
CANADA / JUDGMENT

M.F.W. v. M.A.H.

2019 BCSC 588

COURT

Supreme Court of British Columbia

DECIDED

17 April 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 588 M.F.W. v. M.A.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.F.W. v. M.A.H.,

2019 BCSC 588

Date: 20190417

Docket: E12720

Registry: Chilliwack

Between:

M.F.W. also known as

M.F.H.

Claimant

And

M.A.H.

Respondent

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

Claimant appearing in person:

M.F.W.

Counsel for the Respondent:

U. K. Dhaliwal

S. Grewal

Place and Date of Trial:

Chilliwack, B.C.

May 28-31, June 1-15, July 3-6, August 8-10, October 29-31, November 2, 7, 2018

Place and Date of Judgment:

Chilliwack, B.C.

April 17, 2019

Table of Contents

Overview.. 5

Background. 6

Early Years of the Parties' Relationship. 6

Life During the Marriage. 6

The Smith Farm.. 7

Events Leading to the Marriage Breakdown. 8

The Marriage Breakdown. 10

Conduct of the Parties During the Marriage Breakdown. 11

Post-Separation Conduct of the Parties. 11

Credibility of the Parties. 13

Credibility of the Non-Party Witnesses. 17

Order for Divorce. 20

Guardianship. 20

Parenting Coordinator. 20

Parenting Responsibilities and Parenting Time. 21

History of Parenting Time and s. 211 Recommendations. 21

The Parties' Positions on Parenting Time and Responsibility. 26

Legal Principles. 26

Application of the Best Interest Factors. 29

Conclusions on Parenting Responsibility.	36
Conclusions on Parenting Time.	37
Order for Parenting Time.	39
Holiday Schedule - Mother's Day, Father's Day, Easter, Thanksgiving.	39
Spring Break.	40
Christmas Break.	40
Summer Break.	40
Birthdays.	41
Extracurricular Activities and Variation.	41
Conduct Order	41
Order re Telephone calls.	41
Division of Non-Inheritance Property.	42
Family Photos.	42
Mr. Smith's Dog, Joe.	42
The Respondent's Pension.	43
Other Family Property and Debt	43
The Alleged Oral Agreement Respecting the Respondent's Inheritance.	43
a) Relevant Legal Principles.	44
b) Was an Oral Agreement Made Regarding the Inheritance Property?.	48
c) What were the Terms of the Oral Agreement?.	60
d) Should the Smith Property be the Subject of Unequal Division?.	62
e) Valuation.	62
Support Issues - Determination of Income.	64
Past Orders Respecting Child and Spousal Support	64
The Claimant's Income.	65
The Respondent's Income.	66
Retroactive Child and Spousal Support.	67
Prospective Child Support.	69

Prospective Spousal Support.	70
Section 7 Expenses.	71
Final Orders.	71
Divorce.	71
Parenting Coordinator	71
Guardianship.	72
Passports.	73
Parenting Time.	73
Regular / School Year Schedule.	73
Holidays - Mother's Day, Father's Day, Easter, Thanksgiving.	74
Spring Break.	75
Christmas Break.	75
Summer Break.	76
Birthdays.	76
Extracurricular Activities and Variation.	77
Variation by Consent or Court Order	77
Conduct Order	77
Telephone calls.	77
Property.	78
Photos.	79
The Respondent's Pension.	79
Retroactive Child and Spousal Support	79
Future Child Support	79
Future Spousal Support	79
Review of Child and Spousal Support	79
Section 7 and s. 211 Report Expenses.	80
Costs.	80

Overview

- [1] This is an action by the claimant for various final orders including an order for divorce and orders regarding parenting responsibility and arrangements, child and spousal support, determination of division of family property and debts, as well as s. 7 expenses under the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines").
- [2] The respondent agrees with the order for divorce. With respect to the other orders, he seeks parenting time in his favour, equal allocation of parenting responsibilities, child and spousal support for a limited term only, division of certain family property, and declaration of an inheritance as excluded property.
- [3] The parties lived together for 10 years. They married on July 22, 2006, and had two children, now 9 and 10, during the relationship. I find that they separated on or about June 17, 2015. They have lived separate and apart since that time.
- [4] The respondent was 42 years old at the time of trial. He now lives with his new spouse and since the separation has lived on an Abbotsford farm inherited from his great uncle.
- [5] The claimant was 45 years old at trial. She is now living in a home across the street from the respondent. The children reside with her when she exercises her parenting time and move to the respondent's home when he has parenting time. The claimant represented herself throughout the trial.
- [6] The major issues are the allocation of parenting time and responsibilities, spousal and child support, and the existence and content of an alleged oral agreement respecting division of a substantial inheritance the respondent received from his great uncle. The trial included significant factual disputes between the parties especially with respect to conduct of the parties and the oral agreement allegedly made when the parties separated. Both the claimant and respondent were cross-examined extensively at trial which took place intermittently over 26 days.
- [7] To protect the privacy of the children of the marriage, the parties and certain witnesses are referred to by their initials, and the children are referred to by their first initial only.
- [8] I will provide some general background before turning to the credibility of the parties and other witnesses. I will then address the order for divorce, guardianship, and parenting time and responsibility, before turning to the appropriate division of property and support-related issues.

Background

Early Years of the Parties' Relationship

- [9] The parties met in 2001 in Kitchener, Ontario. The claimant was employed as a Highland dancer and office worker in Ontario. The respondent was involved in construction work. He received training in heavy equipment in 2002 and then frequently went to Fort McMurray, Alberta and other northern locales for work.
- [10] After dating for a few years, the parties began to live in a marriage-like relationship in May of 2005. They became engaged that year in Canmore, Alberta. At that point, the respondent was living with his great uncle, Neil Smith, at Mr. Smith's farm in Abbotsford, B.C.
- [11] The parties were married on July 22, 2006. It was the first marriage for both of them. The claimant moved to B.C. in May of 2007. At that point, they rented a house in the Greendale area of Chilliwack where they lived between 2008 and 2011. They bought a family dog in 2007, and the claimant became pregnant in 2008 with their first child, A. (now age 10, born September 30, 2008). A girl, L., followed a year later (now age 9, born February 17, 2010).

Life During the Marriage

- [12] Throughout the marriage, the respondent was away most of the time working in the construction and excavation industry. By agreement, the claimant stayed home and raised their two young children. The respondent supported this arrangement as he wanted his children to be at home with their mother. Occasionally, the claimant would fly out with the children to see the respondent at his work locations but this was a rare occurrence.
- [13] Unfortunately, the families of both parties are in Ontario, and accordingly the claimant did not have a great deal of support around her in B.C. to raise the children. However, they were close to the respondent's great uncle Mr. Smith and to the respondent's aunt who provided the parties with some support.
- [14] In May of 2011, the parties attempted to move to another house in Chilliwack but they found it unsanitary on arrival and refused to move in. Mr. Smith lent the parties funds for a down payment, and they found another home in Chilliwack, a townhouse in the Sardis neighbourhood. They remained there from 2011 through August 2014. During this time, the respondent continued to be away for long periods of time at work and the claimant continued to look after their young children.

The Smith Farm

- [15] The parties visited Mr. Smith regularly with their kids at his farm in Abbotsford. Mr. Smith's farm property consisted of four parcels of land comprising 110 acres all of which he owned. The farm had been in the respondent and Mr. Smith's family since 1928. Mr. Smith was close to the respondent and helped his family from time to time. He also allowed the parties to park their trailer on his farm during the summer and even paid the respondent's credit card at one point.
- [16] From the start of their relationship, the parties had talked about the possibility of taking over Mr. Smith's farm one day. Mr. Smith had executed a new will on June 17, 2011 so as to make the respondent his sole beneficiary.
- [17] In 2012, Mr. Smith started letting the respondent know more firmly that he would be leaving at least part of his farm to the respondent in his will. Mr. Smith showed the respondent the water valves on the farm. He told the respondent that it was going to be his one day so he needed to know these things. After 2012, when the respondent became more certain of his inheritance, the parties began to think more concretely about a new life together where the respondent did not have to work so hard and with the means to better provide for their children.

Events Leading to the Marriage Breakdown

- [18] The parties had acquired a travel trailer which they parked on Mr. Smith's property starting in 2014 when the respondent started work in Fort McMurray. The respondent used the trailer to live in when working out of town.
- [19] In August of 2014, the parties moved to a house in the Sardis area of Chilliwack on Davis Road. Unbeknownst to the claimant, the respondent began to have an affair with a woman, Ms. O., around the same time. Ms. O. is now the respondent's current spouse. The respondent did not disclose his affair to the claimant and managed to hide it for over nine months.
- [20] Meanwhile, the respondent lied to Ms. O. and told her he was separated. His story was that he was living on the couch and was working out the details respecting the kids prior to finalizing his divorce. The respondent's affair with Ms. O. continued through the fall of 2014 and came to a head with her pregnancy in December 2014.
- [21] Ms. O. terminated the pregnancy in January of 2015. Following that difficult time, she left on January 19, 2015 on a trip to South America between January and April 2015 which was funded by the respondent. In February 2015, the respondent emailed her and falsely stated that his divorce had come through.

- [22] The parties lived in the Davis house for 11 months until June of 2015. During this time, the respondent continued to be away often for work. The claimant continued to mainly look after the kids though she made some modest efforts to develop her prior skills as a photographer and briefly did some small-scale part time work. She flew out to Alberta in December 2014 to join the respondent for Christmas. They continued to make plans for their new home with the respondent continuing to hide his affair from the claimant.
- [23] In February 2015, Mr. Smith passed away. In his will, Mr. Smith left the respondent the 4-parcel farm comprising approximately 110 acres, various farm equipment, and his half million dollar investment fund. Probating the will was eventually finished in March of 2016. The respondent's father, Mr. H. Sr., was the executor of the estate.
- [24] One 20 acre parcel was sold to pay funds associated with the administration of the Smith property. Another 8 acre parcel was sold for \$660,000, with most of the funds remaining in trust pending the outcome of this matter. Two 40 acre parcels remain, one of which includes the Smith house where the respondent and Ms. O. now reside.
- [25] After Mr. Smith passed away, the claimant stated that the respondent started acting out. She thought at the time that his behaviour was due to Mr. Smith's passing.
- [26] The respondent says that he had in his mind in February 2015 that the relationship was over. He says that he told the claimant in February during a fight at the end of the driveway that their marriage was over. However, the comment was not heard by the respondent's father, who was present at the time, and the claimant denied that he said this. The parties' communications leading up to June 2015 contain no reference to the respondent already having stated that the relationship was over. I reject the respondent's contention that he told the claimant in February 2015 that their relationship had ended.
- [27] In May 2015, Ms. O. found out that the respondent was still married and that he was not in fact divorced as the respondent had told her.
- [28] During the spring of 2015, the claimant maintained the Smith property, which was encouraged and approved of by Mr. H. Sr. I find that the claimant regularly ensured the cows which grazed on the farm did not escape, conducted safety checks, collected mail, facilitated an appraiser coming to the home, sent off copies of the death certificate to appropriate individuals, mowed the grass, took care of haying, fed the two dogs who resided at the farm, took an inventory of belongings for the estate, and generally ensured that the home looked lived in. The respondent made a garden plot for her on the Smith farm which the claimant maintained with the two children.

The Marriage Breakdown

- [29] In May 2015, the claimant began to be suspicious of the respondent's conduct. Initially, she believed the respondent was having a breakdown as he started exhibiting strange behaviours. She knew her relationship was in trouble. The respondent had been in town

over the Mother's Day weekend, and sometime on the May long weekend, she found the respondent's wedding ring on her key chain. The respondent testified he did this so that the claimant would understand the relationship was over. However, the parties' text messages in late May 2015 indicate that the respondent did not expressly indicate the relationship was over at that time. Instead, he became increasingly curt, rude, and non-responsive.

- [30] The claimant became more concerned over the state their relationship. She called Mrs. H. Sr., the respondent's mother, and she flew out to B.C. in early June to be with the claimant.
- [31] In early June 2015, the claimant discovered that the respondent was transferring money out of their joint account to a new email address and making purchases without telling her. She became suspicious. While she normally left the bills to the respondent, she opened their bank statements and discovered that the respondent was sending money to Ms. O. The transfers amounted to approximately \$18,000 within a few recent months. There was also about \$11,000 a month in cash withdrawals. This concerned the claimant.
- [32] The claimant asked the respondent if he was having an affair, and he denied that he was. However, when the claimant's iPhone indicated the respondent was in Kelowna (where Ms. O. resided) despite his protestations that he was elsewhere, her suspicions grew. The claimant obtained access to one of the respondent's Gmail accounts, opened up his email without permission, and discovered the respondent's affair with Ms. O.
- [33] The parties separated on June 17, 2015.
- [34] Around the time the marriage was breaking down, the parties were also in the process of selling their house on Davis Avenue. Initially, the idea was that they would both move into Mr. Smith's farmhouse and begin a new life together there. However, as the relationship continued to break down, I accept that the claimant was led to believe she would receive the right to live on the farm as part of the settlement of affairs.
- [35] They signed a listing agreement on June 11, 2015, and the Davis house sold quickly. The subjects were removed on the offer on June 26th.
- [36] The claimant thought she would be moving into the farmhouse with the children and started taking preliminary steps to do so. However, when Mr. H. Sr. learned from his son in July that the marriage was over, he came to town on July 16, 2015, changed the locks, and evicted the claimant from the Smith house on July 17th.

Conduct of the Parties During the Marriage Breakdown

- [37] There are some allegations of untoward behaviour on the part of both parties during the marital breakdown in June and July of 2015. These include swearing, crying and outbursts on the claimant's part, who had suddenly and unexpectedly become aware of the respondent's affair, and bizarre, rude and intolerant behaviour on the respondent's part. I am satisfied for the most part that these behaviours were brought about by the emotional strain of the marriage's end and do not significantly impact the issue of parenting

responsibilities and allocation of parenting time.

Post-Separation Conduct of the Parties

- [38] Much of the trial was taken up by evidence as to the post-separation conduct of the parties. The respondent alleged that the claimant engaged in certain harassing behaviours. These include playing her fiddle at night outside so that the children could hear from across the road, which the claimant denies was her intent, pacing on the road prior to visits, showing excessive concern over the welfare of the children, calling the respondent's home repeatedly when the nightly phone call was not made, refusing to deal with Ms. O., and overzealously protecting her parenting time.
- [39] I find that in the main these behaviours do not impact the assessment of the claimant as a fit parent. The claimant's behaviours and excessive concern for the children must be understood in light of the respondent's repeated statements that Ms. O. was violent with him and that he suffered from spousal abuse. At trial, however, the respondent denied that Ms. O. was violent with him. He claimed to have fabricated his prior reports of spousal abuse. Whether or not these abuse allegations were true - an issue discussed in greater detail below - the fact that such statements were made gave rise to reasonable concerns on the part of the claimant for the children's safety. The respondent acknowledged that if their positions were reversed, and the claimant said such things to him about a volatile spouse, he would have concerns for the children being around such a person.
- [40] The respondent is prone to responding immaturely at times, and struggles with how to balance his current relationship with Ms. O. and his ongoing obligations to co-parent the children. The potential for conflict is heightened during pick-up/drop-off of the children if the claimant and Ms. O. are present together; the two as of yet have been unable to get along for the sake of the children and have only rarely attempted to communicate with each other.
- [41] The claimant blames Ms. O. for the breakdown of her marriage and accuses her of interfering with cooperative parenting efforts with the respondent, as well as the settlement of property and child-related issues between the parties. For her part, Ms. O. avoids the claimant whenever possible in order to attempt to minimize conflict. She characterizes the claimant's behaviour as interfering and bizarre. However, neither the claimant nor Ms. O. have resorted to violence or engaged in conduct so as to give rise to any concerns regarding their roles as care providers.

Credibility of the Parties

- [42] I have evaluated the credibility of the witnesses, including the parties, based on the evidence in this trial. While I have carefully read the s. 211 report of Mr. Robert Finlay, the conclusions I have arrived at as to credibility of the parties and the various witnesses are my own.

- [43] I found the claimant to be highly credible. I have no hesitation in finding that she attempted to be honest whenever possible. Her testimony was candid and forthright. She provided explanations for her motivations and behaviour, which at times was driven by desperation to ensure the welfare of the children.
- [44] The claimant emerged relatively unscathed from four days of aggressive cross-examination. Despite detailed cross-examination on prior statements, and forceful challenges to her truthfulness, I found the claimant's testimony highly credible. Her evidence was generally internally and externally consistent on material points. She made proper allowances in her memory of events. She corrected herself where appropriate. She admitted her faults. She was wholly believable on the witness stand.
- [45] Of note, shortly after the breakdown of the marriage, the respondent offered the claimant a share of Mr. Smith's estate plus an additional million dollars if the claimant would lie for him and confirm to Ms. O. his lie that the two parties were already separated during the respondent's affair with Ms. O. This offer is further detailed below respecting whether the parties made an oral agreement to divide the estate. The claimant told the respondent that she would not lie for him and refused the approximate three-and-a-half million dollar offer out of principle.
- [46] There is an allegation, based on surveillance photos the respondent obtained, that the claimant stole mail from the respondent's mail box and occasionally encroached along his property or paced along the street. On at least one occasion, the claimant is seen with what appears to be an item of mail walking away from the respondent's mail box. The respondent reported the matter to police, though he admitted at trial he did not know if the claimant was in fact stealing his mail.
- [47] The claimant denied the mail theft allegation though she admits she put the children's clothes and other items in the respondent's mail box which is located across the road from her present home on Mr. G.W.'s neighbouring property. On this point, I cannot find that the allegation of theft of the respondent's mail has been made out. It is apparent that mail was sometimes misdirected between Mr. G.W.'s and the respondent's residence. It may well be that the claimant did check the respondent's mail box from time to time for mail that was directed to her, given that the parties formerly directed their mail to the Smith residence. Regardless, I would not find that these allegations impact her credibility or the issues for my determination.
- [48] There is no doubt that the claimant is extremely strongly bonded to the children, and cared for the respondent deeply during her marriage and even after the discovery of the affair. She tended to become emotional when speaking about the children or parenting time, and past orders which have restricted her parenting time. I attribute this to her unwavering determination to do what is right for the children and her lingering regrets over her failed marriage with the respondent. I accept her evidence, filtered as it is through this lens.

- [49] As for the respondent, I would reject much of his evidence as untrustworthy and not credible, though I do accept some of his evidence as to the background events surrounding the pre- and post-separation periods and the care of the children. I find that he exaggerated the narrative in his favour and portrayed his actions and abilities in an overly positive light. He showed a self-justifying tendency at times, deflected responsibility, repeatedly contradicted himself on prior statements, failed to directly answer difficult questions on numerous occasions, and greatly minimized his own faults and the problems in his relationship with Ms. O.
- [50] The respondent has a history of lying to others when it suits his interests. He lied initially to Ms. O. about his marital status when he met her in August of 2014, then directly lied to her again in February of 2015 by telling her he was divorced when he was not. He lied repeatedly to the claimant about the affair and hid it from her for over nine months. The respondent also admitted lying to his mother and the claimant about his whereabouts in June of 2015. Some of these matters relate primarily to his affair and, in isolation, could be construed as situationally specific and might not necessarily detract from his credibility. However, when placed within a larger context, they tend to reveal a pattern of deceit.
- [51] Of significant concern was the respondent's remarkable attempts to secure the claimant's cooperation in perpetuating an elaborate falsehood to Ms. O. by asking her to lie to Ms. O. about his marital status on his behalf. The respondent did this in an attempt to bolster the false narrative he had presented to Ms. O. about already being separated from the claimant when they started their affair. In June of 2015, he texted the claimant that he would give her "more than 50%" of his inheritance if she lied to Ms. O. In effect, this was an attempt to enlist the claimant to lie for him to cover up his earlier lie to Ms. O.
- [52] Perhaps of even greater concern is the fact that the respondent testified, and later reported to Mr. Finlay, that on numerous occasions he lied and exaggerated the difficulties in his relationship with Ms. O. to the claimant, up to and including physical fights. He reported that he did this in order to garner the claimant's trust, make things easier upon himself, and manipulate the claimant into accommodating his positions in the divorce proceedings. The respondent stated in his testimony, however, that all of the previous instances in which he told the claimant that Ms. O. was being violent with him were lies which he made up to manipulate the claimant in his favour. I find the respondent's explanation at trial - that he lied to the claimant about fighting with Ms. O. in order to manipulate the claimant and gain advantage in family proceedings - to be wholly unbelievable and I reject it.
- [53] The respondent had difficulty maintaining this proposition which I find was untrue. He admitted that on two occasions (one where he slept on the claimant's couch overnight, another when the claimant purchased a ticket home from Las Vegas for him) that he left Ms. O. after fighting with her. It is unlikely these events were an attempt to influence the claimant into a more favourable bargaining position. The respondent's reports of physical fighting with Ms. O. did not clearly coincide with significant settlement negotiations or progress in settlement. The evidence indicates that there was, at the very least, instability in

the relationship with Ms. O.

- [54] The respondent told Mr. Finlay that "[the claimant] has exaggerated all of this. She is lying that I told her that [Ms. O.] was physically abusive to me, she told me in the front yard at the end of June, 2017 that she had made up all of the allegations in order to keep the kids away from me and protect the kids, but she didn't say from what." The respondent also told Mr. Finlay that "[m]aybe on two occasions I told [the claimant] that [Ms. O.] and I had a fight or were done because I knew that [the claimant] feasted on that and it helped to move the negotiations between her and I along. It is true that I was manipulating [the claimant] in order to get a settlement."
- [55] These statements are not only internally inconsistent, but also contrary to the respondent's testimony at trial that he made numerous reports of abuse to the claimant. I find the respondent deliberately misled Mr. Finlay and this Court at trial. The respondent's willingness to lie where it suits him significantly undermines his credibility. I must, accordingly, approach his evidence with extreme caution.
- [56] The respondent's evidence is particularly untrustworthy when it comes to financial issues. At one point in his cross-examination when pressed about why he told the claimant lies about Ms. O. abusing him, the respondent - in a rare moment of candour - stated that "my motive is always the financial toll of this whole ordeal unfortunately, it's been at any cost. Truth has gone out the window. Trust has gone out the window."
- [57] In addition, the respondent contradicted his prior sworn evidence. For example, in his testimony he admitted the claimant fed the dogs, and did work on Mr. Smith's farm in the spring of 2015. In a prior affidavit sworn February 7, 2016, he denied the claimant ever cared for the farm or did any watching of the livestock. This is a material matter directly relevant to the potential reapportionment of excluded property under s. 96(b) of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). I find his prior denial of the claimant's contribution was another clear lie intended to augment his trial strategy.
- [58] I accept that the respondent has abandoned the truth, especially where property matters are concerned, but also in his evidence impacting other issues such as parenting time and responsibility. This would include the respondent's attempt to minimize his past fights with Ms. O. in order to portray himself as a stable parent in a mutually supportive relationship.
- [59] Overall, it appears to me that the respondent when backed into a corner is prepared to go to great lengths to escape his circumstances. This has included making offers with respect to his inheritance to the claimant, and lying to those close to him to justify his actions and make himself look better.
- [60] As a result of the respondent's demonstrated and repeated willingness to lie, where there are conflicts in the evidence between the claimant and the respondent, I prefer the evidence of the claimant over that of the respondent.

Credibility of the Non-Party Witnesses

- [61] Several witnesses testified for each party.
- [62] I accept the evidence of Ms. T. (the children's teacher) and Mr. D.W. (the principal at their school) without hesitation. They have no interest in the proceedings. I found them professional, honest and well-meaning. Ms. T. acknowledged her familiarity with the claimant but stated that they were not friends.
- [63] I similarly accept the evidence of Mr. G.W., Mr. Smith's neighbour who provided housing to the claimant in after the marriage breakdown and with whom the claimant continues to reside. He explained his motivation for taking the claimant and her children in as stemming from his own experience in going through a difficult divorce. Mr. G.W. did not attempt to paint the respondent in a bad light. In fact, he stated that he believed the respondent to be a good father. Despite his friendship with the claimant, I found Mr. G.W. forthright, honest, and candid.
- [64] I accept some of the evidence of the respondent's parents though with some qualifications. They were largely uninvolved in the breakdown of the relationship. Mrs. H. Sr. did visit the claimant during the early part of June 2015 but was not involved in the critical communications between the parties. She may have overheard some of the phone calls between the parties, but she did not hear their entire conversations and the respondent was not communicating with her at the time. While she was supportive of the claimant during the marriage, her recollection of events now appears coloured by her desire to support her son.
- [65] As for Mr. H. Sr., I also accept his evidence as to surrounding circumstances. He had a detailed recollection of events and acted responsibly as the executor of the Smith estate. Like Mrs. H. Sr., he lived in Ontario and was out of touch with his son during the critical events of the marriage breakdown, and is therefore unable to speak directly to the presence of an oral agreement with respect to the Smith properties. He also appeared eager to protect the respondent's inheritance.
- [66] In summary, both of the respondent's parents were biased in favour of their son, were eager to volunteer information that cast the claimant in a bad light, appeared anxious to protect the Smith inheritance from the claimant, and appeared at times to have a selective memory of events. They have lent a substantial amount of money to the respondent and have an interest in the outcome of the property claims in this matter. I find that their overriding concern in this matter was protecting their son's inheritance. I would approach their evidence with caution, and I prefer the evidence of the claimant where it differs from the respondent's parents.

- [67] Other neighbours testified. These included Mr. Alan Vanderveen, a retired dairy farmer who lived nearby. He spoke to Mr. Finlay on the respondent's behalf and provided a positive assessment of his observations of the respondent's and Ms. O.'s parenting style toward the children. While I accept this evidence, it is of very limited value. Mr. Vanderveen did not socialize frequently with the respondent and had only limited opportunity to view their parenting abilities.
- [68] Another neighbour, Mr. Conrad De Jong, testified on the claimant's behalf. He verified that the claimant was involved in looking after the Smith property after Mr. Smith passed away in February of 2015. He had a positive assessment of the claimant's parenting abilities having observed her around the children at various holidays. I accept this evidence though, again, it is of limited value.
- [69] The respondent's new spouse, Ms. O., testified for the respondent. I accept some of her evidence. She has commendably taken on the difficult role of being a part-time caregiver for the children during the respondent's parenting time. However, Ms. O. was often highly defensive, argumentative, and at times quite hostile in cross-examination. I find that she minimized problems including fights in her relationship with the respondent.
- [70] Ms. O. also falsely denied becoming angry on one occasion in mid-November 2016 and deliberately spinning her wheels on Mr. G.W.'s lawn. I prefer Mr. G.W.'s account of this incident and do not accept her evidence characterizing this event as an accident. As with the respondent, Ms. O. was prepared to lie, minimize, or exaggerate in order to cast herself and the respondent in a better light.
- [71] Further, it was established that Ms. O. sent the respondent's previous lawyer an email about settlement and negotiations from the respondent's email address. I do not accept that she had the respondent's permission or encouragement to do so. In the email, Ms. O. impersonated the respondent and attempted to slow down the ongoing family negotiation and settlement process.
- [72] Given these concerns with her evidence, I would approach some of Ms. O.'s evidence with caution, and I would reject her evidence where it conflicts with that of the claimant.

Order for Divorce

- [73] The parties have lived separate and apart since June 17, 2015. The evidence satisfied me that there is no possibility of reconciliation of the spouses and that there has been no collusion in relation to the application for divorce. This order will provide for reasonable arrangements for the support of the children of the marriage.
- [74] An order for divorce will take effect 31 days after the date of this judgment is rendered.

Guardianship

[75] The parties are in agreement that they should share joint guardianship of the children. I am satisfied on all the evidence that joint guardianship is appropriate. Accordingly, I order that the parties will share joint guardianship of the children.

Parenting Coordinator

[76] Both parties have expressed support for a parenting coordinator. Having regard to ss. 14-19 of the FLA, and the factors to consider for the appointment of a parenting coordinator set out by the majority in *Fleetwood v. Percival*, 2014 BCCA 502 at para. 48, I am satisfied that a parenting coordinator should be appointed.

[77] The order for a parenting coordinator will be for one year from the date of this order unless otherwise agreed by the parties. The order will go as set out in paragraph 3 of the respondent's draft order except that the fees for the parenting coordinator will be paid on a 75/25% basis with the respondent bearing the 75% of the fees of the parenting coordinator.

[78] The deadline for the selection of the parenting coordinator will be 30 days from the entry of this order.

[79] Specifically, the parenting coordinator will provide guidance, advice and recommendations as to how to:

- a) encourage the parties to engage in cooperative parenting;
- b) facilitate the manner and place of drop offs and pickups to exchange the children;
- c) reduce the potential for conflict between the claimant and the respondent's spouse;
- d) facilitate the children's ability to call the non-custodial parent;
- e) facilitate positive communication between the parties; and
- f) schedule parenting time during holidays.

Parenting Responsibilities and Parenting Time

History of Parenting Time and s. 211 Recommendations

[80] The claimant has been the primary caregiver of the children for the vast majority of their upbringing. Prior to separation, this was often due to the respondent being away for work. As well, in the months immediately after separation, the respondent had very little parenting time with the children.

[81] On August 26, 2016, Master Harper ordered the respondent to have interim parenting time with the children during summer holidays from Wednesday, August 31, 2016 at noon until Sunday, September 4, 2016 at noon by consent.

[82] On December 7, 2016, Master Keighley ordered by consent that the respondent have the children on alternating weekends from Friday after school until Sunday at 6:00 p.m. on an interim without prejudice basis. If the parenting time fell on a holiday weekend, the respondent's parenting time was to begin one day earlier or end one day later.

[83] Mr. Finlay completed a s. 211 report on November 29, 2017. He concluded as follows as to the competence and safety of the parties and Ms. O.:

In summary, the evidence supports a finding that [Ms. W], [Mr. H] and [Ms. O.] are competent and safe parents to the children. The children have positive bonds with each of the parents and they enjoy their time in each home. There were no parental risk factors identified except for the animosity held by [Ms. W] towards [Ms. O.] which has created a loyalty conflict for the children as well as considerable tension and suspicion between the homes. However [Ms. W]'s animosity has its roots in a web of lies and deceit spun by [Mr. H]. She was also trying in June, 2015 to come to terms with the shock of her marriage ending and she targeted [Ms. O.] with her anger and hurt. This resulted in misperceptions and exaggerated allegations about [Ms. O.], a woman [Ms. W] knew little about. [Mr. H]'s lies to both [Ms. W] and [Ms. O.] in 2014 and 2015 greatly contributed to the conflicts between the women resulting in a highly emotional and contentious separation in 2015 and into 2016. There were open conflicts between the two homes which at times were witnessed by the children. [Ms. W] felt betrayed and abandoned by [Mr. H] as a result of the affair.

[84] I find it unnecessary to further review the evidence on the competency of the parties as parents. Nothing I have heard at trial detracts from Mr. Finlay's general conclusion that the parties are generally competent and safe parents, and that Ms. O. has taken on the role of a step-parent in a competent manner.

[85] With respect to final decision-making, Mr. Finlay concluded that it was not appropriate for final decision-making to be vested in the claimant:

With respect to decision making, [Ms. W] has requested that she be able to make final decisions if she and [Mr. H] can't agree. I do not support her request as there is evidence that she has restricted parenting time in the past when she believes that [Ms. O.] will be involved. There is some evidence that she has not always shared information with [Mr. H] about the children. If she was accepting of [Ms. O.] being in the children's lives then her request could be given consideration, however she is clearly still angry and fearful with respect to [Ms. O.], believing that [Ms. O.] is trying to take the children from her. I would be concerned that her emotions and negative beliefs would cloud her judgement in making decisions. I recommend therefore that the parties retain a Parenting Coordinator for a period of at least one year to ensure there is meaningful consultation between the parents and determinations if needed regarding significant decisions in caring for the children's needs.

- [86] The report recommended a gradual increase in the respondent's parenting time over a 12 month period. In phase 1, the respondent would have the children from Wednesday after school until Sunday at 5 or 6 p.m. every second week (with an extra day for a holiday weekend). In phase 2, the respondent's time would increase to equal time on a 2,2,5,5 schedule so that the children were not distressed by a long absence from either home.
- [87] On December 11, 2017, by order of Mr. Justice Bowden, the parties were to share parenting with the respondent having the children on alternating weeks from Thursdays at 3:30 to Sundays at 6:00 p.m. for the January-March 2018 period, commencing January 11, 2018.
- [88] There have not been any incidents of concern, save for an allegation over Ms. O. pulling L's hair in August of 2017 and certain allegations of conduct on the claimant's part on February 8 and 9, 2018. The August 2017 allegation against Ms. O. was dismissed by the Ministry of Children & Family Development ("MCFD"), and I am satisfied that a safety concern respecting that incident has not been established.
- [89] The February 8 and 9, 2018 allegations by Ms. O. against the claimant are important to assess as they led to the suspension of the claimant's parenting time following an ex parte application, and could possibly impact an assessment of parenting time and parental responsibility.
- [90] Ms. O.'s version of the February 8th incident is essentially that the claimant acted in an unsafe and angry manner when dropping off the children. Ms. O. testified that on that date, she was waiting at the home by herself at 3:30 p.m. The claimant came late at 3:55 p.m. The claimant pulled into the driveway, saw her, and immediately reversed quickly out of the driveway without dropping off the kids. She implied that this manoeuvre was dangerous because of the traffic along Wells Line Road the claimant was backing into.
- [91] This incident was part of an overall pattern of conduct which Ms. O. described the claimant exhibiting. Ms. O. testified that the claimant is frequently angry, yells at her or the respondent, and has been verbally abusive toward her. As noted above, I have concerns about the veracity of Ms. O.'s evidence and I reject much of her evidence as being embellished. It may also be that Ms. O. was more inclined to make a responsive allegation to the MCFD given the claimant's complaint about her in the year prior.
- [92] The claimant's version of the February 8th incident is that when she arrived to drop the kids off at 3:30 p.m., the gate was closed. The respondent did not come out of his house as expected, but Ms. O. came outside. The claimant was under the impression that the parenting time agreement only applied when the respondent was at the house to receive the children. As she thought the respondent was not in the house, she kept the kids in the car, backed up, returned home, and texted the respondent. She denies she tore out of the driveway or backed up in an unsafe manner. The respondent later came over around dinner time and picked up the kids.

- [93] The respondent was working in Abbotsford at the time. He returned home as a result of the failure of the claimant to drop the kids off. He picked up the children at approximately 6:00 p.m. across the street at Mr. G.W.'s home.
- [94] Mr. Justice Bowden's order, in place at the time, specified that the respondent's parenting time was to begin at 3:30 p.m. and that the claimant "will take the Children to" the respondent. I accept the claimant's testimony at face value that she thought the children had to be dropped off to the respondent personally. In my view, the Bowden J. order is somewhat ambiguous in this regard.
- [95] As for the Friday, February 9th incident, the claimant states that she was volunteering at the school that day as she often does. She thought she could do so even if it was not her parenting time. By coincidence, she pulled in behind what she now knows to have been Ms. O.'s truck in the parking lot and saw Ms. O. with A and L walking into school. When A appeared to walk astray, the claimant put her hand on the back of A's coat and his backpack in an effort to guide him toward the school. She denied shoving A or acting violently toward him. Ms. O. was busy with L at that point because L's hair became stuck in the zipper of her backpack, and she was wincing in pain.
- [96] Ms. O.'s version of the February 9th incident is that the claimant came up behind A, grabbed him by his neck, and took him into the school. Ms. O. did not indicate what degree of force was used. She said she could tell A was scared from his body language. In direct examination, she described the claimant as angry. In cross-examination, she conceded that the claimant did not scream, swear, or otherwise act inappropriately. Ms. O. then conceded that the claimant did not appear to be angry and did not "rant and rave" when the claimant saw her.
- [97] I have concerns about Ms. O.'s evidence generally given her animus toward the claimant. I also have concerns as to whether she was consciously or unconsciously making a responsive allegation of abuse.
- [98] Further, Ms. O.'s cell phone recorded video for a portion of the incident, and photographs and video were filed in evidence before me. The video shows the claimant's hand on the back of A's neck as if to guide him. It does not show any assaultive behaviour. I can discern no reason why the claimant would have applied force to A in a public setting when it was not her parenting time and she was merely stopping by to read to the children at school.
- [99] Overall, I am unable to find on all the evidence that the claimant's conduct amounted to "family violence" within the meaning of the FLA. I find instead that the claimant placed her hand on A's neck to guide him toward the school, and that was the extent of the physical interaction between them.
- [100] Therefore, I find on all the evidence that the February incidents do not give rise to ongoing concerns with respect to the physical or mental well-being of the children, and do not impact my overall assessment of parental responsibility and parenting time.

- [101] The claimant's parenting time, which after separation was substantially greater than the respondent's, was suspended due to the allegations in February 2018. The matter came back to court on February 22, 2018 before Justice N. Brown. After further inquiring into the incidents on February 8th and 9th, deciding what occurred was less serious than what initially appeared, and putting the allegations in the context of a fuller evidentiary record, he ordered the claimant to have parenting time each week from Sunday at 6 p.m. to Wednesday morning drop-off at school, and the respondent to have parenting time from Wednesday after school until Sunday at 6:00 p.m. He also ordered the claimant not to attend the school during the respondent's parenting time.
- [102] Commencing July 4, 2018 the parties agreed to parenting time on alternating weeks. The arrangement for alternating weeks has been in place since then.
- [103] Thus, the effects of the February 2018 allegations have upended the children's living situation with the result that the respondent's parenting time has gone from just over three days every second week, to in excess of four days each week, to the summer 2018 agreement of a week on / week off basis.

The Parties' Positions on Parenting Time and Responsibility

- [104] The claimant's position is that she should have primary parenting time with the children, and that the respondent should have parenting time every second week from Thursday to Sunday. She submits that it could later increase to Wednesday to Sunday every other week.
- [105] The respondent submits the claimant should be restricted to having parenting time every second week from Thursday after school to Monday morning drop off. In other words, the respondent would have full parenting time one week, and parenting time from Monday after school to Thursday morning in the second week.
- [106] Thus, holidays aside, each of the parties recommends they have parenting time approximately $\frac{3}{4}$ of the time. The positions of the parties are starkly in contrast.
- [107] The claimant seeks relief in terms of parenting responsibilities and parenting time under the FLA. The respondent proposes parenting arrangements pursuant to the Divorce Act, R.S.C. 1985, c. 3 and the FLA.
- [108] In terms of parental responsibilities listed in s. 41 of the FLA, the claimant seeks allocation of those responsibilities to her and for the children to primarily reside with her. The respondent seeks joint exercise of the parental responsibilities of the children.

Legal Principles

- [109] Madam Justice Warren explained the statutory interplay between the Divorce Act and the FLA as follows in: *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453:

- [173] Section 16 of the Divorce Act uses the terms "custody" and "access". It requires the court to take into consideration only the best interests of the child, to consider the past conduct of any person only if the conduct is relevant to the ability of that person to act as a parent of a child, and to give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child.
- [174] The Family Law Act does not use the terms "custody" or "access" but rather refers to "guardianship", "parental responsibilities" and "parenting time". The term "guardianship" refers to the general overall responsibility for children while "parental responsibilities" are the specific decision-making responsibilities that guardians have. Section 39 of the Family Law Act creates a presumption of guardianship in each parent. Section 40(2) creates a presumption that each guardian will exercise all parental responsibilities in consultation with the other guardian. The parental responsibilities are specifically listed in s. 41. Section 42 provides that "parenting time" is the time a child is with a guardian, as allocated under an agreement or order. During parenting time, a guardian may exercise the parental responsibilities of making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child.
- [175] Like the Divorce Act, the Family Law Act provides that the court must only consider the best interests of the child in granting an order respecting guardianship or parenting arrangements: s. 37(1). Section 37(2) of the Family Law Act lists a number of factors that must be considered under the "best interests" test, which provide a useful framework to decide the issue, even under the Divorce Act.
- [110] Under the FLA, there is no presumption that parental responsibilities should be allocated equally, that parenting time should be equally shared, or that decisions among guardians should be made separately or together: s. 40(4).
- [111] Just as there are no presumptions of equal parenting time or responsibility, there are no presumptions in favour of one guardian regarding the best interests of the child: *M.W.B. v. A.R.B.*, 2013 BCSC 885 at para. 179.
- [112] That said, I must take into account the maximum contact principle set out in s. 16(10) of the Divorce Act. That principle provides that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child, and, for that purpose, shall take into consideration the willingness of the party seeking greater custody to facilitate contact with the party whose custody will be reduced: *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 24.
- [113] The consideration of parenting time and responsibility is governed by what is in the best interests of the children, as set out in s. 37(1) of the FLA:

Best interests of child

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

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

[114] In order to determine the appropriate arrangements, I will address the facts as I find them in light of these enumerated criteria.

Application of the Best Interest Factors

[115] At the outset, I note that there are no concerns with respect to family violence that impact my assessment of the best interests of the children. I am unable to find that either the claimant or Ms. O. has engaged in family violence directed at or involving the children.

- [116] I, too, am mindful of s. 37(3) of the FLA; namely, that an agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- [117] I would also have regard to s. 37(4) which provides that in making an order under this part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [118] Turning to the s. 37(2) factors, I find that generally both parents are capable of looking after the children's health and emotional well-being: s. 37(2)(a). Both parents are loving, nurturing individuals who provide the children with safe, healthy environments. Both parties presently live on farm properties which appear to be excellent, engaging environments for each of the children.
- [119] With respect to the children's views per s. 37(2)(b), the children were aged 7 and 9 when interviewed by Mr. Finlay in November of 2017 and were then operating under a different parenting arrangement when the respondent had care of the children every second weekend. The children generally reported positive experience with both parties as well as Ms. O. Mr. Finlay observed signs of both children's views being influenced by their parents, particularly by the respondent. Overall, I find this information as to the children's views to be of limited assistance given the children's ages and level of maturity at the time, the fact that they were then operating under a different parenting arrangement, and the likely influence of the parties (particularly the respondent) upon the children's views.
- [120] The nature and strength of the relationship between the children and the significant people in their lives, s. 37(2)(c), does not substantially favour one party or the other. I have heard evidence from people close to the parties that the children are strongly bonded to the claimant and have difficult time separating themselves from her. I accept Mr. G.W.'s description that the children look to the claimant for guidance and support, that they miss her when they are away from her, are comfortable being close to her, and have never shown any fear of her.
- [121] It is also apparent that the children deeply love the respondent and are strongly bonded to him. Because of his dedication in past years to working hard and making money for the family, and his long absences from the home, I find that the respondent has understandably not yet developed the claimant's considerable skills as a parent. In more recent times, and likely with Ms. O.'s assistance, it appears he is more committed to parenting. In this regard, Mr. Finlay reported that:

both [children] reported missing their mother when with their father and the evidence suggests that currently their attachment to their mother is stronger as compared to [Mr. H] and [Ms. O.]. In addition, [Mr. H] and [Ms. O.]'s employment relationship is in transition and not finalized and their relationship has only stabilised over the last year.

[Emphasis added.]

- [122] The inheritance of Mr. Smith's estate and his recent purchase of an ownership share in a construction company ("VVI") may provide the respondent with sufficient financial resources such that he will no longer have to be away from home for work as much, and will be more available to exercise parenting time. I accept that on balance it is more likely than not that the respondent will be able to spend more time with the children given the greater financial security he now enjoys. Ms. O., for her part, appears to be a supportive spouse fully capable of standing in loco parentis when the respondent is away.
- [123] There is no dispute about the history of the children's care (s. 37(2)(d)). It is agreed that the claimant was the primary caregiver and in fact most often the sole caregiver to both children throughout the marriage. This arrangement was agreed upon by the parties early on in their relationship and seemed to work as well as one reasonably could have expected.
- [124] It was the claimant who historically took the children to the doctor or dentist, dealt with teachers, and facilitated extra-curricular activities. Throughout the marriage, she read to the kids at night, ensured their homework or school projects were done, attended to their hygiene, and put rules in place for their behaviour. She is very involved in their school-related activities and volunteers at the school. The claimant's devotion to the children and attendance to their needs has been deep and unwavering. This commitment continued during the separation and afterward.
- [125] Throughout the marriage, the respondent, for his part, made great sacrifices to pursue financial goals to support the family unit and it is only recently that he has been able to take his foot off the gas, so to speak, and spend more time with the children. The respondent is not to be faulted for being away as often as he was, given the financial necessity and his devotion to his family in doing so, though he was undisputedly less involved in the children's day-to-day care given his role in the relationship as the so-called breadwinner.
- [126] These observations also inform s. 37(2)(e), the children's need for stability given their ages and stages of development. Given that the claimant has clearly shouldered the vast majority of parenting responsibilities in the past, the most readily stable arrangement going forward is one that will continue to involve the claimant taking on wide-ranging responsibilities. The respondent, as well as Ms. O., are also ready to play key roles in the children's ongoing development. The question is not so much a matter of who should be involved, but to what degree each party should be involved to maximize the interests of the children.
- [127] Ms. T., who is L's grade 2 teacher and previously taught A in grade 2 and L in grade 1, reported that in the early part of 2018 when L was with her mother less, L's behaviour became more withdrawn and less participatory. Once L was removed from her mother's care in February 2018, L's behaviour worsened still. She exhibited noticeable behavioural discomfort, and became unable to communicate. The behaviour went away when the claimant's parenting time with L was reinstated, although Ms. T. noted at trial that L is still "not back to how I knew her before." Ms. T. also observed L clinging to the leg of the school counselor in spring 2018, a time period which coincided with reduced parenting time for

the claimant.

- [128] I regard Ms. T.'s evidence as independent and credible. Her evidence was neutral and dispassionate, though it is clear that she deeply cares for A and L. I accept that this behaviour occurred as Ms. T. described it. I find that there is a likelihood that L's behaviour was causally linked to her being away from her mother for greater periods of time.
- [129] It is also noteworthy that both children's grades dropped in the early part of 2018 when they were removed completely from the claimant's care and thereafter when the claimant's parenting time was substantially reduced. I find that this further corroborates the point that the claimant's absence from her children's lives had a demonstrably negative affect on them in early 2018.
- [130] In terms of s. 37(2)(f), the abilities of each party to exercise their responsibilities, I find that the claimant is a competent, devoted parent who provides a nurturing but structured environment for the children. There were some criticisms of the claimant's parenting style from the respondent's mother and to some extent his father. In particular, she was accused of being overly controlling and occasionally prone to outbursts during the marital breakdown. I approach these allegations with caution as both witnesses were biased in favour of their son - as the respondent's mother put it, she was "on his side no matter what." Their evidence as to the qualities of each party's parenting carries little weight.
- [131] As for the claimant's behaviour during the marital breakdown, such as swearing or short-temperedness, I regard this as occurring under a time of great emotional stress, and do not find these behaviours in or around June and July of 2015 impact upon her general abilities as a parent. I would say the same for the allegations of the respondent's disconcerting behaviour during this difficult period as well.
- [132] The claimant demonstrated in court as highly emotional at times when discussing the children as she has in the past to others. I attribute this to her near-absolute dedication to the children - perhaps above all else in life.
- [133] As well, the claimant has been prone to excessively worry about the welfare of her children. This causes her to act out in ways that may appear illogical to others, such as sending repeated texts to inquire about them, or brooding over the welfare of her children when they are in Ms. O.'s care. This behaviour poses an impediment to cooperative parenting between the parties, as does her ongoing harbouring of resentment toward Ms. O. which endures despite the passage of time.
- [134] Overall, apart from some outbursts during the marital breakdown and her disposition to frequently worry about the well-being of the children, the claimant appears to be a very responsible parent who is completely dedicated to the children.
- [135] The evidence also established that the respondent loves his children and that he wishes to spend as much time as possible with them. The claimant is supportive of this to some extent, though she clearly regards herself as the better parent. Mr. Finlay's observations of

the respondent indicated that he possesses a number of parenting strengths including a strong bond with the children, kindness, common interests, and organized parenting skills. At trial, both he and Ms. O. filed a certificate indicating that they have successfully enrolled in parenting courses for parenting after separation, and had attended at least one session, though I could not be certain as to whether they actually completed the full 52 hour course, especially given their credibility issues as noted earlier.

- [136] The respondent undoubtedly has a more laissez-faire, hands-off attitude and is less rule-oriented toward the children as compared to the claimant. This is confirmed by the claimant's testimony, which I accept, that the children would take some time to settle down after their visits with their father. The respondent's apparent willingness to let the children ride in his quad without helmets and his lapse in memory in forgetting to put Mr. Smith's long guns away in 2015 are all concerns, though the currency of these concerns is questionable and I would not place significant reliance on these observations in evaluating the respondent's current level of parental fitness.
- [137] The respondent did not historically participate to any significant extent in the children's school activities and notably has never attended a parent-teacher interview. In contrast to the claimant's regular involvement in school, he generally avoids the children's school. He stated at one point that "the school is poison for me." After the breakdown of the marriage, the respondent had opportunities to participate in the children's activities which he declined, preferring instead to avoid the claimant altogether. More recently, he has been more participatory with the children and has taken the children on various outings with Ms. O. He does not call the children during the claimant's parenting time though the claimant never misses her telephone call with the children.
- [138] The respondent's personal situation appears on the surface to have stabilized since the marital breakdown. His relationship with Ms. O. is reported by both to now be stable, despite previous periods of volatility, up to and including what I accept were instances of Ms. O. becoming physical with the respondent.
- [139] Mr. Finlay noted that the respondent had some history of anti-social behaviour and impulsivity. This was borne out by the claimant's testimony in which she referred to historical instances of the respondent being prone to road rage. I accept the claimant's evidence that during the marriage the respondent was not a patient person and could occasionally get frustrated with the children when they would not do the things he wanted.
- [140] As noted, the respondent has occasionally exhibited a lack of maturity and good judgment. The respondent arguably introduced the children prematurely to Ms. O., immediately after his separation with the claimant, when he invited the children into bed with himself and Ms. O. He admitted to Mr. Finlay that this was an error. A occasionally came home and disclosed statements his father apparently made to the effect that the claimant was "making it hard for him to get divorced" and "dad says you will call the police if he doesn't give you money." The respondent has falsely referred to Mr. G.W. as the claimant's "boyfriend" in

what he characterized as a "jerk move." He also photographed the claimant with Ms. T. on school grounds, in an ill-advised attempt to prove the claimant was improperly in attendance at the school on his parenting time; however, this upset Ms. T. to the extent that she testified she would only talk to the respondent with her administrator present and she cancelled the class bike trip over concerns that he might attend.

- [141] In or around April 2018, the claimant emailed the respondent and requested permission for her to go to a poetry festival on the respondent's parenting time. The respondent's response in an April 23rd, 2018 email is telling: "Not sure how to play this to my benefit. Last time let her go see the school play, I got nothing I asked for." While I generally do not find the parties respective negotiating positions in the family proceeding to be relevant, this type of attitude reflects some lingering immaturity which poses an obstacle to cooperative parenting and stunted parental responsibility on the respondent's part which are of relevant concern under s.37(2)(f).
- [142] As noted, ss. 37(2)(g) and (h) are inapplicable in the case at bar as there is no family violence.
- [143] With respect to s. 37(2)(i), the appropriateness of an arrangement that would require the child's guardians to cooperate, the parties unfortunately continue to have high conflict in their relationship with each other. Each of the parties has acted in a negative, rude or obstinate manner toward the other at some point, especially during the period in 2015 when the marriage was breaking down. Unfortunately, the parties are seldom able to cooperate parenting issues without a court order.
- [144] The occasional cooperation between the claimant and the respondent has been positive at times, though the claimant avoids contact with Ms. O. The claimant blames Ms. O. for having her parenting time drastically reduced after the February 2018 allegations. There are also some lingering and perhaps unresolvable emotional difficulties for the claimant in dealing with Ms. O. due to the respondent's affair and her reluctance to give up control of the children. Ms. O. for her part also avoids contact with the claimant. It is apparent that Ms. O. views the claimant as hostile to engage with.
- [145] At one level, the involvement of a supportive partner is often extremely helpful to a guardian. At another, it can also be a negative factor if it leads to greater conflict. The respondent appears to be sometimes incapable of communicating with the claimant when Ms. O. is present. Ms. O.'s presence is a complicating factor in crafting cooperative parenting arrangements going forward and something that can be assisted by the presence of a parenting coordinator.
- [146] Regarding communication between the parties, there is a concern over the ease with which the claimant can become upset when she receives no response or an inadequate response to her repeated communications regarding the children. However, the respondent does not help matters by failing to respond to legitimate inquiries respecting the children, as for instance, with respect his non-response to the claimant's request to spend Mother's Day

with the children in 2018 and her reasonable request at Christmas of 2017 to know if the respondent was taking the children to Ontario so she could arrange a flight to pick them up. This, too, is a topic the parties should seek guidance from the parental coordinator on.

- [147] Overall, while the respondent has undoubtedly matured more recently, his historical non-attendance at school events, lack of cooperation in co-parenting with the claimant, inclination toward impulsivity, past relationship instability with Ms. O., and negative statements to the children about their mother indicate he still has some distance to go in becoming an optimally responsible parent. The fact that both children are still at an impressionable age tends to heighten the concern that the respondent's problematic behaviour will negatively affect the children.

Conclusions on Parenting Responsibility

- [148] I depart from Mr. Finlay's recommendations in his s. 211 report regarding parenting time and responsibility. In my view, this report does not sufficiently account for the children's historically closer bond with their mother, the fact that she has historically undertaken the vast majority of parenting responsibilities, and the respondent's encouraging but still relatively modest track record to date in successfully parenting the children. Moreover, the s. 211 recommendations do not adequately reflect the degree to which the claimant has sought to support the children in their schooling and the respondent's historical avoidance of the children's school activities.
- [149] Having regard to all the evidence, and the best interests of the children including the enumerated factors in s. 37 of the FLA, I find that the parties ought to share parental responsibilities in respect of day-to-day decisions but that the claimant ought to have primary control over parenting responsibilities with respect to the children, pursuant to s. 40 and 41 of the FLA.
- [150] Consistent with the allocation of the majority of parenting responsibility to the claimant, I find that she is the preferable custodian of the children's passports.
- [151] Despite the claimant's resistance to the children travelling outside Canada. I am satisfied that the respondent is not a flight risk and that he is capable of traveling with the children out of the Lower Mainland for short periods of time. I am satisfied that an order should be made along the lines of that proposed by the respondent regarding travel, though it will be on more restrictive terms.

Conclusions on Parenting Time

- [152] In my view, having regard to the best interests' considerations above, the parties would most benefit from having a stable, predictable schedule which is clear and easy to understand. In the past, the parties have struggled with conflict when the terms have been vague or open to interpretation.

- [153] Consistent with the allocation of parenting responsibility in favour of the claimant, having reviewed all the circumstances impacting the best interests of the children, including the historical roles of the parties and the greater bond of the children with the claimant, I would allocate greater parenting time in her favour as has been the case for the majority of the children's lives before and after separation. In my view, this is in the children's best interests notwithstanding Mr. Finlay's recommendations to the contrary.
- [154] I note that A will graduate this year from elementary school and move to middle school in the fall. L is two years behind A, and will presumably graduate in June of 2021.
- [155] It is unfortunate that Mr. Finlay's plans for a more equitable phasing in of greater parenting time for the respondent were interrupted by the February 2018 allegations. As a result of those allegations, the parenting time has essentially switched from the claimant having three quarters of the parenting time over a two week period, to having no parenting time, to having 2 ½ days each week until the summer of 2018, when the agreement to equally split parenting time began. This equal split agreement has continued to the present.
- [156] There is no presumption that the status quo is the preferred position: *Nunweiler v. Nunweiler*, 2000 BCCA 300 at para. 30. Given the unusual manner in which the parties' current allocation of parenting time came about, altered as it was by the February 2018 allegations, preservation of the status quo in this context is not a significant factor in determining the best interests of the children. The present schedule is not in keeping with the best interests of the children going forward and requires significant adjustment in the interests of stability and predictability.
- [157] It is desirable that both parents have some weekend time with the children to ensure recreational and weekend time is shared. I accept the respondent's evidence that splitting up the weekend is not optimal, and that the 6:00 p.m. exchange works best. It is also in both parents' interests that at least some of their parenting time overlap with school days, with the balance of time substantially tipping in the claimant's favour. I also note and take into consideration that the children have been in violin lessons on Tuesdays, lessons which the claimant participates in.
- [158] I consider as well that a minimal number of exchanges will reduce the potential for conflict. Pick-ups and drop offs at school when only the custodial parent is present appears to be the optimal way to exchange the children. Exchanges at the parties' homes have sometimes proven to be problematic for whatever reason.

Order for Parenting Time

- [159] I have considered other possibilities, but in my view a schedule which allocates greater parenting time to the claimant during the school year, and a roughly equal sharing of holidays, best fits the interests of A and L. I would therefore order the following schedule for the next two years at least until the end of the school year in 2021 when L finishes elementary school.
- [160] The claimant will have all regular parenting time except for every second week when the respondent will have parenting time from Wednesday after school, or if the children have an after-school activity on Wednesday immediately after that activity, to Sunday at 6:00 p.m. The following is a summary of my orders regarding the parenting time schedule. Full details are set out in the final order below.

Holiday Schedule - Mother's Day, Father's Day, Easter, Thanksgiving

- [161] On Mother's Day, if the respondent has parenting time, the respondent is to return the children at 6:00 p.m. on the Saturday before Mother's Day.
- [162] If Father's Day falls outside the respondent's parenting time, he will be entitled to have the children from Saturday at 6:00 p.m. preceding Father's Day to Sunday at 6:00 p.m.
- [163] For the Easter Weekend and Thanksgiving, if the weekend does not fall on the respondent's parenting time, he will be entitled to have the children from Thursday after school preceding the weekend and return the children at 9:30 a.m. on Sunday morning. As I understand the parties have come to an agreement respecting the Easter 2019 weekend, this arrangement will commence for Thanksgiving 2019 and for Easter 2020 and continue thereafter.

Spring Break

- [164] The parenting time during spring break shall be divided equally on a week-on and week-off basis with exchanges to occur on Sunday evening at 6:00 p.m. on the weekend in the middle of the two week spring break. If the respondent has the children in the second week, the children shall be returned to the claimant by 6:00 p.m. on the Sunday before the start of school.

Christmas Break

- [165] In my view, the Christmas holiday period should be shared roughly equally. The respondent currently spends each Christmas in Kelowna, and it is extremely difficult for him to drive to and from Abbotsford on Christmas Day. This makes an exchange of the children in the middle of Christmas Day impracticable and effectively prevents a more equitable sharing of time on Christmas Day. Moreover, the children have never spent a Christmas apart from their mother. I would hesitate at this early stage of the children's lives to completely remove

them from their mother's care on Christmas. However, the children should at some point spend a Christmas Day, or a good portion of it, with their father if a schedule can be made to work.

- [166] Therefore, in order to reach an equitable sharing of the children at Christmas, the claimant shall have the children from the last scheduled day of school before Christmas until noon on Boxing Day. If the respondent is able to adjust his schedule so that the children do not have to travel outside the Lower Mainland (as defined in the final order) on Christmas Day, or if the claimant otherwise agrees, his parenting time will begin at noon on Christmas Day. The Respondent shall then have the children from Boxing Day or Christmas Day at noon until New Year's Day at 6:00 p.m. The children will at that time be returned to the claimant.

Summer Break

- [167] For summer vacation periods, the claimant has testified and I accept that long absences from either parent are detrimental to the children. Unless otherwise agreed, I am prepared to grant equal parenting time on a week on/week off basis to the parties on certain conditions, further set out in the final order below. As the respondent has been prone to being away for extensive periods of time for work, I will add a condition requested by the claimant that she have a first right of refusal for parenting time should the respondent's work commitments prevent him from exercising parenting time in the summer.

Birthdays

- [168] The schedule for parenting time shall not be interrupted by the children's birthdays unless the parties otherwise agree.

Extracurricular Activities and Variation

- [169] As I would not bar the parties from attending school or extracurricular events on the other's parenting time, I order that both parties are free to attend the children's school and participate as a parent in their children's activities on the other's parenting time; however, any such contact ought to be restricted to such activities and will not unreasonably infringe on the other's parenting time.

Conduct Order

- [170] The parties will each make their best efforts to encourage the children to have a good relationship with each parent and refrain from making disparaging remarks to the children about the other parent or the other parent's spouse.

Order re Telephone calls

- [171] I am satisfied that an order for telephone calls should continue though in modified form, given that this has proven to be a contentious issue. These calls have been used by the claimant to maintain her close bond with the children. Unfortunately, the claimant tends to become distraught when the calls are delayed and her repeated attempts to initiate the calls can become an irritant to the respondent and Ms. O. On the other hand, it appears that answering the phone when the claimant calls is often not a priority for the respondent and Ms. O., and this also can lead to problems.
- [172] I would therefore order that each party may have one 20 minute telephone call to the children while they are in the care of the other parent every second night between 6:30 and 7:30 p.m. PST, subject to any agreement otherwise. This would be Thursday and Saturday during the respondent's parenting time for the regular schedule. The children will be entitled to call the off-duty parent whenever they choose. Further conditions attached to these telephone calls are set out in the final order below.

Division of Non-Inheritance Property

Family Photos

- [173] With respect to family photos, the claimant indicated she is not opposed to an order for copying. Therefore, I order that the claimant shall arrange for a copy of the family photos and family history contained on the Mac Computer (formerly Mr. Smith's computer) within 30 days from the entry of the order in this case.

Mr. Smith's Dog, Joe

- [174] Joe is a border collie who originally belonged to Mr. Smith. After Mr. Smith passed in February of 2015, the claimant became Joe's caregiver and would go over to the farm on a daily basis to feed him, let him out, and look after him.
- [175] Joe lived at the Smith farm until August of 2015. At that time, Mr. H. Sr. started to make efforts to place Joe elsewhere. It appears Mr. H. Sr. talked to Mr. G.W. about caring for the dog. The two decided the best place for Joe was to be near the children at Mr. G.W.'s residence. Mr. H. Sr. paid Mr. G.W. to look after Joe at his residence until probate on the will went through. Once the estate was settled, Mr. G.W. took over responsibility for purchasing of dog food, obtaining a dog licence, etc., and became Joe's de facto owner. Joe was residing at Mr. G.W.'s property at the time of trial though I am told his health is in decline.
- [176] I do not view Joe as family property subject to property division under the FLA. He passed from Mr. Smith's estate directly to Mr. G.W. who is not a party to this action. This transfer was expressly approved by Mr. H. Sr., who at that point had full authority to deal with Mr. Smith's property as the estate's executor. The respondent's application for an order respecting Joe is dismissed.

The Respondent's Pension

[177] There is evidence that the respondent has a small pension with the Operating Engineers in Ontario. The claimant is entitled to a one-half interest in any pension accumulated during the marriage. The fee for splitting the pension will be shared equally between the parties. The respondent will file the necessary application with his pension plan's administrator to give effect to the division. Either party may apply for the division of unadjusted pensionable earnings under the Canada Pension Plan for the period from July 22, 2006 through June 17, 2015.

Other Family Property and Debt

[178] The respondent took full responsibility for the family debt that accumulated during his marriage to the claimant. Some of that debt was accumulated surreptitiously as a result of the respondent's affair and his funding of Ms. O.'s trip to South America. The respondent and the claimant both gave evidence that the modest proceeds from the sale of the Davis home were shared equally between the parties. The respondent also paid in full for a vehicle for the claimant. Other than the inheritance, neither party seeks an order with respect to residual family property or debt, and I would not make a further order in this regard.

The Alleged Oral Agreement Respecting the Respondent's Inheritance

[179] The claimant argues the parties made an oral agreement in June 2015 with respect to equally dividing the respondent's share of the inherited properties. The respondent denies making such an agreement and denies the parties acted pursuant to such an agreement. If such an agreement was made, the respondent denies such an agreement would be legally enforceable. He further says that in any event the terms of any alleged agreement lacked certainty and the agreement was repudiated by the subsequent conduct of the parties.

a) Relevant Legal Principles

[180] The FLA regime governs the analysis of the formal validity of the alleged oral agreement respecting the respondent's inheritance.

[181] Section 81 of the FLA sets out the general rule that family property is to be equally divided:

Equal entitlement and responsibility

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[182] Section 83 of the FLA provides as follows:

83 (4) In this Part, "property" includes a beneficial interest in property unless a contrary intention appears.

[Emphasis added.]

[183] Family property is defined in s. 84:

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

[184] Hence, the point in time at which family property and exclusions therefrom are determined is the date of separation, subject to extensions under s. 84(1)(b) for property acquired after separation and derived from family property.

[185] Section 85(1)(b) excludes inheritances to a spouse from the definition of family property. Hence, the starting point for a consideration of the Smith farm is that it represented an inheritance which is presumptively excluded from the usual 50/50 rule for the division of family property set out in s. 81 of the FLA.

[186] However, it is open to spouses to make agreements in respect of "property" division, per s. 92:

- 92. Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:
 - (a) divide family property or family debt, or both, and do so equally or unequally;

- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;
- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].

[Emphasis added.]

[187] Section 92 refers to agreements respecting the division of "property." As the definition of property includes a beneficial interest in property per s. 83(4), it was open to the parties to make an agreement respecting the respondent's beneficial interest in the Smith farm even if the farm was still in probate and actual ownership had not yet passed to the respondent.

[188] The making of such agreements must be construed in light of s. 6 of the FLA which addresses the formation of agreements in the family context:

6 (1) Subject to this Act, 2 or more persons may make an agreement

- (a) to resolve a family law dispute, or
- (b) respecting
 - (i) a matter that may be the subject of a family law dispute in the future,
 - (ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or
 - (iii) the implementation of an agreement or order.
- (2) A single agreement may be made respecting one or more matters.
- (3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.
- (4) Subsection (3) applies whether or not
 - (a) there is consideration,
 - (b) the agreement has been made with the involvement of a family dispute resolution professional, or
 - (c) the agreement is filed with a court.

[Emphasis added.]

[189] Thus, a binding "agreement" respecting a family law dispute or a matter that may be the subject of a future family law dispute does not require consideration. Further, by the combined virtue of ss. 6 and 92, it is open to the parties to make an agreement to include as family property items that would not otherwise be included.

- [190] The fact that an oral agreement is not in writing or not witnessed is not a bar to its validity under the FLA. There is no requirement under s. 92 that the agreement be in writing or that it be witnessed. Oral agreements respecting division of property are enforceable if properly proven on the evidence: *Asselin v. Roy*, 2013 BCSC 1681 at para. 132.
- [191] The decision in *P.N.K. v. C.L.*, 2013 BCSC 1856 further addresses how oral agreements are contemplated in the FLA:
- [86] Interestingly s. 92 makes no reference to such an agreement being in writing. Indeed, the FLA has a specific provision dealing with written agreements respecting the division of property: s. 93 provides that the court may only set aside or replace such agreements in certain circumstances. Section 95(2)(b) then requires that a court considering the unequal division of family property or debt consider "the terms of any agreement between the spouses, other than an agreement described in section 93" [emphasis added]. It is clear that the legislature intended s. 92 to permit oral agreements between spouses.
- [192] I agree that oral agreements are clearly permissible under s. 92. I further heed Justice N. Brown's caution in *Mottershead, v. Ladouceur*, 2014 BCSC 604 that the lack of a written agreement makes the words and actions of the parties more important, and mandates greater scrutiny of the credibility of witnesses:
- [101] When parties do not reduce an alleged agreement to writing, the court must consider the parties' words and actions to see if they establish an intention to be bound. The credibility of witnesses will be particularly important; different versions of events increasing the difficulty of finding out if the parties made an enforceable bargain: *Le Soleil Hotel & Suites Ltd. v. Soleil Management Inc.*, 2009 BCSC 1303 at para 328 [Le Soleil].
- [193] A beneficiary to a will may make an oral agreement as to how the proceeds of the will are to be divided see: *Demetlika v. Demetlika*, 2010 BCSC 38; ss. 6(1)(b) and 83(4) of the FLA. Equally here, after Mr. Smith had passed, it was open the parties to make an oral agreement as to how the respondent's beneficial interest in his pending inheritance was to be divided.
- [194] It has been held that the inheritance exclusion applies as of the date a spouse receives his or her inheritance, and that before an inheritance can be excluded property, it must be received by the beneficiary: *Parton v. Parton*, 2016 BCSC 1528 at para. 51; *aff'd* 2018 BCCA 273. While I would not disturb that general proposition, it does not address the broad ability of spouses to make separation agreements (s. 6(1)(b)(i)) or a situation where spouses come to an agreement with respect to including as family property items that would not otherwise be included (including a beneficial interest in property).
- [195] When Mr. Smith passed away in February 2015, it became clear that the respondent was to inherit the estate and the respondent's interest crystalized from a strictly inchoate interest into a beneficial interest. It matters not whether the respondent establishes that Mr. Smith did not intend any portion of his estate to go to the claimant or that he included a "family law exclusion" in his will. Mr. Smith's will was made during the marriage. His death

occurred before the parties' separation. The respondent's rights as a beneficiary arose on Mr. Smith's death.

- [196] In the family context, it is open to one spouse to make an oral agreement as to how their beneficial interest in an inheritance is to be divided: *Vance v. Vance*, 2007 BCSC 110 at paras. 13-16. It follows that it was open to the parties to treat the respondent's beneficial interest in Mr. Smith's estate as part of their family property if they so agreed. As the claimant has alleged an oral agreement, rather than a gift, the law with respect to gifts between spouses is not engaged on this issue. The threshold issue, then, is whether the evidence establishes that an oral agreement regarding this beneficial interest was made by the parties.
- [197] The absence of a formal signed and properly witnessed agreement does not change the binding nature of a contract. What is required is that the contracting parties express themselves outwardly in a manner indicating an intention to be bound to mutually agreed upon and reasonably certain terms. The courts will not attempt to enforce what is effectively an "agreement to agree." The test is an objective one: if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract exists. The burden to prove the existence of the contract is on the party seeking to enforce it, on the balance of probabilities: *Berthin v. Berthin*, 2016 BCCA 104 at paras. 46-49; *Salminen v. Garvie*, 2011 BCSC 339 at paras. 25-27; *Bate v. Smith*, 2017 BCSC 1261 at paras. 52-54.
- [198] As well, a court may consider the parties' conduct leading up to and following the conclusion of an alleged agreement to determine whether a binding agreement was created vis-à-vis the parties' manifest intentions: *Salminen* at para. 28. Generally, the mere proposal of additional or better terms does not negate the existence of a binding agreement: *Salminen* at paras. 29-30.

b) Was an Oral Agreement Made Regarding the Inheritance Property?

- [199] Mr. Smith's property comprised four parcels totalling 110 acres at the time of his death. This property had been in the respondent's family since the 1930s. Substantial portions of the farm property have been leased to a neighbour to grow hay and for cattle to graze.
- [200] The main parcel is a 40.65 acre parcel with a farmhouse. This parcel is located on Wells Line Road in Abbotsford and contains the original house in which Mr. Smith resided, as well as a barn. A second 40 acre parcel located on Dixon Road is referred to as the "back 40 acres" and borders the main parcel. A third parcel of 20 acres was sold for \$1.2 million by Mr. H. Sr. in his capacity as executor of the estate. This was done in order to raise funds to pay significant expenses. The remaining \$300,000 is to be disbursed to the respondent as the residual beneficiary if no further costs are incurred. Finally, there was a separate eight acre parcel which is not contiguous but which borders Mr. G.W.'s property across the road. This parcel was sold by the respondent for approximately \$660,000 after he received the Smith estate. The majority of proceeds from this sale are in trust pending this proceeding's

outcome.

[201] I find that Mr. Smith's farm was a topic of discussion amongst the parties from an early time in the parties' relationship. The respondent drew pictures of Mr. Smith's farm for the claimant and talked about how they would set it up. The parties originally moved to British Columbia in part to be close to Mr. Smith. Mr. H. Sr. described "Uncle Neil" as the respondent's "western dad."

[202] Based upon his close relationship to Mr. Smith, and Mr. Smith's comments after he changed his will in 2011, I find that the respondent had long been under the expectation that he would become a beneficiary of a substantial portion of Mr. Smith's farm, if not the entirety of the property. During the marriage, the claimant too expected that the family would eventually be living on Mr. Smith's farm and started envisioning a life for the parties and the kids on the farm.

[203] The parties' expectations are reflected in an October 19, 2014 message from the respondent to the claimant in which they discussed the claimant checking on Mr. Smith's dogs while he was away. The respondent chided the claimant for allowing Mr. G.W. to attend to the dogs on one occasion when she was tired, instead of doing it herself. It is clear the respondent feared Mr. Smith would leave his property to Mr. G.W. instead of the respondent:

The farm is our ticket to a new life and my ticket to not working myself into the fn [sic] grave. All Neil wants is you to go by a couple of times to check in [sic] two dogs. If [Mr. G.W.] is going to be the only one that helps him how do we know he won't leave it to him. If that happens I'll be dead in a few years.

[204] The claimant claims that she and the respondent made an oral agreement to treat the Mr. Smith's farm property as family property and to divide it equally. The claimant says that while her discussions with the respondent about the farm were not written down, their communications corroborate the existence of such an oral agreement.

[205] While the respondent was out of town in the spring of 2015, the parties continued to communicate by text message. It is apparent that the parties were contemplating sale of their Davis Street home and a move onto the farm, as evidenced from the claimant texting the respondent on May 24, 2015: "its shit that you have to start right after this job. But I will keep plugging along here getting this house ready to sell. I will help anyway I can."

[206] The claimant refers to a conversation with the respondent in the first week of June of 2015 which the respondent's mother partially overheard. In that call, which occurred when the marriage was breaking down and the claimant was in the process of discovering the respondent's affair, the claimant maintains that the respondent promised to "set her up." The respondent's mother testified that she heard the respondent say "I'll take care of you" over the phone. However, I find Mrs. H. Sr.'s evidence to be of little to no value because she only overheard bits and pieces of the parties' conversation.

- [207] On June 5, 2015, the respondent texted the claimant and told her "[w]e'll figure out what we are going to do with all the stuff, houses and kids so that it ends up fair and that we can still talk." The parties only had one matrimonial home. His trailer was not a house. The only other house the respondent had available to him was his beneficial interest in the Smith farmhouse. By the reference to "houses," the respondent must have meant more than the Davis Street house.
- [208] The claimant maintains that they talked about the farm "plenty" around early June 2015. She testified that they had talked for a few days back and forth about splitting the farm and came to an agreement.
- [209] The claimant stated, and I accept, that it was those conversations in the early part of June that finally led her to agree to sell the family home on Davis Street based on the oral agreement. The Davis house was listed for sale on June 11, 2015 and sold quickly with a closing date at the end of July. The claimant maintains that she relied on the parties' agreement with respect to her getting a portion of the Smith farm, and was in the process of planning to move to the farm on this basis. She claims she would not have agreed to sell their family home on Davis Street if she was not moving to the farm under the expectation of actually owning the Smith farm property or a portion of it - especially given that it was increasingly apparent that the relationship was ending. I accept the evidence of the claimant on this point.
- [210] I find that the respondent during this time was desperately seeking a way out of his predicament. His affair had been discovered. He faced embarrassment from his parents. But as well, he had been caught in a lie to Ms. O. He had previously told Ms. O. that his marriage to his wife was already over. All this was occurring against the backdrop of the plan he shared with the claimant to live a life together with the kids on his uncle's farm. He was seeking a resolution to his deteriorating situation, and he had Mr. Smith's estate to bargain with.
- [211] In an email from the respondent to the claimant dated June 17, 2015, at 3:36 a.m., the respondent wrote "I've given up and I am walking away from this marriage There is still a huge potential for both of us to have a comfortable life separately You need to accept this. You need to stop calling and emailing people I work with." I find that the reference to "huge potential for both of us to have a better life" to be corroborative of the existence of an oral agreement between the parties with respect to the respondent's inheritance.
- [212] Near the end of June 2015, the respondent attempted to promise the claimant more than 50% of the farm if she would lie to Ms. O. for him and state that the parties were already in a functional separation and that the respondent had been sleeping on the couch at the farm. On June 26, 2015, the claimant and the respondent exchanged a series of texts as follows:

12:28 p.m. (Claimant): Stop calling

12:28 p.m. (Claimant): Proverbs 5

2:19 p.m. (Claimant): I can't lie for you [Mr. H]. I do want what was promised to me by you. But I cannot tell her what you want me to.

2:19 p.m. (Claimant): I'm sorry. I love you. I hope you can find your way clear.

2:42 p.m. (Claimant): I hope you have a safe flight.

2:24 p.m. (Respondent): I don't

2:25 p.m. (Claimant): I hate that it has to be this way.

2:28 p.m. (Respondent): I want this to be as smooth and fair so that when this is all done we can still communicate and be civil not just for the kids but for us.

2:29 p.m. (Respondent): I'll sign or email what you want if you can help me.

2:30 p.m. (Respondent): I'll make sure you are set up for your future

2:34 p.m. (Claimant): You cannot ask me to lie for you to her in exchange for the farm. You have always said we would split it 50/50. I should not have to lie to the woman you cheated on me with.

2:36 p.m. (Claimant): You have done many things that have hurt me beyond repair and I still give a shit about your reputation. I hope you will keep this promise even tho you have broken all others you made me.

2:36 p.m. (Respondent): I will give you more thsn 50% [sic]

2:40 p.m. (Respondent): I won't ever take what's yours. I'll give more of my share for this

2:41 p.m. (Respondent): I ruined this. It's my fault 100%. I don't care if you show your lawyer all this. I take full responsibility for what I have done.

2:57 p.m. (Respondent): Il [sic] type and print something out and sign it and scan it to you what ever you want

4:52 p.m. (Respondent): Just landed

4:52 p.m. (Respondent): I typed out a wish list do you want me to email it?]

4:52 p.m. (Claimant): Can u text it? I don't have the email address yet.

4:52 p.m. (Respondent): ok

4:53 p.m. (Respondent): You keep the 40 acres the house is on. 62000 * 40 acres equals 2.48 million Plus 1 million cash Plus all the processions [sic] on the property minus a handful that I'd like. I don't want much just a few things. There should be at least 50000 dollars worth of antiques and equipment and trailers and boats and art and cameras and trucks. Plus I pay for all expenses and all debt out of my share. Plus you get half of the money from the house sale. If you want I'll even pay Dave out of my share. $2480000 + 1000000 + 50000 + 20000 = 3550000$. I get the other 60 acres which at 62000 an acre equals 3720000. Plus my truck and camper because I need somewhere to

live. I also pay for all the lawyer and debt which is almost 125000 for your car 35000 the camper 40000 the visa 30000 and the quad 20000. I've rounded it up a little to add in the lawyer fees and all the bills while we wait for this estate to end. You will have access to cash as soon as the 210 days is up I'll make sure my dad knows. I won't touch anything until it's all settled and if my share sells for more I'll split the difference. 3720000- 125000 equals 3595000. But I need you to do something for me for this deal to work. Even though I don't deserve anything from you because I have hurt you and our kids. I really need this. I need you to stop email me with stories form our past. I need you to only email about the kids or money or estate. I need it kept business like. I will call more often to talk to the kids if you allow me. I also need you to answer an email am going to send. I've been living a life of lies and hurt. I've got no other way to make things better but with setting you up as best as I can. I have to continue the lies to her in order to protect myself and what's left of my share. Even though the numbers don't look to [sic] even there [sic] out by a little I will even it out plus I'll throw in some cash and set up the kids with a trust account out of my share. I need you to deny that we've been together this year and that I've been sleeping on the couch at the farm. I need you to answer that you've know [sic] that it was her reading the emails (which it was) and that's why you said it. I'll call you later when I get to camp. I've made a terrible mistake that I could never be forgiven for. I've lied and cheated to you and those kids. Am sorry [Ms. W.] for hurting you like this. I need to get things smoothed out so I can stop the lies and not be so angry. Am only angry at myself but I take it out on you. Am sorry. You've tried to bring me back and I've continued to hurt you. If you don't like the numbers it's [sic] doesn't have to be the final numbers I'll work out a deal that works for you. If you can't help me and the rest of my life continues to fall apart I don't know what am going to do. I can't lost anymore and be able to stick around. I've thrown away so much and want to be able to see the kids but am running it [sic] of hope. If you can't or won't and you've got every right I'll have to think of a new plan on how to split it all up.

[Emphasis added]

[213] I find that this offer, in which the respondent tried to add his previous agreement with the claimant, was an attempt to sweeten the deal on more favourable terms to the claimant to secure her cooperation in preserving his relationship with Ms. O. I agree with the claimant that it is telling that the respondent did not deny or question the claimant's text that "You have always said we would split it 50/50." Rather, the respondent's next reply two minutes later is "I will give you more thsn 50% [sic]." This is more than silence in the face of the claimant's statement; in my view, it is an attempt to renegotiate the terms of the previously agreed upon 50/50 split between the parties. Moreover, the respondent refers to "my share" twice in the exchange which I interpret as a reference to the parties previously agreeing to split the estate. I find that the respondent's reply represents an acknowledgement of the earlier oral agreement between the parties.

[214] The respondent's lengthy follow-up offer prompted further texts between the parties about the value of the 40 acre property with the house. The respondent repeated his offer to add an extra 1 million in cash, and that if his portion of the Smith property sold for a higher amount he would split it with the claimant:

4:54 p.m. (Claimant): The clear land is worth more than the 40 acres house and barn. They are an encumbrance. I would like the property Line moved to keep Neils ridge.

4:54 p.m. (Claimant): The house is falling apart.

4:57 p.m. (Claimant): When I was here. A realtor called and offered 65000 an acre.

4:58 p.m. (Respondent): Ok. That's why I added 1 million in cash

4:58 p.m. (Respondent): At the minimum. If it sells for more I'll split it with you

4:58 p.m. (Respondent): I was just going low with numbers.

4:58 p.m. (Respondent): Am hoping for 68 per acre

[Emphasis added.]

[215] The claimant refused, texting on June 26, 2015 at 5:34 p.m. "I will not lie for you". The claimant then stated at 6:37 p.m. that "[t]he only way to protect yourself is to let me have it. And you will have to believe and trust me when I say to you that when you get your shit together it will still be there." The claimant added at 6:46 p.m. "I will not lie so you can try and keep a whore", referring to Ms. O. Minutes later, the respondent texted that "[r]ight now when am [sic] in the wrong she's got the power" and "[b]ecause I lied to her just like I did to you am in the wrong. She can use it against me". At 7:10 p.m., the respondent texted "I think she's pregnant." At 7:39 p.m. the claimant texted, "[a]nd if you are smart. You will sign entire farm over to me to protect. For our kids". At 7:40 p.m. she added "[t]hen put your half of the farm in trust for the kids." At 7:41 p.m., he texted "I need you to lie", and then at 7:42 p.m. "[d]o that and I'll sign the deal I typed out right now." At 7:53 p.m., he texts "[o]k I'll start to pray and I'll type out an email giving you half the farm and I'll set the kids up if you do." This eventually led to the following exchange:

8:25 p.m. (Claimant): I want you to [sic] one promise you have made me. The 50% of the farm so I can protect it for our kids.

8:26 p.m. (Claimant): Like people have heard you say.

8:26 p.m. (Claimant): Like you have written to me.

8:27 p.m. (Claimant): Don't call me.

8:28 p.m. (Respondent): I wrote that if you did what I asked you. I don't want this fight u don't want to hold back on things to force your hand.

8:28 p.m. (Claimant): Nope. You said I could have 50% your mom heard you.

8:28 p.m. (Respondent): I hate text msgs

8:29 p.m. (Claimant): Is she a liar too then?

8:29 p.m. (Claimant): I hate lies more.

8:29 p.m. (Claimant): Nope

8:29 p.m. (Respondent): My mom?

8:30 p.m. (Claimant): Good night.

8:30 p.m. (Respondent): No not yet.

[Emphasis added.]

[216] The respondent testified, and I accept, that the parties never came to an agreement during these subsequent negotiations on June 26, 2015 regarding a supplemental division of the inheritance property. Nevertheless, I find that this added exchange does not detract from the determination as to whether there was a previous underlying agreement between the parties. In fact, this communication supports the existence of an earlier agreement.

[217] On July 6, 2015, the respondent sent the claimant an email regarding "the farm." He stated as follows:

After speaking with the lawyer it has been decided that it is in the estates [sic] best interest if you do not move into the farm house. You need to find a place to rent for July (which I'll contribute to) or start looking for a new place to buy with half the proceeds from the Davis Ave house sale for the end of July. The executor is going to pay you from the estate for you feeding the two dogs and doing a head count of the cows. The amount being paid will be up to the executor [sic]. When the 210 days are over I will discuss with my lawyers how our assets will be split up.

[218] The reference to 210 days is a reference to the period an executor must wait after receiving the grant of probate in British Columbia to distribute the estate: Wills, Estates and Succession Act, S.B.C. 2009, c. 13, s. 155(1). It is noteworthy that in the same sentence the respondent references the 210 days, he refers to "our assets."

[219] The respondent and his father testified that they spoke by telephone on the evening of July 7th during which the respondent told his father that the marriage was over. Mr. H. Sr. indicated that at that point he felt he "had to protect the property." The respondent subsequently sent emails on July 7th and 8th to the claimant telling her she could not move onto the farm. The July 7th email from the respondent to the claimant, copied to his lawyer, indicates he consulted with the lawyer that day. In that email, the respondent told the claimant that she could not move to the farm and she needed to look for a new place to buy or rent. He further wrote "it's not that I'm trying to hoard the whole place and leave you with nothing." The respondent conceded and I find that this was a reference to the Smith farm. In his testimony, the respondent indicated that as a result of his consultation with his lawyer, he was determined to make sure the claimant did not move into the house.

[220] In a July 8, 2015 email to the claimant and his parents, the respondent again indicated he did not want the claimant at the farm. He indicated:

I will help financially and will not leave her starving and stranded. Please make this happen. I will move in for the next 210 days and then we can decide what to do. A lease agreement isn't enough, it still allows her to stake claim and she can and will fight it. I can't handle a year long battle. I want the farm and estate to be Dad's and mines [sic] decision, whatever we decide will be in everyones [sic] best interest and I will not leave her without. The kids will be set up the rest their life [sic].

[Emphasis added.]

[221] On July 8th, the claimant responded saying "I don't know what to say [Mr. H]. We sold our house with the knowledge that I was moving to the farmhouse". The claimant also texted the respondent's mother on July 8 that "[i]f [Mr. H] will put in writing what "set you up" mean. I can figure out what to do. But he said that before and he meant the farmhouse and 40 acres. Then changed his mind. I can't live like this." [Emphasis added.]

[222] Mr. H. Sr. emailed the parties on July 8th as well. He indicated, inter alia, a number of "thoughts" including that "[t]he will is very clear, [Mr. H] gets the farm" and that "[a]ll the 'agreements' of the past, even up to the last few days were based on a level of mutual respect, love perhaps, certainly some residual level of commitment to your marriage vows". Mr. H. Sr. offered to talk about options. These statements undercut Mr. H. Sr.'s evidence that there were offers but no prior agreements in respect of the Smith property.

[223] Additionally, I note the testimony of Mr. H. Sr. that when he came out to the farm in July of 2015, he discussed the state of the farm and the status of the respondent's relationship with the claimant. At that time, she told Mr. H. Sr. that the respondent had offered her 40 acres of the farm. In an earlier affidavit, Mr. H. Sr. also referred to the claimant frequently raising her alleged agreement with the respondent for dividing the farm. He sought to resile from this statement at trial by indicating his sworn statement about an "agreement" was untrue, and that he only understood there to be an offer. I reject his trial testimony on this point although I would not rely on Mr. H.'s evidence to establish the existence of an oral agreement between the parties.

[224] The respondent claims he was only offering to set the claimant up in the sense of ensuring the claimant had a place to stay and ensure she had some financial support. I would reject this interpretation. I have already found the respondent lacking credibility generally and willing to lie to others to gain advantage. I find his evidence highly self-serving on this point. It is apparent that the respondent obtained legal advice in early July 2015, and from that point forward became vociferous about stopping the claimant from moving into the Smith farmhouse.

[225] I also note the respondent has a history of making oral agreements over money. In 2011, he made a deal with Uncle Neil for a \$25,000 loan over coffee on a handshake. In 2012, he made an oral agreement with his parents for a loan to pay out the claimant's student debt. Oral agreements were not out of character for him.

- [226] I must be cautious with respect to some of these statements as the claimant's earlier consistent statements cannot provide corroboration of her evidence since a witness cannot corroborate herself. Nevertheless, the respondent's statements expressly or impliedly lend credence to the idea that he had earlier reached an oral agreement with the claimant to share his inheritance as the claimant indicates. I reject his evidence that no such agreement was reached. Irrespective of the email and text exchanges, however, I find the claimant's evidence as to the prior oral agreement to be credible. I accept her evidence that such an agreement was reached in early to mid June 2015.
- [227] This was not simply an ongoing negotiation. As of mid-June 2015, the parties had reached an understanding with sufficiently specific terms that a reasonable person would interpret as the parties having formed a separation agreement with respect to the respondent's share of the Smith farm. Nor was this an agreement to negotiate further. The fact that further negotiations were not met with success did not alter or rescind the earlier, binding contract.
- [228] To summarize, I find the following facts relevant in my conclusion that, in all the circumstances, an oral agreement existed between the parties regarding the respondent's inheritance of the Smith property:
- a) the parties' plan, formulated during the marriage, of one day moving to the Smith farmhouse;
 - b) the claimant agreeing to sell her family home in anticipation of her having some sort of permanent interest in the Smith property;
 - c) the respondent's desire to "set up" the claimant and the children, and his attempts to find a way to move forward from his affair;
 - d) my general acceptance of the claimant's testimony and my specific acceptance of her evidence as to the oral agreement;
 - e) my rejection of the respondent's testimony generally and my specific rejection of his denial of the oral agreement;
 - f) the express and implied admissions of the respondent in his electronic correspondence with the claimant which show a willingness to treat the Smith farm as family property; and
 - h) the respondent's subsequent statements in which he attempted to offer the claimant "more than 50%" if she would lie for him - a statement which supports the existence of a previous oral agreement as testified by the claimant.
- [229] I find on a balance of probabilities that this agreement constituted an oral agreement for the purposes of s. 92 of the FLA in relation to the respondent's beneficial interest in property, and an agreement to treat the respondent's inheritance as family property under the Act despite the fact that it would not otherwise be included under ss. 85(1)(b) and 92(b). The nature of the agreement between the parties was such that they intended the Smith

farm to be characterized as family property. Further, the agreement was made against the background of the parties having long jointly contemplating that each would share in the windfall of the Smith inheritance.

- [230] I additionally find that the respondent's later repudiation of the oral agreement - demonstrated by his attempt to refuse performance of the agreement and his expressed intent to not be bound by the agreement - did not extinguish the underlying agreement. The claimant did not accept this repudiation and treated the agreement as continuing to be in full force and effect between the parties. Despite follow-up negotiations, the claimant never indicated she did not intend continue to with the earlier agreement. Accordingly, the agreement remained in full force and effect notwithstanding the respondent's repudiation of it.
- [231] In all the circumstances, therefore, I find the evidence establishes on a balance of probabilities that the parties agreed that the respondent would transfer to the claimant one half of the farm in settlement of affairs between them and in furtherance of the respondent's desire to "set up" his wife and children going forward. The question, then, is whether the agreement to split the farm referred to the entire farm estate - this being all four parcels - or rather some portion of it such as a 50/50 split of the main 40 acre parcel that the farmhouse was situated on.
- c) What were the Terms of the Oral Agreement?
- [232] While I have no hesitation in finding that the parties came to a 50/50 split with respect to some or all of the property the respondent received from his uncle, the extent of the property subject to the agreement is less clear from an objective perspective. For instance, while the claimant maintains the agreement was for the front 40 acre parcel or half of the respondent's inheritance, some of the exchanges between the parties refer to "50% of the farm," "50%," and "you have always said we would split it 50/50."
- [233] While one of the terms of the agreement was clearly at least a 50% split of the farm, the entire Smith estate the respondent received in his inheritance included the four parcels of land. This became more clearly known to the parties after Mr. Smith's passing in February of 2015 when the will was read by the parties. The will itself referred only to the front and back 40 acre parcels as "farm property."
- [234] The claimant is adamant that when the respondent promised her half of the estate or the farm, he was speaking of the entire estate and did not mention the four individual parcels of land. She points to the email exchange between the parties on June 26th in which the respondent promised the claimant the main 40 acre parcel of land "plus" \$1 million as supporting the earlier agreement. The claimant denied the respondent's suggestion in cross-examination that when the respondent spoke of 50% of the farm he was referring to giving her half the main 40 acre parcel. Nevertheless, even as late as July 2015, the claimant was still seeking confirmation from the respondent in writing as to the extent of his promise to provide her with a share of his inheritance to "set [her] up." As well, the parties'

historical activity in visiting Mr. Smith's farm was traditionally associated with attending the front 40 acre parcel upon which the farmhouse was situated.

- [235] The nature of oral agreements is such that to be enforceable, there must be a consensus between the parties on the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so that their meaning can be determined with a reasonable degree of certainty: *Frolick v. Frolick*, 2007 BCSC 84, at paras. 30-32. The test is not what the parties subjectively intended but whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract: *Berthin* at para. 46.
- [236] While there were indicia the parties may have been agreeing to a 50/50 split of the entirety of the four farm parcels, or to provide the claimant with the main 40 acre parcel upon which the respondent now resides, the evidence is not conclusive. However, there is no doubt that the parties mutually intended the terms of the oral agreement to include at a minimum a 50% share of the main 40 acre parcel with the farmhouse to be characterized as family property. The oral agreement was certainly an attempt by the respondent to settle his affairs with the claimant in furtherance of his desire to "set up" his former spouse and his children going forward. This would have been achieved by a 50/50 split of the main 40 acre parcel.
- [237] I cannot conclude that a reasonable person, viewing the matter objectively, would necessarily find that the parties agreed to include the other three parcels in the agreement. The evidence only establishes, as a matter of certainty, that the parties' reference to the "farm" meant the front 40 acre parcel. While it may have been the case that the parties' repeated references to the "farm" subjectively or at certain times meant the full farm property, the objectively discernable language between the parties on this point is equivocal. From the surrounding circumstances, it cannot be clearly discerned what the parties meant when they were referring to splitting the "farm" at the time the agreement was made beyond reference to the front 40 acre parcel. I find that these observations preclude a finding that there was a meeting of the minds regarding these three additional parcels so as to conclude that these parcels were intended by the parties to be included in the agreement.
- [238] Given the ambiguity in the parties' references to the "farm," I am only prepared to find on a balance of probabilities that the claimant has established that the parties came to a meeting of the minds with respect to a split of the main 40 acre parcel with the farmhouse. The claimant may have subjectively thought with good reason that she would be getting more, but due to the added difficulty in interpreting oral agreements from the outside looking in, and the evidence put forth, only the above terms of the agreement were certain and are enforceable at law. Accordingly, only the main 40 acre property is to be characterized as family property for the purposes of asset division.

d) Should the Smith Property be the Subject of Unequal Division?

- [239] Under s. 95(1) of the FLA, the court may order an unequal division of family property if it would be "significantly unfair" to divide it equally. The factors impacting the decision to possibly order unequal division are set out in s. 95(2). Alternatively, excluded property is subject to division under s. 96 on the basis of significant unfairness having regard to the two enumerated factors in s. 96(b).
- [240] I might have considered reapportionment had I come to a different conclusion as to the terms of the oral agreement. However, having regard to the nature of the oral agreement as stated above, and the applicable statutory factors, I would not exercise my discretion to reapportion the property that was subject to the oral agreement.
- e) Valuation
- [241] The Court unfortunately has little evidence to assist it on the valuation of the Smith farm properties at the time of trial. There is no appraisal of the properties. The claimant, who represented herself, has offered little assistance in proving the value of the inheritance.
- [242] It is known that the neighbouring 20 acre parcel was sold for \$1.2 million (equivalent to \$60,000 per acre) after the parties' separation. Mr. H. Sr. stated that this price was undervalued though I would not rely on that opinion since his estimation was that of a lay person. Nevertheless, the sale of the 20 acre parcel provides a useful starting point for an appropriate price per acre.
- [243] The eight acre parcel was subsequently sold for \$660,000 (equivalent to \$82,500 per acre). This value is also useful as a guide in that it represents the sale of a similarly located lot and is temporally closer to trial than the sale of the 20 acre parcel.
- [244] The actual market value of the two 40 acre main parcels at the time of trial is likely much higher. Indeed, in his Form 8 financial statement, the respondent listed the rear 40 acre property at a value of \$2.6 million and the main 40 acre property with the farmhouse at a value of \$3.2 million. The respondent's attempted agreement in 2015 to have the claimant lie for him contemplated a \$2,480,000 value for the main 40 acre parcel. During that exchange, the claimant indicated that the rear 40 acre parcel may actually be worth more than the front 40 acres with the farmhouse; however, the claimant has not provided proof of this at trial.
- [245] Despite the precise value of the two main properties being unclear, this Court must do the best valuation job possible with the limited evidence it does have: *Dosanjh v. Liang*, 2015 BCCA 18 at para. 61.
- [246] In my view, a fair and equitable approach would be to take the total value of the two parcels sold (\$1.2 million and \$660,000) and divide the total by the 28 acres which was sold in the two sales. This would yield an average price per acre of \$66,428.57. The figure is skewed slightly in favour of the larger parcel, but that is a reasonable allowance while attempting to achieve a price per acre for the larger 40 acre parcels. These figures do not account for the added value of the farmhouse being on one of the 40 acre parcels, but the evidence at

trial was that the farmhouse is very old and would likely add little to the value of the land.

- [247] Using this approach, a reasonable estimate of the main 40.65 acre parcel with the farmhouse at the time of trial would be \$2,700,321.37. I accept that this is likely a conservative figure. However, as the claimant has not proven a higher valuation, I cannot in fairness value these properties any higher. Giving effect to the parties' oral agreement would result in the claimant's 50% share being \$1,350,160.69.
- [248] As the main 40 acre parcel is the respondent's current home on land that has been in his family for many years, I will not impose a sale of this property. Instead, if the respondent cannot secure the funds to satisfy the remaining portion of the judgment in the claimant's favour within 60 days from the entry of the order in this matter, an order will be made for the sale of the back 40 acre parcel to satisfy the judgment. The parties will share conduct of sale.
- [249] I will concurrently make an order releasing the balance of the funds held in trust on the eight acre parcel to the respondent and the claimant equally. The claimant's share of the funds held in trust will correspondingly reduce the judgment in her favour.
- [250] The claimant's certificate of pending litigation on the back 40 acre parcel will remain on title until such time as the respondent has satisfied the judgment or the property has been sold to satisfy the amounts owing.

Support Issues - Determination of Income

- [251] The claimant seeks orders for ongoing and past child and spousal support. While the respondent does not oppose either order, he argues that income ought to be imputed to the claimant, that he has been overpaying child and spousal support because his income is now lower, and that the spousal support ought to have an end date.

Past Orders Respecting Child and Spousal Support

- [252] The respondent did not pay child or spousal support for the first few months after separation.
- [253] On February 29, 2016, Master Taylor ordered the respondent to pay the claimant \$147 for February 2016 (calculated as \$2,647 less \$2,500 in child paid by the respondent), \$2,647 per month for child support commencing March 1, 2016, and \$2,853 per month for spousal support commencing February 1, 2017. These figures were based on a Guidelines income of \$193,125 which approximates the respondent's 2014 line 150 income. The respondent has been paying child and spousal support since February 29, 2016 based upon his Guideline income of \$193,125.

The Claimant's Income

- [254] The respondent suggests the claimant's income should be imputed at \$50,000 per year from the date of the separation until the present. The claimant's tax returns indicate her income was \$0 in 2012, \$0 in 2013, \$2,700 in 2014, \$2,640 in 2015 and \$31,383 in 2016. During the marriage the claimant fully committed herself to the children, as encouraged by the respondent, and had almost no income and her income in recent years has mostly been based upon child and spousal support.
- [255] The claimant has a college diploma in business administration, a certificate in auto mechanics, and experience in computers, data entry, and producing spreadsheets. During the marriage, the claimant developed her prior skills as a photographer and briefly did some small-scale part-time work in photography. However, while she has some talent in these areas, she has made only a token income in recent years from photography and in many years has had no income at all aside from support payments.
- [256] Section 19(1)(a) of the Guidelines allows the court to impute an amount of income to a spouse in appropriate circumstances. Nevertheless, I cannot find that the claimant has been intentionally under-employed or unemployed. Her inability to find and maintain employment is no doubt due to her traditional role during the marriage limiting her ability to earn income.
- [257] Going forward, it is apparent that claimant's time will be pre-occupied with the children and that her income-earning potential will continue to be impaired by her position during the marriage. The claimant currently has no income aside from child and spousal support. I accept that this is likely to continue in the reasonably near future. I would not impute income to the claimant at this time.

The Respondent's Income

- [258] In 2011, the respondent stated that he earned \$89,000. His notice of assessment for 2011 lists his line 150 income at \$89,818. The respondent stated that this was a relatively good year for income and that prior to 2011 he had earned less than that. For 2012, the respondent's line 150 income on his tax return is listed at \$142,844. In 2013, the respondent worked in Fort McMurray as a mine foreman. His 2013 Notice of Assessment lists his line 150 income as \$193,896. His 2014 Notice of Assessment reported line 150 income is \$193,091 (consistent with his T4 amount of \$193,091.26).
- [259] For 2015, the respondent's line 150 income on his notice of assessment is stated as \$179,577.
- [260] For 2016, the respondent's line 150 income was listed on his tax return as \$137,472.49. His sources of income includes a gross income of \$177,399.06 from Mariposa Contracting (\$112,446.84 net after various business expenses), \$40,000 from HNS Holdings (which, after capital cost allowance, yielded a net income of negative 627.59 for the respondent), a gross

income of \$14,833 (net \$8,741.05) from farming being a lease on one of his inherited properties, gross income of \$5,763.68 from Iron Edge Contracting, and a lump sum payment from CIBC Mellon Global Securities of \$10,917.87. The respondent's Form 8 financial statement, filed November 30, 2017, indicates a 2016 income for child and spousal support purposes of \$137,472.49.

- [261] The respondent's 2017 tax return was entered late in the day while he was under cross-examination. It lists his line 150 income as \$53,439.21. This may well be because 2017 has been a transition year for the respondent as he re-orientates his life closer to home after making the decision not to work in Fort McMurray any longer and to cut down on his excessive overtime. The respondent says that his income during the 2011 to 2017 years averaged \$159,845.71.
- [262] The respondent suggests I impute his 2017 income at \$80,000. The claimant argues the respondent is deliberately under-employed and notes that he benefited from the proceeds of Mr. Smith's estate. I accept that 2017 was a transition year for the respondent wherein he made lifestyle changes. The respondent also had the care of the children for a much greater proportion of time during 2017. In all the circumstances, I shall impute the respondent's income for 2017 as being \$80,000.
- [263] The respondent estimated that in future years his salary would be in the range of \$160,000 from all sources. Until he bought into VVI in mid-2018, he was an employee of VVI but contemplated securing financing to purchase shares of VVI to become a partner. After he starts receiving dividends from VVI, his income will be firmed up and may increase.
- [264] I accept the respondent's estimate of \$160,000 a year in future years from being a shareholder of VVI which the respondent bought into in 2017. This income is likely to be supplemented with farm income and possibly income from the business the respondent owns with his father, though it appears the latter income is currently fully excludable by an allowable claim for capital cost allowance with respect to real property. I find that an estimate of farm income of \$10,000 a year going forward is reasonable. For the calculation of 2018 income, as he only bought into the company part way through 2017, I would impute the respondent's 2018 income at \$140,000, which takes into account \$10,000 in farm income.
- [265] For future years, the respondent's estimated income of \$160,000 is likely to be supplemented by farm income and possibly income generated from his inheritance in future years. I would at this time impute the respondent's income going forward at \$170,000. However, due to the uncertainty in the respondent's current income, and as the respondent's income is likely to vary in future years, I will order that a review may take place in 2020.

Retroactive Child and Spousal Support

- [266] I have found that the parties separated on June 17, 2015. The respondent began paying \$5,500 in spousal and child support commencing March 1, 2016, including \$2,647 for child support and \$2,853 per month for spousal support. It appears the respondent effectively paid a similar figure for February 2016. The respondent thus paid no child or spousal support for approximately 7 ½ months after separation from mid-June 2015 through the end of January 2016. The claimant received one lump sum for arrears in support. At a judicial case conference on November 4, 2015, Master MacNaughton (as she then was) ordered the respondent to pay the claimant \$10,000 for child support arrears on a without prejudice basis.
- [267] The claimant seeks further retroactive child and spousal support from the time of separation. The respondent seeks a reassessment of child and spousal support from the date of separation until the present given what is now known about the respondent's income versus the \$193,125 figure that was used to calculate support.
- [268] For 2015, the children lived with the claimant. The respondent's line 150 income on his notice of assessment was stated as \$148,316. Given that this is the extent of information that I have on the respondent's income, I will use this figure to calculate the respondent's payment obligations. Using this figure, the respondent should have paid \$2,083 in child support and \$3,119 for spousal support at the mid-range, which I find appropriate in the circumstances, for a total of \$5,202 per month. Therefore, the respondent owes \$33,639.60 for June 17 - December 31, 2015.
- [269] For 2016, the respondent's line 150 income was \$137,472.49. Throughout the bulk of 2016, the children continued to primarily live with the claimant. After the Bowden order on December 11, 2017 parenting time became shared. Based on the respondent's 2017 income, he should have paid \$2,572 per month for spousal support and \$1,951 for child support for a total of \$4,523 in 2016. For January 2016, when the respondent paid nothing, I would award the claimant \$4,523. For February through December 2016, the respondent paid \$5,500 per month which is an overpayment of \$977 per month over 11 months or \$10,747. The total amount for 2016 owing to the respondent is \$6,224.
- [270] For 2017, the respondent continued to share parenting time with the claimant. I have accepted the imputation of his salary at \$80,000 to reflect his lower earnings this year. Based upon this salary, the respondent should have paid \$1,665 spousal support per month at the mid-range, and \$1,239 in child support for a total of \$2,894 per month. As the respondent actually paid \$5,500 per month, he overpaid by \$2,606 per month or \$31,266 for the year.
- [271] For 2018, I have imputed the respondent's salary at \$140,000 per year. This translates into a mid-range spousal support payment of \$3,100 and a child support figure of \$2,037 for a total of \$5,137 for the month of January when parenting time was shared. The respondent actually paid \$5,500 per month leading to a \$363 overpayment for January 2018. From

February 2018 forward through June 2018, the respondent had the majority of parenting time. The figures for this period would therefore be \$1,393 per month for spousal support and nothing for child support (\$6,965 total). The respondent paid \$5,500 per month (\$27,500 total) during this time. The respondent should be credited with \$20,535. As of July 2018, parenting time was again shared and payments should have returned to \$3,100 for the mid-range of spousal support and \$2,037 for child support for a total of \$5,137 per month. For the six month July-December period the respondent overpaid by \$363 per month or \$2,178. Overall, the respondent overpaid by \$23,076 in 2018.

- [272] For 2019, I have imputed the respondent's income at \$170,000. For each month in 2019 to date, the respondent ought to have paid \$3,846 in spousal support at the mid-range and \$2,395 in child support. For January through April, the total of \$6,241 per month leaves a shortfall of \$741 per month or a total of \$2,964 owing to the claimant for 2019.
- [273] Setting off the credits (\$60,566.00) and amounts owing (\$36,603.60) for past child and spousal support, the respondent shall receive a credit of \$23,962.40 for past overpayment of child and spousal support.

Prospective Child Support

- [274] Based upon the schedule above, the children will be in the respondent's care for approximately 28.5% of the time during the school year. The holidays will be more equal with the parties sharing roughly equal parenting time. However, it is apparent to me that even if the children are in the respondent's care for over 40 percent of the time, the claimant will have responsibility for the majority of childcare expenses.
- [275] The claimant will be substantially responsible for the majority of their meals, clothing, activities and lessons during the week. She will be responsible for transportation to school most days and will prepare their lunches on most days. While the respondent will undoubtedly share some responsibility, his time with the children will be less responsibility-laden than that of the claimant's.
- [276] On balance, I cannot find that the respondent has or will bear increased costs as a result of his proportion of parenting time exceeding 40 percent of the time. I would, therefore, not apply any set-offs either in relation to retroactive support or support going forward.
- [277] Using the Guidelines income of \$170,000 for the respondent, I award an amount of \$2,395.00 to the claimant consistent with the calculated amount from the Guidelines. This amount shall be payable May 1, 2019 forward.

Prospective Spousal Support

- [278] There is both a compensatory and non-compensatory basis for an award of spousal support. However, I find that the compensatory basis is the primary one that needs to be considered at this time. This was a nine year traditional marriage within a 10 year relationship. The claimant's devotion to the home and the children allowed the respondent to work hard and grow his career in the excavation and construction industry, and has indirectly contributed to the respondent's success.
- [279] The claimant has a very strong claim to compensatory entitlement based on the economic loss she suffered during the marriage and the corresponding economic advantage conferred on the respondent: see ss. 161-162 of the FLA.
- [280] Upon entry into the marriage, the claimant moved to British Columbia and gave up previous teaching and clerical jobs. I find that the claimant suffered a capital loss during the marriage and was prejudiced by the parties' joint decision that she abandon her career for one in home care and children rearing. This decision allowed the respondent to pursue his career and excel in the construction industry, which for him has been a high-earning vocation. Commensurate with the respondent's career growth, there was a corresponding deprivation to the claimant. Due to her historical and ongoing commitment to the children, it is likely that the claimant will be hampered in her ability to earn any significant income in the future, including her potential for future income through photography.
- [281] In my view, permanent spousal support is required to address the economic inequities arising from the marriage. The respondent has invited me to put an end-date on future spousal support but I would decline to do so at this stage.
- [282] I would award the claimant \$3,846 in monthly spousal support, a mid-range figure, based upon a Guidelines income of \$170,000 per year for the respondent.

Section 7 Expenses

- [283] The parties agree that the respondent will pay his proportionate share of the s. 7 expenses on a 75/25% basis as suggested in the draft order.

Final Orders

- [284] After a consideration of all the above issues, my final orders are as follows:

Divorce

1. An order for divorce will take effect 31 days after the date of this judgment is rendered.

Parenting Coordinator

2. A parenting coordinator is to be appointed.

3. The order will go as set out in paragraph 3 of the respondent's draft order except that the fees for the parenting coordinator will be paid on a 75/25% basis with the respondent bearing the 75% of the fees of the parenting coordinator
4. The order for a parenting coordinator will be for one year from the date of the order unless otherwise agreed by the parties.
5. The deadline for the selection of the parenting coordinator will be 30 days from the entry of this order.
6. The parenting coordinator will provide guidance, advice and recommendations as to how to encourage the parties to engage in cooperative parenting including:
 - a) facilitating the manner and place of drop offs and pickups to exchange the children;
 - b) reducing the potential for conflict between the claimant and the respondent's spouse;
 - c) facilitating the children's telephone call to the non-custodial parent;
 - d) facilitating positive communication between the parties; and
 - e) scheduling parenting time during holidays.

Guardianship

7. The parties will share joint guardianship of the children.
8. Pursuant to s. 40 and s. 41 of the Family Law Act, the claimant and the respondent, as guardians, will exercise parental responsibilities with respect to the children on the following terms:
 - a) The claimant and the respondent will each have responsibility for making day-to-day decisions affecting the children and will have the day-to-day control and supervision of the children during their respective parenting time;
 - b) The claimant will have primary parenting responsibility for the children in respect of those matters set out in s. 41(b)-(l) of the Family Law Act;
 - c) Each of the claimant and the respondent, as guardians, will have the obligation to advise the other guardian on any significant matters that arise for the children during their respective parenting time;
 - d) Each of the claimant and the respondent, as guardians, 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 their health (except for emergency decisions), education, religious instruction, and general welfare, and are obligated to try to reach agreement on those decisions;

- e) In the event the claimant and the respondent, as guardians, cannot reach agreement on a significant decision despite their best efforts, the claimant, as guardian with the majority of parenting time, will be entitled to make those decisions;
- f) The respondent will have the right to apply for directions from the court on any decision he considers contrary to the best interest of the children under s. 49 of the Family Law Act; and
- g) The claimant and the respondent, as guardians, have the right to obtain information concerning the children directly from third parties, including but not limited to, teachers, counsellors, medical professionals, coaches or instructors, and caregivers.

Passports

- 9. The children's passports will be shared as follows:
 - a) If either party travels with the children outside of the Lower Mainland of British Columbia (defined as the United States border to the south, Whistler to the north, the Strait of Georgia to the West, and Hope to the east), the traveling party shall provide the non-travelling party with reasonable advance notice, a travel itinerary and contact information for the children while they are traveling.
 - b) Until the end of 2021, neither party shall take the children out of Canada for a period longer than five days without the written consent of the other party. Such consent IS not to be unreasonably withheld. After July 1, 2021, this period for travel without consent will increase to a period longer than seven days.
 - c) The claimant shall have custody of the children's passports and shall provide the children's passports to the respondent upon two weeks' notice of intent to travel to the United States with the children during the respondent's parenting time, or as agreed upon in writing by the parties.
 - d) The claimant shall provide a copy of the children's passports to the respondent.
 - e) If the respondent receives the passports, he shall return the children's passports to the claimant at the end of the respondent's parenting time.

Parenting Time

- 10. The following order replaces all previous orders respecting parenting time:

Regular / School Year Schedule

- a) The claimant will have the primary parenting time with the children at all times except the respondent will have parenting time every second week, from Wednesday after school, or if the children have an after-school activity on Wednesday immediately after that activity, to Sunday at 6:00 p.m. when the children will be returned to the claimant's care.

- b) The regular, holiday and other schedules will continue indefinitely but may be reviewed on or after July 1, 2021 after both children have graduated from elementary school, their graduation being deemed a material change of circumstances.
- c) For drop offs at the parties' homes, the non-custodial parent or a caregiver on their behalf will wait near their residence and allow the parent with the children a brief period of time to remove them from a vehicle and say good-bye before approaching the children.
- d) This regular schedule and the holiday schedule will prevail except as set out below or specifically agreed in writing or electronic communication by the parties, or counsel acting for either, or as ordered by the court.
- e) This regular schedule will commence immediately following the Easter 2019 weekend, with the claimant having parenting time in the first week this order is in effect, and the respondent's parenting time commencing on Wednesday of the second week.

Holidays - Mother's Day, Father's Day, Easter, Thanksgiving

- f) On Mother's Day, if the respondent has parenting time, the respondent is to return the children at 6:00 p.m. on the Saturday before Mother's Day and the claimant's regular parenting time will commence a day early.
- g) If Father's Day falls outside the respondent's parenting time, he will be entitled to have the children from Saturday at 6:00 p.m. preceding Father's Day to Sunday at 6:00 p.m.
- h) For the Easter and Thanksgiving weekends, parenting time will be shared. If the weekend does not fall within the respondent's parenting time, he will be entitled to have the children from Thursday after school preceding the weekend and return the children at 9:30 a.m. on Sunday morning. If the weekend does fall on the respondent's parenting time, the children will be returned to the claimant at 9:30 a.m. Sunday morning so that the weekend may be shared. As the parties have come to agreement respecting the Easter 2019 weekend, this term will commence with the Thanksgiving 2019 weekend and the Easter 2020 weekend and continue thereafter.
- i) For Halloween, the parties will share Halloween with an exchange to take place at 6:15 p.m. If Halloween falls within the claimant's parenting time, the claimant will have parenting time until 6:15 p.m., and the respondent will have from 6:15 p.m. until school the next morning, or 9:30 a.m. if there is no school, at which time the regular parenting schedule will resume. If Halloween falls on the respondent's parenting time, the respondent will have parenting time until 6:15 p.m. after which the claimant will have from 6:15 p.m. until school the next morning, or 9:15 a.m. if there is no school, at which time the regular parenting schedule will continue.

Spring Break

- j) Spring break will begin on the last day of classes before spring break and will end at 6:00 p.m. on the Sunday night before classes resume.
- k) The parenting time during the two week spring break shall be divided equally on a week-on and week-off basis with exchanges to occur on Sunday evening at 6:00 p.m. in the middle of spring break.
- l) Commencing in 2020, the respondent will have the first half of spring break in even numbered years, and the claimant will have the second half. This schedule will alternate every year unless otherwise agreed or ordered.

Christmas Break

- m) The Christmas holiday period shall be defined as the period commencing on the evening after the last scheduled day of school before Christmas school vacation commences and the evening before school recommences after the Christmas school holiday.
- n) The regular parenting schedule shall be suspended during the Christmas school holiday period.
- o) Neither party will travel with the children on Christmas Day unless this travel is previously agreed to or the court orders otherwise.
- p) The claimant shall have the children from the last scheduled day of school before Christmas until noon on Boxing Day. If the respondent is able to adjust his schedule so that the children do not have to travel outside the Lower Mainland (as defined above) on Christmas Day, or if the claimant otherwise agrees or the court otherwise orders, his parenting time will begin at noon on Christmas Day. The Respondent shall then have the children from noon on Boxing Day or Christmas Day, as the case may be, until New Year's Day at 6:00 p.m. The children will at that time be returned to the claimant who will have the remainder of holiday time with the children.
- q) The respondent will notify the claimant at least two weeks in advance of Christmas Day as to whether he is able to assume parenting time of the children on Christmas Day at noon. If he fails to notify the claimant during that period, his parenting time will begin at noon on Boxing Day.
- r) If either party plans to take the children to Ontario during the holiday, they will give the other party at least two weeks' notice and advise the other party where they will be staying with the children.
- s) The regular access schedule will resume following the Christmas holidays.

Summer Break

- t) The parties will equally share the parenting time over the school summer break.
- u) The parties' summer schedule will commence after school on the last day for which the children are in attendance at school before the summer break.
- v) The parties will share access to the children on a week on, week off basis with exchanges occurring on Sunday nights at 6:00 p.m.
- w) The specific weeks for such holidays will be determined by the parties no later than June 1st of each year, with the claimant having the first option as to her choice of weeks for the summer of 2019.
- x) Unless the parties agree otherwise in writing, the children should not be away from either parent for more than one week at a time in the summer.
- y) If the respondent reasonably suspects that he will be away working out of the Lower Mainland during the entire portion of any of his parenting time in the summer, the claimant will have a first right of refusal with respect to parenting time rather than the children staying with the respondent's caregiver(s).

Birthdays

- z) The schedule for parenting time shall not be interrupted by the children's birthdays unless the parties otherwise agree.

Extracurricular Activities and Variation

aa) Either the claimant or the respondent will be free to attend the children's' school and participate as a parent in their children's activities on the other's parenting time, though any such contact will be immediately restricted to participation in school-related activities and will not unreasonably infringe on the other's parenting time.

Variation by Consent or Court Order

bb) The terms respecting parenting time will be subject to variation at any time on the recommendation of the parenting coordinator or by agreement between the parties or by court order.

Conduct Order

- 11. The parties will each make their best efforts to:
 - a) encourage the children to have a positive relationship with each parent; and
 - b) refrain from making disparaging remarks to the children about the other parent or the other parent's spouse.

Telephone calls

12. The following rules will apply respecting telephone calls:
 - a) The children will be entitled to call the off-duty parent whenever they choose.
 - b) Each party may have one telephone call to children while they are in the care of the other parent every second night between 6:30 and 7:30 p.m. PST.
 - c) The party with the children shall initiate the call.
 - d) The parent who has the children will give the children privacy during the telephone phone calls with the other parent. The children may both speak to the parent individually or together by means of speaker phone.
 - e) The calls will be limited to a duration of 20 minutes in total inclusive of calls for both children.
 - f) Neither party will use the telephone call to make recordings of the telephone conversation.
 - g) It will be the responsibility of the parent who is on the telephone to tell the child or children that it is time to end the call.

Property

13. The respondent is ordered to pay the claimant \$1,350,160.69 in satisfaction of the claimant's division of property claims within 60 days from the entry of the order in this matter. That amount will be reduced by the credit owed to the respondent for past over-payment of child and spousal support.
14. The balance of the funds held in trust on the eight acre parcel is to be released to each party equally. The claimant's share of the funds held in trust will be applied to correspondingly reduce the judgment in her favour.
15. If the respondent cannot secure the funds to satisfy the net portion of the judgment in the claimant's favour within 60 days from the entry of the order, the back 40 acre parcel (PID 010-837-787 being Lot 72, Plan NWP4211, Section 14, Township 19, New Westminster Land District 36) on Dixon Road shall be immediately listed for sale to satisfy the judgment in the claimant's favour. The aforementioned property will be listed for sale forthwith on the following terms:
 - a) The listing price shall be determined by the respondent;
 - b) The parties shall have joint conduct of the sale. In the event the parties cannot agree on any matter relating to the sale of the home, either party may seek directions from this Court respecting the conduct of the sale;
 - c) Upon sale of the property, the following liabilities and expenses shall be paid from the proceeds of sale before any distributions are made to the parties:

I. real estate commissions and applicable taxes;

- II. the usual adjustments between vendor and purchaser;
 - III. reasonable, agreed-upon legal fees and disbursements relating to the conveyance of the property; and
 - IV. any amounts required to fully pay and discharge other liabilities registered against the property; and
- d) The remaining net proceeds of the sale will be used to satisfy the remainder of the judgment owing to the claimant, with the balance payable to the respondent.
- 16. The claimant's Certificate of Pending Litigation on the back 40 acres will remain on title until such time as the respondent has satisfied the judgment or the property has been sold.

Photos

- 17. The claimant shall arrange for a copy of the family photos and family history contained on the Mac Computer (formerly Mr. Smith's computer) within 30 days from the entry of the order in this case if she has not done so already.

The Respondent's Pension

- 18. The claimant is entitled to a one-half interest in any of the respondent's remaining pensions accumulated during the marriage. The fee for splitting the pension will be shared equally between the parties.
- 19. The respondent will file the necessary application with his pension plan's administrator to give effect to the division.
- 20. Either party may apply for the division of unadjusted pensionable earnings under the Canada Pension Plan for the period from July 22, 2006 through June 17, 2015.

Retroactive Child and Spousal Support

- 21. The respondent is entitled to a credit of \$23,962.40 for overpayment of past support payments.

Future Child Support

- 22. The respondent will pay \$2,395 per month to the claimant for prospective child support based upon a Guidelines income of \$170,000 starting May 1, 2019.

Future Spousal Support

- 23. The respondent will pay \$3,846 per month to the claimant for spousal support based upon a Guidelines income of \$170,000 starting March 1, 2019.

Review of Child and Spousal Support

24. The parties may agree to vary the amount of child or spousal support.
25. Due to uncertainty in the income of the respondent at present, either party may apply for and trigger a one-time review of the quantum of child or spousal support, though not entitlement, at any time after July 1, 2020. Prior to such review, the parties will exchange up-to-date financial records showing their incomes for the 2018-2019 tax years. This one-time review does not require a material change in circumstances and does not affect the parties' right to otherwise apply for a variation in support based upon a material change in either parties' circumstances.

Section 7 and s. 211 Report Expenses

26. The claimant and the respondent will split s. 7 expenses on a 75/25% basis with 75% to be paid by the respondent.
 27. The cost of the s. 211 report prepared by Mr. Finlay shall similarly be split on a 75/25% basis.
- [285] Counsel for the respondent shall prepare for entry a final order that gives effect to these reasons. A copy will be provided to the claimant for her approval as to form and content. The claimant will have 10 days from receipt of the draft order to provide comments on the draft. If no comments are received, the respondent may submit the order to the Court for approval without the signature of the claimant.
- [286] I would add that the claimant, the respondent, and Ms. O. have understandably had a difficult time in letting go of past conflicts and the unsatisfactory way the parties' marriage came to an end and the respondent's new relationship began. The Court encourages the parties to communicate more effectively and work together in a cordial and mature manner on decisions that affect A and L. If the parties put the children's best interests ahead of their grievances with each other, the children's emotional health and happiness can only be rewarded.

Costs

- [287] The claimant has been successful on the main issues of property division, parenting responsibility, and parenting time. Success on the child and spousal support issues has been divided though these issues took up only a minor portion of the trial. Therefore, as the claimant has been substantially successful, unless the claimant or respondent notify the court registry within 30 days of the delivery of these reasons that they wish to make submissions as to costs, the claimant will be awarded costs on the scale of ordinary difficulty.

"Brundrett J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/05/2019BCSC0588.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/m-f-w-v-m-a-h-2019>

Prepared on 29 October 2026 · Esheria