

CANADA / JUDGMENT

M.L.L. v. W.J.L.

2004 BCSC 1037

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

M.L.L. v. W.J.L.

2004 BCSC 1037

Date: 20040729

Docket: 18535/03

Registry: Prince George

Between:

M. L. L.

Plaintiff

And

W. J. L.

Defendant

Before: The Honourable Mr. Justice Meiklem

Reasons for Judgment

Counsel for the plaintiff:

K.L. Basran

Appearing for the defendant:

W.J.L., In Person

Date and Place of Trial:

May 31 to June 4, and

June 10, 11, 2004

Prince George, B.C.

ISSUES AND SUMMARY OF BACKGROUND FACTS

- [1] The main issue in this divorce action is the custody of the two children of the marriage. There are less significant issues concerning spousal maintenance and allocation of family debts. The divorce order was pronounced on the last day of the trial, June 11, 2004.
- [2] The plaintiff, born [], 1959, is a military police warrant officer in the Canadian Armed Forces. Mr. L. graduated from the police academy and was transferred to Comox, B.C., in June 1978. The parties met in Comox in January 1982 very shortly after Ms. L., born [], 1962, was posted to Comox as a private in the military police.
- [3] The parties became romantically involved very quickly and were married on July 15, 1982, immediately before Mr. L.'s posting to Shilo, Manitoba. Ms. L. received her transfer to Shilo in January 1983, and the parties resided and carried out their law enforcement duties in the military in Shilo, Manitoba, until July 1987 when they were transferred to Calgary, Alberta.
- [4] Ms. L. was discharged from the military in September of 1989 as unsuitable for further employment. In March 1990 Mr. L. was posted to Cypress for 6 months. Mr. L. was transferred and the parties moved from Calgary to Comox in July 1992. The parties resided in Comox until the spring of 1996 when they purchased a house in Courteney. They were resident there until the summer of 1999 when they moved to Mr. L.'s new posting in Damascus, Syria, under secondment to the Department of Foreign Affairs.
- [5] During the aforementioned years and subsequent to her discharge from the Armed Forces, Ms. L. worked at various jobs either as a security guard or in a secretarial capacity or as a retail store hostess. From the summer of 1994 until the summer of 1999 Ms. L. was self-employed providing home daycare.
- [6] The parties' first child, M.L., was born on [], 1994, and W.L. was born on [], 1996.
- [7] Ms. L. joined Mr. L. in Damascus in August 1999 and obtained employment there as a community co-ordinator. The family spent Christmas of 1999 in Damascus but returned to Canada for summer holidays in June of 2000 where they visited Mr. L.'s grandmother in Mississauga, Ontario, and Ms. L.'s parents in C.[], B.C. Mr. L. returned to Damascus ahead of Ms. L. Very shortly after Ms. L. and the children rejoined Mr. L. in Damascus at the end of August 2000, Mr. L. made it known to Ms. L. that he considered the marriage over and wanted a divorce.

- [8] The parties differ in their recollections of the details of this relationship-ending discussion. Ms. L. recalls being shocked at learning of Mr. L.'s intention to end the marriage and asking him why he had waited until she returned to Syria to inform her. She recalls him advising her that she could leave without the children or remain with him until the end of their agreed tour of duty and not inform anyone of the marriage breakdown. She thought the latter was better for the children, and stayed on.
- [9] In November 2000 Mr. L. presented Ms. L. with a draft separation agreement, already signed by himself. This draft agreement provided acknowledgements by the parties that they had agreed to reside in the same residence for the children's benefit until June 2001 at which point Ms. L. would return with the children to take up residence in Canada while Mr. L. completed his posting. The custody provision of that draft agreement provided as follows:

Both parties agree that once the wife returns to Canada on or about the 24th day of June 2001, the parties' two children, W.L. and M.L. will return to Canada and reside with the wife. Both parties also agree that they both have a mutual responsibility for the upbringing of their children and both will enjoy an active part in the upbringing of their children. The husband will have full rights to the children's education and will not be restricted access to visit the children. The husband will also not be restricted in visiting the children at any time nor be restricted in being with the children away from the wife for holidays or visits. If at any time the children make it known or wish to contact via any means of communication be it telephone, internet or in person or to visit the husband, the wife shall advise the husband immediately and not interfere with their communications or visits. If at any time the children make it known or wish to reside with the husband, the wife shall advise the husband immediately.

- [10] The draft agreement of November 2000 proposed that Mr. L. supplement Ms. L.'s indexed Armed Forces medical pension of \$655.00 per month with the sum of \$1,200.00 per month for child support payable until:

... both children have reached their 18th birthday, or until the wife remarries or cohabits with a supporting person. At that time the payments for maintenance for the children will be reassessed. Both parties agree that when the wife and two children return to Canada, that the wife will seek employment to financially assist supporting the parties' two children. From time to time, or when there is a change in income for either party, the parties will reassess their financial situation and maintenance payments may be altered with consent of both parties, or, in certain circumstances, by order of a court.

- [11] Mr. L. testified that Ms. L. declined to accept the terms of the draft agreement because she wanted a greater amount of child support, a portion of his pension and spousal support.

- [12] In late November 2000, Mr. L. purchased return airfare tickets for Ms. L. and the children to spend Christmas holidays in Canada with Ms. L.'s parents. At this time Ms. L. obtained \$900.00 from the Canadian Embassy as an advance on her contract as community co-ordinator commencing in January 2001. The return flight for Ms. L. and the children was booked for January 11, 2001.
- [13] Although Ms. L. confirmed by e-mails on January 9 and January 10 that she was returning with the children on January 11, 2001, she arrived on January 11th without the children to advise Mr. L. that she was returning only to remove her possessions from the family home.
- [14] There is a great deal of conflict and inconsistency in the defendant's testimony as to when she decided to return to Syria without the children. At one point she testified that she had every intention of returning to Syria with the children until she learned that Mr. L.'s December pay was not deposited into their joint bank account and she received calls from credit card companies advising her that Mr. L. had removed his name from her credit cards. She then testified that she was not really worried about the pay and her mind was changed by his e-mails demanding that she return to the account money that she had withdrawn. After she was confronted with the fact that Mr. L.'s pay was deposited to their joint account for the month of December in the usual fashion, Ms. L. asserted that her decision was not formulated until the day she got on the airplane and her decision was the result of an accumulation of various concerns. This response however is inconsistent with the fact that she enrolled M.L. in a C.[] area school on December 18, 2000. Ms. L. denied that she had made any final decision at such an early date and said that she vacillated daily according to the tenor of Mr. L.'s e-mails.
- [15] Ms. L. admitted opening a new bank account in early December 2000 and withdrawing funds from their joint accounts in the approximate amount of \$2,500.00 during the month of December.
- [16] The copies of e-mails placed in evidence make it clear that Mr. L. anticipated the possibility of Ms. L. not returning because he queried her on December 21st: "are you planning on returning?" Another e-mail from Mr. L. to prospective counsel dated January 29, 2001, however, negates any suggestion that Ms. L. planned the Christmas visit to Canada as a means of separating the children from Mr. L. Mr. L. stated to counsel:

In late November 2000, I spoke to my wife and stated that she obviously needed a break from me (and I from her) and that she should go to her parents' residence in B.C. for Christmas and possibly even seek legal counsel.

The same correspondence advises his prospective counsel that he had previously consulted another lawyer on December 26th.

- [17] Mr. L. testified that he was able to speak to the children three times between December 6 and 17, 2000, but was unsuccessful in telephoning them after that date for several months, notwithstanding frequent efforts which he stated were at least twice per week, involving him rising at 3:00 a.m. Damascus time. He said that on the majority of calls there was no answer, and on one occasion when he did succeed in talking to Ms. L. on the telephone at her parents' home, she refused to let him talk to the children.
- [18] In April 2001 Mr. L. wrote a letter to Ms. L.'s parents seeking their help in facilitating telephone access to the children. This was also ineffective.
- [19] The parties did communicate by e-mail and they agreed that Mr. L. would have a two week visitation in the summer of 2001. Ms. L. offered to drive the children to and from Edmonton airport and expressed the wish that he maximize his contact with the children.
- [20] When Mr. L. flew to Edmonton neither Ms. L. nor the children were there as agreed. He waited four hours during which he telephoned her residence, telephoned the police regarding motor vehicle accidents and telephoned her parents. He then rented a car and drove from Edmonton to C.[]. He found no-one at her home address and he then drove to her parents' residence where he saw her vehicle. There was no response to his initial knock on the door but he heard voices and persisted and eventually engaged Ms. L. in two hours of negotiations. She was apparently concerned that he would not return the children and once he signed a short document agreeing that he would follow the schedule set out in the attached airline tickets and arrange for the children to call her on a daily basis, he obtained the children and drove back to Edmonton and flew with the children to Toronto. He and the children visited his mother for two weeks and he returned the children to C.[].
- [21] Ms. L.'s explanation at trial for not taking the children to Edmonton as she had agreed was that Mr. L. had not sent monies which she had demanded by e-mail. This explanation is at odds with the concerns that she exhibited when he arrived in C.[] to pick the children up.
- [22] The e-mail entered in evidence indicates that on June 24, 2001, in response to an e-mail from Mr. L. setting out the flight departure time from Edmonton as 1200 hours on the 14th of July and the return to Edmonton from Toronto as 1535 hours on the 24th of July and his advice that he would be renting a car to drive to and from C.[], Ms. L. had responded:

It will be no problem with me and the kids driving to Edmonton both for the pickup and return. Just let me know your arrival into and departure out of Edmonton and I will let you keep the kids up to the last minute and I will meet you at the airport. If there is no layover for you just let me know. I want you to have as much time with the kids as possible as this is what they want.

She then goes on to relate the events of W.L.'s kindergarten graduation and makes no mention of requiring funds.

[23] On June 26th Ms. L. sent another e-mail, once again as a reply to the same e-mail that she had replied to on June 24th stating briefly - "when can you send extra money?". These appear to be the e-mails that Ms. L. characterizes as her demand for funds which she intended to make a pre-condition of her driving to Edmonton. It also appears from the following excerpt from Ms. L.'s examination for discovery that she considered that this exchange constituted advice to Mr. L. that she would not be driving to Edmonton without specified payment:

Q So he had to rent a car and drive to C.[], is that correct?

A Yes.

Q Did you tell him you weren't going to be in Edmonton?

A Yes, I did.

Q Before he got there?

A Yes.

Q So, he drives to C.[] and he talks to you there, is that correct?

A Yes.

Q Now why were you not at the airport with the kids in Edmonton?

A I had asked him to help me with the funds and he refused.

Q Help you with funds, is that the creditor's?

A No, to help me get to the airport.

Q Oh, okay. So you had no money to get from C.[] to Edmonton?

A Didn't, no and he didn't want to pay it, so I said okay.

[24] Ms. L.'s response on examination for discovery that she did not have sufficient money to get to Edmonton from C.[] is clearly erroneous since she had received, in error, the \$4,505.00 that the Government of Canada intended to pay to Mr. L. for the air flights for himself and his children for the summer vacation. These funds had been deposited by direct deposit to her on June 5, 2001. She transferred these funds from a bank account that she used to receive direct payments to another bank account on June 13th, and as of July 13th, there remained \$3,400.65 on deposit in the latter account. Ms. L. testified that she assumed the \$4,505.00 deposit was intended to be hers as a reimbursement of moving expenses arranged by Mr. L. I find that explanation disingenuous. When the plaintiff contacted Ms. L. to inform her of the error she said that she did not have the money any longer. Mr. L.'s employer eventually re-advanced the vacation travel funds to him. His employer requested repayment of the initial advance from Mr. L.

- [25] Mr. L. returned to Ottawa from his Syrian tour of duty in July of 2002. The evidence is possibly incomplete in respect of the e-mail exchanges between the parties but there is an original e-mail message from Mr. L. which Ms. L. replied to on June 19th. Mr. L. proposes paying for her fuel and hotel accommodations for driving the children to and from Edmonton for a departure on July 24th and a return on August 13th.
- [26] Ms. L.'s response of June 19, 2002, contains no text other than in the subject line, which reads "Did you get response of two e-mails". Mr. L. replied on June 23rd saying that he had not received a response. Apparently Ms. L. did not reply to that. The evidence does not indicate whether Ms. L. had ever actually responded to the proposal.
- [27] It would appear from Mr. L.'s June 2, 2002 e-mail to Ms. L. that his original proposal predated June 2nd, because on that date he asked her why she had not responded to his query as to whether he could see the children that summer.
- [28] Mr. L.'s uncontradicted testimony was that in July 2002 he was able to contact Ms. L. by telephone and in response to his inquiry as to why she had not answered him in respect of access she said that "maybe more money would mean more access". Mr. L. had been paying \$1,200.00 per month, but as his pay was reduced when he returned to Canada in July 2002, he reduced child support to \$800.00 after researching the Child Support Guidelines on the internet. He increased this amount to \$810.00 in April 2003.
- [29] Mr. L.'s present income is approximately \$63,000.00 per annum.
- [30] Mr. L. retained legal counsel who wrote to Ms. L. in December 2002 regarding access over Christmas, but Ms. L. did not respond.
- [31] Mr. L. commenced this action on February 7, 2003. At that time he was seeking joint custody and joint guardianship of the children but, as a result of ensuing difficulties in arranging access and specific concerns about the children's intellectual and social development, Mr. L. amended his pleadings in January of 2004 to claim sole custody and joint guardianship.
- [32] Mr. L. testified that from August 29, 2002 until March of 2003, he was unable to speak to his children and he was denied access for the spring break of 2003 by the defendant's posture that she would only allow access if he signed an interim sole custody order. Mr. L. offered to consent to a specified access order with a police assist clause but Ms. L. did not deem that to be satisfactory.
- [33] On April 15, 2003, Master Baker granted an order specifying telephone access to the children by Mr. L. on Tuesdays, Thursdays and Sundays, commencing between 5:00 p.m., and 5:30 p.m. C.[] time and ordering the defendant to co-operate in the installation of a "smart ring" service at Mr. L.'s cost. Master Baker also ordered specified access for the summer of 2003 commencing July 4 and ending August 15, to be arranged and paid for by Mr. L., and alternating Christmas access, with Christmas 2003 being with Mr. L. and arranged and paid for by him. This order provided that summer access and spring break access would involve the children departing from the Prince George airport and for Christmas access they would

depart from the Dawson Creek airport.

- [34] Mr. L. maintained a log of his telephone calls and attempted telephone calls from March 3, 2003 to May 16, 2004. This log was placed in evidence and he was not cross-examined upon it. According to the log he made 144 attempts to telephone the children within the terms of the Master's order of April 15, 2003, and was successful on 65 of those attempts.
- [35] Mr. L. made arrangements and booked flights for the children from Prince George to Ottawa and summer access pursuant to the order did occur in 2003 although the parties were in a dispute regarding Ms. L.'s claimed travel expenses which Mr. L. paid under protest and continues to dispute.
- [36] Mr. L. characterizes the summer access in 2003 as a wonderful period of time together, but he was very concerned about the children's development, particularly that of M.L. He had always spent a lot of time reading with her and he felt that her reading ability had actually declined since 2002. He was also concerned with her skills in mathematics and felt that both children's attention level had decreased. He found them less curious and more immature.
- [37] Mr. L. had an educational assessment of the children performed at the Turnbull Learning Centre Ltd. on August 12, 2003. Both children showed above average or superior performance in oral comprehension. M.L. was below average in letter/word identification, mathematics calculation, quantitative concepts and math fluency, spelling and writing fluency. She exhibited average ability in reading vocabulary, reading fluency, picture vocabulary, applied problems in mathematics and writing samples. W.L. was significantly below average for his age and grade level in passage comprehension, applied problems, spelling, writing samples and spelling out sounds. W.L.'s ability was average in respect of story recall, understanding directions, calculations, quantitative concepts and academic knowledge.
- [38] On August 11, 2003, Mr. L. wrote Ms. L. a very detailed and lengthy e-mail expressing his concerns over the children's health and development. Although this message predated the professional assessment of the children, his comments on their reading, communication and educational development closely parallel the results of the assessment at the Turnbull Learning Centre. Mr. L. made a number of specific suggestions to Ms. L. concerning activities for the children and urged her to read to them. He also expressed concern about M.L.'s obesity upon her arrival and the effect it had upon her self confidence. He stated:

Now, after 5 weeks of nutritious food, regular meals, healthy snacks and regular activities M.L. is very happy that she had lost weight and that her shorts are loose.

- [39] Mr. L.'s comments are not merely self-serving; there is a dramatic contrast between photographs of M.L. taken on July 5, 2003, and August 13, 2003, corroborating her weight loss.

- [40] Ms. L.'s August 14, 2003, response to Mr. L.'s lengthy e-mail was a cryptic: "confirm return flights".
- [41] The children's summer of 2003 visit was spent with Mr. L. and his new partner, Ms. M.L.. Ms. M.L. and Mr. L. met initially in Syria where Ms. M.L. was employed with the Department of Foreign Affairs. Ms. L. suspects Mr. L. and Ms. M.L. were romantically involved in Syria before the marriage breakdown but they both adamantly deny that and date the commencement of their romantic involvement as in August 2001 following Ms. M.L.'s break-up with her previous boyfriend, and many months after Ms. L. returned to Canada.
- [42] Ms. M.L. has a Bachelor of Arts degree and a college diploma in retail management. She was [] of the Canadian Department of Foreign Affairs in Syria in 1999.
- [43] Ms. M.L. was also concerned during the summer 2003 visit about M.L.'s weight and her eating habits such as asking for a second helping of food before she had started her first helping. She was very surprised that M.L. could not spell single syllable words and that her reading ability seemed poor. She noted that W.L. could not spell "cat". She and Mr. L. taught the children the use of utensils and eating with their mouth closed. They found that at the end of the six week visit they were adept enough to impress a restaurant waitress with their behaviour and manners.
- [44] Following the summer 2003 access visit, Mr. L. was unsuccessful in communicating with the children until October 14th, notwithstanding at least 20 logged attempts within the hours specified in the April 15, 2003, Master's order. He received no advice from Ms. L. that the children had arrived home safely.
- [45] In November 2003, Mr. L. applied for an order finding Ms. L. in contempt of court and for a variation of the Master's order to provide detailed terms in respect of access for Christmas 2003. Following the hearing of the application on November 25, 2003, Rogers J. adjourned the contempt application generally and specified the departure and return dates for the Christmas access in 2003 and specified the start and finish dates of access for future Christmas and spring breaks. He further refined the Master's order to provide that Ms. L. should pay transportation costs of the children to and from the airports in advance and provide receipts for which she would be reimbursed by the defendant, unless he challenged the expenses on the grounds of reasonableness. A transcript of Mr. Justice Roger's oral reasons indicates that he found that, on the face of the materials, there was clearly a pattern of Ms. L. putting up resistance to telephone access. He said:

... I frankly do not accept her comments that the children are older and therefore they are not in the house when these telephone access times come by. If we know that we have a telephone access on Tuesdays, Thursdays and Sundays, we organize our lives accordingly. We do not schedule things during those telephone access times, and we do not say to the children, oh, it's okay to go off and have dinner at your friend Timmy's at 4:30 when it is certainly possible that you could go and have dinner at friend Timmy's at 5:30 after the telephone access is completed.

- [46] Between the date of this order and Christmas 2003 access, Mr. L.'s log of telephone calls indicates that he was much more successful in speaking to the children.
- [47] The children did travel by air to Ottawa on December 20, 2003. Mr. L. testified that he was most concerned upon their arrival because they had no winter clothes or foot wear and no luggage or toiletries and they carried only small plastic bags of toys. Both children had gained a tremendous amount of weight and were very poorly dressed and M.L. had more than regained the weight that she had lost during her summer visit. M.L. blamed their weight gain on the amount of junk food they ate.
- [48] While the children were in Ottawa for the Christmas 2003 visit, Dr. Posthuma attended to interview and test Mr. L. and the children in connection with the s. 15 custody and access report which had been ordered by Mr. Justice Rogers on November 25, 2003.
- [49] The children returned to C.[] on January 4, 2004. On January 8th Mr. L. sent an e-mail to Ms. L. seeking confirmation that she had received the electronic tickets for the children's travel for the March spring break visit. He received no response. After persistent questioning of the children in several phone calls, he did eventually learn, in a telephone conversation with the children on January 29th that they had received the tickets.
- [50] Mr. L. travelled to Vancouver to prepare to exercise access with the children on March 14 to 18, but the children did not arrive on the scheduled flight. Ms. L. testified that she did not take the children to Fort St. John for the scheduled flight because she did not have sufficient funds to purchase gasoline to drive the 174 kilometers from C.[] to Fort St. John. She said that she asked her parents for money and they declined, but this evidence was contradicted by her mother's testimony. Following intervention by Mr. L.'s counsel, Ms. L. arranged for her ex-boyfriend to drive her to Fort St. John to catch the corresponding flight the following day. However, the children could not travel on stand-by as unaccompanied minors and the airline demanded \$53.00 for each of them. Ms. L. was unsuccessful in negotiating a stand-off over that issue with the airline before the flight left. Consequently, the spring break access did not occur.
- [51] Dr. Posthuma prepared a written report dated March 8th, 2004, and also testified at the trial. Dr. Posthuma had both parents complete the usual battery of psychological questionnaires and observed the children in the care of Mr. L. and Ms. M.L. in Ottawa, and in the care of Ms. L. in C.[] in January 2004. He was unsuccessful in his attempts to interview Ms. L.'s parents and he was clearly of the view that Ms. L. and her parents were not co-operative with his efforts to do so.
- [52] Dr. Posthuma did interview the children's teachers at their current school, which is the C.[] School in which Ms. L. enrolled the children in September of 2003. Dr. Posthuma also had the children complete the Wechsler Intelligent Scale for Children, 3rd Edition (WISC-III).

[53] Dr. Posthuma's report contains the following comments in respect of the children's academic performance and intellectual development, starting with his comments on the Turnbull Learning Centre Assessment arranged by Mr. L.:

. . . The Turnbull Learning Centre utilized the Woodcock-Johnson, 3rd Edition, tests of academic achievement. These are very well recognized tests that are standardly used by psychologists throughout North America. Unfortunately the children's school records from L.[] School were not available at the time of this assessment, in spite of these having been requested, on many occasions, from Ms. L. The school records of the children's current school, C.[] School, were also not available. However, both of the children's teachers were interviewed. Ms. L. believes the children are doing fine at school, and the only reason she transferred them from their former school, was because of the violence amongst some of the students. M.L.'s teacher, Ms. G., who is the principal of the school, states that M.L. is a good average student in the middle of her class in oral reading, although she was poor initially in starting the program. She believes that M.L.'s spelling is at the grade 3 level, her comprehension is excellent and she is doing well in mathematics. Ms. S., W.L.'s teacher, believes that he is slightly below grade 2 level in oral reading, but at the grade 2 level in spelling and comprehension, and satisfactory in all the other subjects. The teacher's completion of the Teacher/Child Rating Scale produced benign results.

Both of these teacher's appraisals are impossible to reconcile with the objective testing of the Turnbull Learning Centre, and the intellectual testing conducted by myself in December of 2003. The only possible understanding of the teacher's comments, would imply that the remainder of the students in these children's classes are similarly impaired.

As opposed to academic achievement testing represented by the Woodcock-Johnson, intellectual testing measures potential. A comparison of the various sub-tests of intellectual testing, can be also compared to the academic achievement testing (the Woodcock-Johnson), to determine where there has been weakness in both formal and informal intellectual development by the school and home. M.L.'s overall intelligence is in the 31st percentile of the population. In other words, 69% of children her age have scored better than her in the testing. There is, however, a considerable discrepancy between her verbal sub-tests, which average in the 17th percentile, and her performance or non-verbal sub-tests, which average in the 62nd percentile. Her verbal abilities are also a reflection of environmental factors. In her particular case, she is pulled down in her verbal abilities by a very poor arithmetic sub-test, which is in the 0.4 percentile, and by the comprehension sub-test, which measures social judgment, which is in the 16th percentile. Her poor performance in arithmetic is consistent with the Woodcock Johnson results, in which she is deficient in three out of the four mathematical areas measured. W.L.'s overall score in the WISC-III is in the 19th percentile. There again is a considerable discrepancy between his verbal and non-verbal sections of the test, with his verbal being in the 11th percentile and his performance in the 37th percentile. W.L.'s verbal scores are pulled down by his poor performance in comprehension, which is in the 2nd percentile and information, which measures general knowledge of the world, which is in the 16th percentile.

It should be pointed out that intellectual test results can vary considerably over time, depending on the child's cognitive development, and environmental factors. That is, unlike adults, whose intellectual scores are usually quite crystallized, children's test scores can be quite variable. The children's father claims that during the time he had the children last summer, they improved considerably in their general knowledge and vocabulary skills as a result of his efforts and those of Ms. M.L.'s. The fact that the academic achievement testing as measured by the Woodcock-Johnson, is at a much lesser level than the intelligence testing, does provide objective support to his fears that the children's intellectual development is being compromised. The children's father indicates that he would place the children in special programs designed to address their learning disabilities. While the mother may be relying on the children's current teachers for her opinion that the children are progressing well academically, the objective testing does not support this view. The testing also does not support her position that she provides a stimulating environment for the children's cognitive development.

The observations of both parents interacting with their children, confirms the interpretation of the above testing. The children behaved quite differently with both parents and in their interaction with me. With their father and Ms. M.L., they very much encouraged in conversation during meal times and play time. They introduced a variety of topics based on experiences from their recent and last summer's visit, that encouraged not only thinking, but verbal development. With their mother there was very little systematic or organized involvement. The conversation was superficial, disjointed and essentially child directed, rather than parent directed. The children were more attentive, affectionate and were respectful of each other with their father, than was the case with their mother, where there was very little affection being displayed, especially by the mother, as well as squabbling between the children and very few examples of limit setting in an appropriate manner. There was much inconsistency in the mother's attempts at limit setting. The children, at times, became hyperactive, and the mother irritated at these times.

Normally, given the circumstances of these children, it would have been expected for them to be more relaxed and spontaneous in the presence of their mother, than their father, with whom they have spent little time over the last three years. The fact that the reverse was true, may be an artifact of not only the difference in parenting style, but also of the litigation.

M.L. made a very revealing statement for a girl of her age, when I was talking to her in her mother's home, while her mother was not present. At the time we were making casual conversation. She offered, without any apparent cue, that "we have nothing to hide". The statement is very much in context, however, with her general demeanor in the interviews I had with her in both her mother and father's home. That is, she, as well as her brother, were very unwilling to reveal details about their home life in either home. In the Parent Attachment Structured Interview, which is a procedure used in this assessment to determine the significant attachments between a child and an adult, both children gave an automatic response, choosing their mother without any seeming consideration for the subject matter. Both she and her brother were clearly loyal to their mother in the legal dispute. In many ways, M.L. mimicked many of her

mother's behaviours and evasiveness. It is of concern that on one hand the children, especially M.L., expressed such strong loyalty to their mother, yet, on the other hand, appeared to be more relaxed and comfortable with their father. In order for such a situation to develop, it would appear likely that the mother, either directly or indirectly, has co-opted the children in her dispute with their father. M.L. does not appear to be a happy child, in spite of claims of the school and her mother to the contrary. Her father showed me pictures of her taken during the summer months. In the interim she has gained much weight, is obese for a child of her age, and is looking more stressed.

Another major difference in the two observation periods was the condition of the parents' homes. The father's home is tidy, clean and organized, including both children's rooms. The mother's home is littered throughout. The litter includes old clothing that is stacked along with other objects, several feet high in some places. It is difficult to get to the children's bed because of the assortment of objects piled on the floor. The disorganization of the mother's home, in contrast to the organization of the father's home, parallels how both parents' approach to their children and, in turn, the likely manner in which the children are being encouraged to approach their own lives.

[54] Dr. Posthuma's report includes the following paragraph concerning his interview with Ms. L.:

Ms. L. provides quite a different perception of the subsequent events than does her husband. She does acknowledge that when she went away at Christmas, her husband wanted to be with the children, and that she was the one who insisted that she take the children. She, however, then sates, that her husband rebuffed all her attempts at her trying to keep him in touch with the children, and that the children never wanted to go and see their father for last summer's access, or the past Christmas break but she persuaded them to go. She states the children complain about him smoking in front of them and drinking wine. She states she doesn't ask the children about what occurs, but they tell her. She feels that Mr. L. should have chosen a posting to Edmonton so he could be closer to the children. She feels that his is only applying for the custody of the children because "they are his kids, just like I want the kids". It was very hard to get a history from Ms. L., generally, and especially with regards to events since the marital breakdown. She would evade a specific question and often became tangential to a general question. She states that the only issue with the children is the dispute over custody. There are no other concerns with regards to parenting abilities, and/or the children's needs. She believes that Mr. L. has a lot of anger against her, in that he won't tell her what he is doing with the children and won't allow the children to contact her when they are with him. Mr. L. denies those allegations.

[55] Dr. Posthuma cites several behaviours on the part of Ms. L. which he considered to be at odds with her position that she has been fully cooperative and encouraging of the children's involvement with their father, including not being at home when she had arranged to be home to receive his (Dr. Posthuma's) communication and apparently being unable to arrange an interview with her parents on the basis that one was busy and the other was not feeling well, failing to complete and return questionnaires and failing to respond to

repeated requests through e-mails and letters requesting school records.

[56] Of Ms. M.L., Dr. Posthuma says the following:

Ms. M.L. states that she and Mr. L. are very devoted to each other. She states because of their common-law relationship, they are entitled to various benefits from the Diplomatic Services, and thus is able to arrange her career on the basis of her family situation. She states in her free time she enjoys writing poetry and short stories, cooking, gardening, camping and canoeing. She denies any medical problems or significant medical history in her family. Ms. M.L. states she is upset that Ms. L. apparently told the children that she was responsible for the break-up of the marriage, which she finds hurtful, personally and professionally. Parenthetically, Ms. L. did indicate, in this assessment, that Mr. L. was involved with Ms. M.L. romantically, prior to December of 2000. Ms. M.L. states she does not know how to rectify the situation. She feels that Ms. L.'s action have also been very hurtful to the children.

In spite of Ms. M.L.'s concerns on this matter, she enjoys a very affectionate and vibrant relationship with both children. She voices similar concerns to Mr. L., that the children's emotional and intellectual development are suffering. It was quite apparent during the observation period that she works closely with Mr. L. to successfully address these concerns with the children. Her ability to establish a close relationship with the children is somewhat surprising, given the limited contact she has had with them, and the circumstances that have been described above with regards to the dispute. That is, it would have been more expected that the children would have been somewhat aloof from Ms. M.L., and not receptive to her overtures. The fact that the children are able to demonstrate a higher quality of interaction, both on an emotional and intellectual level with Ms. M.L., than their mother, is considered significant.

[57] Dr. Posthuma clearly favours a custodial disposition in favour of Mr. L. in the following conclusion to his report:

This assessment is faced with some difficult issues. Normally, other factors being equal, the psychological research and clinical experience supports the notion of continued custodial care with the primary caregiver in cases of marital breakdown. This assessment would indicate that the above rule of thumb is not likely to be applicable, because of factors that have been indicated. It is likely that these children are more closely attached to their mother, but it is also probable that these children's attachment with their mother is not healthy and will impede their emotional and intellectual development. M.L., in particular, models her mother's behavior in mannerisms and behavior. These are not healthy and are likely to lead to serious emotional difficulties as she enters adolescence and adulthood. She is already obese. In her mother's presence she behaves much more immaturity, than when she is with her father. W.L. also displays problems. It is unlikely that he is encouraged to develop his own interests and ideas. He seems very restricted by his mother and sister during the time that he was observed in their presence. This is in contrast to his behavior with his father, where he is encouraged to develop his own ideas, interests and autonomy.

Among the many unusual interactions that were observed during my time in C.[], was a visit to the horse barn, where Ms. L. keeps her horse. It is necessary to attend to a horse on a frequent basis. These pursuits are often very much enjoyed by children. In this particular case, however, Ms. L. made really no attempt to involve the children, nor did the children express any interest in these activities. Instead, the children became bored, and even though it was minus twenty one degrees Celsius outside the barn, W.L. ran around in a T shirt outside, while his mother was attending to the horse. The car, which had been left running, had been visited by both children. M.L. was complaining that W.L. was fooling around with the controls of the car during part of this time. The juxtaposition of the mother's actions in not encouraging the children to be involved in an intrinsically appealing event (the horse) and the children's decision, once they were bored, to go outside and play in a car with the motor running, is considered to represent some of the problems that exist with Ms. L. in her care of the children.

In contrast, the children have not only a much different environment in the paternal home, but also behave differently in their father's presence, than in their mother's. The children appear to be more relaxed, demonstrative of their affection and respect for each other as siblings, as well as for their parent, more intellectually curious and more organized. Their father, along with Ms. M.L., provide a more structured environment, that appears to account for the differences noted in the children's behavior.

These children are at a stage in life, where the stimulation by their parents [is] going to be definitive in their subsequent development as adolescents and as adults. While the emotional attachment to their father may not be as strong as it is to their mother, it is considered that there is a significant emotional attachment with their father, that will be reinforced over time if the children were to be in his custodial care. This likely inequality in the strength of attachment between the respective parents, is considered to be outweighed by the unhealthy aspects that are involved in the children's, particularly M.L.'s, attachment to her mother, as well as the positive gains of the intellectual and emotional development that can be provided by their father.

Given the likely involvement of the children in support of their mother's position in their parents' conflict, it is likely that there will be some difficulties initially in the transition of custodial care, if this was the decision by the Court. It appears likely that the father and Ms. M.L. are quite aware of the importance of the mother's relationship with the children, and would take appropriate steps to minimize the duration of any distress that may arise from the transfer of custodial care.

Finally, it is some concern that the mother sees the current litigation as simply a battle between the parents for custody, and that there are no compelling issues relating to the children's welfare.

[58] Ms. L. provided a reasonable explanation of the children playing in the car while it was running to the extent that she negated the safety concerns. The car was apparently started by remote starter, and the motor would have turned off in the event the children had made any contact with the controls.

CUSTODY AND GUARDIANSHIP

[59] The pertinent legislative provisions to be applied by the court are of course s. 16 of the Divorce Act and s. 24 of the Family Relations Act, both of which are invoked in this case. The most pertinent portions of s. 16 of the Divorce Act are s-ss. 8, 9 and 10, which read as follows:

- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[60] Section 24(1) of the Family Relations Act reads as follows:

- (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:
 - (a) the health and emotional well being of the child including any special needs for care and treatment;
 - (b) if appropriate, the views of the child;
 - (c) the love, affection and similar ties that exist between the child and other persons;
 - (d) education and training for the child;
 - (e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

[61] Thus, the Family Relations Act provides that the best interest of the child must be given paramount consideration, and the Divorce Act provides that the best interests of the child is the only consideration.

[62] On a consideration of the factors set out in s. 24(1) of the Family Relations Act and the evidence before me, I have come to the conclusion that it is in the best interests of the children of the marriage that the parties share joint guardianship and that Mr. L. have sole custody.

[63] The trial provided a fuller opportunity for me to assess the parenting capacities of the parties and the needs and circumstances of the children than was available to Dr. Posthuma and I found that his assessments of the parties were borne out during the trial to a significant degree.

[64] One of Dr. Posthuma's initial conclusions which was borne out in my view was that Ms. L.'s portrayal of herself and her background in an unsophisticated, psychologically naïve manner in psychological testing was more a reflection of her personality than an artifact of the custody dispute. This aspect of her personality was evident throughout the trial.

[65] Ms. L. spent very little of the available court time focusing on matters affecting the best interests of the children or the specific factors that the court must consider in a custody dispute and a great deal of time attempting to demonstrate that, indeed, Mr. L. and Ms. M.L. were having an affair and this was the reason the marriage ended abruptly. Ms. L. states in her written closing argument:

The defendant believes there was an affair and that there was a plan. The plaintiff wanted out of the marriage and found a career person. There is now money. The children are wonderful, kind, loving, perfect in every way. The career person has no children and will stop at nothing to help him get them.

[66] She then goes on in a lengthy paragraph to review the evidence of one of the children saying something to Ms. L.'s mother which she considered implicated Ms. M.L. and concludes the paragraph with:

I believe that there is enough testimony to support the issue of an affair but that it has effected the children and that the defendant has dealt with this issue as best as she can.

[67] Ms. L. indeed approached the trial as a custody battle waged on the basis of past conduct without demonstrating relevance to parenting ability. Thus, an inappropriate amount of time was spent on matters such as the suspected affair and Mr. L.'s inconsiderate behaviour in disposing of pets without consulting her in the years before the children were born.

[68] Ms. L. asserts in argument: "I put myself in his shoes each day and do try to come half way but it takes two". This is a completely unrealistic assessment of her conduct that I have summarized in the previous section. In my view, she not only does not put herself in his shoes, but she has been completely blind to the best interests of the children in her dealings with Mr. L. over access. In my view she has deliberately tried to minimize the children's contact with their father. This has had a detrimental affect on the children's emotional well being and also their education and training, and if she was granted sole custody, there is no reasonable expectation that she would change her approach or behaviour.

- [69] Ironically, her assertion, to his benefit, that the children have equal emotional attachment to Mr. L. as to her, is probably also naïve and unrealistic, as suggested by Dr. Posthuma. However, I agree with Dr. Posthuma in this case that the relatively stronger bond that presently exists between the children and Ms. L. will be equalized in time and is offset by the positive gains in their intellectual and emotional development that can be provided by Mr. L.
- [70] Ms. L. makes the point that Mr. L. is a "rule man" and she clearly does not favour the added structure in Mr. L.'s life that Dr. Posthuma sees as an advantage. This suggests a hypothetical concern that it may not be in the children's best interests to be thrust into an overly structured environment. But Mr. L. did not impress me as inappropriately regimented, and I was impressed by the degree to which he and Ms. M.L. had similar perceptions of the children's needs and with their apparent accomplishments with the children during the limited access that has occurred.
- [71] It is clear to me that both Mr. L. and Ms. M.L. understand fully the importance of the children's relationship with their mother. I accept their assurances that they will not only fulfill their promises to maximize that contact but will also provide the necessary funds to assure that it occurs. This will be of great benefit to the children.
- [72] Ms. L. asserted in her testimony, and in argument, that if custody is granted to Mr. L. she will move to Ontario to be closer to the children. She requests in her submission that, if the court awards sole custody to Mr. L., she be allowed "to move together to Ontario as a family and not have them removed from their home in B.C. with the aid of the RCMP". Unfortunately, as I write these reasons, the summer vacation is nearly one-half spent; in the event that the court was to grant an order accommodating an order in that manner, and there was non-compliance, inherent delays in enforcement would frustrate the implementation of the sole custody decision before the start of the school term and adversely affect the best interests of the children.
- [73] Ms. L. has it in her control to avoid the necessity of removal from her home with the aid of the RCMP, and there is certainly no reason that she cannot accompany the children to Ontario.
- [74] I order that Ms. L. will have access to the children until the departure time of flights from Fort St. John or Prince George, B.C., to be arranged, booked and paid for by Mr. L. on or after August 7, 2004. Ms. L. will pay for the cost of transporting the children to the designated airport and shall be reimbursed the reasonable cost thereof upon provision of receipts to Mr. L.
- [75] In the event that Mr. L. elects to travel to British Columbia by ground transportation to pick up the children on or after August 7, 2004, or is forced to do so by virtue of the non-cooperation of Ms. L., the RCMP are empowered to assist in the enforcement of this order and to enter any residence where the children may reasonably be believed to be situate.

- [76] The following provisions, commonly referred to as the Master Joyce model, shall apply to define the joint guardianship hereby awarded:
- a. The parents are to be the joint guardians of the estate of the children;
 - b. In the event of the death of either parent, the remaining parent will be the sole guardian of the person of the children;
 - c. The parent who has the primary responsibility for the day to day care of the children will have the obligation to advise the other parent of any matters of a significant nature affecting the children;
 - d. The parent who has primary care will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the children, including significant decisions concerning the health (except emergency decisions), education, religious instruction, and general welfare of the children;
 - e. The parent who does not have primary care will have the obligation to discuss the foregoing issues with the parent and each parent shall have the obligation to try to reach agreement on those major decisions;
 - f. In the event that the parents cannot reach an agreement with respect to any major decision despite their best efforts, the primary care parent shall have the right to make such decision;
 - g. The other parent shall have the right to seek a review of any decision which that parent considers contrary to the best interests of the children;
 - h. Each party will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals and third party care givers.
- [77] Ms. L. shall have access to the children for the first six weeks of each summer vacation commencing on the day following the last day of school. She shall also have access to the children for the entire period of spring break in each year. In the event that Ms. L. relocates to Ontario, each parent shall have access to the children for one-half of the Christmas vacation period with Ms. L. having the first half of the Christmas vacation in even numbered years, and Mr. L. in odd numbered years. In the event that she does not relocate to Ontario, Ms. L. shall have access to the children for the entire Christmas vacation period in each year, commencing on the day following the last day of school and ending on the day preceding the next day of school, with the transportation costs of access being borne by Mr. L. In the event that Ms. L. moves to Ontario the parties are at liberty to apply in respect of weekend or other intermittent access.

DIVISION OF ASSETS/LIABILITIES

- [78] The triggering event was a s. 57 declaration pronounced March 31, 2003.

[79] The only significant family asset is the plaintiff's military pension. The amount that would be paid to Ms. L. as a result of the division of pension entitlement from the date of marriage to the date of separation on December 6, 2000, is \$127,365.61. The division for the period from the date of the marriage to the date of the triggering event is approximately \$163,481.45.

[80] The plaintiff submits that an equal division of his pension benefits would be unfair for several reasons -

- a) the parties separated on December 6, 2000, after which the defendant admits to increasing the parties' debt via credit cards and cash withdrawals;
- b) since separation the plaintiff has paid a disproportionate share of the family debt, approximately \$22,434.10 out of a total of \$39,900.00; and the plaintiff claims that he has repaid the incorrect deposit by the military in the amount of \$4,500.00 (it is unclear that this is supported in the evidence however) and costs of moving items out of long term storage of \$810.00 for which he should be compensated;
- c) the defendant admits to receiving an unequal share by over \$30,000.00 of the family possessions at the time of separation;
- d) the plaintiff has been obliged to pay substantial legal costs expected to exceed \$80,000.00 due in the most part to the defendant's unwillingness to respond to numerous requests concerning access;
- e) the defendant is unlikely to agree to pay any extraordinary expenses associated with the children in light of her denial that they have any problems with respect to academic development or health.

[81] The plaintiff suggests that the defendant's share of the pension should be 35% rather than 50%. I think the second and third of these reasons constitute sound reasons that an equal division of the pension benefits would be unfair. In my view a fair division is to divide the pension by allocating to Ms. L. the pension entitlement between the date of marriage, July 15, 1982, and the date of separation December 6, 2000, that is approximately \$127,365.61.

[82] The plaintiff has an RRSP valued at approximately \$319.35 and the defendant cashed in her RRSP's valued at \$2,802.41. No order of division is made in respect of RRSP's.

[83] Household effects have been divided to the mutual satisfaction of the parties save and except that the plaintiff wishes to receive his fly fishing rod, fly fishing life jacket, box of fishing gear, neoprene stocking foot hip waders, booted hip waders, fins, a Husqvarna chain saw, coin collection and stamp collection, and the defendant wishes to receive her mother's painting and family photos. I order that

the above articles will be exchanged in accordance with those requests.

[84] The parties CPP credits shall be divided equally as at the triggering event date.

- [85] The plaintiff shall retain sole ownership of a 1982 BMW valued at \$2,000.00.
- [86] The only remaining property item to discuss is the approximately \$17,000.00 of credit card debt in Ms. L.'s name owed to four different lenders.
- [87] I agree that the plaintiff has paid his share of the family debt. Although Ms. L. claims she does not have the financial means to service the remaining credit card debt at this time, this is merely a function of her choice of not working outside the home and adjusting her budget accordingly. The retirement of this relatively smaller portion of the debt will not impede her ability to become economically independent or self-sufficient, which I think would be the only reasonable basis for apportioning the responsibility to Mr. L.

SPOUSAL MAINTENANCE

- [88] Ms. L. had to be prompted at the outset of the trial to indicate whether she was maintaining a claim for spousal maintenance and she stated that she was applying for \$850.00 per month. At one point in her testimony Ms. L. indicated that she had all the money that she required. She was employed somewhat intermittently but very frequently during the marriage and at one point was able to earn \$4,000.00 per month providing in-home daycare. In 2003 the deposits into her account were approximately \$35,000.00. She admitted on cross-examination that not all the cash she received from her babysitting was deposited into her account. Her annual living expenses are \$22,200.00 according to her Form 89 sworn April 7, 2004.
- [89] I am not satisfied that the defendant suffered any economic disadvantage from the marriage or its breakdown and I think she has the ability to be self-sufficient. I conclude that she has not demonstrated a need for spousal support.

CHILD MAINTENANCE

- [90] In light of the uncertainty surrounding whether Ms. L. will relocate to Ontario, and if so, when she will obtain employment, and in light of the credit card debt she remains burdened with at this point in time, and has not been servicing, I think it is appropriate to suspend her obligation to pay child support for one year from the date of these reasons on the basis of hardship.
- [91] Counsel for the plaintiff sought liberty to speak to costs after judgment and that request is granted.

"I.C. Meiklem, J."

The Honourable Mr. Justice I.C. Meiklem

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