

CANADA / JUDGMENT

M.A.B. v. J.A.B.

2023 BCSC 1276

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2023 BCSC 1276 M.A.B. v. J.A.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.A.B. v. J.A.B.,

2023 BCSC 1276

Date: 20230725

Docket: E02782

Registry: Abbotsford

Between:

M.A.B.

Claimant

And

J.A.B. also known as J.B.

Respondent

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

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E.A. Berrie

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A.E. Hayes

Place and Dates of Trial:

Abbotsford, B.C.

May 1-4, 8-12, 2023

Place and Date of Judgment:

Abbotsford, B.C.

July 25, 2023

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Introduction

- [1] The claimant, M.A.B., and the respondent, J.B., met when they were young teenagers in Halifax, Nova Scotia. The respondent had a difficult childhood and was involved in the criminal justice system from a young age. At 16, he pleaded guilty to second degree murder ("Index Offence") and spent the bulk of the next 20 years in the federal penitentiary system, first in the Maritimes, then from January 2000 onward, in British Columbia.
- [2] The parties' relationship continued throughout the respondent's incarceration, and they were married at Mission Institution in September 2014. The claimant supported the respondent throughout this time, both financially and in advocating on his behalf within the corrections system.
- [3] The parties have two children: J.T.B., who was born in 2011 and is currently 12 years old, and J.V.B., who was born in 2017 and is now six years old. Both children were born in British Columbia and have resided in the Lower Mainland since birth.
- [4] The parties' relationship deteriorated after the respondent was released on parole in 2017. The specific date of separation is somewhat nebulous, but by early 2020, both parties considered the relationship at an end. The parties consent to a divorce.
- [5] The claimant seeks sole guardianship and parental responsibilities of the children, and seeks to relocate with them to Halifax, Nova Scotia, where she will have the support of her extended family. The claimant also seeks child support and spousal support, and seeks to have income imputed to the respondent.
- [6] The respondent seeks joint guardianship of the children and parental responsibilities in accordance with the Joyce Model. The respondent opposes relocation and seeks parenting time with the children in person one day per week with additional communication via phone or video. The respondent says he has been paying child support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), as required and calculated by the Federal Child Support Guidelines, SOR/97-175 [Guidelines]: Divorce Act, s. 15.1(3). The respondent also opposes an order for spousal support on the basis that he cannot afford to pay.

- [7] The notice of family claim also sought division of family debts. However, that claim was abandoned at trial. The respondent also initially raised parentage of the children, but conceded at trial that he is the father of the children.
- [8] The parties agree that the issue of guardianship is to be determined under the Family Law Act, S.B.C. 2011, c. 25 [FLA], while parenting time, relocation, child support, and spousal support are determined under the Divorce Act.

Background Facts

The Parties

- [9] The claimant is 42 years old and was born and raised in Halifax, Nova Scotia. The claimant's parents and siblings continue to reside in or near Halifax.
- [10] The respondent is 41 years old and had a very difficult childhood, which the Parole Board of Canada ("Parole Board") described as "a dysfunctional upbringing in which [the respondent] witnessed violence and substance abuse and [was] sexually abused by a family member and physically assaulted by a caregiver". The respondent moved frequently between Edmonton and the Maritimes as a young toddler, spending time with his mother and grandparents. When he was ten, he went to live full time with his grandparents in the Maritimes.
- [11] The respondent was bullied and experienced difficulties at school. As a result, he started boxing at age ten and showed promise, competing and winning at the provincial and national levels. However, his home life remained challenging. He spent time in various foster homes and also lived with his boxing coach for a time. The respondent's grandfather died when he was 11 years old. This had a significant impact on him and coincided with the beginning of his interactions with the law.
- [12] The respondent and claimant met when they were 13 and 14 years old, respectively, and started dating in 1994. The respondent lived with the claimant's family at one point but, from approximately age 14 onwards, was living in a rental apartment with friends, with his living expenses funded by social assistance.

The Index Offence

- [13] According to the Parole Board, prior to the Index Offence, the respondent was living a transient lifestyle involving drug trafficking and criminal activity. The respondent was on bail for a robbery and assault when he committed the Index Offence. The victim of the robbery was 65 years old and suffered serious injuries to his eyes and face.

- [14] The Index Offence occurred in 1998, when the respondent was 16 years old. The respondent and an accomplice murdered the victim during an attempted robbery. The Parole Board described the murder as "brutal", noting that the victim was "tied up, a towel wrapped around his head, and he was hit with a propane tank, kicked in the face and body and burned with a [b]low torch". The respondent and claimant fled after the murder, but the respondent surrendered ten days later.
- [15] The respondent pleaded guilty to second degree murder in April 1998 and received a life sentence in December of that year. The claimant's understanding at the time was that he would serve seven years in a correctional facility and then be on parole for the rest of his life.

The Respondent's Incarceration

- [16] The respondent was initially incarcerated in a youth correctional facility in Nova Scotia but subsequently moved to Springhill Institution, a medium security adult correctional facility in Nova Scotia and also spent time at Dorchester Penitentiary in New Brunswick. The claimant visited the respondent throughout his incarceration. When he was at Springhill, she would take a bus for inmates' wives to visit him approximately once a month.
- [17] When the respondent was 17 years old, he was moved to Atlantic Institution in Renous, New Brunswick, a maximum-security adult correctional facility. The respondent experienced difficulties as a teenager in the adult correctional system and acknowledges that he "made a lot of bad decisions" while incarcerated, including participating in a major incident (riot) at Atlantic Institution. As a result, in January 2000, he was transferred to Kent Institution in Agassiz, British Columbia. Parole Board records confirm this, noting that during the early part of the respondent's sentence, his institutional behaviour was poor and he was involved in the institutional drug subculture and received approximately 40 institutional charges.
- [18] The parties' relationship continued after the respondent was transferred to British Columbia. The claimant traveled to British Columbia for private family visits ("PFVs") with the respondent on four occasions in 2000, 2001, 2003, and 2005. The 2005 PFV also coincided with the respondent's parole hearing, which the claimant attended and spoke on his behalf.
- [19] In August 2005, the respondent was released on day parole to a community residential facility ("CRF") in Kelowna. The claimant had completed her education and was working as a children's aid in Nova Scotia at the time. The respondent told the claimant he was not moving back to Nova Scotia; accordingly, she decided to relocate to British Columbia to be with him and continue their relationship.
- [20] However, in January 2006, shortly before the claimant arrived in Kelowna, the respondent's day parole was suspended, and eventually revoked. The claimant's understanding was that this occurred because of his suspected involvement in another murder. The claimant also learned that the respondent had been unfaithful to her upon his release.

- [21] The claimant returned to Halifax for a short period of time, but returned to British Columbia in the summer of 2007. She did so at the respondent's request and based on his promises that they would build a life together once he was released. The claimant settled in Abbotsford and started working as a dietary aid at an assisted living facility.
- [22] From 2006 onwards, the respondent was incarcerated at the Kent, Mission, and Matsqui Institutions. The claimant's understanding was that the respondent was moved between institutions because he continued to get into trouble, resulting in institutional charges against him. The claimant described the respondent as being abrasive and entitled, and said that this caused difficulties in his interactions with corrections staff and parole officers.
- [23] Over the course of the respondent's incarceration, the claimant was his primary support person. She attended approximately half a dozen parole hearings and multiple case management meetings. The claimant acted as a go-between for the respondent with his case managers, corrections administration, and his parole officers. The claimant advocated on the respondent's behalf, communicating with his case management team, wardens, and elders. The respondent faced institutional charges multiple times during his incarceration, and the claimant helped him defend those charges.
- [24] The claimant also worked to support herself and the respondent financially. The respondent required funds to pay for additional food, healthcare products, and phone bills while incarcerated. The parties also had PFVs approximately every four to five weeks, with an attendant cost of approximately \$250 per visit.
- [25] The respondent's behaviour improved over time, and he was eventually transferred to a minimum-security facility. He also successfully undertook various education and training programs while incarcerated. While incarcerated, the respondent learned he had First Nations heritage and began participating in associated programming within the correctional facility and elder-assisted parole hearings. Prior to his release on day parole in April 2017, the respondent cascaded down to and was housed at the Kwikwèxwelhp Healing Village. He also completed the Indigenous Community Maintenance Program.
- [26] The respondent's most recent psychological assessment was completed in 2017 where he was assessed as moderate-high risk for general and violent re-offending. However, the psychologist confirmed that his involvement in boxing did not increase this risk.

The Children

- [27] In anticipation of the respondent being released on parole, the parties planned and became pregnant with their first child in 2010. J.T.B. was born in March 2011. The respondent remained incarcerated and was refused permission to attend J.T.B.'s birth. The claimant gave birth to J.T.B. on her own.

- [28] The respondent remained incarcerated for the first six years of J.T.B.'s life. During this time, the claimant brought J.T.B. to visit the respondent on a daily basis. The parties also continued to have PFVs approximately every four to five weeks. As a result of the claimant's efforts, the respondent was a constant near-daily presence in J.T.B.'s life from the time he was born until the respondent was released on day parole in April 2017.
- [29] The claimant returned to work for approximately six months after J.T.B. was born but found that she was being pulled in too many directions and not able to give J.T.B. the attention he required. The claimant was diagnosed with post-traumatic stress disorder in 2002 and found that this, along with anxiety, made it too difficult for her to sustain employment. Accordingly, the claimant decided to stop working and went on social assistance.
- [30] The parties were married at Mission Institution on September 29, 2014. This was the 20th anniversary of their relationship. The respondent had been incarcerated for all but approximately three to four years of their relationship.
- [31] Again, in anticipation of the respondent's release on parole, the claimant became pregnant with the parties' second child in 2016. J.V.B. was born in July 2017, approximately one month after the respondent was released. The respondent was living at a CRF in Surrey at the time, but was able to be present for her birth, and spend time with the claimant and children on an extended travel pass immediately following J.V.B.'s birth.

The Parties' Relationship

- [32] I turn now to the material time frame in issue in this litigation and set out my factual findings as to the circumstances surrounding the breakdown in the parties' relationship following the respondent's release on parole in 2017.

Release on Day Parole and Geographic Restrictions

- [33] The respondent was released on day parole in April 2017. The parties expected that he would reside at a CRF in Abbotsford; however, there was no bed available, and the respondent instead went to a CRF in Surrey. The claimant drove to Surrey four to five days a week to pick up the respondent and bring him to Abbotsford, then return him to Surrey in time for curfew.
- [34] Once the respondent became eligible for weekend travel passes, the claimant would also bring him from his Surrey CRF to Abbotsford to stay with her and the children on weekends. When he was home on the weekends, the respondent spent time studying for the sports and nutrition courses he was taking while the claimant cared for the children.
- [35] Approximately two and a half months after the respondent was released, a bed became available at the Abbotsford CRF. However, the respondent testified that he chose not to transfer to the Abbotsford CRF because his case management team suggested that it would be better for him not to be in a CRF where he was unwanted because of the potential

negative implications that could have for his parole. The respondent also told the claimant that staying in Surrey would be better for his employment prospects. The respondent testified that he did not want the claimant and children (who were at the time approximately seven years and two months old) to move to Surrey because he did not want them bounced around and "Abbotsford was their whole world", so it was best for them to stay there.

- [36] While I accept that these were relevant considerations, I find that the respondent's decision to remain in Surrey was predominantly made to enable him to work in the fitness industry and attempt to revive his boxing career. The respondent made this decision knowing that so long as he remained in Surrey, he would be subject to geographic restrictions that would require him to obtain travel passes to visit the claimant and children in Abbotsford. This decision is illustrative of various decisions the respondent made that had the effect of prioritizing his pursuit of a boxing career over his ability to spend time with his children.
- [37] The respondent earned various fitness certifications while he was incarcerated and after his release, which enabled him to work in a boxing gym and as a personal trainer upon his release. He worked at Gateway MMA from July 2017 to March 2018. In March 2018, the respondent began working at Steve Nash Fitness World ("Fitness World") in Whalley. While working at Fitness World, the respondent met Ms. R. and developed a friendship with her. In late spring 2018, his parole officer, Lara Isakson, noticed a new address on the respondent's pay stubs; the respondent disclosed that this was Ms. R.'s address. Shortly thereafter, the Correctional Service of Canada ("CSC") completed a community assessment for Ms. R. to permit the respondent to spend time with her at her home in Surrey.
- [38] By June 2018, the respondent stopped taking weekend passes to stay with his family in Abbotsford and began taking passes to Ms. R.'s house. The respondent also began paying Ms. R. \$300 per month to stay at her home on weekends.
- [39] As of fall 2018, the respondent was seldom spending time at the claimant's home. Ms. Isakson became concerned that he had not disclosed his friendship with Ms. R. to the claimant. In light of this, Ms. Isakson disclosed to the claimant that the respondent had been spending time with Ms. R., so that the claimant could make an informed decision about how much support she wished to continue providing to the respondent.
- [40] The respondent wanted to continue competitive boxing upon his release. The Parole Board and CSC were not initially supportive of him returning to boxing because, among other reasons, his Index Offence involved physical violence. The claimant understood the basis for the CSC's position and the potential impact on the victim's family and tried to navigate the respondent away from boxing. The respondent interpreted this as the claimant no longer supporting him, and this caused difficulties in their relationship.

- [41] At some point in 2018, the respondent became concerned that he was putting his parole at risk by continuing to visit the claimant. He was worried she could make allegations against him that would result in his parole being revoked. The respondent says this is one of the reasons he was not able to spend more time with the children. I do not accept that this was a significant factor limiting the respondent's time with the children.
- [42] Rather, the preponderance of the evidence establishes that the claimant remained supportive of the respondent throughout his incarceration and while on parole, including when they were experiencing difficulties in their relationship. The claimant did everything possible to help the respondent get released on parole and stay there, notwithstanding the difficulties in their relationship. Moreover, the respondent made a choice not to move to a CRF in Abbotsford--where his geographic restrictions would have permitted him to visit the children without the need for a travel pass--and from his release onwards, his time was largely occupied pursuing personal training work and attempting to revive his boxing career.
- [43] Regardless, as of early 2019, the respondent was visiting the claimant and children for one to two hours, approximately once a week.

Suspension of Day Parole and Non-Removal Order

- [44] In April 2019, the respondent's day parole was suspended for an accumulation of a number of issues, including potential breaches of the respondent's telecommunications conditions. When the respondent's belongings were being packed up, an undisclosed tablet was discovered containing text messages between him and Ms. R., which constituted a further breach of his parole conditions. By consequence, his parole was suspended, and the CSC recommended revocation.
- [45] The respondent was not forthcoming in his testimony about the circumstances leading up to the parole suspension and attempted to minimize his culpability for the breaches of his conditions. Notably, he did not mention the additional infraction related to the undisclosed tablet and communications with Ms. R. In his testimony, he attributed the suspension of his parole to the fact that he was persisting in his efforts to pursue professional boxing and this was causing conflict with his case management team.
- [46] Shortly after his parole was suspended, the respondent contacted the claimant and told her he would be released again in 30 days and that they could work through their relationship difficulties. The respondent assured her that when released, he would come home to her and the children, they would undertake counselling, and he would give up boxing in favour of working as a personal trainer to provide for them.
- [47] In reliance on these assurances and at the respondent's request, on July 16, 2019, the claimant provided a letter of support for the respondent's upcoming parole hearing. In her letter, the claimant wrote that the respondent had a positive impact on her and the children's lives, they missed the respondent, and "[h]e helps support my parenting which helps my

confidences in my daily rolls [sic] and tasks". The claimant also wrote that she and the respondent "are a strong team". The claimant testified that she felt these statements were true when she wrote them.

- [48] The claimant provided the letter of support not knowing that the respondent had retained legal counsel and was seeking a non-removal order in respect of the children. In this regard, unbeknownst to the claimant, on July 18, 2019, the respondent obtained an order from the British Columbia Provincial Court prohibiting either parent from removing the children from the Fraser Valley and the Lower Mainland of British Columbia without written consent of the other parent or further court order. The respondent testified that he did this because of the claimant's constant threats of moving back to Halifax. I accept that the claimant told the respondent that if he were to be incarcerated again, she did not want to raise the children alone in British Columbia and would consider returning to Halifax, but I do not accept the respondent's characterization of these statements as threats.
- [49] Rather, the July 2019 letter of support demonstrates that the claimant remained supportive of the respondent despite the suspension of his parole. As she had done previously, the claimant was trying to advocate on behalf of the respondent and help him obtain release despite the difficulties in their relationship, and with the hope that he would commit himself to her and their family when released. This did not occur. The respondent was released shortly thereafter in July 2019 but did not return to the claimant or the children. Indeed, the claimant did not learn that the respondent had been released until late August 2019.
- [50] On July 30, 2019, the July 18, 2019 non-removal order was extended to August 27, 2019. On August 27, 2019, the July 30, 2019 order was varied by consent to provide that neither parent would permanently remove the children from the Lower Mainland of British Columbia without written consent or further court order ("Non-Removal Order"). The claimant attended in court on that day and consented to the order as she understood it would allow her to take the children camping in Hope, British Columbia.

Breakdown of the Parties' Relationship

- [51] In July 2019, the suspension of the respondent's parole was cancelled by the Parole Board, and a reprimand was issued instead. As a result, the respondent was again released on day parole. However, the Surrey CRF at which he had previously resided would not accept him, and the respondent had difficulty finding another CRF that would accept him. The only available CRF ended up being the Circle of Eagles CRF in Vancouver, which houses high-risk sex offenders and does not allow any children under the age of 18 on the premises.
- [52] Upon his release to Circle of Eagles, the respondent continued to spend weekends at Ms. R.'s house. He was not spending time with the claimant or her children in Abbotsford. The location of this CRF again required the respondent to obtain travel passes to see the children in Abbotsford. The respondent testified that he scaled back considerably on taking weekend

passes to the claimant's home in Abbotsford after he was released to Circle of Eagles to manage the volatility in his relationship with the claimant. He also testified that he was very busy with work at this time, working 40-50 hours per week.

- [53] In September 2019, the respondent had the claimant removed as a community support because their relationship was not positive for him anymore. The respondent did not like that the claimant was talking to his parole officer, and he no longer wanted his case management team to discuss his circumstances with her. Despite this, the parties spent Christmas together as a family that year. This was the last occasion that the parties were intimate, and the claimant considered them separated from that point onwards.
- [54] In early 2020, the claimant requested that the respondent's travel pass to her home in Abbotsford be rescinded because she felt that the respondent was manipulating and not being forthright with her. The claimant filed the notice of family claim on February 21, 2020.
- [55] The respondent was living at Circle of Eagles during the COVID-19 pandemic and faced increased restrictions in the early months of the pandemic. Nonetheless, he saw the children around J.T.B.'s birthday in March 2020, his birthday in May 2020, and around J.V.B.'s birthday in July 2020. He also had phone and FaceTime contact with the children, though not consistently.
- [56] The respondent's day parole was continued in July 2020, when he was granted "day parole other". This permitted him to leave Circle of Eagles CRF and reside at Ms. R.'s house. The respondent's geographic boundaries while residing at Ms. R.'s house only extended as far east as Lefevre Road in Langley. He thus required a travel permit to visit the children at the claimant's residence in Abbotsford.
- [57] The respondent initially testified that he did not see the children in person from late July 2020 until March 2022, but admitted under cross-examination that he saw the children at Christmas 2022. He also had phone and video contact with the children during this time. In late November 2020, the claimant took the children home to Halifax to visit her family, but returned in early January 2021.
- [58] The respondent also saw the children in March 2022 when he met the claimant at the Reggae Café to celebrate J.T.B.'s birthday. The respondent's parenting time became more consistent from that point onwards, and he obtained a travel permit to visit them in Abbotsford. Among other occasions, J.V.B. attended an Easter party with the respondent and his friends; the respondent attended J.T.B.'s elementary school graduation; and the respondent took both children to the Abbotsford Air Show in August 2022.

Current Circumstances

Claimant

- [59] The claimant and children are currently living in a small two bedroom and den apartment in Abbotsford where she pays rent of \$1,298 per month. The claimant is worried about crime in their neighbourhood; she testified to an incident where J.T.B. was home alone when an unidentified man entered their patio area and approached him.
- [60] The claimant does not have family or any other form of support network in British Columbia. She testified to multiple occasions where emergencies have arisen--including as to her own health--where the respondent has been unwilling or unable to assist, and she has thus had to rely on neighbours or acquaintances to help her and look after the children.
- [61] The claimant remains on social assistance as her predominant source of income. She also works nominal hours per week at the children's school as a lunch time supervisor.

Respondent

- [62] In February 2022, the respondent obtained a license for his personal training business, Ms. R. has allowed the respondent to build a gym in her basement, which he outfitted using employment insurance, the Canada Emergency Response Benefit, and other social assistance program benefits. The respondent uses this gym for his boxing training and for personal training with clients. There is no evidence as to what rent, if any, the respondent pays to Ms. R. for the use of her basement.
- [63] The respondent currently has approximately five personal training clients and testified that this is the maximum he can accommodate given his boxing training. He charges approximately \$80 per session and, in recent months, has been doing three to five sessions and earning \$240 to \$400 per week from personal training.
- [64] The respondent is a talented boxer who people in the boxing industry believe has the potential to be quite successful. The respondent has thus pursued a professional boxing career since his release. This involves an extensive training regime pursuant to which he spends five hours per day, five to six days per week training and recovering. The respondent schedules his personal training clients around his boxing training and matches.
- [65] With the CSC's permission--and over the objection of the victim's family--the respondent obtained his boxing license and fought his first boxing match in November 2019. The Parole Board subsequently granted him permission to travel for boxing matches on multiple occasions, including to Alberta in January 2020, Quebec in November 2020, and Ontario in December 2021. The respondent also attended pre-match training camps in Toronto on two occasions, where he stayed with an aunt and uncle. The respondent participated in eight fights from 2019 through March 2023.

- [66] The respondent has had some success boxing in the heavyweight division. He testified that he is currently ranked 192nd in the world, and his goal is to become the heavyweight champion of the world. The respondent also seeks to use boxing as a means of giving back to the community, including working with his friend, F.L., in starting a charity, Punch for Parkinson's.
- [67] The respondent's boxing career requires a significant investment of funds, which he obtains in large part from sponsors. Boxing has not to date resulted in any income for the respondent net of expenses. The respondent has participated in multiple fights post-COVID-19. On some occasions, his expenses have been covered by the opponent, but in other circumstances, he has had to pay to participate, which includes funding the opposing party's expenses and the purse for the fights. The respondent has travelled for boxing matches on multiple occasions from 2022 onwards, including to Ontario, Alberta, and Saskatchewan, attended a training camp in Toronto, and fought a match in Burnaby.
- [68] I find that it is only through the generosity of Ms. R. and his sponsors that the respondent is able to continue to pursue professional boxing, an endeavour that the evidence is clear does not presently provide him with any income. Ms. R. is subsidizing the respondent's personal and business expenses; he would not be able to prioritize his boxing training and thus work limited hours as a personal trainer without her subsidization. Indeed, the respondent testified that he cannot presently support himself on his personal training income alone.
- [69] The respondent was granted full parole on March 23, 2023. He continues to reside at Ms. R.'s house where he pays \$575 in rent per month: \$300 for accommodation, \$250 for food, and \$25 for water filtration.
- [70] The respondent remains subject to travel restrictions as a condition of his parole but, from July 2022 onwards, has had travel passes issued that permit him to visit the children in Abbotsford. As of 2023, the respondent has been seeing the children on a more regular basis, often taking them to the recreation centre in Abbotsford or for sushi one day on weekends.
- [71] The claimant has not had the children stay with him overnight. He testified that he has asked, but the claimant refuses to allow the children at Ms. R.'s home. While I accept that the claimant likely does not want the children with Ms. R., I also accept Ms. R.'s evidence that there is not presently a room for the children at her home and she has concerns about one of her dogs.

Credibility

- [72] The parties' evidence is generally consistent with respect to major events and circumstances prior to 2017. However, their evidence differs in material part on the issues surrounding the breakdown of their relationship and the reasons why the respondent was unable to spend more time with the children after his release on parole. As such, the credibility and reliability of the parties' evidence is in issue.
- [73] Credibility and reliability are separate but related concepts. Credibility pertains to a witness' veracity, while reliability has to do with the accuracy of their testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109, citing *R. v. H.C.*, 2009 ONCA 56 at para. 41.
- [74] I am guided in my assessment of the parties' credibility by the approach set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013), and *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). The factors to be considered were summarized in *Bradshaw* as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". I have found this approach useful.

[Citations omitted.]

- [75] Significant frailties in a witness's evidence--such as inconsistencies between their testimony and contemporaneous documentation or inconsistencies and contradictory explanations of key issues--may affect both credibility and reliability: see e.g. *Chao Yin Canada Group Inc. v.*

Xenova Property Development Ltd., 2021 BCSC 1445 at paras. 53-55, appeal dismissed as abandoned, 2023 BCCA 39. Additional factors that may be considered when assessing credibility include whether a witness's explanation defies logic or common sense, or if a witness is evasive, longwinded, or argumentative in their responses: Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd., 2019 BCSC 739 at para. 92.

- [76] Applying these principles, I find the claimant to be a forthright and credible witness. She did not overstate her evidence, was fair to the respondent in acknowledging many of his positive qualities, and candidly admitted to conduct that framed her in a less than positive light. While she was at times argumentative under cross-examination, the claimant nonetheless conceded points where appropriate.
- [77] I acknowledge that the claimant indicated in her tax documentation that she and the respondent were separated while he was incarcerated and thereafter, despite taking the position in the litigation that separation did not occur until sometime in 2019. However, this does not, in my view, materially detract from her credibility given the particular circumstances of the parties' relationship and the impact of the respondent's incarceration and parole conditions on their living situation. Even when released, the respondent did not reside with the claimant other than on weekends for a relatively short period of time until he began taking weekend passes to stay at Ms. R.'s, home, and moved there when granted day parole.
- [78] Considered as a whole, I find that the claimant's evidence as to the material events in issue in this litigation, namely her relationship with the respondent, her efforts to sustain their relationship, his engagement with the children prior to the breakdown in the parties' relationship, and his involvement--or lack thereof--in her and the children's lives following his release on parole in 2017, to be both credible and reliable. Where there are conflicts in the evidence regarding the interactions between the parties and the time the respondent spent with her and the children, I prefer the claimant's evidence to that of the respondent. Indeed, the claimant's evidence as to the amount of time the respondent spent with her and the children following his release is not disputed by the respondent in material part. Rather, he says his inability to spend more time with the children was largely due to factors outside his control.
- [79] However, the claimant's evidence as to specific dates and the sequencing of events was periodically difficult to follow and, considered in light of the available documentary evidence, was shown to be at times unreliable. I find that the respondent tended to have a better recollection of dates and was overall a more reliable historian of the timing and sequence of events than the claimant.
- [80] That being said, I find that I must approach certain aspects of the respondent's evidence with caution, particularly to the extent he testified on his inability to exercise parenting time with the children. The respondent was at times argumentative and confrontational under cross-examination. He also tended to overstate the impact of his parole conditions and

concerns about the claimant reporting him on his ability to spend time with the children, in turn minimizing the impact of his own choices on his relationship with both the claimant and the children. In this regard, I find the respondent's testimony to be selective and incomplete, and that he attempted to frame his evidence in a manner most advantageous to him. By way of example:

- a) The respondent testified that his ability to obtain travel passes limited his time with the children, but his parole officer, Ms. Isakson, testified that she could not recall any instances where she refused a requested travel pass;
- b) The respondent first testified that the COVID-19 restrictions resulted in him not seeing his children for an extended period of time, but then conceded that he in fact saw them in March, May, and July 2020; and
- c) The respondent appears to have been less than forthright with Ms. R. about his lack of contact with the children: she testified that he told her the claimant had cut him off from speaking with the children for two years from late 2019 to late 2021, but this was contradicted by his own evidence that he had FaceTime contact with the children during that time and in-person contact on multiple occasions, including at Christmas 2019 and again in March and May 2020.

[81] Accordingly, where there are conflicts in the parties' evidence regarding the amount of time the respondent spent with the children post-release and the reasons for that, I prefer the claimant's evidence to that of the respondent.

Issues

[82] The issues that I must determine are as follows:

- a) Does the respondent regularly care for the children such that he is a guardian pursuant to s. 39 of the FLA;
- b) If the respondent is a guardian of the children, how should parenting responsibilities be allocated;
- c) Should the claimant be permitted to relocate with the children to Halifax, Nova Scotia, and, depending on the outcome of that determination, what parenting time ought to be allocated to each of the parties;
- d) What amount of child support is the respondent required to pay pursuant to the Guidelines, and should income be imputed to him for this purpose; and
- e) Is the claimant entitled to spousal support?

[83] As noted above, the parties consent to an order for divorce being granted.

Guardianship

[84] The parties agree that the issue of guardianship is to be dealt with under the FLA. It is undisputed that the respondent is a parent of the children. The respondent does not take the position that he has ever resided with the children. As such, the issue before me is whether he is a guardian pursuant to s. 39(3)(c) of the FLA, which provides:

- (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:
 - (a) section 30 [parentage if other arrangement] applies and the person is a parent under that section;
 - (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;
 - (c) the parent regularly cares for the child.

[Emphasis added.]

[85] Section 39(3)(c) of the FLA was considered in *A.A.A.M. v. British Columbia (Children and Family Development)*, 2015 BCCA 220. In that case, the appellant's father had never lived together with the mother in a marriage-like relationship before or after the child's birth. The child was in the care of the Director of Adoption and despite having court-ordered parenting time, the father was found to have exercised infrequent and sporadic contact with the child. The trial judge found he did not regularly care for the child within the meaning of s. 39(3)(c). This finding was overturned on appeal, with that Court stating as follows as to what constitutes "regularly cares for" in this context:

[63] I doubt that a visit once every calendar year could be intended to qualify as 'regular' for the purposes of s. 39(3)(c), even though it could be said to have taken place at regular intervals. It seems to me that the intention of the Legislature was to refer to a parent who has demonstrated a continuing willingness to provide for the child's ongoing needs and a record of 'usually' or 'normally' doing so in fact. Certainly, it connotes something more than simply 'visiting' the child, even at regular intervals.

[86] In concluding that the father had met the applicable standard under s. 39(3)(c) in *A.A.A.M.*, the Court of Appeal noted various limitations on the father's ability to exercise access to the child, including limitations imposed by the Director and the eventual proposed adoption by prospective parents who resided in Alberta. In those circumstances, the Court found that the trial judge erred in failing to consider the restrictions on the father's ability to contact the child, and concluded that the important point was that the father continued to care for and about the child and to work towards securing guardianship rights: paras. 66-67.

[87] The core question under s. 39(3)(c) has thus been construed as whether the applicant parent has shown a willingness to provide for the child's ongoing needs "usually" or "normally", that is, more than simply visiting the child at regular intervals: *Doyle v. Handley*, 2018 BCSC 293

at para. 38; see also *L.P. v. A.E.*, 2023 BCSC 429 at para. 37. This is in my view consistent with *A.A.A.M.*, where Justice Groberman dissented in the result but agreed with the majority that "the phrase 'regularly provides care' focusses on the nature and frequency of the parent's caregiving rather than on its periodicity": para. 79.

- [88] In the present case, and despite the limitations imposed by the respondent's incarceration, the parties did live as best they could in a marriage-like relationship even while the respondent was incarcerated, with the claimant visiting the respondent on a near-daily basis both before and after J.T.B. was born and engaging in PFVs when possible. The respondent thus had a history of regularly caring for J.T.B. until he was released in 2017, and for both children in the months following his release, when the claimant was bringing the respondent to her home in Abbotsford on a daily basis and he was taking weekend passes to her residence.
- [89] The respondent's care for the children became more intermittent and sporadic from late 2018 onwards. Following his re-release in July 2019 and in the 2020 to 2021 time frame, various factors contributed to the respondent's reduced care for the children, including his focus on boxing and issues that arose between the parties regarding the conditions on which the claimant was comfortable with the respondent having parenting time with the children. Regardless, the respondent continued to pay child support and spent time with the children on a sporadic basis.
- [90] Section 39(3)(c) asks whether the parent "regularly cares for" the children in the present tense. This was noted by Groberman J.A. in dissent in *A.A.A.M.*, but he concluded it was not necessary to decide whether it should be interpreted as focusing on past or present circumstances in that case: para. 81. However, this Court's subsequent decision in *D.M.H. v. D.B.C.*, 2017 BCSC 1065, contemplates the "regular care" required by s. 39(3)(c) occurring at any point during the child's life: para. 143.
- [91] The evidence before me establishes that the respondent regularly cared for the children at various points in their lives, including when he was spending days and weekends with the claimant in the July 2017 to early 2018 time frame, and has been doing so in the months leading up to trial, taking the children for meals and to activities and outings in the community. In the result, considering the evidence as a whole and in the unique circumstances of this case, I find that the respondent has met the relatively low threshold of regularly caring for the children and is thus a guardian of the children pursuant to s. 39(3)(c) of the FLA.

Parenting Time and Relocation

Legal Framework

- [92] The parties agree that the issues of parenting time and whether the claimant is permitted to relocate with the children are to be determined under ss. 16.1 and 16.9 to 16.96 of the Divorce Act. I likewise agree. Where available, the Divorce Act is the preferable basis for consideration of child mobility issues, as the federal legislation is paramount: *C.C. v. S.P.R.*, 2022 BCSC 1503 at para. 32, citing *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20.
- [93] Sections 16.9 to 16.96 of the Divorce Act deal specifically with "relocations" of a child, which are defined in s. 2(1) as a change in the place of residence of a child that is likely to have a significant impact on the child's relationship with a person who has parenting time. It is common ground that this case involves a relocation. On a relocation application, "[t]he crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being": *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 152.
- [94] There are no prior orders or agreements between the parties regarding parenting time; the matter comes before me at trial as an initial application. A blended analysis that considers relocation as part of my determination as to parenting time is thus required: *A.J.L. v. J.G.L.*, 2021 BCSC 2429 at paras. 51-52, *aff'd L. v. L.*, 2022 BCCA 341, referring to *Falvai v. Falvai*, 2008 BCCA 503 at para. 25, and *K.W. v. L.H.*, 2018 BCCA 204 at para. 110, leave to appeal to SCC *ref'd*, 38253 (22 November 2018). In doing so, I am to balance all relevant factors, including the claimant's proposed move, in deciding what is in the children's best interests.
- [95] The principles that govern all parenting orders are set out in s. 16 of the Divorce Act, and begin with the requirement that the court shall take into consideration only the best interests of the child in question. Pursuant to s. 16(2), I am to give primary consideration to the children's physical, emotional, and psychological safety, security, and well-being. Section 16(3) then lists factors that must all be considered in determining the best interests of the child.
- [96] In determining the best interests of the child, past conduct is only to be considered if it is relevant to the exercise of parenting time, decision-making responsibility, or contact with the child under a contact order: Divorce Act, s. 16(5). In allocating parenting time, the court must give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child: s. 16(6). This is the "parenting time factor": *Barendregt* at para. 135.
- [97] The inquiry that must be undertaken is "highly fact-specific and discretionary": *Barendregt* at para. 152. While the best interests of the child are paramount, the Supreme Court of Canada in *Barendregt* recognized that the interests of child and nurturing parent are intertwined, such that a relocation that is beneficial to a parent's education, employment opportunities, and economic stability can in turn contribute to a child's well-being: para. 171. As the Court explained:

- [173] It is often difficult to disentangle the interests of a parent from the interests of a child. Indeed, "the reality that the nurture of children is inextricably intertwined with the well-being of the nurturing parent" is far from novel: [citations omitted]. A child's welfare is often advanced in tandem with improvements in the parent's financial, social, and emotional circumstances.
- [98] Section 16.92(1) of the Divorce Act lists factors that must be considered, in addition to the general considerations listed in s. 16(3), in determining whether a proposed relocation is in the best interests of the child. However, in deciding whether to authorize a relocation of the child, the court shall not consider, if the relocation is prohibited, whether the person who intends to relocate would relocate without the child: s. 16.92(2).
- [99] The burden of proof is allocated by s. 16.93 of the Divorce Act, and is succinctly summarized by Justice Gomery in *M.J.V. v. J.R.*, 2022 BCSC 1068:
- [29] Section 16.93 allocates the burden of proof on a relocation application in three cases:
- a) The burden to establish that the proposed relocation is in the best interests of the child is on the proponent of the relocation "[if] the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party" (sub-s. (1));
 - b) The burden to establish that the proposed relocation is not in the best interest of the child is on the opponent of the relocation "[if] the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child" (sub-s. (2)); and
 - c) In any other case, the parties of the proceeding have the burden of proving whether the relocation is in the best interests of the child (sub-s. (3)). That is, both proponent and opponent have the burden of proving their respective assertions.

[Emphasis in original.]

- [100] There is no prior order, arbitral award, or agreement between the parties dealing with parenting time. As such, I am considering parenting time and relocation as an initial application under s. 16.93(3). The claimant thus bears the burden of proving that relocation to Halifax is in the children's best interests, while the respondent bears the burden of establishing that it is in their best interests to remain in Abbotsford.

Divorce Act, s. 16(3): Best interests of the Children

- [101] I will now address the relevant considerations articulated in s. 16(3) of the Divorce Act.
- (a) The children's needs, given the children's ages and stages of development, such as the children's need for stability

- [102] Section 16(3)(a) of the Divorce Act provides that the court must consider "the child's needs, given the child's age and stage of development, such as the child's need for stability". The respondent submits that the children's need for stability is best served if the children stay in Abbotsford where they have always lived and where both of their parents live in close proximity to each other. I do not agree.
- [103] While the children have lived in British Columbia throughout their lives, the claimant has been their sole consistent caregiver during that time. She provides a constant presence and stability in their lives. In my view, at six and 12 years old, the children are still relatively young enough that a change in residence is unlikely to have a significant impact in their lives, so long as they remain in the claimant's care.
- [104] The respondent acknowledges that by consequence of his incarceration, the children have not had the stability of having their father as a consistent presence in their lives. The respondent submits that this is because of factors outside his control, namely those related to his parole conditions. While I recognize that his need to comply with parole conditions made exercising parenting time more difficult, those factors were not, in my view, the primary cause of him not being a stable or consistent figure in his children's lives.
- [105] Rather, from 2017 onwards, the respondent consistently made choices that, whether intentionally or not, had the effect of prioritizing advancement of his boxing career over maintaining a stable and consistent presence in his children's lives. By way of example, the respondent:
- a) Chose to remain at his Surrey CRF despite a place becoming available in an Abbotsford CRF in 2017;
 - b) Reduced the frequency of weekend passes he took to visit the claimant in favour of taking weekend passes to Ms. R.'s house prior to his parole being suspended in April 2019;
 - c) Chose to take weekend passes to Ms. R.'s home after he was re-released on day parole in July 2019; and
 - d) Structured his release on full parole to be reliant on subsidies from Ms. R. in respect of both his living situation and professional personal training business so that he could prioritize his boxing training, rather than obtaining employment and accommodations that would permit him to have consistent parenting, including overnight visits, with the children.
- [106] Importantly, the respondent's position presumes that the claimant will remain in Abbotsford regardless of whether relocation is permitted--e.g. that she will not relocate without the children. I cannot assume that this will be the case. Section 16.92(2) of the Divorce Act provides that in deciding whether to authorize a relocation, the court shall not consider whether, if relocation were not permitted, the person seeking to relocate would do so without the children: see also A.J.L. at para. 50.

- [107] If the claimant were to relocate without the children, the evidence clearly establishes that the respondent does not have the ability to provide stable care for them, and he has not proposed a plan for how he would parent in the claimant's absence. More specifically:
- a) The respondent's current living situation does not permit him to have the children reside with him. There is not currently a bedroom for them at Ms. R.'s house (though the children could sleep on cots in the gym), and there is a "reactive" dog in the home that Ms. R. testified would need to be kenneled in the presence of children;
 - b) The respondent's employment as personal trainer is tied to his current residence, as Ms. R. is allowing him to use her basement as a gym; and
 - c) The respondent does not presently intend, nor can he afford, to obtain suitable accommodation that would permit the children to live with him. As his parole officer testified, the respondent's continued ability to work only part time as a personal trainer so that he can pursue his boxing career is made possible in large part because of Ms. R.'s generosity in subsidizing his room and board.
- [108] Additionally, the fact that the respondent is now on full parole leaves him without the safety net available to offenders on day parole in the event that his living situation were to change. Ms. R. testified that the respondent is welcome to rent a room from her and use her basement as his gym for personal training for as long as she owns the property. However, and despite Ms. R.'s best intentions, circumstances change, often without notice.
- [109] The respondent's parole officer testified that if Ms. R. is for whatever reason no longer able or amenable to subsidizing the respondent's room and board, he would need to find market rental accommodation, something that he is unlikely to be able to afford to do based on his personal training earnings of \$240 to \$400 gross per week. If he were to be unable to find market rental accommodation, his recourse would be to a homeless shelter. The respondent's living circumstances are thus not, in my view, conducive to meeting the children's needs for stability.
- [110] Second, I do not accept the respondent's submission that his lack of greater involvement in the children's lives resulted from his need to comply with his parole conditions. The respondent made various choices about his living situation that resulted in the claimant's residence falling outside the permissible geographic boundaries of his CRF and Ms. R.'s home, such that he required travel passes to spend time with the children in Abbotsford. I accept Ms. Isakson's testimony that she did not recall refusing the respondent any travel passes requested for that purpose. Further, while the additional restrictions necessary during the COVID-19 pandemic did impact the respondent's ability to travel outside the geographic limits of his Vancouver CRF, those restrictions were only in place for a matter of months, and the respondent was able to spend time with the children in both May and July 2020.

- [111] While the respondent raised numerous complaints that the claimant limited his access to the children at various times, he did not take any steps to have his parenting time established by court order, despite having obtained the Non-Removal Order. Moreover, the respondent does not presently seek to have significant parenting time with the children if relocation is refused.
- [112] In this regard, the respondent's amended counterclaim seeks in-person parenting time with the children every weekend from Friday at 5:00 p.m. to Sunday at 5:00 p.m. However, he revised his position at trial to reduce the amount of time sought to be effectively eight hours one day per week (Sundays from 11:00 a.m. to 7:00 p.m.), with the exception of weekends where Monday is a statutory holiday where he seeks to have the children from Sunday at 11:00 a.m. to Monday at 7:00 p.m. I infer that this change in positions stems from an implicit acknowledgement by the respondent that his current living situation cannot accommodate the children staying with him overnight on a regular weekly basis.
- [113] The respondent testified that he is not seeking more time with the children because he is working to improve his position in the community, and he finds it stressful to take on too much. He also testified that he is not able to have the kids overnight because the logistics of doing so are outside his control.
- [114] In the latter respect, the respondent fails to acknowledge the impact of his pursuit of professional boxing has on his ability to exercise parenting time with the children. When asked in cross-examination whether he has any plans to move out of Ms. R.'s home, his response was that moving out would increase his monthly expenses by two to two and a half times so that is not an option. The respondent also testified that he will not be able to exercise his parenting time when that would interfere with his boxing training--e.g. if he was travelling for a training camp or boxing match.
- [115] I accept that the respondent is pursuing his boxing career with dedication and genuinely believes that he can and will succeed and that this will in turn provide financial advantages for his children in the future. However, the question before me is what is in the children's best interests at present, including their need for stability. At present, the respondent's pursuit of a professional boxing career impedes his ability to be a stable and consistent presence in the children's lives.
- [116] If the children are permitted to relocate to Halifax with the claimant, then they will be physically separated from their father. On the other hand, if the children are not permitted to relocate and the claimant nonetheless moves to Halifax, then they will be separated from their mother. In either scenario, there is a significant likelihood that the children will not have as close a relationship with one of their parents.
- [117] This being the case, and considering the whole of the evidence before me, I find that the claimant has the better ability to offer stability to the children. In my view, if the claimant moves to Halifax, the children will experience greater instability if they were to stay in British Columbia with the respondent than if they were to move to Halifax with the

claimant. In either case, the children will be separated from one of their parents, but given the parties' respective roles in the children's lives to date, I find that separation from the claimant would cause far greater instability for the children than separation from the respondent.

[118] While I recognize that physical separation from the respondent may detrimentally impact the children's emotional needs, if relocation is permitted, this factor can be mitigated by phone and video contact, as has been the case to date. J.T.B. has his own phone, and the claimant has permitted J.V.B. to communicate with the respondent using her device.

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

[119] Section 16(3)(b) of the Divorce Act requires the court to consider the "nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life". The children have resided solely with the claimant for their entire lives and understandably have a very strong bond with her.

[120] I am also satisfied that the children have strong relationships with their maternal grandmother, J.F., and maternal aunt, R.M.H., both of whom are located in Halifax. Ms. F. FaceTimes with J.T.B. approximately every three days, and even more frequently with J.V.B. Ms. H. messages the children through Facebook messenger, and also FaceTimes with J.T.B. He will contact her once in a while; she contacts him more frequently, and he answers her calls.

[121] The respondent has never cared for either for the children on a full-time basis. Until recently, his time with them has largely been with the claimant also present. The respondent called multiple witnesses to testify to the strength of his relationship with his children: Ms. R., Mr. L., and R.H. The weight that I can give to these witness' evidence is minimal given the limited interactions they had with the respondent and his children, and corresponding lack of meaningful opportunity to observe his parenting. For example:

- a) Ms. R. testified in chief that she believes the respondent has the ability to take care of his children, but conceded on cross-examination that she had never witnessed the respondent interacting with small children and that his children had never been to her home;
- b) Mr. L. testified that he observed the respondent spending "good quality time" with the children, but candidly admitted that his observations were limited to one occasion he could not recall specific details about, and a second occasion where he saw approximately five minutes of security camera video footage of the respondent with his children in Mr. L.'s boxing gym; and

- c) Mr. H. testified to having observed the respondent with his children 10-20 times over the past five years when they were patrons at his restaurant, that he had no concerns, and that both children have strong relationships with their father. However, Mr. H. conceded that his observations were mostly of instances where both the claimant and respondent were present; he could only recall one instance where he observed the respondent alone with his son.
- [122] The respondent also submits that, in the July 2020 to March 2022 period, the claimant's withdrawal of support for travel passes and his inability to obtain travel passes during the COVID-19 pandemic interfered with his ability to forge a strong bond with the children. I accept that the pandemic and the claimant's conduct for a short time limited the respondent's physical contact with the children; however, the evidence establishes that phone and video contact remained an option.
- [123] Moreover, the respondent took no steps to have his parenting time recognized by way of court order in face of these alleged difficulties. I accept that doing so, or agreeing to supervised visitation, would have involved not insignificant expense; however, I am not satisfied on the evidence before me that the respondent was unable to pursue those options. Doing so may have come at the expense of him having to work more hours as a professional trainer, thereby limiting his boxing training, but I do not accept that his inability to have regular in-person contact and correspondingly form stronger bonds with his children in this time frame was the claimant's fault, or that he was unable to do anything to ameliorate the situation.
- [124] The parties' evidence regarding the children's relationship with the respondent establishes that both children love their father and have enjoyed spending time with him. This appears to remain the case for J.V.B. However, at present, both parties testified that J.T.B. often refuses to speak with the respondent and will refuse to answer or return calls from the respondent.
- [125] In the result, I am satisfied that the children have established relationships with their father and care for him. However, in my view, the nature and strength of their bond with the claimant is clearly stronger than with the respondent. The children have also developed bonds with the claimant's extended family in Halifax; there is no evidence of any relationships between the children and the respondent's extended family.
- (c) Each spouse's willingness to support the development and maintenance of the children's relationship with the other spouse
- [126] Section 16(3)(c) of the Divorce Act directs the court to consider "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse". While communications between the claimant and respondent have been difficult at times, they have both demonstrated that they are willing to support the development and maintenance of the children's relationship with the other parent.

- [127] I do not accept the respondent's submission that the claimant is unlikely to support the development and maintenance of his relationship with the children. While there have been periods of time where she has limited the respondent's contact with the children, her conduct as a whole satisfies me that she will continue to support the respondent's relationship with the children. Even during difficult times, the claimant remained willing to facilitate electronic communication, including in late 2020 when she took the children home to Halifax for an extended visit. She also facilitated regular in-person contact with the respondent while he was incarcerated, and after his release, would drive the children to see him, largely at his convenience, within the geographic limits of his CRF.
- [128] Nor do I accept that the claimant's desire to relocate back to Nova Scotia indicates that she intends to sever the respondent's relationship with the children. The fact that the respondent's Index Offence occurred in Nova Scotia, and the victim's family is opposed to his return, are immutable and arise from the respondent's, not the claimant's, conduct. I appreciate that there may be stigma associated with the Index Offence in Halifax, but given the ease of access and dissemination of information via the internet, the prospect of the children being associated with the respondent's crimes arises no matter where they reside, as exemplified by J.T.B. recently learning about his father's criminal history through a Google search.
- [129] I do not find the submission that the claimant decided to have children with the respondent knowing his circumstances, and should therefore be required to remain in British Columbia despite the breakdown of their relationship, compelling. The respondent's crimes should not, in my view, operate to deprive the claimant of the ability to live and raise the children in her hometown and with the support of her family, or the children of the ability to further develop their bonds with their maternal grandmother, aunt, and cousins.
- [130] There is no evidence before me as to what steps the respondent would take to foster and maintain the children's relationship with the claimant if she were to move to Halifax without them. This likely flows from the respondent's position being predicated on the claimant remaining in British Columbia even if relocation is not permitted, and his concession that he does not presently have the capacity to be the primary caregiver for the children.
- [131] It is an inevitable consequence that if the claimant moves to Halifax and the respondent remains in Surrey, whichever parent with whom the children do not reside will have their relationship compromised. The distance between Abbotsford and Halifax, and attendant time and cost required for either parent to exercise parenting time creates significant barriers. Nonetheless, I find that within these constraints, the claimant exhibits more willingness to support the children's relationship with the respondent than does the respondent in respect of the claimant.

(d) The history of care of the children

- [132] Section 16(3)(d) of the Divorce Act requires the court to consider the history of the child's care. It is undisputed that the claimant has been the sole caregiver for the children since birth, and that this remains the case. The respondent concedes that he does not presently have the ability to have the children reside with him (other than possibly for one night on long weekends), and that this situation is unlikely to change in the near future.
- [133] The respondent was incarcerated when J.T.B. was born and thus had limited ability to care for him other than during PFVs. However, J.T.B. spent the first six years of his life, 2011 to 2016, visiting the respondent at correctional facilities on a near-daily basis, and also spent time with him on PFVs. J.T.B. was the focus of the respondent's attention during these visits. However, once the respondent was released, he did not spend as much time with J.T.B. The claimant testified that the respondent went from being an attentive father while incarcerated to one who had little time for J.T.B., and later J.V.B., once he was released.
- [134] The respondent was present for J.V.B.'s birth but again had limited ability to care for her given his parole status and revocation. From 2017 to 2019, J.V.B. largely knew the respondent through FaceTime contact, and she had not spent time with him, without the claimant also being present, until recently.
- [135] The respondent submits that due to the circumstances of his incarceration and parole, he had no ability to have a history of care for the children, and that since the parties decided to have children knowing this, it should not weigh against him. The respondent submits that he "did not purposely choose not to care for the [c]hildren, he was simply prevented from doing so in a way he sought due to his circumstances" and because his relationship with the claimant deteriorated upon his release. I do not accept this submission. The respondent's conduct as outlined above demonstrates a pattern of conduct whereby he made choices that prioritized his boxing career over spending time with his children.
- [136] Nor do I accept the respondent's submission that his financial situation or requirement that he remain employed as a condition of his full parole prevented him from being more involved in the children's lives. To the contrary, the evidence establishes that the respondent has chosen to work less than full capacity as a personal trainer, thereby forgoing additional income, to further his boxing career, which at present provides him with no income after payment of his boxing-related expenses. In such circumstances, the respondent's financial circumstances are of his own making and do not explain his level of involvement in the children's lives.
- (e) The children's views and preferences, giving due weight to the children's age and maturity, unless they cannot be ascertained
- [137] Section 16(3)(e) of the Divorce Act provides that the court ought to consider the views and preferences of the child, giving due weight to the child's age and maturity, unless they cannot be ascertained. There is no s. 211 or views of the child report under the FLA outlining the children's views on relocation before the court. The respondent submits that the claimant should have obtained such a report and that her failure to do so weighs against

relocation. I disagree. It was open to either party to put the children's views before the court, but neither chose to do so.

- (e) Cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous heritage

[138] The parties provided little evidence on how relocation would impact the children's cultural, linguistic, religious, or spiritual upbringing or their heritage. The claimant testified that relocation would provide greater social connection for the children with her family's heritage, but that evidence taken alone does not militate for or against relocation, particularly when considered in conjunction with the respondent's First Nations heritage.

- (g) Plans for the children's care

[139] Neither party presented specific plans for the children's care. The respondent provided no evidence as to how he would care for the children if relocation were refused but the claimant nonetheless moved to Halifax. As set out above, the respondent's circumstances do not presently permit him to care for the children on a full-time basis, nor does he have family support to assist him in that regard. None of the witnesses who testified on his behalf attested to a willingness to assist him in caring for the children should the need arise. Most significantly, the respondent will be on parole for the rest of his life and did not address what care arrangements would be available for the children if his parole were suspended or revoked.

[140] If the children were permitted to relocate with the claimant, the claimant will have the help and support of her mother and sister to care for them. Ms. F. will be available to assist with childcare and transportation, and indicated that she would be able to take time off work to assist the claimant if there were an accident or emergency. Ms. H. likewise would be available to help in caring for the children, for example by taking them to their activities and doctors' appointments.

[141] If relocation is permitted, the children would have multiple potential caregivers. Unlike past circumstances, where the claimant has had to rely on the generosity of friends and neighbours to care for the children when she has experienced health emergencies, the children will have the care and support of the claimant's family if relocation is permitted. This is particularly important in light of the claimant's evidence--which I accept--that she continues to deal with health challenges and is likely to require further surgical intervention in the near future.

- (h) The ability and willingness to care for and meet the needs of the children

[142] Section 16(3)(h) of the Divorce Act asks the court to consider the ability and willingness of each parent to care for and meet the needs of the child. The claimant has been the primary caregiver for both children since birth, and there is no question that she has both the willingness and ability to continue to do so.

- [143] Moreover, the evidence establishes that the claimant's ability to care for the children and meet their needs, particularly from a financial perspective, will be ameliorated should relocation be permitted. If the children were to relocate to Halifax, they would be able to live with and have the benefit of assistance from the claimant's mother, Ms. F.
- [144] I also accept Ms. F.'s evidence that entry-level work would likely be readily available to the claimant at her place of employment--a hospital--at rates ranging from approximately \$19-32 per hour. Ms. H. also testified that she pays \$700 rent per month for a three-bedroom, and that it is not difficult to find accommodation in the Halifax area. These factors suggest in my view that the claimant would benefit from an improved financial position if she were to relocate to Halifax, which would in turn result in a corresponding improvement in her ability to care for and meet the children's needs. As the Court noted in *Barendregt*:
- [173] It is often difficult to disentangle the interests of a parent from the interests of a child. Indeed, "the reality that the nurture of children is inextricably intertwined with the well-being of the nurturing parent" is far from novel: *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 845; see also *Willick*, at pp. 724-25, per L'Heureux-Dube J. A child's welfare is often advanced in tandem with improvements in the parent's financial, social, and emotional circumstances. The trial judge found this to be the case here.
- [145] While I do not doubt that the respondent is willing to care for the children, it is clear on the evidence before me that he does not presently have the ability to do so other than on a very limited basis. His inability to have the children stay with him at his current residence is illustrative and was the reason for his change in position as to the amount of parenting time sought.
- [146] In my view, the tenor of the evidence taken as a whole demonstrates that the respondent is presently fully committed to pursuing his boxing career but, by consequence, has limited time and ability to care for and meet the children's needs. While this may result in future financial benefit for him, and thus potentially also the children, if his boxing career proves fruitful, the question before me is his current capacity to do so.
- (i) The ability and willingness to communicate and cooperate on matters affecting the children
- [147] Section 16(3)(i) of the Divorce Act requires the court to consider the ability and willingness of each parent to communicate and cooperate with one another on matters affecting the child. While there remain significant communication issues and anger between the parties, their communications have undoubtedly improved in the months leading up to trial. The respondent has recently become an emergency contact for the children, and the claimant has kept him apprised of key events in the children's lives and included him in those events, i.e. J.T.B.'s elementary school graduation and dinner.

[148] It is my hope that given the passage of time, the parties will be able to work together to improve communication and decision making as it relates to the children. The order regarding relocation may also provide some certainty to the parties to move forward in parenting the children and develop effective ways to communicate regarding important decisions in the children's lives.

(j) Family violence

[149] In conjunction with s. 16(4), the court must consider:

- (i) any family violence and its impact on, among other things,
- (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
- (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child

[150] Both parties acknowledge they had a volatile relationship with frequent aggressive verbal arguments. This is supported in the evidence before me. However, it does not, in my view, amount to family violence. Moreover, the parties' historical conduct does not assist in determining what is in the children's best interests in respect of relocation, as I am not to consider the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child: Divorce Act, s. 16(5). In the result, I conclude that the issue of family violence is not a factor in the relocation decision.

(k) Other civil or criminal proceeding relevant to the safety, security, and well-being of the children

[151] Neither party takes the position that there are any other civil or criminal matters that impact the children's best interests.

Divorce Act, s. 16.92(1): Additional Factors

[152] I turn now to consider the individual factors that must be considered on relocation applications pursuant to s. 16.92(1) of the Divorce Act.

(a) The reasons for the relocation

[153] The claimant seeks to relocate to Halifax to benefit from the support of her family, primarily that of her mother and sister. The claimant says that she is isolated in British Columbia and does not have the support network that would be available to her in Halifax. The claimant asserts that with the support of her family in Halifax, she will be better able to work and thus support the children at a higher standard of living than is possible in British Columbia.

[154] The claimant has dealt with multiple medical issues in the past, where she has relied on friends and neighbours to care for the children, and she faces the prospect of additional medical procedures in the future. Given the breakdown in the parties' relationship, the claimant no longer wishes to continue to raise the children--largely on her own--in British Columbia. Indeed, the claimant made it known to the respondent on various occasions that she did not intend to remain in British Columbia if his parole were revoked and he was incarcerated again. This is what led to the respondent obtaining the Non-Removal Order after his parole was revoked in the summer of 2019.

[155] On the evidence before me, I find that the claimant has a bona fide desire to return to Halifax that is not unreasonable in the present circumstances. I find that her desire to relocate does not arise from any improper purpose or to deprive the respondent of parenting time with the children.

(b) The impact of the relocation on the children

[156] The claimant also asserts that relocating will have a positive impact on the children because they will be able to forge stronger relationships with their extended family and because she will in turn be less stressed and, with the help of family, better able to work and support the children. In the claimant's submission, the children's living situation--being close to family and in circumstances where the cost of living is less and she has assistance that will enable her to work more--will be more beneficial than their current situation of living in poverty in British Columbia.

[157] The respondent submits that relocation will unquestionably have a negative impact on his relationship with the children. The respondent also submits that the negative impact of relocation will be greater for J.T.B. due to his age, because he has a social circle in Abbotsford, and because he needs his father's guidance. There is no evidence before me about J.T.B.'s social circle in Abbotsford. Nor is there any evidence before me that his age (12 years old) is a pivotal age at which relocation is detrimental or at which he requires guidance from the respondent. Nor does the evidence before me establish that J.T.B. is receptive to receiving such guidance at present, or that the respondent cannot provide some guidance by way of phone or video parenting time if relocation is permitted.

[158] I agree with the respondent that in the absence of a s. 211 or views of the child report, it is very difficult to assess the impact of relocation on the children. The respondent submits that I can assume, based on Mr. H.'s evidence that J.T.B. loves his father and looks up to him, that "relocation would have a negative impact on [J.T.B.] where he is no longer able to see his father and spend quality time with him". This is not an assumption that I am prepared to make in the absence of a proper evidentiary foundation, and in particular given the limitations in Mr. H.'s evidence outlined above.

- [159] Considering the evidence as a whole, I agree with the claimant that the positive impacts of the proposed relocation, both in terms of fostering their relationships with extended family and the additional support available to the claimant and the children in Halifax, outweigh the potential negative impacts.
- (c) The amount of time spent with the children by each person who has parenting time and the level of involvement of that person in the children's life
- [160] The children have resided solely with the claimant since birth. She has been the parent primarily involved in and responsible for all aspects of the children's lives since birth. The respondent does not dispute this and acknowledges that the parties do not share parenting time.
- [161] In response to this factor, the respondent repeats his assertion that he did not and does not have the ability to have shared parenting because of factors outside his control. I do not accept this submission. The respondent had the opportunity to reside at a CRF in the same community as the claimant's home and that would not have required travel passes to visit the children, but decided not to. His choice to pursue a professional boxing career in addition to working as a personal trainer and the resulting demands on his time is again a decision of his own making, and one which in turn impacts his living situation and limits the respondent's ability to have the children stay with him at his home
- [162] The respondent hopes the current situation is temporary and that he will have more income and ability to increase his parenting time and have the children overnight as they grow and his finances increase. This is a laudable goal, and the respondent is undoubtedly dedicated to pursuing his boxing career. However, it does not change the fact that from the time he was released on parole to present, the respondent has not exercised regular, consistent parenting time with the children.
- [163] While the time the respondent spends with the children increased in the months leading up to trial, it remains the case that his parenting time occurs on an occasional basis when convenient to his work and boxing schedule and for special events. His involvement with the children is significantly less than that of the claimant. The respondent does have electronic parenting time with the children, though it is also sporadic in nature, and limited by J.T.B.'s current disinterest in participating.
- [164] Finally, I find that the respondent's concerns about the claimant putting his parole at risk are not substantiated by the evidence before me. In particular, the July 2019 letter shows that she remained supportive of the respondent to the CSC even when they were experiencing difficulties in their relationship.
- (d) Whether the person who intends to relocate the children complied with any applicable notice requirement

- [165] Section 16.9 of the Divorce Act requires a party intending a relocation to give notice in a prescribed form. The respondent takes the position that the claimant did not comply with the requirements of s. 16.9 by failing to provide a plan for visitation or parenting time and not disclosing until trial where the children would reside in Halifax.
- [166] However, the respondent conceded in oral argument that it would be highly unfair for the claimant's application to relocate the children to be dismissed for failure to give proper notice and does not take that position. In the result, while I agree with the respondent that the claimant ought to have provided more fulsome particulars of her plan for relocation, I find that her failure to give appropriate notice under s. 16.9 of the Divorce Act does not preclude relocation or prevent me from deciding the relocation issue in the circumstances of this case. This is particularly so given that the respondent was aware that the claimant was considering relocating to Halifax as early as July 2019, when he obtained the Non-Removal Order.
- (e) The existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside
- [167] The Non-Removal Order specifies that the children are not to be permanently removed from the Lower Mainland of British Columbia without written consent or further court order. Pursuant to s. 194 of the FLA, this Court has the jurisdiction to change, suspend, or terminate a Provincial Court order when making an order that affects the Provincial Court order or if the parties would need to return to the Provincial Court to have the order changed, suspended or terminated.
- [168] This Court can also assume jurisdiction when making orders under s. 16 of the Divorce Act, despite existing Provincial Court orders: *D.A.F. v. R.D.F.*, 2017 BCSC 873 at para. 21. Put differently, s. 194 of the FLA does not prevent this Court from making orders under s. 16 of the Divorce Act: *D.A.F.* at para. 18, citing *Power v. Spadafora*, 2015 BCSC 1399 at paras. 30-33.
- [169] The overarching consideration is one of judicial comity: *K.M.P. v. A.E.J.*, 2020 BCSC 1916 at para. 19, citing *Power*. Accordingly, once it is established that this Court can exercise jurisdiction, the next question is whether it should. In *Power*, Justice Watchuk declined to do so on the basis of judicial comity because the Provincial Court proceedings were ongoing and outstanding: paras. 41-42. No such concerns arise here. Rather, and similar to the circumstances in *D.A.F.*, the Non-Removal Order is almost four years old and the parties both agree that this Court ought to exercise its jurisdiction in determining the claimant's relocation application.
- [170] In the result, I find that if I determine that relocation is in the children's best interests, I have jurisdiction to make an order permitting relocation despite the existence of the Non-Removal Order.

- (f) The reasonableness of the proposal of the person who intends to relocate the children, taking into consideration, among other things, the location of the new place of residence and the travel expenses
- [171] The claimant did not provide a fulsome proposal for the respondent's exercise of parenting time if relocation is permitted. The respondent says that this is a significant factor militating against relocation, as he will not be permitted to return to Halifax for any purpose because that was the location of his Index Offence.
- [172] It is unknown at present whether the respondent would be permitted to travel to Halifax for the purpose of visiting the children if relocation is permitted. The victim's family has provided the Parole Board with multiple victim impact statements over the years requesting that the respondent not be permitted to travel to Halifax. The Parole Board did refuse the respondent permission to travel to Nova Scotia for boxing purposes in 2019.
- [173] The respondent's parole officer was unable to say whether the respondent would be permitted to travel to Halifax to visit the children if they are permitted to relocate with the claimant. Decisions of this nature are made considering the location and duration of the travel, the purpose, risk level, whether the destination may be a trigger, and any concerns of the victim or their family.
- [174] The ultimate decision as to where and when the respondent may be permitted to travel outside his geographic restrictions remains that of the CSC or, depending on the nature of the request, the Parole Board. The victim impact statements will be given consideration, but the Parole Board's prior decisions demonstrate that they are not determinative. For example, the victim's family was opposed the respondent being allowed to box professionally in any location, but the Parole Board permitted him to do so over their objection.
- [175] In the event that the respondent is not permitted to return to Halifax, the claimant is prepared to facilitate visitation between the respondent and the children in Toronto, where the respondent has family. Indeed, the respondent has been granted permission to travel to Toronto on two prior occasions for boxing training camps and stayed with family in those instances. The claimant is also prepared to facilitate regularly scheduled FaceTime parenting time for the respondent, at a minimum on a weekly basis. Regardless, the loss of that time will undoubtedly be significant in terms of the respondent's relationship with the children.
- [176] At present, neither party has the financial means to fund cross-country travel for the respondent to spend time with the children if relocation is permitted. This may well change in the future if the respondent's boxing career becomes remunerative, or if he devotes more time to remunerative personal training. Likewise, the claimant expects that her financial situation will be ameliorated in Halifax through the prospect of a reduction in her living expenses and increase in her ability to work outside the home.

(g) Whether each person who has parenting time or decision-making responsibility has complied with their obligations under family law legislation and the likelihood of future compliance

[177] Neither party has failed to comply with their obligations under applicable family law legislation. As is set out in further detail below, the respondent has been paying child support largely in accordance with his Guidelines income, and there are no interim orders imposing further obligations on him. I am satisfied that while child support has been withheld on occasion, the respondent understands his obligations to pay support, wants to support his children, and is likely to comply with his obligations in the future.

Conclusion

[178] The relevant question is what parenting arrangement is in the children's best interests, bearing in mind the critical factor of the claimant's intention to relocate to Halifax. I reiterate that in deciding this issue, s. 16.92(2) of the Divorce Act prohibits me from considering whether or not the claimant would relocate without the children. Likewise, I cannot compel the respondent to relocate to Halifax; indeed, he is not permitted to relocate at all absent permission from the CSC.

[179] Having considered all of the relevant factors as outlined above, I find that it is in the children's best interests, having regard to their physical, emotional, and psychological safety, security and well-being, to allow their relocation to Halifax with the claimant. To summarize, I come to this conclusion based on my consideration of all of the factors as set out above, with particular reference to the following factors:

- a) The claimant has been the children's primary caregiver for their entire lives and remains so;
- b) The claimant is better able to care for and meet the children's needs. The respondent does not presently and will not in the foreseeable future have the ability to care for the children or meet their needs. The children cannot reside with him at his current residence, he does not presently plan to move, and indeed he cannot afford to do so;
- c) The claimant is willing to facilitate the maintenance of the children's relationship with the respondent via electronic communications and have the children travel to have in-person parenting time with the respondent when he visits his family or attends boxing training camps in Toronto; and
- d) There are no improper motivations for the claimant's desire to relocate; rather, she will have the benefit of family support and improved economic opportunities in Halifax, which will in turn benefit the children: Barendregt at para. 173.

[180] I am cognizant that permitting the claimant to relocate with the children will have a substantial impact on the respondent's in-person parenting time and that this loss is a significant factor. However, his in-person parenting time has been irregular and infrequent in the years since he was released. I find that the prospective loss of this time is mitigated

by the respondent continuing to exercise regular electronic parenting time, which is consistent with how he has exercised the majority of his parenting time since he was initially released on day parole in April 2017.

[181] While permitting relocation poses a potential risk to the respondent's ongoing relationship with his children, as the Court recognized in *Barendregt* at para. 135, the maximization of contact between parent and child is not an end in itself. It is only important insofar as it is consistent with and promotes the best interests of the child: *M.J.V.* at para. 81. I find that the children's best interests are best promoted by permitting them to relocate to Halifax.

Child Support

[182] Pursuant to ss. 15.1(1)-(3) of the Divorce Act, the court may make an order for child support in accordance with the Guidelines. The objectives of the Guidelines include establishing a fair standard of support for children to ensure that they continue to benefit from the financial means of both spouses after separation, and ensuring consistent treatment of spouses and children who are in similar circumstances: Guidelines, ss. 1(a), (d).

[183] The core principles that govern child support were summarized in *D.B.S. v. S.R.G.*, 2006 SCC 37, and restated in *Michel v. Graydon*, 2020 SCC 24:

[10] In *D.B.S.*, this Court endorsed certain important principles governing orders for child support (including retroactive child support) that merit restating here:

- Child support is the right of the child, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents (para. 38);
- Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together (para. 38);
- The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life" (paras. 38-45).
- Retroactive awards are not truly "retroactive", since they merely hold payors to the legal obligation they always had to pay support commensurate with their income (para. 2);
- Retroactive awards are not confined to "exceptional circumstances" or "rare cases" (para. 5); and
- In determining whether to make a retroactive award, the payor parent's interest in certainty in his/her obligations must be balanced with the need for "fairness and . . . flexibility". A court should consider whether the recipient parent's delay in seeking retroactive support was reasonable in the circumstances, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail (para. 133).

[Emphasis in original.]

- [184] There is no existing interim order regarding child support. The respondent currently pays \$310 per month and an additional \$50 for J.V.B.'s dance lessons. The parties share other expenses for the children when needed.
- [185] It is undisputed that the respondent has paid between \$300 to \$310 per month in child support from 2019 onwards. The claimant acknowledged in closing argument that this amount is consistent with the appropriate range under the Guidelines given the respondent's 2019, 2020, and 2021 tax returns and notices of assessment. As such, she does not seek retroactive child support for 2019, 2020, or 2021.

Imputation of Income

- [186] The claimant takes the position that the respondent's determination to pursue a career as a professional boxer has resulted in circumstances where he is purposely keeping himself under-employed as a personal trainer. The claimant seeks to have income imputed to the respondent commensurate with full-time employment at minimum wage, and retroactive child support based on imputed income from January 1, 2022, onwards.
- [187] The respondent did not strenuously oppose imputation of income to him, but suggested that if income were to be imputed, it should commence as of January 1, 2023. He again relied on Ms. Isakson's evidence about his financial disclosure as mitigating against imputation. However, that evidence does not assist on this point; the fulsomeness of the respondent's financial disclosure is not determinative of whether he is intentionally under-employed.
- [188] For child support purposes, income is generally determined using the parties' "Total income" on the Canada Revenue Agency T1 General form, in accordance with s. 16 of the Guidelines: *K.R.W. v. P.M.M.*, 2023 BCSC 981 at para. 129; *McKenzie v. Perestrelo*, 2014 BCCA 161 at para. 94. However, the court retains discretion to impute income to a spouse in certain circumstances under s. 19(1) of the Guidelines. One such circumstance of particular relevance here is where a spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child or spouse: Guidelines, s. 19(1)(a).
- [189] The test for imputing income on the basis of intentional under- or unemployment is one of reasonableness and considers the spouse's specific circumstances, such as age, education, health, work, history, and work availability: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37. A spouse is intentionally under-employed if they choose to earn less than they are capable of earning: *K.W. v. A.G.*, 2023 BCSC 629 at para. 96, citing *Drygala v. Pauli*, 61 O.R. (3d) 711 at para. 28, 2002 CanLII 41868 (C.A.).
- [190] Imputation of income is not dependent on a finding that the spouse is under- or unemployed with the intent to evade or minimize the payment of child support; the relevant consideration is whether the parent is earning what they are capable of earning: *R.J.L. v. T.G.S.*, 2023 BCSC 3 at para. 137, citing *Barker v. Barker*, 2005 BCCA 117 at para. 19.

Section 19(1) of the Guidelines reflects the principle that "[p]arents who are healthy and can work have a duty to seek employment, and persistence in an un-remunerative employment will not be an excuse": R.J.L. at para. 138, citing *Fong v. Fong*, 2011 BCSC 42 at para. 82.

- [191] The claimant submits that income equivalent to full-time work of 40 hours per week for 50 weeks a year at the minimum wage, at the time of trial, of \$15.65 should be imputed to the respondent. This would yield an annual imputed income of \$31,300. No evidence was adduced regarding the minimum wage; however, this is a fact of which judicial notice can be taken: *J.R.G. v. J.C.K.*, 2021 BCSC 616 at paras. 113-114.
- [192] In my view, the claimant's assertion that the respondent is intentionally under-employed to permit him to pursue professional boxing is borne out on the evidence. Since being released, the respondent has subsisted on various social assistance programs and nominal income from personal training.
- [193] Moreover, rather than working full time as a personal trainer, the respondent trains approximately five hours per day for boxing--three and a half hours of training and one and a half hours of recovery--five or six days per week. He then spends approximately one to two hours per day working as a personal trainer, conducting sessions for clients at the gym in Ms. R.'s basement. His evidence was that he has been building his personal training business from early 2022 onwards, presently has five clients, and that this is the most he can commit to in light of his boxing training regime. The respondent plans to continue to box professionally for the next five to seven years.
- [194] The respondent's testimony that he does not presently earn income net of expenses as a professional boxer is substantiated in the evidence before me. It is clear that the respondent incurs significant expenses in his pursuit of professional boxing that are defrayed by sponsorships and Ms. R.'s subsidization of his living expenses. This allows him to sustain a lifestyle that would not otherwise be possible on his limited personal training income alone.
- [195] The respondent's 2022 tax return was not before the Court. He acknowledged that he had possibly deposited approximately \$45,000 into his bank account over the course of that year, but testified that the bulk of those funds were derived from boxing sponsorships and can only be applied to his boxing-related expenses. In 2022, the respondent earned \$5,500 in prize money from boxing matches, before deducting expenses. I have no reason to reject the respondent's evidence regarding his financial situation; indeed, Ms. Isakson testified that the respondent is required to make detailed monthly financial disclosure as a condition of his parole, and she has no concerns with his disclosure.
- [196] I am satisfied that the preponderance of the evidence clearly shows that his pursuit of professional boxing comes with significant expenses that are funded via donations and sponsorships, and does not presently yield income net of expenses.

- [197] It is reasonable to infer that but for the respondent's choice to pursue professional boxing--an endeavour that does not presently provide him with any income and that he could not sustain absent Ms. R. subsidizing his expenses--he would be able to work full time and have more personal training clients, earning at least minimum wage. Indeed, he is likely capable of earning more given the fitness and personal training certifications he holds, that his rate of pay when employed at Fitness World was \$32-33 per hour, and that he charges approximately \$80 per session when working as a personal trainer.
- [198] The respondent acknowledges that his pursuit of a professional boxing career limits the amount of time he can spend working a personal trainer, and that this endeavour has yet to provide him with sufficient income to support himself absent the generosity of his sponsors and Ms. R. In light of this, he did not strenuously oppose income being imputed to him, but took the position that if income was going to be imputed, then the appropriate start date is January 1, 2023. In this regard, the respondent notes the significant impact of the COVID-19 pandemic on the fitness industry and widespread gym closures during that time, and the time and effort he invested in starting and building his personal training business.
- [199] Considering the whole of the evidence before me, I conclude that a minimum annual income of \$31,300 ought to be imputed to the respondent. For clarity, should his total income exceed this minimum in a given year, then child support will be payable based on his actual income. However, I agree with the respondent that the appropriate date for imputation of income is from January 1, 2023, onward.

Retroactive Child Support

- [200] As noted above, the claimant does not seek retroactive child support for 2019, 2020, or 2021. Given my conclusion that income will be imputed to the respondent from January 1, 2023 onwards, the issue of whether retroactive child support ought to be ordered turns on whether the respondent paid child support in accordance with the Guidelines for his 2022 actual income. The respondent says that he has done so and thus opposes an order for retroactive support.
- [201] Notably, however, the respondent's 2022 tax returns were not before the Court. He testified that he has provided the required information to his accountant, but his tax documentation is not yet available. There is thus insufficient evidence before me to determine whether the amount of child support paid corresponds with the amount required by the Guidelines based on the respondent's "Total income" in his 2022 T1 General form. In the circumstances, the claim for retroactive support for 2022 is adjourned, with leave to reapply following receipt of the respondent's 2022 tax information.

Spousal Support

- [202] The claimant seeks compensatory spousal support pursuant to s. 15.2 of the Divorce Act on the basis that she has lost time in the workforce to care for the children. However, if relocation is permitted, then the claimant acknowledges that she will have the familial support necessary to enable her to re-enter the workforce. The claimant also concedes that the respondent's income is currently limited, which in turn impacts his ability to pay spousal support. Accordingly, she seeks only a nominal award of spousal support in the amount of \$1 per month for a period of four years to preserve her ability to seek a variation of spousal support in the event that the respondent's boxing career were to eventually prove lucrative.
- [203] The respondent opposes any award of spousal support being made on the basis that the claimant did not have a reasonable expectation of economic support from him because he was incarcerated for much of their relationship, and because he does not earn sufficient income to pay support. In doing so, he relies on *Westbrook v. Ellacott*, 2002 BCSC 1071. That decision dealt with non-compensatory support and is thus of limited assistance given that the claimant seeks only compensatory support.
- [204] The objectives of a spousal support order set out in s. 15.2(6) of the Divorce Act are the starting point for determining entitlement and aim to:
- 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.
- [205] The conceptual basis for entitlement to spousal support includes compensatory, non-compensatory, and contractual support. In making an order for spousal support, the court must consider the condition, means, needs, and other circumstances of the spouses, including the length of cohabitation, the functions performed by the spouses during cohabitation, and any relevant agreements or orders on support: Divorce Act, s. 15.2(4).
- [206] The objectives of a compensatory order were summarized in *Jordan v. Jordan*, 2022 BCSC 1564 as follows:
- [132] Compensatory support is intended to provide redress for an economic disadvantage arising from the marriage or its breakdown (such as diminished earning capacity and lost career opportunities from taking on childcare responsibilities) or the conferral of an economic

advantage upon the other spouse (such as enhanced earning capacity through career development): *Chutter v. Chutter*, 2008 BCCA 507 at para. 39. Either an economic disadvantage or an economic advantage may provide a basis for an award of compensatory spousal support. Both are not required.

[Emphasis in original.]

- [207] In my view, the claimant suffered economic disadvantage arising from the marriage and its breakdown in that she bore sole responsibility for caring for the children during respondent's incarceration and after he was released. While the claimant did return to the workforce for a relatively brief period of time following J.T.B.'s birth, she has predominantly relied on social assistance to support herself and the children. The claimant completed additional schooling to work as a dental assistant, but testified that she was unable to work as a dental assistant because she could not find employment that was compatible with her childcare responsibilities as, effectively, a single parent.
- [208] In addition, the claimant having sole responsibility for the children has conferred economic advantage on the respondent since he was released on parole. The evidence overwhelmingly establishes that the respondent has been free to pursue his personal training business and professional boxing career unencumbered by childcare responsibilities because of the claimant's ongoing full-time care for the children. While those endeavours--particularly his boxing career--have yet to generate significant income, the respondent is nonetheless able to pursue those activities unencumbered by parenting responsibilities because the claimant has had sole responsibility for the day to day care of the children. The respondent also enjoys a much higher standard of living than the claimant by way of benefits conferred by his boxing sponsorships and travel opportunities.
- [209] Considering the evidence as a whole in light of the relevant factors, I find that the claimant is entitled to compensatory spousal support. I also find that an order for nominal support as sought by the claimant is appropriately granted to preserve her ability to seek a variation in the event that the respondent's business or boxing ventures eventually prove more profitable than at present. Accordingly, I award the claimant spousal support of \$1 per month for a period of four years.

Divorce

- [210] The parties seek an order of divorce. The conditions that must be satisfied for a divorce to be granted are set out in ss. 8-12 of the Divorce Act. Based on the following evidence, I find that those conditions are satisfied:
- a) The parties married on September 29, 2014, in Mission, British Columbia;
 - b) The parties have not lived together for the duration of their marriage, and have been living separate and apart since at least April 14, 2019;

- c) There is no collusion in relation to the application for divorce, and the parties are not seeking the divorce for any improper purpose or on false evidence;
- d) There is no chance that the parties will reconcile; and
- e) There are reasonable arrangements made for the children based on the outcome of this trial, as detailed above.

[211] Based on the foregoing, I am satisfied that the requirements of the Divorce Act have been met and grant a divorce. Pursuant to s. 12(1) of the Divorce Act, the divorce will take effect on the 31st day after the issuance of this order.

Conclusion and Orders

[212] It is clear to me that the respondent cares deeply for his children and genuinely seeks to establish some form of presence in their lives. It is my hope and expectation that, going forward, the claimant, together with her extended family, will work together with the respondent in a cooperative manner to foster his continued presence in the children's lives, and make decisions based on what is in the children's best interests.

[213] In summary, I make the following orders:

- a) Pursuant to s. 39 of the FLA, the claimant and the respondent are the guardians of the children.
- b) Pursuant to s. 16.3 of the Divorce Act, the parties will share decision-making responsibilities for the children as follows:
 - i. In the event of death of the respondent, the claimant will be the only party with decision-making responsibility for the children;
 - ii. In the event of death of the claimant, the respondent will be the sole party with decision-making responsibility for the children;
 - iii. Each guardian will have the obligation to advise the other guardian of any matters of a significant nature affecting the children;
 - iv. Each guardian will have the obligation to discuss with the other guardian any significant decisions that have to be made concerning the children, including significant decisions about health (except emergency decisions), education, religious instruction, and general welfare;
 - v. If the guardians are unable to agree on a significant decision despite their best efforts, the claimant is entitled to make those decisions and the respondent will have the right to apply to this Court for directions on any decision he considers contrary to the children's best interests; and

- vi. Each guardian will have the right to obtain information concerning the children from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party caregivers;
- c) Pursuant to s. 16.1 of Divorce Act:
- i. the children's primary residence will be with the claimant; and
 - ii. the claimant is permitted to relocate with the children to Halifax, Nova Scotia;
 - iii. the respondent will have contact with the children as follows:
 - (1) Reasonable in-person contact as and where agreed upon by the parties and with the approval of the CSC or the Parole Board as appropriate, or as further ordered by this Court;
 - (2) Reasonable telephone and/or electronic communication of no less than three times per week on mutually convenient days and times as agreed to by the parties or as further ordered by this Court;
 - (3) Reasonable telephone and/or electronic communication on Father's Day, the children's birthdays, the respondent's birthday, and Christmas Day;
 - (4) The respondent's telephone and/or electronic communication is to be initiated by the respondent via J.T.B.'s phone, and if J.T.B. is not available, then via the claimant's phone. The claimant may assist the children for the purpose of facilitating the calls only and is required to ensure the respondent has current telephone contact information for herself and J.T.B.; and
 - (5) The payment of travel costs incurred to exercise or facilitate the respondent's in-person parenting time will be by agreement of the parties or further order of this Court.
- [214] The respondent is found to be a resident of British Columbia and is imputed to have a gross annual minimum income of \$31,300.
- [215] Pursuant to s. 15.1 of the Divorce Act, the respondent will pay the claimant child support in accordance with the greater of his actual gross annual income or \$31,300 commencing January 1, 2023 and continuing on the first day of each and every month thereafter for as long as the children are eligible for support under the Divorce Act, or until further agreement of the parties or Court order.
- [216] The claimant's claim for retroactive child support for 2022 is adjourned, with liberty to reapply upon receipt of the respondent's 2022 tax documentation, which is to be provided to the claimant forthwith upon receipt.

- [217] The parties shall exchange their income tax returns and notices of assessments no later than June 30 of each calendar year. Child support shall be retroactively adjusted to the beginning of each year, based on the parties' then incomes or, in respect of the respondent, a minimum an annual imputed income based on 40 hours of work per week at minimum wage;
- [218] By consent, respondent will pay to the claimant his proportional share for the children's special or extraordinary expenses. The parties' proportionate sharing of special or extraordinary expenses shall be 56% to the respondent and 44% to the claimant.
- [219] I also make the following orders regarding special expenses:
- a) The following expenses shall be special or extraordinary expenses: dance lessons for J.V.B. and such other expenses as agreed to by the parties;
 - b) The party incurring a special or extraordinary expense shall provide the other party with a receipt for reimbursement;
 - c) Proportionate sharing of special or extraordinary expenses shall be based on the parties' then incomes or, in respect of the respondent, a minimum annual based on 40 hours of work per week at minimum wage; and
 - d) The parties shall conduct a review of special or extraordinary expenses annually, and a reconciliation of the amount due and owing for the previous year shall be paid in the June of the following year, until the children are no longer children of the marriage, as defined by the Divorce Act.
- [220] Pursuant to ss. 225 and 227 of the FLA and by consent of the parties, I also make the following orders:
- a) The parties will:
 - i. Put the best interests of the children before their own interests;
 - ii. Encourage the children to have good relationships with the other parent and speak to the children about the other parent and any parent's partner in a positive and respectful manner;
 - iii. Make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication, or argument in front of the children; and
 - iv. Encourage their respective families to refrain from any negative comments about the other parent, their extended family and any parent's partner, and refrain from any discussions in front of the children concerning family issues or litigation.
 - b) The parties will not:
 - i. Question the children about the other parent or time spent with the other parent beyond simple conversational questions;

- ii. Discuss with the children any inappropriate adult, court, or legal matters; or
- iii. Blame, criticize, or disparage the other parent.

[221] Pursuant to s. 15.2 of the Divorce Act, the claimant is awarded spousal support in the amount of \$1 per month for a period of four years.

[222] By consent, the claimant's claim for division of family debts is dismissed as if tried on the merits.

[223] The parties also agreed at the outset of the trial that irrespective of the outcome, they would each bear their own costs, and I so order.

"The Honourable Justice J. Hughes"

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