 ¶35 (B.C.S.C.), where she discussed contempt in the following terms:

Wilful breach of a court order will always be a contempt of the court. A deliberate refusal to pay money pursuant to a court order when one has the ability to pay will constitute a civil contempt of the court. It is also a private injury or wrong to the person who is the beneficiary of the order. Such a private wrong will rarely constitute a criminal contempt unless it is calculated to defy the court's authority and, thus, to interfere with the administration of justice.

[345] In *Manolescu*, Huddart J. found that the objectives of denunciation and general and specific deterrence required that the defaulting husband be sentenced to a period of incarceration. Huddart J. held that the husband's misconduct was reprehensible and deserving of censure under Rule 56 of the Rules of Court, and although his conduct did not amount to criminal contempt, it was as serious as any civil contempt could be and no other penalty other than incarceration could reflect the gravity of his offence and the repetitive nature of the contemptuous conduct. In the result, Mr. Manolescu was sentenced to 90 days in jail.

[346] The plaintiff also relies on *Moutal v. Moutal* (1997), 34 R.F.L. (4th) 218 (B.C.S.C.), where I rejected the payor's evidence of his inability to pay as justifying his long history of failure to pay support. I held that the payor had shown a wilful disregard for previous court orders and had attempted to deliberately mislead this Court. In the circumstances, I sentenced the payor to two weeks in custody.

[347] The plaintiff submits that the defendant had a clear and demonstrated ability to make at least partial payments toward compliance with the orders of Pitfield and Ross JJ., but instead he chose to apply the monies for his own purposes.

6. Asset Division

[348] The plaintiff submits that the family assets consist of the former matrimonial home with a value of \$1,600,000 and the PEI Cottage with a value of \$150,000. Shares of the companies have not been valued. Against these assets, there are debts and liabilities of \$857,000. Thus, there would be \$743,000 remaining after the sale of the matrimonial home and paying out the debts. Counsel argues that this amount is further reduced by the costs of sale, liabilities in the private school and foreclosure actions, and the plaintiff's outstanding legal fees in all actions.

[349] The plaintiff notes that although the defendant has thus far been able to pay legal fees of between \$55,000 and \$65,000, the plaintiff has not been able to pay anything. There have been ten applications to court and three days of examinations for discovery and the hearing fees alone for the trial will be well over \$10,000.

[350] The plaintiff testified that the cost of a two-bedroom "teardown" in either Dunbar or Point Grey is in excess of \$1,000,000, and to rent a suitable house in this community would cost between \$3,000 and \$4,000 a month. However, because the plaintiff is unemployed, has the day-to-day primary care of the four children and their pets, and has a poor credit rating because of the foreclosure action, she is not an ideal candidate for rentals, and she does not have sufficient funds to pay a damage deposit and the first one month's rent.

[351] In her argument for reapportionment of the family assets in her favour, the plaintiff relies on s. 65 of the FRA, paragraphs (e) and (f) of s-s. (1);

- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- [352] The plaintiff argues that the claim for reapportionment relates to the role she had assumed during the marriage, the defendant's history of refusing to pay child and spousal support in accordance with court orders, and her need to provide a home for the children. She also submits that the court should reapportion the family assets in her favour as a result of the sacrifice that she has made to her career and the capital loss she has suffered affecting her ability to become and remain economically self-sufficient: see *Lodge v. Lodge* (1993), 79 B.C.L.R. (2d) 360, 48 R.F.L. (3d) 365 (C.A.) and *Manchur v. Manchur*, 2001 BCSC 1607.
- [353] The plaintiff also submits that reapportionment is appropriate where the payor is either unable to make sufficient provisions for the support of the custodial parent or is unwilling to do so, and the custodial parent has been economically disadvantaged by the marriage and its breakdown and will remain economically disadvantaged while continuing to bear the burden of caring for the children: see *Neate v. Neate* (1997), 33 B.C.L.R. (3d) 146, 28 R.F.L. (4th) 116 (C.A.).
- [354] The plaintiff also relies on the decision of Mr. Justice Slade in *B. (R.K.) v. B. (N.S.)*, 2004 BCSC 619, where he reapportioned family assets in favour of the custodial parent because of the burdens of providing for the children as well as the defendant's underemployment and refusal to pay child support. Slade J. held at ¶82-87:

82 Section 65 of the Family Relations Act sets out the factors that must be considered in making an order reapportioning family assets. The subsections that are argued to apply in the case at bar are s. 65(e) 'the needs of each spouse to become or remain economically independent and self sufficient' and s. 65(f) 'any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse'.

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84 When the combined financial resources of the spouses will not support both their needs, the court may award a greater portion to the spouse who has custody of the children so that at least one of the spouses may become economically independent. Re-apportionment in favour of a custodial parent may be required if that parent has a greater need for economic independence and self-sufficiency in order to discharge her duty as a custodial parent (*Cohen v. Cohen* (1995), 11 R.F.L. (4th) 1 (B.C. C.A.); *Palmer v. Gutsche*, [1998] B.C.J. No. 1269 (B.C. S.C.))

85 Generally, a spouse may receive a greater share of the family assets under s. 65(1)(e) where that spouse had responsibility of maintaining the children of the marriage. (*Kennedy v. Kennedy* (1994), 98 B.C.L.R. (2d) 287 (S.C.))

86 The court may re-apportion the home entirely in favour of the wife, who has the burden of providing for children of the marriage, and where the husband cannot contribute adequately. The court has re-apportioned entirely the home in favour of the wife, who had the burden of providing for the children, based on the husband's poor past performance in sharing that burden of providing for the children. (*Kopejtko v. Kopejtko* (1985), 49 R.F.L. (2d) 26 (B.C. C.A.), *Neate v. Neate* (1997), 28 R.F.L. (4th) 116 (B.C. C.A.))

87 Where one spouse has a history of refusing to pay support, the court may re-apportion in favour of the other spouse. In particular, re-apportionment may occur where the wife and child would be at risk if they depended on the husband's support. (See also *Kreuzkamp v. Kreuzkamp*, [1994] B.C.J. No. 931 (B.C.S.C. Bablitz v. Bablitz (1994), 10 R.F.L. (4th) 84 (B.C. C.A.); F.R.A. s. 65(1) (f))

B. Defendant's Submissions

[355] The defendant's closing submissions were essentially divided into three main categories: custody, access and guardianship; the determination of the defendant's income for the purposes of child and spousal support; and the reliability of the plaintiff's evidence based on what the defendant called her non-responsiveness.

1. Custody, Access and Guardianship

[356] The defendant's counsel argued that the children's future, happiness, health and psychological wellbeing depend to a great extent on whether this Court not only recognizes the defendant's "inner humanity", but, more importantly, can structure a judgment that promotes and fosters positive possibilities while inhibiting the negative features. He submitted that the Court should view both parents as having failed in some respects, but that it should also have faith in their love for the children and that they will come around "to wanting to fix the problem more than the blame." This humanistic approach, in the defendant's view, is in stark contrast to the plaintiff's submissions, which focus on the negative features and assign blame rather than fix the problem.

[357] The defendant submits that the plaintiff need not have spent as much time detailing every bit of evidence against him and attacking his ethics, morals and character because he has admitted all of his wrongdoings and acknowledged and recognized them as clear and unequivocal wrongs. Accordingly, his counsel did not propose to respond point by point to the plaintiff's complaints, which he believes have been in part overstated in histrionic and inflammatory language. Instead, he prefers to focus on the two simple issues in the case: what is the appropriate parenting schedule, either for the short term or the long term; and what funds are available to the plaintiff at this point in time.

[358] The defendant submits that there three vital facts upon which everyone agrees:

- Each parent dearly loves the children and is loved by them in return.
- Both parents and Dr. Koopman agree that it would be in the best interests of the children if they stayed in Vancouver where they would have access to both parents.
- The parents and Dr. Koopman agree that the plaintiff's ability to remain with the children in Vancouver depends on her reasonable ability to financially support herself.

[359] The defendant also agrees that, if at all possible, the children should remain at their present Catholic school.

- [360] The defendant submits that he has always acknowledged the plaintiff's value as a mother and, contrary to the plaintiff's submissions, this was not something that arose only during the course of his testimony at the trial. The defendant points to the fact that Ms. Uegster testified to positive statements that he made about the plaintiff early in their sessions, and that this is also referred to by Dr. Koopman in her s. 15 report.
- [361] The defendant counsel asks to be put on a term of "probation" so that he can demonstrate to the Court that he has recognized his problems. He will see a psychiatrist and he will agree to the children continuing to see Ms. Tredger, a process in which he also wishes to be involved. He will get active therapy from a psychologist on a weekly basis, particularly focusing on anger management and communication skills. He would meet with his counsel at least once a month to deal with issues.
- [362] The defendant argues that the present access schedule should continue until the summer and that the summer vacations should be shared. He says that after the summer, the access arrangements should be reviewed to determine whether he has been performing as promised and/or required. At that time, if the defendant has done everything expected/required, a form of parallel parenting arrangement should be ordered.
- [363] The defendant argues that the evidence clearly demonstrates that he has a deep and abiding love for his children, that he was very actively involved in their lives before the separation, and that the children have benefited from his parenting. He says that the Report and Dr. Koopman's testimony is compelling evidence of the bond that the children have with both parents. He particularly stresses that Dr. Koopman opined that the lack of one parent and their balancing influences could be very detrimental to the children's development, and, because of this, a move to PEI is not in the children's best interests.
- [364] The defendant refers to the following decisions in support of his submissions on shared parenting:
- Metzner v. Metzner, [1993] B.C.J. No. 1839 (S.C.);
- Ames v. Ames, [1999] B.C.J. No. 1816 (S.C.);
- Thibeault v. Ravelo, 2001 BCSC 1066 (S.C.); and
- Ness v. Ness, [1997] B.C.J. No. 2935 (S.C.), aff'd 1999 BCCA 51, 43 R.F.L. (4th) 363.
- [365] The defendant submits that in each of those cases, there was a sole custody award with a shared parenting arrangement. He submits that the fact that the parents cannot get along is by itself an insufficient reason to refuse to allow the children to have shared time with the parents.

- [366] The defendant argues that joint guardianship under the "Joyce model" is ultimately appropriate. He believes that the recommendations contained in the Report are in the best interests of the children and he would like to have the equal time/shared parenting. However, if the Court orders access to be two weeks on and two weeks off, he would like an opportunity in the middle of the two week period for the children to visit and spend time with the other parent.
- [367] If, however, the Court is of the view that equal time/shared parenting is not an option, then the defendant asks that the current parenting schedule of every Wednesday night and every other weekend Friday to Sunday be expanded to include every other weekend from Thursday to Monday. What the defendant proposes is that in fact every other week he would have the children with him from Wednesday after school until Monday morning. This would give the defendant a total 12 days and nights out of every 28, and the schedule could be reviewed after the summer of 2008. He submits that he has demonstrated that he is capable of parenting the children, particularly with the considerable physical and emotional support provided by Daisy Wong, which was recognized in the Report and accepted by the plaintiff.
- [368] The defendant's counsel addressed the issue of the source of reasonable funds to be obtained by the plaintiff submitting that they must be:
- ... juxtapositioned [sic] against what standard of living should the mother be prepared or compelled to accept under the intersection of all the various facts which have come into existence as a result of the separation and the father's financial situation .
- [369] The defendant says that the plaintiff can realistically look to the proceeds from the sale of the former matrimonial home and the PEI Cottage, together with the support from the defendant and her employment income, as well as student loans she could take out if she goes back to university.
- [370] The defendant submits that the plaintiff is fixated on the past and this is counter-productive to improving the happiness and welfare of the parties and the children and will "only ensure a delay in the healing process which must inevitably follow".
- [371] The defendant submits that both parties reacted extremely powerfully, if inappropriately, because of their individual concerns for the children and reaction to the separation. The defendant found himself living on his own and with greatly diminished access to the children. His situation was compounded when his finances "took a hit" contemporaneously with the order of support payments that he could not make. Nevertheless, the defendant's counsel says there has been a "considerable calming of the waters between the parties over the past two month period".

2. The family assets and finances

- [372] The defendant argues that it is impractical and not financially feasible for the plaintiff to retain the matrimonial home given the parties' current financial situation. The PEI Cottage should also be sold and the net proceeds from the sales would be approximately \$800,000, after deducting \$100,000 for Gotham shareholder tax liability and joint family debt. The defendant submits that mortgage payments on both properties would be \$5,450 per month, and he is the only possible present source for these payments. Further, keeping the properties would tie up the defendant's limited capital, which he has to use eventually to provide a better living environment for the children, himself and Ms. Wong.
- [373] The defendant submits that in the circumstances of this case, if the plaintiff were to receive 60% of the net proceeds from the matrimonial home, she would get \$480,000, and if she were to receive all of the equity in the cottage, the plaintiff would have total capital of roughly \$643,500. He submits that this would be more than ample to find suitable accommodation for herself and the children, or to be invested wisely. This would leave the defendant with roughly \$320,000 and result in a 66/34 division of assets in favour of the plaintiff. However, counsel argues that this division should take into account and cancel whatever arrears of child and spousal support are outstanding because to not take this into account would put a large and additional financial burden upon the defendant in addition to any further support orders.

3. Income

- [374] The defendant says that he strongly supports the plaintiff's idea to return to nursing and get her MA in nursing, which would mean that she could reasonably expect to start earning income by September 2009. The defendant says that the plaintiff has extensive entrepreneurial skills, abilities and established performance history, and is competent in a wide range of fields with a very employable skill set. In these circumstances, the defendant submits that the Court should impute to her an income of \$50,000 per year.
- [375] He suggests that the major reason given by the plaintiff for not re-entering the pharmaceutical industry - the need for travel, would be alleviated by a shared parenting arrangement.
- [376] The defendant discusses eight support scenarios, with his income ranging from \$180,000 to \$275,000 per year, the plaintiff's income ranging from nil to \$50,000 per year, and with both sole and shared custody scenarios. The scenarios are summarized in the following table:

Scenario

Plaintiff Income

Defendant Income

Child support

Spousal Support

1 - sole

\$0

\$180,000

\$3,720

\$2,309 / 2,769 / 3,496

2 - shared

\$0

\$180,000

\$3,720

\$2,309 / 2,769 / 3,496

3 - sole

\$0

\$200,000

\$4,090

\$2,690 / 3,425 / 4,003

4 - shared

\$0

\$275,000

\$4,090

\$2,690 / 3,425 / 4,003

5 - sole

\$50,000

\$200,000

\$2,904

\$1,872 / 2,351 / 2,858

6 - shared

\$50,000

\$200,000

\$4,090

\$1,872 / 2,351 / 2,858

7 - sole

\$50,000

\$275,000

\$5,477

\$3,357 / 3,969 / 4,589

8 - shared

\$50,000

\$275,000

\$4,291

\$3,357 / 3,969 / 4,589

[377] The defendant argues that the fact that the plaintiff would receive approximately \$690,000 (sic) in net family assets could considerably reduce the spousal support she requires.

[378] In response to the plaintiff's submission that the court should deem the defendant's income to be the same as Mr. Hassman's, the defendant argues that this would be, in effect, taking Mr. Hassman's money to meet the defendant's financial obligations. He argues that it is clearly inappropriate to impute income to him by attributing part of Mr. Hassman's income to the defendant.

[379] With reference to the plaintiff's claimed s. 7 expenses of \$40,294 (with an au pair), the plaintiff says that this alone requires a pre-tax income of \$80,000.

[380] The defendant, relying on the Statistics Canada website, submits that an annual income of \$89,000 was enough to put an individual among the top 5% of the country's tax filer population. Similarly, an annual income of \$181,000 was sufficient to put someone among the top 1% of the tax filing population. The defendant's counsel referred me to the Fraser Institute website as authority that an average Canadian two-income family in 2003 had an income of approximately \$58,782. Accordingly, the defendant argues that the plaintiff's request for s. 7 expenses of \$40,000 per year is excessive.

[381] With reference to the child support arrears arising out Mr. Justice Pitfield's order, the defendant says that it was based on a finding that the defendant's income was \$400,000 per year. Meanwhile, Madam Justice Ross, making an interim spousal support order, found that the defendant had an income of more than \$250,000 but less than \$325,000 per year. With the benefit of hindsight and the evidence at the trial, the defendant says that if it is assumed that the defendant had a 2006 income of \$250,000, child support should have been \$5,015

per month, \$2,775 per month less than ordered by Pitfield J., retroactive to June 1, 2006. That "overpayment" until the end of the trial translates into \$47,175.

- [382] On the other hand, if the defendant's income for 2006 and 2007 is determined to have been \$200,000 per year, then child support payments would have been \$4,090 per month, resulting in "overpayment" of \$3,700 per month for a total of \$62,900.
- [383] As for the spousal support of \$4,189 per month ordered by Ross J. based on the SSAG and assuming that the children were in the plaintiff's sole custody, this would have required the defendant to have a taxable income of approximately \$275,000.
- [384] The defendant submits that it is possible for the plaintiff and the children to relocate from the Dunbar area to other locations in North Vancouver, Burnaby or Richmond, which are far less expensive. The plaintiff has to accept the reality of living in one of those areas as a necessary sacrifice that she has to make if she is to remain with children in the Greater Vancouver area. Living in the general Vancouver area will not preclude the children from continuing to participate in their current activities, nor will it separate them from their friends and will allow them to continue to attend their present school and church. The defendant argues that in fact this could very easily open an opportunity for new friends and activities.
- [385] The defendant submits that the plaintiff's idea of moving with the children to PEI without their father would destroy the bond between him and the children. He submits that it may simply be necessary for the plaintiff to find rental accommodation for the next few years, and if she utilizes her capital well and adds to it any income that will flow to her after she has her MA in nursing, she could, without great difficulty find a suitable home to purchase.
- [386] Although the defendant led no evidence on the cost of rental accommodation, his counsel submits that there was ample rental accommodation available with four or five bedroom units ranging from \$1,600 to \$3,600 per month.
- [387] In defence of his expenses, he submits that his present accommodation is shared with Ms. Wong and at a cost of \$2,000 if is inexpensive and a "good deal" in this market, particularly as Ms. Wong contributes \$600 per month.
- [388] The defendant acknowledges that he should "try to figure out a way" to get out of the lease of the expensive Land Rover and find cheaper transportation. However, because he already has a bad or no credit history, breaching the lease will only make the matters worse. He submits, again without any evidence, that leases are only on new vehicles and require a significant downpayment and the monthly rates would only be a few hundred dollars less than the current lease. He agrees that he could save money by not taking trips on the boat, but argues any savings are only marginal in the "overall financial situation". Further, although holidays can be changed to incur as little out of pocket expense as possible and a "few hundred dollars per year" may be saved, he again submits the savings would "only change the equation nominally".

- [389] The defendant strongly disagrees with the plaintiff's closing submission that only some of the "joint debts" should be paid from the gross sales proceeds of the matrimonial home. He submits that none of the joint debts are his personal debts and says that the family debts comprise the \$117,000 shareholders loan owed to Gotham; \$9,800 owed to Mr. Spranger for the purchase of the boat; \$4,500 owed to Capital One MasterCard; and \$33,000 owed to American Express.
- [390] With reference to the household contents, the defendant correctly points out that neither party provided an inventory of the contents or a formula for a division. Nevertheless, he argues that these are considerable and he should be permitted to go through the house with a video camera and record the contents. Then, each party would draw up a list of the desired items, and any dispute could be resolved by either compensating each other monetarily or changing their selections.
- [391] In reply to the plaintiff's submissions concerning the defendant's credibility, he submits that although he was admittedly slow in his ability to recall certain details and facts, he was nevertheless sincere in his effort to provide full and honest responses to the questions asked. He took 'ownership' of his role during the marriage and his behaviour since the separation, escalating inappropriate behaviour toward his wife and the negative effect he could see it having on his children. He submits that he was candid in admitting past inconsistencies, exaggerations and even untruths. Furthermore, as a result of counselling, his own reading and studying, and particularly sitting through the trial, he "very much more clearly saw a true image of himself and his relationship with his wife and children."
- [392] The defendant acknowledges that he still has some way to go to eliminate all of his inappropriate responses, but, as his counsel stated during the opening statement, he has yet to receive all the psychotherapy that he requires.

4. Non-responsiveness of the Plaintiff:

- [393] The defendant refers to the following decisions on this topic:

Jonasson v. Jonasson, [1995] B.C.J. No. 1052 (S.C.);

Lundberg v. Hanlon [1998] B.C.J. No. 2536 (Master); and

Genesee Enterprises Ltd. v. Abou-Rachad, 2001 BCSC 59, 84 B.C.L.R. (3d) 277.

- [394] In each of those decisions, the court was critical of a particular witness because of aggressiveness or argumentativeness or because of long rambling and often non-responsive answers. In Genesee, as in Lundberg, the witness' demeanour in the witness box was argumentative and non-responsive. In Jonasson, Ehrcke J. concluded that a witness's credibility was severely weakened because of rambling and unfocused testimony as well as giving evasive, non-responsive, and argumentative answers on cross-examination.

[395] The defendant submits that the plaintiff took every opportunity in her evidence, whether on direct or cross examination, to "slam" him. He submits that the plaintiff exhibited such a "depth of anger" and "emotional overload to her answers" that the court should be sceptical of her evidence particularly as it was also often long, rambling and non-responsive.

5. Miscellaneous

[396] Under a section entitled MISCELLANEOUS, the defendant endeavours to respond to a number of issues raised by the plaintiff. Firstly, he says that his failure to produce financial information ought not to result in the court disregarding the sworn testimony of witnesses and to do so would present a serious risk to the critical issue in the case, which is the determination of the best interests of the children. Further, he says that the "judgment of the court will have to be balanced "precariously" on the fulcrum of funds available from MD Analytics to the defendant. This is the most important issue in this case."

[397] The defendant submits that his source of funds and his ability to reduce his standard of living is crucial, and an overestimation of the amount of his income together with an unrealistic estimation of his ability to reduce his standard of living, immediately puts him in a position of being in contempt of court. He says that any uncertainty should result in him being given the benefit of the doubt. For the Court to impose a judgment on the defendant which is not possible for him to obey would result in the judgment coming "apart bit by bit until the whole thing collapses. This would only bring us back by another application by the mother to move." He submits, however, that a forensic review in a year's time will enable the court to "make any necessary adjustment that should have been an underestimation [sic] on any of the financial matters."

[398] The defendant submits that he has been placed in a terrible "Catch-22 position": in order to stay in the children's lives he has to persuade the Court of his financial ability to do so, but on the other hand he has to convince the Court that his access to funds is significantly less than the plaintiff claims.

[399] In response to the plaintiff submission that the Court ought to draw an adverse inference from his failure to call his personal friend, George Affleck, listed as a witness to the defendant's relationship with the children, he replies that this witness was not called because counsel had been directed by the court to shorten the witness list to keep the trial within the time limit.

[400] In reply to the plaintiff's submission that the defendant indulges in improper and expensive dining and travel, he responds that the company accountants have never indicated that the company has in any way inappropriately handled the expenses. He also says that although Mr. Hassman took bonuses when MD Analytics was not in a position to pay them, this does not negate the evidence of other witnesses that the company was not in a position to do so.

- [401] He submits that it must be remembered that Mr. Hassman said that some of the funds he received were regular and normal commissions given to any employee upon completion of sales, and Mr. Hassman's evidence was that not only had he closed the sales himself, but also he was working overtime because of the defendant's absence from the office.
- [402] Finally, with reference to the plaintiff's position that the defendant should be found in contempt of court, he submits that if such a finding is made, any sentence should be suspended for a probationary period with "performance terms that would not be dissimilar to terms that the court will deem advisable even in the absence of a finding of contempt".

C. The Plaintiff's Reply

- [403] In her general response, the plaintiff submits that there was very little reference made in the defendant's closing submissions to actual evidence, facts or documents. No template or homily can be applied or should be applied to the case at bar. Each case is unique. While the defendant asks the Court to ignore his past conduct, particularly his conduct toward the plaintiff and his poor parenting choices, the plaintiff submits that the defendant has not changed at all, but has only briefly altered his conduct before the Court. She submits that the best predictor of the future is the defendant's past conduct.
- [404] With reference to the defendant's submission that there should be a period of probation of eight months, she says that he is, in effect, proposing that there should be a new trial after the eight-month period, which would ignore his significant and serious failure to disclose documents and his lies. The plaintiff simply cannot afford a new trial; she has followed meticulously all of the rules in bringing this matter before the court and to permit a retrial by the defendant would be unjust.
- [405] The plaintiff submits that it is only the defendant's counsel who says that his client has psychological problems and that he will undergo therapy. There is no evidence before the Court of any of this. In fact, throughout, the defendant has denied any misconduct. The defendant was not as candid as his counsel submits. He did not admit his lies until he was caught and even then continued to blame others for his failings.
- [406] Further, the plaintiff repeats her submission that the defendant has not been candid about his income and, more particularly, he has failed to demonstrate where sufficient money will be found to allow the plaintiff and the children to remain in Vancouver.
- [407] With reference to Ms. Tredger, plaintiff submits that the defendant has "flip flopped". In his evidence in chief, he said that he would not let the children attend with her, but only in his closing submissions does his counsel say that the defendant allow the children to attend and will also attend himself.

IV. Conclusions

A. Credibility

- [408] The plaintiff's counsel correctly argued that where there is a conflict in the evidence of the plaintiff and the defendant, the evidence of the plaintiff is to be preferred. However, I go further. Because of the numerous inconsistencies in the defendant's evidence, his failure to produce documents as ordered on time or in some instances at all, and because of his admissions under cross-examination that much of his evidence given under oath at his examination for discovery or in his affidavits was false, I am inclined to not accept his evidence at all unless it is corroborated by evidence of a reliable witness.
- [409] The evidence of the plaintiff, on the other hand, although at times long-winded and rambling, was reliable and supported by evidence of objective witnesses, documents, and the evidence of the defendant extracted on cross-examination. Accordingly, where there is any conflict between the evidence of the parties, I accept the evidence of the plaintiff.

B. Custody and Guardianship

- [410] There is no doubt that the period since the separation has been an extremely difficult and trying time for the parties and their children. The relationship between the parents was at times highly acrimonious. For reasons that are not entirely clear, I conclude that the defendant was extremely angry with the plaintiff and that this drove him to acts that were extremely detrimental to the children. In the presence of the children, he has spoken harshly to their mother and called her foul and abusive names. As well, he has allowed his anger to interfere with the best interests of the children, including their access to counselling and learning aids. In my view of the evidence, his recalcitrance has been driven only by his determination to maintain a presence in the lives of the children and his anger at the plaintiff, rather than a selfless attempt to do what is best for the children.
- [411] He has been less than reliable in attending the children's activities, particularly in the early months of the separation, and has tried to shift the responsibility for his failings on the plaintiff's "failure" to keep him informed. Further, he has not availed himself of the opportunities to provide the necessary funding for some of the children's' needs, preferring instead to take vacations, attend conferences of dubious corporate benefit, and generally enjoy a lavish lifestyle.
- [412] During cohabitation, I conclude that the plaintiff was the parent primarily responsible for the day-to-day childcare, although there is no doubt that the defendant was devoted to the children and in his own way was actively involved in their lives. I do not think that the defendant is lacking love for his children; rather, at present, he is more inclined to ensure that "his rights" as a father are not infringed. Greater attention to the needs of the children, rather than focusing on his rights as a parent, would yield great benefits for both the children and the defendant.

- [413] The legislative framework addressing the importance of custody of children is found within s. 16 of the DA, and particularly s-s. (8), (9) and (10):
- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, needs, means and other circumstances of the child.
 - (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as apparent of a child.
 - (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [414] The present condition of the children is one of uncertainty, largely because of the precarious financial circumstances of their parents brought about in large measure by the actions of the defendant. I find that the plaintiff has laboured mightily to maintain a level of security for the children and to remove them from the rancour of the litigation. They have remained in their home and continued at their school and their activities and in my view their stability and sense of security is best achieved in their present environment. They are doing remarkably well in school and they have many friends in the area. Their educational and healthcare needs are well attended to and the plaintiff has undertaken all steps are necessary to ameliorate the trauma off the separation. I am satisfied that she is a parent who will facilitate access between the children and their father. Furthermore, I am satisfied that unlike the defendant she has been guarded in her comments about the defendant when the children are nearby.
- [415] In my view of the evidence and applying the legislative factors discussed above, I conclude that the plaintiff ought to have sole custody of the children with an order of joint guardianship along the lines of what is termed the Joyce Model. The final decision in the event of disagreement rests with the plaintiff.
- [416] The evidence satisfies me that the children have a deep bond with their father and although I have found reason to be critical of his conduct since the separation insofar as it has affected them, the children remain firmly attached to both parents.

C. Mobility and Access

- [417] Gordon, *supra*, is a leading authority on mobility rights of a parent and the custody and access rights of a parent. The plaintiff's counsel summarized the considerations set out in Gordon and they are found at ¶304 of these Reasons.

[418] The existing custody arrangement was set by the order of Master Donaldson and is one of interim joint custody with primary residence with the plaintiff. I am abundantly satisfied that the children have a loving and trusting relationship with their mother. They are close in age and each has a close relationship with their siblings.

[419] The present access arrangements, alternating weekends and a day in the off-week as well as divided school holidays, provide for the children to have a relatively extended amount of time with their father. The plaintiff acknowledged that the children have a close relationship with their father and that this should continue. However, she is critical of his actions and understandably lacks the level of trust necessary for effective co-parenting. In the Report, Dr. Koopman noted that the children want to spend more time with their father and as earlier noted, opined that:

Both clients love their children but are enraged one with the other. Each parent indicates to the writer that all they want is peace and to move forward but they are mired down in negativity that is impacting their children as much and probably more than themselves. Both parents have acted out inappropriately around the children regarding their negative feelings for the other parent. The writer and their child therapist, Barbara Tredger both heard and witnessed the children's reactions to this unsolicited information.

...

These children are closely bonded to both parents. They have never lived without both of them in their lives for very long. The parents, as has been described, present different but complementary styles to their children's lives and formed a balance that they have profited from. Everyone that was interviewed by the writer and the writer's own observation is that these children are delightful but also individuals. They have obviously been fostered and nurtured to be who they are by both parents and have therefore been able to bring forth their individualities and have been validated conjointly by both parents. A sudden lack of one parent and a lack of these important balancing agents can be very detrimental to the children's development of identity and personal security, e.g. one parent has almost disappeared from their lives, they can be certain that the other will not also be taken from them. If they move to PEI the children will very likely suffered grief and loss over not being with their father. They have already demonstrated emotional problems over the separation and frustration in not being with both parents equally. If the next move is taken in which they see the father considerably less and he has less input into their lives some significant altercations in my view can take place that may well cause serious adjustment problems in different ways to each of the children.

[420] The evidence of the plaintiff leads me to conclude that she believes that the children would much prefer to remain in Vancouver and her primary, if not only reason for moving is to achieve a level of material and financial security that has not been available here since the autumn of 2006. Although the children love visiting PEI, it is my view that their home is in Vancouver and I share Dr. Koopman's view that removing one parent from the children's daily lives can be very detrimental to them. Further, on the evidence of the plaintiff, the

children are well settled into their school and they have many friends in the area. Their therapist is near, as is their family doctor. Although the children have an attachment to PEI and their extended family there, it is as a place to visit rather than to live. In my view, the disruption from their school and present environment would not be in their best interests, and only the lure of a reliable financial base motivates the plaintiff. By the orders I make in this case, I intend to provide that base.

[421] Furthermore, in part because of the children's attachment and bond with the defendant and in part because of the Report, it is apparent that the objectives of s. 16(10) require an access order that will facilitate extensive time with their father. This objective, which I conclude is in their best interests, cannot be achieved if the children were to move to PEI. There is no ability for the defendant to work in the east; his role as the companies' inspiration requires that he live in Vancouver. Further, there will not be sufficient free time and funds to allow the kind of contact which I consider to be in the best interests of the children.

[422] The claim by the plaintiff to move herself and the children to PEI is dismissed.

D. Income of the Defendant and the Plaintiff and child and spousal support

[423] There is ample reason to be cautious in approaching the defendant's evidence of his income for the purposes of determining and fixing the correct amount of child and spousal support. Nevertheless, I am satisfied that with the cancellation of the Gotham contract described above, the fortunes of Gotham and the defendant have declined. I am confident that the reversal is not permanent, but it has and will reduce his income. Based on a year over year analysis of the defendant's income and the benefits he receives as an owner of these closely held companies, I set his income for child and spousal support purposes at \$275,000.

[424] Presently, the plaintiff has no employment income. However, after the turmoil of the separation and the end of litigation, she should be able to put her talents and training to good use. Her qualifications as a nurse are dated but, as she has demonstrated, she can work in some capacity at least until she returns to university to obtain her Master's degree. I recognize that the separation was emotionally devastating for her and that, together with her childcare responsibilities, had a significant impact on her ability to continue with Pfizer and led to her taking disability leave. It is time now to move on, but in the meantime she is in need of spousal support from the defendant and she will likely need continuing spousal support until some time after she graduates.

[425] The Guidelines set child support for four children where the payor has an income of \$275,000 are \$5,477 per month.

[426] The plaintiff's claimed s. 7 expenses were detailed at ¶330 of these Reasons. The total is approximately \$62,000 per year, not counting the one time expenses of \$2,900 for orthodontics and AlphaSmart keyboards, and would require approximately an additional

\$5,000 a month from the defendant. This must be adjusted to reflect the present actual cost of the nanny of \$400 per month and any income the plaintiff will earn until she returns to university. However, in the meantime, I set child support for the four children named above at \$5,477, the special expenses at \$36,890, and the defendant's monthly share of the special expenses at \$3,074, totalling \$8,551 per month, commencing December 1, 2007, the first day of the month following the trial, and continuing until further order.

- [427] The SSAG have been found to be a "useful tool": see *Yemchuk v. Yemchuk*, 2005 BCCA 406 and *Redpath*, supra. Where the payor has an annual income of \$275,000 and is paying child support and special expenses totalling \$8,551 per month, the range of support is \$2,461 to \$3,990 with a duration of 12 years from the date of separation. In determining the appropriate amount of spousal support within this range, I take into account the fact that the plaintiff has a significant skill set, is planning to upgrade her education, and will be greatly assisted in her childcare obligations via childcare expenses to be paid by the defendant.
- [428] The defendant is ordered to pay child support of \$8,551 per month and spousal support of \$2,500 per month commencing on December 1, 2007. The parties may apply to review the amount of spousal support following three years from the entering of this order or upon a material change in the circumstances of either party.
- [429] The defendant's claim to reduce the support orders and to cancel or reduce the arrears is dismissed. He had an ability to pay; opportunities to appeal the orders or to make application to vary in a timely manner and failed to do so. In my view, there is no merit to such relief. As of the commencement of the trial, the defendant was approximately \$130,800 in arrears under the two support orders. However, he is entitled to a "credit" of approximately \$14,800 for payments he has made. Accordingly, I fix the arrears at \$115,950, which are to be paid to the plaintiff by October 1, 2008 with the appropriate pre and post-judgment interest.

E. Division of Assets

[430] Sections 65(1)(e) and (f) of the FRA, provides:

- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- [431] The two assets for which the plaintiff seeks reapportionment are the former matrimonial home and the PEI cottage. As I indicated a number of times during the trial, the matrimonial home needed to be sold so that the property value would not be adversely affected by a sale on foreclosure and that the costs could be reduced. Hopefully, that has been done. In any event, I am satisfied that the appropriate and just course is for the plaintiff to have sole interest in both properties and that the defendant take such steps as may be necessary to effect a transfer of any registered interest he may have to the plaintiff, including the removal of any liens.
- [432] I make this order because there is a demonstrated and established need for the plaintiff to have the equities in these properties as a necessary first step to becoming and remaining economically independent and self-sufficient. The plaintiff has the physical and educational ability to return to full time employment, but this will take some time and retraining. The defendant has demonstrated that he is blind to his financial responsibilities and to orders imposed upon him. He is prepared to put his own expectations first and his unreliability exposes the plaintiff to the risk that he will default in making regular payments. The funds available in the two properties will provide some measure of assurance and funding to allow her to resume studies and obtain her Master's in nursing. Eventually she may be economically independent of the defendant and self-sufficient.
- [433] The plaintiff is to be solely responsible for paying out any mortgages on the properties including the mortgage securing the guaranteed line of credit with the CIBC. Further, she is to pay the builders liens of the architect and the painter as well as the following miscellaneous debts:
- CIBC Personal Line of Credit No. **39;
 - CIBC Loan No. ***34;
 - RBC Overdraft and RBC Visa debt;
 - CIBC Aerogold Visa No. *766;
 - Costco American Express No. ***008; and
 - Outstanding fees owed to the children's former school.

The plaintiff will indemnify and save the defendant harmless for any claims upon him for any of the above debts.

- [434] Neither party led evidence of the value of the defendant's or the plaintiff's interests in the various companies. This may well be the result of expert advice that there was no underlying value, but I ought not to speculate on that and I do not. It is sufficient to note that the commercial endeavours of both the plaintiff and the defendant have yielded considerable income over the years. As noted earlier, the defendant has a talent for creating business opportunities and his business partner the administrative acumen to make these ventures lucrative. While there may be an underlying value to these

enterprises, their real value is the present ability to produce income for the defendant so far as to provide support for the plaintiff and the children and for himself. In these circumstances, I order that the defendant is to be the sole owner of the shares in the various companies and the plaintiff is to transfer any shares she may have to him.

[435] There was no evidence led by either side of either the inventory or the value of the household contents, although the plaintiff is content that the defendant shall have ownership of the Stickly dining room furniture. The parties would be well advised to go about an orderly and fair division taking into account not just the value of a particular item, but also the unique needs of each parent and the children.

[436] Although I question the fiscal wisdom for the defendant to retain the interest in the motor cruisers or other vessels, he is to be the sole owner of them and solely responsible for any associated debts, costs or fees. The defendant is to be sole owner of whatever air miles he has accumulated though his business travel and the National Bank portfolio. The defendant is to be solely responsible for the following debts:

- CapitalOne MasterCard;
- The defendant's American Express;
- Sears card No. ****263;
- Outstanding Arbutus Club fees;
- All costs of the foreclosure proceedings on the former matrimonial home, including all per diem, increased interest and other charges, brought about by the reason of the defendant's non-compliance with the support orders; and
- Any other debts incurred by the defendant since the parties' separation.

[437] The parties are to divide any pensions under the provisions of Part 6 of the FRA and the Canada Pension Plan benefits according to the regulations governing that plan.

F. Contempt

[438] Ingredients of criminal contempt must be strictly proven and committal can only be made on admissible evidence after a hearing conducted strictly in accordance with the Rules of Court: *Glazer v. Union Contractors Ltd.* (1960), 34 W.W.R. 690, 26 D.L.R. (2d) 349 (B.C.S.C.); and *Sampson v. Carpenter Estate* (1992), 10 B.C.A.C. 244, 21 W.A.C. 244.

[439] With respect to the standard of proof required in civil contempt proceedings, Mr. Justice Spencer, in *Vance v. Vance* (1984), 50 B.C.L.R. 373 (S.C.), stated at page 375:

[T]he proceedings here have to do with civil rather than criminal contempt. Nonetheless, in my view the standard of proof required is very close to, if not identical with, the standard of proof in criminal contempt, namely, proof beyond a reasonable doubt. Civil contempt has two aspects to it. One, as between the parties, has to do with conferring a right upon the wronged party to

exercise civil execution against the wrongdoer. The other aspect has to do with redressing the apparent insult or injury done to the state by demeaning its courts. That second aspect entails upon the court the power to punish even for civil contempt.... Since the punishment for civil contempt involved the liberty or property of the subject, I am of the view that proof of civil contempt must be beyond a reasonable doubt....

Similar conclusions were reached in *Cartier Inc. v. Cartier Men's Shops Ltd.* (1988) 20 F.T.R. 15, 21 C.P.R. (3d) 219 (T.D.), *aff'd* (1990) 111 N.R. 152, 32 C.P.R. (3d) 383 (F.C.A.), and *Iron Ore Co. of Canada v. U.S.W.A., Local 5795* (1979), 20 Nfld. & P.E.I.R. 27, 53 A.P.R. 27 (Nfld. C.A.).

[440] In *Manolescu*, *supra*, the payor had persistently and deliberately flouted child maintenance orders made by the court. Huddart J. found the defendant guilty of contempt, writing at ¶50:

His misconduct does not have severe and wide-spread repercussions; it does not bring the court process into disrepute; it affects only his family. The fact that Mr. Manolescu is one of so many who have deliberately defied court orders to pay maintenance that the problem has become systemic does not render his misconduct criminal in the sense that word is used when defining contempt. He was not preaching disobedience. He was not participating in an organized program of civil disobedience. He was not challenging publicly the rule of law.

[441] Huddart J. considered Mr. Manolescu's misconduct to be "as serious as any civil contempt can be" and sentenced him to 90 days incarceration as "no other penalty will reflect the gravity of his offence and the repetitive nature of his contemptuous conduct..."

[442] There is overwhelming evidence that demonstrates that the defendant has not complied with a number of court orders including the support orders of Pitfield and Ross JJ. These orders were not appealed or any appeals that were launched were abandoned and applications to vary the orders were not pursued. Rather, the defendant chose to pay whatever he thought he should pay.

[443] Further, I conclude that with full knowledge of the orders and the financial obligations, the defendant chose to pay for expenses of his own choosing and facilitated a rearrangement of corporate finances so that Mr. Hassman could take additional funds from the companies. Any surplus funds he had were not paid over to the plaintiff in even an attempt to comply.

[444] Additionally, there were numerous requests for disclosure and production of documents as early as the summer of 2006 and a Demand for Discovery of Documents was delivered to the defendant in mid-July 2006. The plaintiff applied in October 2006 for an order of production and although the defendant filed a List of Documents and a Supplemental List, many documents were not listed, including relevant and important financial documents. In May 2007, the plaintiff filed another application to compel production, which prompted a Fourth Supplemental List, but still some important documents were not produced. The plaintiff made a further request for production in late June 2007 and filed yet another

application for production in mid-July 2007. When the application was heard on July 24, 2007, Master Baker ordered production of an extensive number of documents by July 31, 2007. The defendant did not fully comply with that order and deposed that a number of documents were not in his possession, power, or control. The missing documents included the defendant's income tax returns for 2003, 2004 and 2006. When the defendant applied to adjourn the trial because of the withdrawal of his second counsel, Myers, J. granted a brief adjournment but ordered the defendant to produce his missing tax returns as well as updated financial records, including bank and credit card statements as well as cancelled cheques for the past three years. Although the defendant produced his tax returns on September 21, 2007, he did not produce the other documents as ordered. Indeed, as earlier noted, it was not until well into the trial that the defendant provided just some of the documents.

[445] In all the circumstances, I find the defendant in contempt of court for his wilful disobedience of the court's orders. I adjourn the imposition of a penalty until counsel have made full submissions and the defendant has an opportunity to purge his contempt.

G. Divorce

[446] There will be an order for divorce and change of name.

V. Summary of Orders

[447] This Court makes the following orders:

- (1) order of divorce and change of name; and
- (2) sole custody of the children is awarded to the plaintiff;
- (3) the parties will have joint guardianship of the children on the "Joyce Model";
- (4) the plaintiff's application for permission to move to PEI with the children is dismissed;
- (5) the defendant will have access to the children in accordance with the order of Master Donaldson of April 18, 2007 as described above;
- (6) the defendant will pay the plaintiff child support in the amount of \$8,551 per month commencing on December 1, 2007, said amount comprising base support of \$5,477 per month and s. 7 expenses of \$3,704 per month, with the latter amount for s. 7 expenses to be adjusted from time to time to take into account the plaintiff's income, if any, the increased cost of an au pair if such cost increases, the cost of a full-time nanny when the plaintiff attends school, and any other extraordinary or special childcare expenses which may reasonably arise;

- (7) the defendant will pay the plaintiff spousal support in the amount of \$2,500 per month, with each party at liberty to apply for review of the spousal support order following three years after the entering of this order or upon a material change in the circumstances of either party;
- (8) the plaintiff will have the sole title to the former matrimonial home and the PEI cottage or the proceeds thereof;
- (9) the plaintiff will be solely responsible for the debts set out in ¶433 of these Reasons;
- (10) the defendant will have the sole title to the boats and the shares in the family companies;
- (11) the defendant will be solely responsible for the debts set out in ¶436 of these Reasons;
- (12) the parties will divide their respective pension plans in accordance with the relevant provisions of the FRA and any other relevant statutes;
- (13) the defendant will pay the defendant \$115,950 in arrears outstanding under the orders of Pitfield and Ross JJ. referred to in these Reasons;
- (14) the defendant is found in contempt of court with sentencing to be adjourned; and
- (15) order for pre and post-judgment interest.

VI. Costs

[448] The plaintiff is entitled to her costs throughout. Her counsel asks for liberty to speak to that claim after my reasons, but I can advise counsel that in my view the need for a trial became inevitable and was unduly lengthened and made significantly more complex by the defendant's conduct and failure to comply with the production orders. Further, the defendant has admitted to lying under oath and a strong case has been made, based on prima facie consideration of the issue, of reprehensible conduct deserving of the court's rebuke in the form of special costs. In any event, counsel are at liberty to speak to the costs.

"The Honourable Mr. Justice Warren"

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