
CANADA / JUDGMENT

M.M. v. L.M.

2020 BCSC 798

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 798 M.M. v. L.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.M. v. L.M.,

2020 BCSC 798

Date: 20200529

Docket: E115351

Registry: Kelowna

Between:

M.M.

Claimant

And

L.M.

Respondent

And

Holding Company

Respondent by Counterclaim

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Counsel for the Claimant

and Respondent by Counterclaim:

M.M. Sinclair

The Respondent on her own behalf:

L. M.

Place and Date of Trial/Hearing:

Kelowna, B.C.

February 18 - 21, 24 - 28, 2020

Place and Date of Judgment:

Kelowna, B.C.

May 29, 2020

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I. Introduction

- [1] This is a high-conflict family law case that has, unfortunately, torn this family apart. The parties have four children. Three of the children have reached the age of majority and are no longer dependant on their parents. Accordingly, the adult children are not the subject of any orders in this action.
- [2] However, the adult children are involved in the conflict as they have chosen sides between their mother and father. Therefore, the conflict between the parties has become a conflict that involves the entire family. Hopefully, once the issues in this action have been decided, the family can begin a process of healing and reconnection.
- [3] The parties' youngest child, S., is 10 years old.
- [4] The parties were married on November 12, 1994. They separated in October 2016 and divorced by an order dated March 5, 2018.
- [5] In August 2019, the claimant married his current spouse. The respondent also remarried, but she is no longer in that relationship.
- [6] At the commencement of the trial, the respondent refused to participate in the trial. However, at my urging, she agreed to participate in the process. She cross-examined witnesses, gave direct evidence on her behalf, and made submissions at the conclusion of the trial. The respondent has no legal training but, to her credit, she did the best that she could to present her case.
- [7] The orders sought at the trial of this action are as follows:
 - a) orders relating to the child, S., including orders for custody or primary residence, guardianship, parenting responsibilities, and child support;
 - b) orders for the division of family property;
 - c) a spousal support order for the respondent;
 - d) conduct orders against the respondent; and
 - e) an injunction restraining the respondent from posting negative comments about the claimant on the internet.

II. Background Facts

- [8] The claimant is 46 years of age and resides in Vernon, BC. He is a professional who owns and operates a private practice in the Thompson-Okanagan area.

- [9] The respondent is 45 years of age and now resides in Kelowna, BC. During her relationship with the claimant, she raised the children and took care of the household. For a period of time, the respondent assisted the claimant in his practice by managing the office. Since the separation, the respondent has been attempting to establish herself as a motivational speaker and transformational coach.
- [10] The parties met each other in August 1994. At that time, the claimant was attending university in Edmonton, Alberta. The respondent worked in Waterton, Alberta.
- [11] The parties married on November 12, 1994. The respondent did not work for a few years after the marriage but eventually took employment as an ophthalmic assistant. She continued as an ophthalmic assistant until the children were born.
- [12] During the marriage, the parties moved to a number of different locations in order to pursue the claimant's professional training. They lived in Calgary, Alberta between 1999 and 2002, where the respondent sold Pampered Chef products in the evenings and on weekends. They moved to Iowa for approximately two years, where the respondent took courses and became a personal trainer. The parties also resided in Indiana for a time, where the claimant completed his professional training.
- [13] The claimant started in his professional education program in 1996. He completed his professional training in 2009 and started in private practice. He has continued in private practice since then. The parties moved back to Alberta in 2011 and then moved to Vernon in 2013. The parties lived in Vernon until their separation.
- [14] The claimant conducts his private practice through two companies. He runs all of the revenues and expenses from his practice through an operating company (the "Operating Company"). Both parties hold shares in the Operating Company.
- [15] The claimant works from a building owned by a holding company (the "Holding Company"). The Holding Company owns one asset, which is the building from which the claimant operates his practice. The Holding Company leases the building to the Operating Company. Both parties also own shares in the Holding Company.
- [16] The main location for the claimant's practice is in Vernon, BC, but he also has a practice in Kamloops, BC. For a period of time, the claimant also worked in Kelowna and Salmon Arm, BC, but he has discontinued both of those practices.

III. History of the Relationship

- [17] According to the claimant, the relationship between the parties has been rocky right from the beginning. He testified that there were good times and bad times but that it was like a roller coaster. He says that the respondent got angry and began yelling when they disagreed. He describes her as being unhappy with life. The claimant testified that it was unpleasant to be around the respondent when she was displeased, so he gave in to her demands. He says that if there was any disagreement, he learned to just go along with her.
- [18] The claimant testified that the respondent has temper issues and depression. He testified that she was on medications for her depression and for control of her impulses. The claimant says that their relationship was pretty good if the respondent was on her medication; however, if she went off of her medication, the relationship was rocky.
- [19] When the children were young, the respondent was the main caregiver for the children, and she was the person who looked after the household. Both parties are deeply religious people with a strong devotion to their church. They have attempted to raise their children with the same level of devotion to their religious beliefs.
- [20] The claimant describes the respondent as a good mother if she was doing well on her medications. However, he says that there are a number of instances where she has shown inappropriate conduct towards the children.
- [21] The claimant testified that in October or November 2014, when their oldest daughter was still in high school, the respondent told their daughter to leave the family home because their daughter was rebelling against their religious beliefs. The claimant alleges that the respondent was displeased because their daughter was gone for long periods of time without telling her parents where she was or contacting them. The banishment from the family home resulted in their daughter living with family friends. Approximately three weeks later, the respondent allowed her daughter to return to the family home on the condition that she fulfil her daily religious obligations.
- [22] The claimant testified that he disagreed with the respondent's action in kicking their daughter out of the family home, but he did not intervene in order to avoid any confrontation.
- [23] According to the claimant, there was a period of time in 2015 or 2016 where the respondent did not get out of bed for two months. She left the claimant and the older children to take care of the youngest child, S., and the household.
- [24] Near the end of their relationship, there was an incident in which the respondent struck their oldest daughter. The respondent and their daughter were arguing outside of S.'s room when the incident occurred. The claimant says that he had to intervene between the two in order to stop the confrontation.

IV. The Separation

- [25] In February or March 2016, the respondent told the claimant to leave the family home. The claimant alleges that the respondent told him to leave because he was unwilling to tell his side of the family that they were all bad people. According to the claimant, the respondent did not get along with his family. Therefore, earlier in their relationship, the claimant cut off ties with his family at the insistence of the respondent. The claimant says that the respondent was not satisfied with the claimant cutting off ties with his family; she wanted the claimant to tell them exactly what bad people they were. The claimant alleges that when he refused to do so, the respondent told him to get out.
- [26] The respondent did not deny the claimant's version of what transpired. Her evidence is that she gave the claimant an ultimatum to "fix what was going on or get out". However, the respondent did not identify at trial what it was she wanted the claimant to fix.
- [27] The claimant left the family home and stayed at a friend's cabin. He moved back into the family home approximately three weeks later at the request of the respondent.
- [28] The parties continued to reside in the same home until October 2016, when the respondent told the claimant to leave. The relationship finally came to an end as a result of a disagreement over whether taking the oldest daughter's cell phone away from her was an appropriate punishment. The respondent had taken the oldest daughter's cell phone away from her as a punishment. The claimant did not agree with the punishment, so he returned his daughter's cellphone. When the respondent found out that the claimant returned the phone, the parties argued. The claimant testified that during the argument, the respondent ran to the kitchen, retrieved a knife, and held it to her stomach.
- [29] The claimant was able to calm the situation down to the point where the respondent gave up the knife and retired to her bedroom. At 3:30 a.m., the respondent woke the claimant to tell him that she did not feel safe and that he needed to get out. Accordingly, the claimant left the house and the parties have been living in separate residences since that incident.
- [30] The respondent admits that she told the plaintiff to get out of the house. However, the evidence establishes that she told S. that the claimant walked out on the family. The respondent denies having done so, but the report of the psychologist, Robert Colby, suggests otherwise. Mr. Colby describes what S. understands about the separation in his report of August 20, 2019. Mr. Colby reports that:
- [S.] then said, "My dad just walked out at night. I did not get to say goodbye." He then added, "I was five." He said his mother told him that.
- [31] The respondent also told a former family friend that the claimant left the family. The former family friend testified that the respondent and S. were in her Beach Shop on the day following the separation. At that time, the former family friend did not know that the parties had separated. However, she recalls that while in her shop, the respondent saw the claimant drive by in his vehicle. She testified that when the respondent saw the claimant, the

respondent broke down and stated, in the presence of S., that the claimant "left us--he packed his stuff and moved out--he abandoned his family".

V. Post-Separation

- [32] The respondent says that since the separation, she feels alienated and isolated. The friendships that she had while in the marriage have disappeared. The relationships she had with people in her church have also ended. She blames the claimant for the breakdown of those relationships.
- [33] The respondent admits that she was on medications for depression during the marriage. She claims that she has now entered a phase of self-discovery and acceptance in her life so she is no longer on any of the medications she has historically taken.
- [34] The respondent claims that she and the children who reside with her are afraid of the claimant. She testified that it was not safe in their home for the children as they were growing up. She claims that while their son, S., loves his dad, S. is terrified to see him. She testified as well that the entire family wanted love from the claimant but that the claimant was not able to give it.
- [35] The respondent accuses the claimant of inflicting abuse and harassment upon the respondent by being "passive-aggressive", "narcissistic", and "abusive". The respondent also accuses the claimant of being "addicted" to pornography.
- [36] While the claimant admits to having watched pornography, he denies being addicted to it and testifies that he has never exposed his children to pornography.
- [37] Beginning in 2015, the parties lived in a rental residence in Vernon. Following the parties' separation, the landlord issued an eviction notice for nonpayment of rent. The claimant explains that he had difficulty in paying one month's rent, but he brought the rent up to date shortly after it was due. The respondent claims that the claimant intentionally failed to pay the rent in order to have her evicted. Whatever the reason was for the nonpayment of rent, the landlord persisted with the eviction procedure. The parties lost their arbitration under the Residential Tenancy Act, S.B.C. 2002, c. 78, and the respondent was required to move out of the property in July 2017.
- [38] In August or September 2017, the respondent moved to a temporary accommodation at Big White Ski Resort near Kelowna. She took S. with her to Kelowna without the claimant's consent. She also enrolled S. in a Kelowna school without the claimant's consent.
- [39] Moving S. to Kelowna made it difficult for the claimant to spend parental time with S. as the claimant's work was in Vernon and Kamloops.
- [40] From the date of separation to the judicial case conference on August 16, 2017, the respondent allowed only limited parenting time for the claimant. The judicial case conference resulted in an order granting the claimant a structured parenting time schedule.

The judicial case conference order granted the claimant parenting time with S. every second Tuesday from 5:00 p.m. to 7:00 p.m. and every second weekend from Friday after school until Sunday at 6:00 p.m. The order also provided that the parties could arrange parenting time on such other dates and times as agreed between the parties. However, the respondent refused to agree to any additional parenting time for the claimant.

- [41] Shortly after the judicial case conference order, the claimant requested that the respondent allow him to pick up S. at school on Friday afternoon to commence his parenting time. The respondent refused the claimant's request. In addition, the claimant requested that the respondent allow him to take S. on a vacation to visit the claimant's mother. However, the respondent again refused to agree.
- [42] Therefore, the claimant made an application for an order allowing him to pick up S. at school on Friday afternoons for his parenting time and for an order allowing him to take S. on a vacation between November 10 and November 14, 2017. The claimant obtained the orders he was seeking on October 2, 2017, without a hearing and by consent.
- [43] In the fall of 2018, the respondent removed S. from school for approximately one week and travelled with him to Texas. The respondent did so without obtaining the claimant's consent to take S. out of the country and without notifying the claimant that she was doing so. During this period of travel, the claimant did not know where the respondent had taken S. and had no way to contact him.
- [44] The respondent admits that the trip to Texas was not the first time that she had taken S. out of the country without the claimant's consent or knowledge. Before the trip to Texas, she took S. to Oregon for a couple of days.
- [45] The claimant describes numerous difficulties with obtaining the cooperation of the respondent with respect to parenting time with S. There have been numerous requests, made both verbally and in writing, for additional parenting time or modifications in parenting time. The respondent has either denied the requests outright or made no response at all.
- [46] The claimant requested parenting time with S. during Christmas 2018. The respondent's response was, in effect, to refuse any time to the claimant.
- [47] When the respondent would not agree to a request for parenting time during spring break 2019, the claimant made an application for parenting time during that period. On March 20, 2019, the Court granted parenting time to the claimant during the 2019 spring break.
- [48] Pursuant to the March 20, 2019 order, the claimant was entitled to two seven-day periods of parenting time with S. during the summer of 2019. In August 2019, the claimant requested the dates for his second seven-day period but received no response from the respondent. The claimant offered to take the weekend of August 24, 2019, in lieu of the seven-day period, so that S. could attend the claimant's wedding to his new spouse. The respondent did not respond to this proposal. Therefore, S. did not attend the claimant's wedding. The

respondent claims that S. did not attend because he did not want to, but she provides no explanation for why she did not respond.

- [49] During spring break in 2019, the claimant took S. to meet his new wife's family in Alberta. During this trip, S. spoke to the respondent by telephone. On the telephone call, the claimant heard the respondent refer to his new wife's family as "white trash". The claimant immediately took the phone away from S. and advised the respondent that her comment was not acceptable and hung up.
- [50] The respondent does not deny that she used the term "white trash" but suggests that the term was being used in a joking manner. It should be plainly obvious to the respondent that using that terminology in reference to the claimant's family is not acceptable. It is even less acceptable when the respondent uses the term in a conversation with the claimant's 10-year-old child.
- [51] On September 11, 2019, the claimant applied to vary the parenting time aspect of the judicial case conference order. As a result of the application, the Court modified the order so that the parenting time was shared by the parties on the following schedule:
- a) S. would be transferred to the claimant's care on Mondays at 9:00 a.m. and would remain in the claimant's care until Wednesday at 9:00 a.m.;
 - b) S. would be transferred to the respondent's care at 9:00 a.m. on Wednesdays and would remain in the respondent's care until Friday at 9:00 a.m.; and
 - c) the parties would alternate weekends from Friday at 9:00 a.m. until Monday at 9:00 a.m.
- [52] The claimant testified that he has also been unable to obtain the access code to S.'s cell phone. The claimant says that he has requested the code from the respondent, who refuses to provide it to him and insists that he get it directly from S.
- [53] In addition, notwithstanding a previous court order to do so, the respondent has refused to disclose her address to the claimant.
- [54] The respondent complains of the claimant's conduct following separation. In particular, she makes allegations that the claimant manipulates the situation to suit his purposes. However, she gives very little, if any, details about how the claimant has manipulated any specific circumstance for his purposes. While she may genuinely believe that the claimant is being manipulative, I have no evidence upon which to objectively make such a finding.
- [55] The respondent testified that gymnastics is an activity that S. enjoys and is excited about. The respondent claims that when S. made the gymnastics team, the claimant would not support S. in this activity. She alleges that the complainant gave her a number of concerns with S. participating in gymnastics. However, the respondent provided no details of what those concerns were. She testified only that she felt the conduct of the claimant, in opposing S.'s participation in gymnastics, put her and S. in an unsafe situation. Therefore, the respondent told S. that gymnastics was not going to work out. The respondent suggests that

the claimant manipulated the situation to make her the unpopular parent.

- [56] The respondent also testified that the claimant creates chaos by making it look like he is being accommodating when he is in fact disrespecting her and not recognizing her needs. However, the respondent provided no details of or explanation for this allegation.
- [57] The respondent had a particular concern about the claimant's conduct in allowing S. to sit in his Vernon office all day on a school day when he was required to be attending school in Kelowna. The respondent claims that the claimant failed in his parental responsibilities by failing to get S. to school and by making him sit all day in his office without notifying the respondent.
- [58] The claimant explains that he had arranged with the respondent for her to pick up S. at his home at 7:00 a.m. so that he would be at school on time. At 7:00 a.m., the respondent did not arrive. The claimant says that he emailed the respondent to determine where she was but received no response. The claimant was required to attend to his appointments at work, so there was no way that he could get S. to school in Kelowna. Therefore, the claimant took his son to work with him where he stayed for the balance of the day. The claimant says that he told the respondent where their son was but that she did not pick him up until he got home that evening.
- [59] The claimant has attempted to arrange counselling for their son. He suggested a counsellor in Vernon but that became unfeasible after the respondent moved to Kelowna. Subsequently, the claimant asked the respondent to take S. for counselling to Sharla Schofield in Kelowna. However, the respondent refused that request.
- [60] On the other hand, the respondent has taken S. to counselling without consulting with the claimant. In particular, the respondent has taken S. for counselling with Leora Splett. She claims that she took him for counselling with Ms. Splett on an emergency basis because S. was complaining of neck pain. The respondent concluded on her own that S. required counselling rather than physical medical treatment because S. had not sustained any physical injury to cause neck pain. She concluded that S. required counselling to deal with emotional issues.
- [61] When the claimant found out about Ms. Splett, he also discovered that S. was seeing another therapist in Kelowna. The claimant asked the respondent for the identity of the therapist in Kelowna. The respondent refused to tell the claimant who it was. During her testimony at trial, the respondent revealed that she took S. to the Women's Shelter for counselling.
- [62] When the parties were residing in Vernon, S. attended Silver Star Elementary School. When the respondent moved to Kelowna, she enrolled S. in a private school with an arts focus called Studio 9.
- [63] The school records from Studio 9 indicate that S. is meeting expectations in his schoolwork. However, the principal of Studio 9 testified that from September 2019 to January 29, 2020, S. had a total of 21 absences from school. Five of those absences were with parental excuse.

Sixteen absences were without parental excuse. The principal testified that when a student is absent without notice of the absence from a parent, the school calls and leaves messages for the parent. If there is no response from the parent, the absence is recorded as an absence without parental excuse.

- [64] The principal of Studio 9 confirmed that S.'s frequent absences from school have negatively impacted his instruction in the classroom and his ability to complete his classroom work.

VI. Conduct of the Respondent

- [65] The respondent has been unwilling to follow the Court's directions and orders in this family law case. In particular:
- a) when the Court ordered the appointment of a parenting coordinator, the respondent refused to sign the parenting coordinator agreement because, according to the respondent, she did not want to incur the costs of the parenting coordinator and did not want to be bothered by another person involved in this process;
 - b) after the Court ordered that all communications between the parties be directed through the OurFamilyWizard application, the respondent intentionally chose not to check the application to receive communications from the claimant;
 - c) the respondent chose to ignore deliveries made to her from the claimant's counsel, which resulted in her being unaware of procedures that were taking place in this action;
 - d) the respondent denied court-ordered parenting time to the claimant for Easter 2018, June 2018 and August 2019;
 - e) on July 23, 2019, the court ordered that the respondent's email address be used as an address for service in these proceedings, but the respondent chose not to check that email address for information relating to the action;
 - f) the respondent failed to attend examinations for discovery on July 23, 2019 and on December 19, 2019, because she failed to check her emails and failed to open deliveries she received from claimant's counsel; and
 - g) the respondent has failed to comply with various disclosure orders made by the Court in advance of trial, including orders for financial disclosure.
- [66] It is also apparent that the respondent is unfazed by the potential that she could face penalties or sanctions for contempt of court by failing to comply with court orders. On more than one occasion during the trial of this action, the respondent indicated that she was unprepared to participate in the process and that she was prepared to be in contempt of court for failing to do so. While, at the urging of the Court, she did participate in the process, her statements that she was prepared to be in contempt indicate an attitude of disrespect for the Court's process and the Court's orders.

VII. Orders with respect to S.

[67] The pleadings in this family law action are unusual. The claimant, in his fourth amended notice of family claim, seeks orders with respect to S., orders relating to family property, and conduct orders. However, the claimant does not seek a divorce. Further, the claimant's pleadings limit his claim for parenting arrangements to the provisions of the Family Law Act, S.B.C. 2011, c. 25. The claimant does not plead the Divorce Act, R.S.C. 1985 c. 3 (2nd Supp.) with respect to his parenting claims.

[68] The claimant pleads both the Divorce Act and the Family Law Act in support of his claims relating to child support.

[69] The respondent has filed a counterclaim in which she claims a divorce under the Divorce Act. She also seeks orders with respect to S. under both the Divorce Act and the Family Law Act. However, the respondent did not pursue the remedies relating to S. at the trial.

[70] On March 5, 2018, on the application of the respondent, the Court ordered that the parties be divorced.

1) Parenting Arrangements for S.

[71] Given the state of the pleadings and the claims advanced by the parties at the trial, it is my view that I must deal with the parenting arrangements for S. under the provisions of the Family Law Act. The claimant does not plead the Divorce Act with respect to his parenting claims.

[72] Section 37 of the Family Law Act provides as follows:

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;

- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (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.
- [73] On March 20, 2019, the Court ordered that Robert Colby prepare a report pursuant to s. 211 of the Family Law Act. The purpose of the report was to provide an opinion on the needs and views of the child and the ability and willingness of the parties to satisfy those needs.
- [74] Mr. Colby is a registered psychologist with over 40 years of experience in the field of family and child psychology. He has extensive professional training in assessment and therapy relating to family dynamics and parent training. He is well qualified to provide opinions with respect to the needs of the child and the ability of the parents to fulfil those needs.
- [75] Mr. Colby conducted extensive interviews with both parties and administered psychological testing to each of them. He also interviewed S. and took some time in observing S.'s interactions with each of the parties. Mr. Colby interviewed S.'s siblings. He conducted collateral interviews with three people presented to him by the claimant and three people whose names he received from the respondent. In addition, Mr. Colby conducted interviews of the counsellors and therapists who had interaction with the parties or S.
- [76] Mr. Colby prepared an extensive report that outlines the results of his interviews, a summary of the tests administered, and a list of recommendations for the ongoing care of S. Mr. Colby's report of August 20, 2019, is in evidence.
- [77] Mr. Colby makes the following observations, which are particularly informative:
- a) When asked to draw a family picture, S. drew a picture that included his mother, father, his three siblings, his sister's spouse and himself.
 - b) S. advised Mr. Colby that his mother told him that "my dad just walked out at night. I did not get to say goodbye. I was five".

- c) S. said he does not like the claimant's new spouse and that her children say mean things about him.
- d) S. told Mr. Colby that his father "lies", but he did not want to talk about it.
- e) The respondent has been actively engaged in providing care for her children throughout their development, and she presents with a great deal of stamina and energy for addressing the children's needs.
- f) The claimant has played a decreased role with the children, in a large part due to his professional career, but he has made every effort to spend time with the children when he was available.
- g) The respondent takes the position that the claimant should have no contact with S.
- h) The respondent has a long history of attending to the children's emotional and psychological care. She has been an active parent across a broad spectrum of their lives. This is less true of the claimant, who has played a secondary role in regard to parenting these children. It is not unusual within a family structure that there is a dynamic established with each parent having specific responsibilities both in terms of providing for the family and providing for the household. At points of marital breakup, parents need to re-establish their roles in their relationships with the children which is what the claimant has been attempting since the separation.
- i) Mr. Colby is concerned about the respondent's decision-making. She has a history of being depressed or inactive. There have been points where the respondent threatened suicide and where she was dysfunctional and remained in bed for a period of time and was unable to provide child care due to emotional factors.
- j) The role of the siblings of S. have an effect on his perception of his father as two of his siblings reject his father and one of his siblings rejects his mother. This places S. in the middle of the dynamic, and he makes verbal statements rejecting of his father and his father's partner and her children. However, this is counter to the observed behaviours regarding S.'s relationship with his father and his father's new partner.
- k) Each parent plays a role in depreciating the other parent. S. verbalizes negative statements regarding his father both based on his own experiences and accepting his mother's statements. At present, S. exhibits a positive relationship with both parents; however, he is placed in a vulnerable position in regard to accepting his father.
- l) The validity of the respondent's perceptions and her belief in regard to the risk that the claimant presents to S. are questioned by Mr. Colby. The respondent's present rationale and reasoning for eliminating the claimant from the co-parenting process is not consistent with the assessment of Mr. Colby or the information provided by third-party professionals who have worked with the family.

m) The positive influence of the claimant's engagement with S. is essential for S.'s well-being.

[78] Mr. Colby makes the following recommendations with respect to S.:

- a) that S. remain in the primary care of his mother and that she relocate back to Vernon so that S. can be registered in a Vernon school program;
- b) that parenting time with S. be shared equally between the parties;
- c) that a parenting time schedule be established in which S. is in one parent's care on Monday and Tuesday, in the other parent's care on Wednesday and Thursday and the parents have alternating weekends;
- d) that spring break be divided equally between the parties;
- e) that summer holidays be divided equally between the parties in two week segments. Any holiday plans involving travel should be established by May of that year and a detailed itinerary should be provided to the other parent with contact numbers for S.;
- f) that S. spend Christmas Eve and Christmas morning with one party and Christmas afternoon and Boxing Day with the other party on a rotating annual basis;
- g) when S. is in the care of the claimant, the claimant should not be engaged in any online distractions, and any use of electronic media should involve S., so that it presents an enhancement to the father-child relationship;
- h) since the parties have difficulty reaching mutual decisions and concerns have been raised regarding the validity of conclusions formed by the respondent, the parties should engage a parenting coordinator with authority under a standard parenting coordinator contract;
- i) since the parties have difficulty with communications, the parenting coordinator may choose to establish a parenting communication system such as OurFamilyWizard;
- j) that the parties engage a child therapist for S. to provide him with continued support; and
- k) that neither parent nor their extended family or associates present any negative information to S. or to anyone else in S.'s presence regarding the other parent.

[79] When determining the appropriate parenting arrangements for a child, the Family Law Act requires that I consider only the best interests of the child. In order to determine what is in the best interests of the child, I must consider all of the child's needs and circumstances including those factors set out in s. 37(2) of the Family Law Act. Of particular importance in this case are the following factors:

- a) the child's health and emotional well-being;
- b) the history of the child's care;
- c) the ability of each party who seeks parenting time to exercise his or her responsibilities; and

- d) the appropriateness of an arrangement that would require the parties to cooperate on issues affecting the child, including whether requiring the parties to cooperate would increase any risk to the child's safety, security or well-being.
- [80] It should go without saying, but Mr. Colby emphasizes that S. needs to engage with his father in order to enhance his well-being. The express desire of the respondent to eliminate the claimant from any parenting arrangement is not in the best interests of S.
- [81] Section 37(4) of the Family Law Act allows me to consider a party's conduct if it substantially affects a factor relating to the child's needs and circumstances as set out in s. 37(2). The respondent seeks to deny the claimant any time with S.; this would have a significant and negative impact on S.'s health and well-being.
- [82] The conduct of the respondent following the separation calls into question her ability to properly exercise her parenting responsibilities. In particular, the following conduct is of concern:
- a) failing to consult or even notify the claimant of her move to Kelowna and the enrollment of S. in the Studio 9 school;
 - b) seeking counselling for S. for complaints of neck pain rather than seeking medical attention;
 - c) refusing counselling for S. when suggested by the claimant but taking S. for counselling on her own without notifying the claimant;
 - d) travelling with S. across the border without the claimant's knowledge or consent;
 - e) unreasonably denying the claimant's requests for parenting time or modifications to parenting time;
 - f) failing to communicate parenting issues to the claimant;
 - g) ignoring communications from the claimant about S. and parenting issues;
 - h) allowing S. to miss a large number of days of school without explanation;
 - i) failing to comply with court orders relating to parenting time for the claimant and orders relating to other parenting issues; and
 - j) communicating inappropriately with S. by:
 - i. telling S. that the claimant just walked out at night; and
 - ii. calling the family of the claimant's new spouse "white trash".
- [83] The allegations that the respondent makes against the claimant with respect to his shortcomings in parenting are either insignificant, if viewed objectively, or without foundation in the evidence.

- [84] The respondent's allegation that the claimant is addicted to pornography has no basis in the evidence. There is no medical evidence to establish an addiction. There is also no evidence to suggest that the claimant viewed any pornographic material in the presence of his children or that there was any risk that he would do so.
- [85] The allegations that the claimant is abusive or that S. is afraid to spend time with his father also have no foundation in the evidence. The respondent made these statements during her testimony but did not provide any details. Mr. Colby does not make any such conclusions about the claimant.
- [86] However, I must not lose sight of the fact that the respondent has been the primary caregiver for S. throughout his entire life. I must also consider that she has given a great deal of herself in addressing the children's needs throughout their lives.
- [87] I am impressed by the work done by Mr. Colby in this case. He has done an extensive amount of work to provide this Court with a comprehensive report on the dynamics of the relationships existing in this family. In particular, he has provided an objective viewpoint of the needs of S. and the circumstances in which the child finds himself in this family. Therefore, I am prepared to accept, for the most part, the recommendations made by Dr. Colby in his report of August 20, 2019.
- [88] Accordingly, I will make the following orders with respect to the parenting arrangements for S.:
- a) S. will remain in the primary care of his mother provided that she relocates to Vernon by August 1, 2020.
 - b) If the respondent does not relocate to Vernon by August 1, 2020, the primary care and primary residence for S. will be transferred to the claimant effective August 7, 2020.
 - c) S. will be enrolled in school in Vernon commencing in September 2020.
 - d) Commencing immediately, the parties will share parenting time on a two-two-three rotating basis. The claimant will have parenting time with S. on Monday and Tuesday, the respondent will have parenting time with S. on Wednesday and Thursday. Weekends from Friday to Sunday will be rotated between the parties.
 - e) The party about to exercise parenting time will pick up S. at the other party's residence at 6:00 p.m. on the evening before his or her parenting time is to begin. Other members of S.'s immediate family, including the claimant's current spouse, may pick S. up for the parenting time exchange.
 - f) Notwithstanding paragraphs d) and e) above, if, at any time prior to June 30, 2020, S. is required to physically return to school, then the parenting time will remain as established by the order made on September 11, 2019, until the end of the school year.

- g) Summer vacations for S., commencing with the summer vacation for 2020, will be divided equally between the parties in two-week segments. If any of the parties have holiday travel plans those plans must be established and the itinerary and contact information for S. communicated to the other party by May 1 of the year of travel. The allocation of the two week segments will be agreed upon by the parties or, failing agreement, will be determined by the parenting coordinator appointed by this order.
 - h) Parenting time with S. during spring break of each year will be divided equally between the parties.
 - i) Parenting time over the Christmas holidays will be divided equally between the parties with S. spending Christmas Eve and Christmas morning with one parent and Christmas afternoon and Boxing Day with the other parent on a rotating basis. The claimant will have Christmas Eve and Christmas morning with S. for the Christmas holidays in 2020.
- [89] The parties have been unable to communicate with each other and have been unable to work productively together to make decisions relating to S. Therefore, it is appropriate to engage a parenting coordinator to assist the parties in meeting their obligations under these parenting arrangements. On September 11, 2019, an interlocutory order was made appointing Craig Neville as a parenting coordinator for the parties. Unfortunately, the respondent refused to sign the parenting coordinator agreement so the involvement of Mr. Neville never materialized. Accordingly, I will once again appoint Craig Neville as a parenting coordinator in this matter on the following terms:
- a) Pursuant to s. 15 of the Family Law Act, the parties will forthwith retain Craig Neville as parenting coordinator (the "Parenting Coordinator") for a term of 24 months, on the terms provided in this order and in the most current form of parenting coordination agreement (the "Standard PC Agreement") endorsed by the British Columbia Parenting Coordinators Roster Society (the "Society"). Where the terms of this order conflict with the Standard PC Agreement, this order will prevail.
 - b) The parties will sign the Standard PC Agreement and return the same to the Parenting Coordinator within 21 days of said agreement being provided to them by the Parenting Coordinator.
 - c) If the respondent refuses to sign the Standard PC Agreement, then the parenting coordinator will be engaged on the terms acceptable to the claimant.
 - d) The Parenting Coordinator may assist the parties by:
 - i. building consensus between the parties, including, but not limited to, by:
 - (1) developing and instituting guidelines for the implementation of the parenting terms of this order;
 - (2) developing and instituting guidelines for communications between the parties;

- (3) identifying, creating and implementing strategies for resolving conflicts between the parties; and
- (4) providing information respecting resources available to the parties for the improvement of their communication or parenting skills; and
- ii. making a determination respecting the parties' parenting responsibilities as permitted by the Family Law Act and regulations.
- e) The fees, disbursements and other charges of the Parenting Coordinator will be shared equally by the parties.
- f) The respondent's share of the fees, disbursements, and other charges of the Parenting Coordinator may be deducted by the claimant from the respondent's spousal support payments if the respondent fails or refuses to pay her share.
- g) Each party will have the right, pursuant to s. 19 of the Family Law Act, to bring an application for an order changing or setting aside a determination made by the Parenting Coordinator if the Parenting Coordinator has acted outside his authority or made an error of law or mixed fact and law.
- [90] I also order that the parties engage a child therapist to provide ongoing support for S. The parties will share equally the cost of the therapist. The claimant will provide the names of three potential therapists to the respondent. The respondent will either choose one of the three suggestions made by the claimant or, within 7 days, propose three therapists of her choosing for consideration by the claimant. If the parties cannot agree on a therapist for S. or if the respondent fails to submit her suggestions for a therapist, then the claimant will be entitled to choose the therapist unilaterally. If the respondent feels that the therapist chosen by the claimant is not appropriate, she will have liberty to apply to the court.
- [91] The respondent's share of the costs of therapy for S. may be deducted by the claimant from the respondent's spousal support payments if the respondent fails or refuses to pay her share.
- [92] The parties will:
 - a) put the best interests of S. before their own interests;
 - b) encourage S. to have a good relationship with the other parent and speak to S. about the other parent in a positive and respectful manner;
 - c) make a real effort to maintain polite, respectful communications with each other;
 - d) refrain from any negative or hostile criticism, communication or argument in front of S.; and
 - e) intervene immediately to prevent any negative or hostile criticism or communication about the other party by any extended family or associates.

2) Guardianship

[93] Section 39(1) of the Family Law Act provides that each parent of a child is the child's guardian. Therefore, the claimant and the respondent are guardians of S.

[94] Specific parental responsibilities for the guardians are set out in s. 41 of the Family Law Act. As guardians of S., the parties will exercise their parental responsibilities for S. in the following manner:

- a) Each party will advise the other party of any matters of a significant nature affecting S.
- b) Each party will discuss with the other party any significant decisions that must be made concerning S., including significant decisions about health (except emergency decisions), education, religious instruction and general welfare.
- c) The parties will attempt to reach agreement on significant decisions concerning S.
- d) In the event that the parties cannot reach agreement on a significant decision concerning S. despite their best efforts, the claimant is entitled to make those decisions, and the respondent has a right to apply to the Parenting Coordinator for a review of any decision that she considers contrary to the best interests of S.
- e) The parties have the right to obtain information concerning S. directly from third parties including, but not limited to, teachers, counsellors, medical professionals and third-party caregivers.
- f) During their parenting time, the party exercising the parenting time may make day-to-day decisions affecting S. and has the day-to-day care, control and supervision of S.
- g) In the event of the death of a parent, the surviving parent will be the only guardian of S.

3) Child Support

[95] There is no question that S. is entitled to child support. The basic legal principles related to a child's entitlement to support were summarized by Mr. Justice Kent in *Bennett v. Bennett*, 2015 BCSC 699 at para. 40, as follows:

- a) parents have a joint and ongoing legal obligation to support their children;
- b) the right to child support is the right of the children, not the parent who has primary care of them; and
- c) the payor parent's earning capacity and not what that parent actually earns determines the amount of child support payable.

[96] The amount of child support payable is determined under the Family Law Act and the Divorce Act by reference to the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The Guidelines are regulations made under the Divorce Act. The Guidelines set child support payments based upon the payor parent's earnings or earning capacity.

- [97] In this case, since I have ordered that the parties share parenting time with S. equally, I must consider s. 9 of the Guidelines. Section 9 of the Guidelines provides as follows:
9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [98] The first step in determining the appropriate amount of child support for S. is to determine the annual income of each of the parties for the purposes of the Guidelines. The Guidelines start from the premise that a spouse's annual income is the income reported in his or her T1 tax return. Presumptively, the Guidelines income is the amount claimed in the total income section of the tax return. In most cases, the total income in the tax return is at "line 150" of the tax form.
- [99] The court may depart from the "line 150" income for Guidelines purposes if that figure does not fairly assess the payor's income. If the payor's income fluctuates or is unpredictable, the court will look to an average income for a fixed number of years.
- [100] Further, s.19(1) of the Guidelines allows the court to impute a level of income to a spouse as the court considers appropriate in certain circumstances, including:
- a) where a spouse is intentionally underemployed or unemployed, other than where the underemployment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational health needs of the spouse; or
 - b) where the spouse has failed to provide income information when under a legal obligation to do so.
- [101] The claimant has produced his personal income tax returns and the financial statements and income tax returns for his companies. The claimant derives his personal income as dividends paid out of the Operating Company. The claimant's 2018 personal tax return is the most recent tax return available for the purposes of the trial since the deadline for filing tax returns for 2019 has just passed.
- [102] In 2018, the claimant declared his total income to be \$285,360. This entire amount of income is the taxable amount of dividends paid from the Operating Company to the claimant. However, s. 5 of Schedule III of the Guidelines requires an adjustment to the taxable amount of dividends paid from a Canadian corporation in order to arrive at the proper Guidelines amount. Section 5 of Schedule III provides that the taxable amount of

dividends received by a spouse is replaced by the actual amount of the dividends received. The rationale for this adjustment is that the actual amount of the dividends received by a spouse from a Canadian corporation is grossed-up for tax purposes to arrive at the taxable amount of those dividends. Therefore, the taxable amount of dividends declared in an income tax return is not the actual amount received by the spouse. In this case, the taxable amount of dividends received by the claimant is adjusted downwards to reflect the tax gross-up applied to the actual dividends. This adjustment results in a Guidelines income for the claimant of \$248,139.

- [103] The respondent suggests that the amount declared in the claimant's income tax return is not a fair representation of his income because it may have been higher if he had not shut down his practices in Salmon Arm and Kelowna. However, the respondent presented no evidence about why the claimant shut those practices down. The reason for shutting down those two practices was not put to the claimant on cross-examination, and there is no evidence to suggest that he shut those practices down in order to reduce his income to avoid his child and spousal support obligations.
- [104] Therefore, I find that a Guidelines income of \$248,139 per year is a fair representation of the claimant's income for Guidelines purposes. The child support obligation on the claimant based on this level of income is \$2,121 per month.
- [105] In this case, since the parties are sharing the parenting time with S. equally, I must consider the child support obligations of the respondent.
- [106] Since the date of separation, the respondent claims that she has been unable to work, partly as a result of her emotional state. She has not sought out work in office management, an area in which she has experience through the claimant's practice. She has not looked into returning to work as a personal trainer or an ophthalmic assistant. She has not done so because, in order to work as a personal trainer, she requires recertification. In order to work as an ophthalmic assistant, she also would require recertification, and she has not been involved in the field for over 20 years.
- [107] In more recent months, the respondent has embarked upon a plan to become a motivational speaker and a transformational coach. She has just started this process and claims not to have any income generated from that work so far. She has not created a business plan.
- [108] Unfortunately, the evidence before the Court relating to the respondent's income is a tax return from 2016. In 2016, the respondent declared approximately \$70,000 in income. This income was the taxable amount of dividends paid to the respondent. I assume the respondent received this dividend income from the Operating Company.
- [109] The respondent has not filed tax returns since 2016.

- [110] The respondent filed a financial statement in this action on August 10, 2017. That financial statement has income tax returns for 2016 and the years previous attached to it. However, it does not include any information about her 2017 income. It includes only a listing of expenses and assets.
- [111] The respondent presented no evidence of her income since 2016.
- [112] The claimant submits that I should impute income to the respondent because of her failure to disclose her current income as required by the Supreme Court Family Rules. The claimant submits that the respondent's failure to provide her income information is inexcusable since claimant's counsel reminded her to do so and because the respondent failed to attend at her examination for discovery on two occasions.
- [113] The claimant also submits that the respondent's failure to take steps to find employment since her separation is also a basis to impute income to her for the purposes of child support obligations.
- [114] I agree with claimant's counsel that the respondent's failure to comply with the Supreme Court Family Rules by providing the necessary financial information to allow this Court to assess the respondent's level of income is inexcusable.
- [115] The failure of the respondent to properly disclose her financial circumstance does not allow this Court to properly assess her financial situation and her ability to pay child support. While the respondent may not have filed tax returns since 2016, she has not given any information relating to her revenues since the date of separation. The respondent suggests that she has embarked upon a career as a motivational speaker and transformational coach. She has not provided any information about the income she has derived from those endeavors other than to say that she is just starting down this road.
- [116] The claimant submits that I should impute an income of \$30,000 to the respondent. The child support obligation on the respondent at an income of \$30,000 per year is \$279 per month under the Guidelines.
- [117] The claimant also submits that if there is a shared parenting arrangement ordered, a set-off of the respondent's child support obligation of \$279 per month from the claimant's child support amount of \$2,121 per month results in a monthly payment by the claimant of \$1,842 for child support.
- [118] In the circumstances of this case, I am prepared to impute an annual income of \$30,000 to the respondent for the purposes of child support. I am also prepared to offset her child support obligation from the child support obligation of the claimant. Therefore, the net result is that the claimant will pay the sum of \$1,842 per month in child support to the respondent commencing on June 1, 2020, and continuing on the first day of each and every month thereafter for so long as S. remains a child as defined in Part 7 of the Family Law Act.

[119] The claimant made no claims or submissions with respect to the payment of expenses contemplated by s. 7 of the Guidelines. However, those expenses will be paid 90% by the claimant and 10% by the respondent.

VIII. Property Division

[120] Section 95(1) of the Family Law Act presumes the equal division of family property and family debt unless it would be significantly unfair to do so. Section 95(1) of the Family Law Act provides as follows:

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

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

[121] In this case, I see no reason to vary from the usual presumption. Therefore, the parties will divide the family property and family debts equally.

1) Family Assets

[122] The claimant concedes that the following assets are family property:

- a) the Operating Company;
- b) the Holding Company;
- c) a 2016 Toyota Tacoma;
- d) trailers;
- e) a Malibu Sunsetter boat; and
- f) a TD Bank savings account.

[123] The respondent does not dispute the claimant's listing of family property.

[124] The claimant led no specific evidence about the value of the trailers or the Malibu Sunsetter boat. They are included as assets of the claimant in his Form F8 financial statement filed January 14, 2020. Claimant's counsel referred generally to his Form F8, but it is not an exhibit in the trial nor was the claimant specifically asked to confirm the assets listed in the form. However, as it is a benefit to the respondent to do so, I am prepared to accept the values attributed to these assets in the Form F8. Those values are \$2,000 for the trailers and \$13,000 for the Malibu Sunsetter boat.

- [125] The parties purchased the 2016 Toyota Tacoma while they were still together. On separation, the respondent kept the Toyota Tacoma and eventually sold it. The respondent's Form F8 financial statement, marked as Exhibit 4 in the trial, deposes that the value of the Tacoma truck was \$45,000 and that there was a \$20,000 debt owing against the truck. Therefore, the net value of the Toyota Tacoma is set at \$25,000.
- [126] The respondent's Form F8 financial statement also lists the value of the TD Bank savings account as an asset. The parties accumulated the funds in that account during the marriage. Therefore, that account is family property. However, the respondent depleted that account after the separation. At the time of the separation, the account had a value of \$16,197.
- [127] Experts in real estate appraisals and business valuations have assessed the value of the two corporate entities through which the claimant operates his practice. A real estate appraiser, Clifford Smirl, assessed the fair market value of the building owned by the Holding Company. A business valuation expert, Derek Sanders, assessed the overall value of both the Holding Company and the Operating Company.
- [128] Mr. Smirl assessed the fair market value of the property owned by the Holding Company to be \$675,000 as of March 11, 2019. Mr. Sanders considered the real estate appraisal and attributed a value to the real estate owned by the Holding Company of between \$670,000 and \$680,000. After considering the \$471,000 owing by the Holding Company under the mortgage for the building and the \$192,000 debt due by the Holding Company to the Operating Company, Mr. Sanders concluded that the value of the Holding Company was zero dollars to \$15,000.
- [129] The valuation of the Operating Company was based upon the value of the following corporate assets:
- a) the estimated net tangible assets;
 - b) goodwill;
 - c) the estimated cash on hand as of May 31, 2019; and
 - d) the accounts receivable from the Holding Company.
- [130] Mr. Sanders deducted income taxes and long-term debt from the value of the corporate assets and concluded that the Operating Company had a value of between \$425,000 and \$460,000.
- [131] In order to arrive at a value for the Operating Company, Mr. Sanders extrapolated the expected financial performance of the Operating Company from the year-end financial statements for the year ended December 31, 2018, to the valuation date of May 31, 2019. Mr. Sanders assumed that the performance of the Operating Company would mirror its performance in 2018. Therefore, he assumed that the cash on hand for the Operating Company would increase at the same rate that it did for the same period in 2018. That

assumption led Mr. Sanders to the conclusion that as of May 31, 2019, the Operating Company would have \$200,000 in cash.

- [132] Mr. Sanders' assumption did not account for any withdrawals of cash from the Operating Company for purposes other than reducing debt or purchasing new corporate assets. In this case, the claimant withdrew money from the Operating Company to pay ordinary business expenses, to support himself and to pay court-ordered child support and spousal support. As a result, the cash on hand for the Operating Company as of May 31, 2019, was \$23,850.41. The difference between the cash assumed by Mr. Sanders to be on hand as of May 31, 2019, and the actual cash on hand is \$176,149.59.
- [133] Mr. Sanders testified that his valuation of the Operating Company would decrease if the Operating Company used its cash for purposes other than for reducing debt or purchasing new corporate assets. He testified that the decrease in value would be the difference between the \$200,000 he assumed would be available and the actual cash held by the Operating Company as of May 31, 2019.
- [134] Accordingly, the business valuation report of Mr. Sanders dated June 18, 2019 overstates the value of the Operating Company by \$176,149.59. Therefore, the adjusted value for the Operating Company is between \$248,850.41 and \$283,850.41.
- [135] The claimant claims a further downward adjustment to the value of the Operating Company in the amount of \$612.51 because the Holding Company had this amount of cash in its account as of May 31, 2019. In my view, an adjustment to the value of the Operating Company for the cash in the Holding Company is not appropriate. The cash in the Holding Company should not affect the value of the Operating Company because they are separate legal entities.
- [136] In addition, Mr. Sanders values the Holding Company based on the value of its real estate holdings only. Mr. Sanders did not consider any cash assets for the valuation of the Holding Company. If anything, the value of the Holding Company should increase by the cash it had as of May 31, 2019.
- [137] Mr. Sanders assumed that the valuation date for the businesses was May 31, 2019. The valuation date for the division of family assets is usually the date of trial (*Sanai v. Mahmoud*, 2017 BCCA 155 at para. 13). Neither party provided an explanation for the May 31, 2019, valuation date. However, the claimant proceeded as though the appropriate date for valuing the businesses was May 31, 2019. The respondent made no contrary submissions. Therefore, I will accept May 31, 2019, as the date for valuation of the business assets. The parties presented no evidence to show any change in the value of the companies between May 31, 2019 and the date of the trial.
- [138] Based on the foregoing, I have concluded that the fair market value of the Holding Company is \$15,000 and the fair market value of the Operating Company is \$260,000.

[139] Subject to adjustments for the expenses related to the division of the family assets (which are discussed later in these reasons), the claimant must make an equalization payment to the respondent of \$124,401.50 in order to achieve an equal distribution of assets (the "Equalization Payment"). An accounting of the Equalization Payment is set out in the table below:

Asset

Asset Value (\$)

50% payable by claimant (\$)

50% payable by respondent (\$)

Holding Company

\$ 15,000.00

\$ 7,500.00

Operating Company

260,0000.00

130,000.00

2016 Toyota Tacoma

Value:

Loan Amount:

Net:

45,000.00

20,000.00

25,000.00

\$ 12,500.00

Trailers:

2,000.00

1,000.00

Malibu Sunsetter:

13,000.00

6,500.00

TD Bank savings:

16,197.00

8,098.50

TOTALS:

\$145,000.00

\$20,598.50

Net payable by claimant after offset (the Equalization Payment)

\$124,401.50

(\$145,000.00

- \$20,598.50)

[140] In exchange for the Equalization Payment, the respondent must execute all documents required to transfer her shares in both the Holding Company and the Operating Company to the claimant.

2) Property Disposition Expenses

a) Tax Consequences of the Corporate Share Transfer

[141] In *Sanai*, Justice Saunders held that a failure to allow for the tax burden imposed on the parties by a distribution of assets is an error in principle. At para. 32, Justice Saunders referred to the following passage from *Maguire v. Maguire*, 2016 BCCA 431:

[38] The case law that developed under the FRA provided that there is no absolute rule as to whether tax consequences should or should not be taken into account in the division of family assets. Where there is evidence that a division of family assets will attract tax consequences, an allowance should be made for tax. Where it is not clear when or in what amount taxes will be exigible, an allowance may not be made: *Murchie v. Murchie* (1984), 53 B.C.L.R. 157 at para. 390 (C.A.); *Halpin* at para. 63; *McPherson v. McPherson* (1988), 48 D.L.R. (4th) 577 at 583 (Ont. C.A.). Likewise, where taxes are "speculative" the court may not take taxes into account: *O'Bryan v. O'Bryan* (1997), 43 B.C.L.R. (3d) 296 at para. 54 (C.A.); *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 31-32.

[Emphasis added in *Sanai*.]

[142] The claimant wishes to retain the shareholdings in the Operating Company and the Holding Company. This will require that the claimant or the companies purchase the respondent's shares. The evidence of the corporate accountant, Cheryl Schmidt, describes two methods by which the parties can effect the transfer of the respondent's corporate shares. If the companies repurchase the respondent's shares, the respondent will pay tax on the purchase price as dividends. On the other hand, if the claimant purchases the respondent's

shares using dividends he receives from the companies, then the claimant will pay taxes on the dividends.

- [143] The evidence of Ms. Schmidt is that there will be tax consequences to the parties no matter which method they choose. However, the party who is required to pay the taxes depends upon the method chosen. In either case, the parties should share this tax liability equally.
- [144] The parties have presented no accounting evidence about which method of share purchase is preferable. Further, neither party has expressed a preference for one method over the other. In these circumstances, it is not possible to determine whether the companies should repurchase their shares or whether the claimant should purchase the shares directly.
- [145] The parties should agree on the method they wish to adopt for the purchase of the respondent's shares in the companies. However, if the parties cannot agree on the method, then the claimant may decide the method unilaterally.
- [146] Once the parties know the tax consequences of the share transfer, the taxes payable on the share transfer will be divided equally between the parties. If the respondent is required to pay the taxes on the transfer, the Equalization Payment will be increased by 50% of the taxes payable. If the claimant is required to pay the taxes on the transfer, he will be entitled to a credit on the Equalization Payment in the amount of 50% of the taxes payable.

b) Real Estate Commission

- [147] The claimant submits that he may need to sell the building owned by the Holding Company in order to make the Equalization Payment. He submits that if the sale of the building is necessary, then the parties should share the real estate commission and the conveyancing costs equally. I agree.
- [148] Therefore, I will order that if the claimant requires the Holding Company to sell the building it owns in order to pay the Equalization Payment, then the parties will share equally the real estate commission and the conveyancing costs that become payable within six months of this judgment. The claimant is entitled to credit for 50% of any such real estate commission and conveyance costs against the Equalization Payment.

3) Claimant's Student Loan

- [149] The claimant incurred student loans between 2002 and 2006 during the marriage. Therefore, pursuant to s. 86 of the Family Law Act the student loans are financial obligations incurred by the claimant during the relationship and, as such, are family debts.

- [150] The claimant is in the process of negotiating a reduced amount for the repayment of those student loans. Those negotiations are still ongoing. Accordingly, it is not possible to establish what the ultimate obligation for those loans will be. The claimant has requested an order that if and when he pays off those loans, the respondent will pay the claimant one-half of any amounts paid.
- [151] The Supreme Court of Canada in *Stein v. Stein*, 2008 SCC 35, approved the division of a contingent tax liability between the parties even though the liability would only crystallize in the future. Justice Bastarache in *Stein* held as follows at para. 11:
- [11] In my view, the fact that it is not feasible to precisely value an asset or debt at the time of separation does not alter the principle that the complete financial situation of both spouses needs to be considered in order to ensure a just result. In the context of assets, courts have concluded that spouses have a right to claim an interest even where the asset itself is "inchoate, contingent, immature, or not vested" (*Rutherford v. Rutherford* (1981), 23 R.F.L. (2d) 337 (BCCA), at p.342. See also *Grove v. Grove*, [1996] B.C.J. No. 658 (QL) (S.C.), and *Webb v. Webb* (1994), 135 N.S.R. (2d) 161 (S.C.)). I believe the same approach ought to apply to debts -- the principle of fairness requires that debts be considered even where they cannot be fully valued at the time of separation.
- [152] Therefore, I will order that the parties share equally any liability of the claimant for his student loans once the claimant determines the final amount payable.

IX. Spousal Support

- [153] In her counterclaim, the respondent claims spousal support pursuant to the Divorce Act. Section 15.2 of the Divorce Act provides that a court may make an order requiring one spouse to pay a reasonable amount to the other for support. The factors considered in making a spousal support order are set out in s. 15.2(4) and include:
- a) the length of time the spouses cohabited;
 - b) the functions performed by each spouse during the cohabitation; and
 - c) any order, agreement or arrangement relating to support of either spouse.
- [154] Further, s. 15.2(6) of the Divorce Act directs that in ordering spousal support the court should:
- a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[155] The Court of Appeal in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 32-35, established broad principles for consideration when ordering spousal support. Those principles can be summarized as follows:

- a) marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support;
- b) the statutory factors and objectives to be considered in awarding spousal support include both compensatory and non-compensatory principles;
- c) the compensatory support principle recognizes the need to compensate a spouse for the economic disadvantages arising from the end of the marriage and to account for economic advantages that are conferred on a spouse as a result of the marriage;
- d) the non-compensatory support principle recognizes the need to compensate a spouse for the loss of the economic partnership and the mutual support that both parties enjoyed during the marriage;
- e) the Divorce Act and the Family Law Act acknowledge both principles of compensation for spousal support because neither principle alone is sufficient to achieve a just and legal framework for spousal support; and
- f) it is not a question of applying one principle or the other but, rather, a matter of applying the relevant factors and striking a balance that best achieves justice in the particular case before the court.

[156] The economic disadvantages typically considered in the compensatory support principle include the withdrawal of one spouse from the workforce to assume primary responsibility for child care and household management. Withdrawing from the workforce to assume those functions often results in an impairment of that spouse's future economic opportunities.

[157] The non-compensatory support principle allows the court to assess the level of entitlement required to meet the spouse's needs after the separation. It is not limited to a level of support to meet the basic necessities but takes into account the standard of living enjoyed by the parties during the marriage.

- [158] The claimant agrees that the respondent is entitled to spousal support. The respondent is entitled to spousal support on the compensatory support principle on the basis that this marriage was one of long duration in which the respondent withdrew from the workforce to assume primary responsibility for child care and household management. She also withdrew from the workforce to assist the claimant in the building of his private practice.
- [159] The respondent is entitled to spousal support on the non-compensatory support principle on the basis that during the marriage, she was entirely dependent upon the claimant to provide her with the standard of living that she enjoyed throughout their relationship.
- [160] Once entitlement to spousal support is established, the level of support to which the respondent is entitled must be determined. In determining the amount of spousal support that is appropriate, the court generally refers to the Spousal Support Advisory Guidelines [SSAG]. The SSAG are an informal guide for the court to use as an advisory tool to determine what level of spousal support is appropriate and for what length of time.
- [161] The SSAG uses two formulas to assess the level of spousal support. One of those formulas is the "without child support formula" and the other is the "with child support formula". In this case, the claimant is required to pay and the respondent is entitled to receive child support. Therefore, the appropriate formula to be used is the "with child support formula".
- [162] The "with child support formula" attempts to calculate spousal support based on the combined net disposable income of each spouse. The net disposable income of each spouse is their gross income less taxes and deductions. The "with child support formula" also accounts for the payment and receipt of child support and gives child support payments priority over spousal support.
- [163] Counsel for the claimant has provided SSAG calculations from which the appropriate level of spousal support can be determined. The claimant bases his SSAG assessments on an annual Guidelines income of \$248,139 for the claimant and \$30,000 for the respondent. The assessments also assume a child support payment of \$1,842 per month payable by the claimant. These are the figures that I have determined to be appropriate for Guidelines income and child support. Based on these assumptions, the SSAG has suggested a spousal support payment of \$5,663 at the low-end, \$6,486 in the mid-range and \$7,311 at the high-end. Given the length of their relationship, the duration set by the SSAG is "indefinite".
- [164] The respondent is currently receiving \$6,824 from the claimant in spousal support pursuant to an interim order made on April 6, 2018. Based on the SSAG formula, I conclude that the respondent's spousal support should remain the same.
- [165] Therefore, spousal support payable by the claimant to the respondent will remain at \$6,824 per month and continuing on the first day of each and every month thereafter.

X. Conduct Orders

[166] The claimant seeks conduct orders against the respondent pursuant to s. 225 of the Family Law Act. The claimant submits that the orders he seeks are appropriate because of the respondent's history of showing animosity towards the claimant and of making disparaging remarks about him to S.

[167] While I agree that the respondent's conduct following the separation has been inappropriate and unacceptable, I do not interpret s. 225 of the Family Law Act as giving me the authority to make conduct orders against the respondent at this stage in the proceedings. Section 225 is part of Division 5 of Part 10 of the Family Law Act. The purposes for which an order is made under Division 5 of Part 10 are defined by s. 222 as follows:

222 At any time during a proceeding or on the making of an order under this Act, the court may make an order under this Division for one or more of the following purposes:

- (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
- (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
- (c) to prevent misuse of the court process;
- (d) to facilitate arrangements pending a final determination of a family law dispute.

[168] The parties, having taken this proceeding to trial, are past the point where settlement, resolution or other arrangements are a possibility. This judgment will bring the issues in this family law dispute to a conclusion.

[169] Therefore, I am not prepared to make any conduct orders pursuant to s. 225 of the Family Law Act at this stage in the proceeding.

XI. Financial Disclosure Requirements

[170] The parties will have an ongoing obligation to disclose their financial information to each other, even after this final decision. The ongoing financial disclosure is required so that the parties can assess whether a material change in circumstance has occurred that may require a variation of the support orders made in this action.

[171] Therefore, the parties will exchange their T1 general tax returns and their notices of assessment on an annual basis on or before June 1 of each year, commencing on June 1, 2021.

XII. Injunction

[172] The claimant seeks an injunction restraining the respondent from posting certain information on her social media sites. The nature of the information the claimant seeks to enjoin the respondent from posting is described in his fourth further amended notice of family claim as follows:

any material, comments or allegations relating directly or indirectly to the claimant, legal proceedings between the parties, or comments relating to the parties' child, [S.'s] experiences while in the claimant's or the claimant's wife's care.

[173] In support of his claim for an injunction, the claimant relies on the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. However, the test set out in *RJR-MacDonald Inc.* is the test for granting an interlocutory injunction. The *RJR-MacDonald Inc.* test does not apply when the court is deciding whether to grant a permanent injunction after a trial of the issue.

[174] The claimant is not before the Court asking for an interlocutory injunction to prevent irreparable harm pending a trial. The claimant is asking for a permanent injunction following a trial of the action.

[175] The BC Court of Appeal considered the test for a permanent injunction in *Cambie Surgeries Corporation v. British Columbia (Medical Services Commission)*, 2010 BCCA 396. In that case, the trial judge granted permanent injunctive relief based on the test from *RJR-MacDonald Inc.* Although the parties agreed that the trial judge had correctly set out the test, the Court of Appeal held that the trial judge applied the incorrect test. At paras. 27 and 28, Justice Groberman, writing for the Court, stated:

[27] Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.

[28] In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, per se, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.

[176] In *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46, the Newfoundland Court of Appeal considered *Cambie Surgeries* and refined the test further. In particular, the Court held that, in a private law action, it is not enough for an applicant to

"establish its legal rights", but rather the applicant must establish a cause of action, on the evidence. The Court distinguished *Cambie Surgeries* on the basis that the injunction sought in *Cambie Surgeries* was to enforce a statutory right as opposed to an injunction sought to remedy a private law wrong.

[177] The Newfoundland Court of Appeal in *NunatuKavut Community Council Inc.*, summarized the analytical framework to determine whether a permanent injunction is appropriate at para. 72:

[72] I will conclude this analysis by saying that the proper approach to determining whether a perpetual injunction should be granted as a remedy for a claimed private law wrong is to answer the following questions:

- (i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);
- (ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);
- (iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);
- (iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's *prima facie* entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);
- (v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?
- (vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[178] The claimant has not pled a cause of action against the respondent that could be the basis of a permanent injunction. The fourth further amended notice of family claim pleads an injunctive remedy but pleads no legal basis for that remedy. During submissions, counsel for the claimant alleged that the postings were defamatory, but he did not address the factual basis or the legal test for the tort of defamation. Further, even if the respondent's postings are defamatory, the claimant has not addressed whether an injunction is an

appropriate remedy.

- [179] In these circumstances, I am not satisfied that the claimant has established an entitlement to an injunction against the respondent. Therefore, I dismiss the claimant's request for an injunction.
- [180] However, my ruling on the injunction in this case does not prevent the claimant from pursuing a remedy in tort in which he may include injunctive relief.
- [181] The claimant refers to *R.W. v. P.C.*, 2015 BCSC 748 in which Justice Abrioux (as he then was) granted an injunction in a family law case. The injunction was to restrain the claimant from posting negative information about the respondent on the internet. However, the injunction granted by Justice Abrioux was an interim injunction pending the trial. Justice Abrioux specifically reserved the question of a permanent injunction to the trial judge.
- [182] The trial decision in *R.W.* is *R.W. v. P.C.*, 2017 BCSC 998. The trial judge, Justice Gropper, found that the information posted on the internet was defamatory and granted a permanent injunction restraining the claimant from further postings. However, the judgment does not address the test for a permanent injunction. The judgment also does not disclose whether the pleadings alleged the tort of defamation. What is clear from the judgment is that the Court held that the postings in question were defamatory.
- [183] Therefore, the case of *R.W.* does not establish the claimant's entitlement to an injunction.

XIII. Seized of Further Proceedings

- [184] Given the complexities of the issues between the parties and the previous conduct of the parties in this action, it is appropriate that I seize myself of any further proceedings that arise in this action. Therefore, I will so order.

XIV. Costs

- [185] The parties are at liberty to make submissions on the issue of costs. The parties may make their costs submissions in writing. The claimant will file his submissions and deliver them to the respondent within 14 days of the date of these reasons. The respondent will file her submissions and deliver them to the claimant within 14 days following receipt of the claimant's submissions.

"Hori J."

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