
CANADA / JUDGMENT

M. v. M.

2010 BCSC 1826

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1826 M. v. M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M. v. M.,

2010 BCSC 1826

Date: 20101217

Docket: 0934102

Registry: Prince George

Between:

J.A.M.

Plaintiff

And

S.S.S.M.

Defendant

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

Counsel for the plaintiff:

P.L. Schmit, Q.C.

Counsel for the defendant:

C.G. Fletcher

Place and Date of Trial/Hearing:

Prince George, B.C.

March 9 - 12, March 15 - 19,

March 29 - April 1 and April 29, 2010

Place and Date of Judgment:

Prince George, B.C.

December 17, 2010

INTRODUCTION

- [1] The parties in this divorce action appeared before this court to deal with issues of custody, guardianship and access, and division of family assets following the breakdown of their marriage on March 9, 2009. The culminating circumstance of their separation on that date was a physical assault by the defendant on his wife at their home in Prince George. Mr. M was subsequently charged with assault and that matter was dealt with in the Provincial Court on his entering into a guilty plea. He was subject to the terms of a peace bond.
- [2] The parties have two children; being R.M.M., born September 11, 2004; and S.M.M., born August 27, 2001. Since the date of separation the children have been primarily resident with Ms. M at the former family home in Prince George. While I refer to custody being in issue, it is not necessarily in issue being that Mr. M does not seek custody of the children but rather seeks access on terms quite different from the terms proposed by the plaintiff. Additionally, there are issues relating to the terms of a guardianship order with Ms. M seeking terms somewhat different from the terms of a 'Joyce Order' in that because of an inability to communicate she desires to have the ultimate right to determine certain guardianship decisions with Mr. M being given an opportunity to apply to the court in the event he disagrees. Neither is there a disagreement with respect to child support or spousal support.
- [3] The most disconcerting aspect of this lengthy trial is the fact that this trial proceeded without the benefit of having a s. 15 report dealing with the children. As the evidence developed there is no doubt that a s. 15 report was desperately needed yet both counsel proceeded with the trial without the court having the benefit of it. In addition to the issues relating to the children, the trial involves several unanswered questions regarding the accounting practices utilized by the accounting firm responsible for the preparation of yearend statements. There are unanswered questions with respect to potential tax liabilities of both parties. The potential tax liabilities relate to what I view as the write-offs utilized by the accounting firm that provided advice with respect to the incorporation of the numbered company utilized by the family regarding the transportation business operated by Mr. M. A review of the financial statements indicate to me that monies from the transportation business were used for personal expenses and to some extent to obtain tax relief that may or

may not be appropriate under the Income Tax Act. With respect to this issue neither party provided the court with any expert evidence. In -----Sohang v. Savedoff, [2001] B.C.J. No. 2248, 2001 BCCA 646 (B.C.C.A.), it was held that expert evidence is not required to prove a contingent liability of this type. Evidence was provided by the accounting firm utilized by the proprietorship and the numbered company regarding the efficacy of what had been done and the defence called Linn Collin Ross, chartered accountant, to provide some examples of what further work had to be done with respect to determining if there were in fact contingent tax liabilities arising as a result of expenses and write-offs that had occurred over the past several years. Mr. Ross was not called to provide expert evidence but only to give some evidence with respect to the books. He testified that he had looked at the general ledger documents but not underlying documents. In particular he noted that he had not been able to locate any s. 85 rollover documents pertaining to the transfer of assets from the proprietorship previously operated by Mr. M when M Transport Ltd. was incorporated on August 27, 2008. The defendant argues that there should be some allowance in any court order made with respect to an order dividing assets so that any potential contingent liability involving contingent tax liabilities with respect to the businesses operated in the trucking industry are included in any declaration under s. 57. Essentially, the defendant argues that any contingent liability arising from the operation of those businesses ought to be equally divided between the parties.

- [4] The plaintiff's position, both at opening and at the conclusion of this trial, is merely that one-half of the issued and outstanding shares of the defendant in 625237 B.C. Ltd. and M Transport Ltd. be transferred to the plaintiff, that she be appointed as a director of both companies and that the companies be wound up with the assets being sold and that all debts of the companies be paid with the net value of the companies being divided equally between the plaintiff and the defendant, and that other assets acquired by the defendant subsequent to separation, being primarily two Peterbilt trucks and trailers, be sold and those net proceeds from sale also be divided equally between the plaintiff and the defendant. The plaintiff further submits that if the plaintiff and defendant cannot agree on the manner of winding up the numbered company and M Transport Ltd. the matter would be referred to the Registrar for inquiry, assessment, or an accounting pursuant to R. 32 of the Rules of Court with the result of any inquiry, assessment or accounting to be certified and the certificate, when filed, be binding on the parties.
- [5] The defendant opposes the winding up of the companies arguing that the effect of such an order would be to destroy the income earning ability of the defendant and the goodwill of his transport business which has been developed over the past decade. The defendant further opposes Ms. M's involvement in the companies due to the inability of the plaintiff and defendant to work together as directors of the two companies.

CHILD AND SPOUSAL SUPPORT

- [6] By interim order made Friday January 20, 2010, the parties agreed to spousal support based on the defendant having a Guideline income of \$140,000 and that pursuant to the Guidelines it was agreed that the defendant pay the plaintiff the sum of \$1,940 per month for the interim periodic maintenance of the children of the marriage, commencing on the 1st day of December 2009 and continuing on the first day of each and every month thereafter until further order of the court. As I understand it, this amount of child support is to continue as a permanent child support order.
- [7] With respect to the issue of child support, I therefore order that the defendant shall pay to the plaintiff the sum of \$1,940 per month for the support of the children of the marriage, payable on the first day of each and every month, commencing on the first day of January 2011. Also, with respect to child support, the following shall also apply -
- a) The plaintiff will be entitled to claim the children as dependents for the purpose of entitlement to Child Tax Benefits, and such other government subsidies and tax credits that may be available;
 - b) On or before May 31 of each and every year the plaintiff and the defendant will provide to each other a copy of all documents required to be produced by them pursuant to s. 21(1) of the Federal Child Support Guidelines. In addition, the parties will provide a copy of their respective general ledgers and working papers for any closely held companies in which either of them owns any shares for the most recent year, prior to May 31, 2011, and thereafter prior to May 31 in successive years;
 - c) The defendant's basic child maintenance payments will be adjusted annually to comply with the Federal Child Support Guidelines, commencing 2011, and the adjusted amount based on the previous year's income will commence being paid on the following August 1st in each year;
 - d) The defendant and plaintiff shall maintain the children on their respective medical, dental and extended health insurance plans available to them whether for purchase or otherwise, either through their places of employment or through the defendant's businesses and companies or otherwise available to them by virtue of any relationship, for so long as they have such coverage;
 - e) The plaintiff and defendant will each pay their proportionate share of extraordinary expenses which will include the following -
 - i. Sports activities, including registration fees, game fees and reasonable equipment expenses with the plaintiff providing the defendant with a copy of any cancelled cheque, receipt and/or invoice establishing the expense;

ii. Health related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aides, glasses and contact lenses;

iii. Prior to incurring any non-retained medical, extended health and dental expenses, including orthodontic expenses, the parties will inform each other in writing of the cost and need to incur the expense and obtain the other party's agreement to the expense being incurred.

f) Based on the plaintiff having been found to have a Guideline income of \$9,260, and the defendant having a Guideline income of \$140,000, the plaintiff will pay 10% and the defendant will pay 90% of the extraordinary expenses and special expenses, and thereafter the proportion of the extraordinary and special expenses will be reviewed and determined in accordance with each party's Guideline income.

[8] With respect to spousal support, I was advised at trial that the parties had resolved the issue of spousal support and I order that the defendant shall pay to the plaintiff, for periodic spousal maintenance and support, the sum of \$3,540 per month commencing on the first day of April 2010 and continuing on the first day of each and every month thereafter to and including June 1, 2012 whereupon spousal maintenance shall cease.

CUSTODY AND ACCESS OF THE CHILDREN

[9] This is one of those cases where prior to the decision of *Robinson v. Filyk* (1996), 28 B.C.L.R. (3d) 21, 84 B.C.A.C. 290 (C.A.), the court no doubt would have come to the conclusion that because the parents were unable to communicate and put their own interests aside for the best interests of the children that joint custody would be unworkable. Later in these reasons I will go over the evidence heard relevant to the issue of the hostility that exists between Mr. and Ms. M. In this particular case however both the plaintiff and defendant have submitted that joint custody may be appropriate. I commend counsel for this approach because I have concluded that notwithstanding the hostility and the toxic relationship that exists between Mr. and Ms. M, they both care very deeply for their children and both recognize that their children love and need each of them notwithstanding the major differences in their parenting styles.

[10] In *Robinson v. Filyk*, Madam Justice Huddart said this at paras. 22 to 27:

[22] In *Anson I* I opined that a joint custody and joint guardianship order would be appropriate "where both parents are excellent parents, there is a history of co-operation with respect to the parenting of the child and there is no valid reason to exclude a parent from having significant input into the raising of the child" (at 370). I have come to be persuaded that such a statement is as much a statement of legal or factual presumption as that of the majority in *Baker and Kruger*. It is now clear that legal and factual presumptions have no place in an enquiry into the best interests of a child, however much predictive value they may have. The Supreme Court of Canada has stated absolutely clearly that such presumptions detract from

the individual justice to which every child is entitled.

Discussion

- [23] The concept of the best interests of a child has been called ephemeral. Certainly it is difficult to apply. However transitory it may appear, this concept is nonetheless the only test for guardianship and custody of a child available to a court in British Columbia.
- [24] The Divorce Act adds only two factors for a trial court to consider. Subsection 16(9) forbids the court from considering "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." Subsection 16(10) requires a court to "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, [a court] shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."
- [25] Section 24 of the Family Relations Act sets down the factors the court is to consider in assessing the best interests of the child. They include the health and emotional well being of the child, the views of the child where appropriate, the ties that exist between the child and other persons, education and training for the child, and the capacity of the available adult resources. Consideration of material well-being is relevant to guardianship of the estate of the child. Consideration of conduct is limited as in the Divorce Act.
- [26] In a country where there is no common parenting philosophy it may not be surprising that the legislatures have chosen to mandate individual enquiries into the individual child's best interests, rather than to impose a community view of parenting by laying down stricter guidelines for the exercise of a court's authority to decide what is in a child's best interests when parents cannot. The analysis of the child's needs and resources will be contained by the particular child's extended family and community.
- [27] Any thought that an enquiry into a child's best interests is to be "undertaken with a mindset that defaults in favour of a preordained outcome absent persuasion to the contrary" was dispelled in *Gordon*, supra at 58. Writing for the majority, McLachlin J. emphasized the individual nature of every enquiry at 58:

But Parliament did not entrust the court with the best interests of most children; it entrusted the court with the best interests of the particular child whose custody arrangements fall to be determined. Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the Divorce Act for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining. "[G]eneral rules that do not admit of frequent exceptions can[not] evenly and fairly accommodate all of the varying circumstances that can present themselves": per Morden A.J.C.O. in *Carter v. Brooks*, supra, at p. 51. The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests;

to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected. "No matter what test or axiom one adopts from the many and varied reported decisions on this subject, each case must, in the final analysis, fall to be determined on its particular facts and, on those facts, in which way are the best interests of the children met": *Appleby v. Appleby*, supra, at p. 315. [1]

[11] As such, as referred to by McLachlin J., the court has a duty to give each child individual justice by reviewing each child's unique relationship with parents, siblings, extended family and the community the child resides in. As such there are no longer any presumptions and there have been no presumptions in this court since 1996 that would thwart the court from involving itself in a sensitive inquiry into the needs and circumstances of the child, or in this case the children, of the marriage. I am thankful to counsel for having taken the position that a joint custody order may be appropriate given the best interests of these two young children. The principle difference exists with respect to the access proposed by each. Because of that it is necessary to look at the background of the parties and the evidence heard at trial with respect to the parenting styles of both parents. In that regard one must also deal with the backgrounds of the parties to fully understand the basis on which their parenting styles possibly originate. I would say that I am satisfied that the principal problem is, without a doubt, the issue of the oldest child S while the youngest child R does not present the same problem when it comes to the issue of parenting.

BACKGROUND OF THE PARTIES

- [12] At time of trial Ms. M was 33 years of age and Mr. M was 36 years of age. They graduated from the same school and commenced dating shortly after graduation when she was 17 and he was 19. After graduating from high school in 1994 Ms. M worked for a bookkeeping and management company and attended the College of New Caledonia. She obtained a marketing diploma in May of 1997. At this time Mr. M was working as a truck driver. He had been involved in truck driving even while he was a student in high school. After graduation Mr. M also became involved in dispatching with his father and later operated a proprietorship known as M Transport. During this time the parties dated and Ms. M performed accounting services for Mr. M at no cost.
- [13] At the time of their marriage on August 9, 1999 the parties resided in Langley, B.C. Ms. M was employed and Mr. M had his trucking company. The parties only lived in Langley for a short time where Mr. M made contacts in the plywood business for transporting plywood. Ms. M, with her accounting background, assisted with billings for the proprietorship while Mr. M operated his trucking company with either him or others driving for him.
- [14] In 2000 the parties relocated back to Prince George. After the move back to Prince George Mr. M expanded his trucking business where he had owner/operators hauling for him. Essentially, his operators hauled for him with contacts that he had made throughout British Columbia. M Transport would dispatch the owner/operators with the mills paying M Transport and then M Transport dispensing payments to the owner/operators. The owner/

operators trucks operated under M Transport's insurance and licencing and carried the name of his proprietorship on their trucks.

- [15] On the couples return to Prince George Ms. M began working for an accounting company, and, according to her, also worked 30 to 40 hours per week for the proprietorship making all data entries relating to the business. At about that time Ms. M's parents had built a new home and were in the process of selling their former family home which had been built in 1981 and a contract was entered into between the M's and her parents to sell the existing home for \$180,000, with payments at \$1,000 per month. At the time of trial there was some \$26,384.67 owed to the plaintiff's parents by the parties and the value of the home was agreed to be \$414,000. Her parents' new house is located within a few minutes of their former residence.
- [16] Shortly after the parties returned from the lower mainland a numbered company, 625237 B.C. Ltd., was incorporated for tax reasons. The numbered company was incorporated as a result of a suggestion from the bookkeeper. Mr. M and Ms. M each had 50% of the issued shares in the company.
- [17] When the parties were first married Mr. M attended the Jehovah's Witness Kingdom Hall and did bible study, although as a child he had attended the Sikh Temple. Mr. M did not convert to the Jehovah's Witness faith but the evidence is quite consistent with his wife and his two children being active in regularly attending at the Kingdom Hall on at least Wednesday evenings and Sundays.
- [18] Following their return to Prince George in 2000 Mr. M only attended the Kingdom Hall irregularly and just on Sundays. This continued for perhaps one year. There is some disagreement as to whether or not Mr. M, after the birth of his two sons, agreed that they would be brought up in the Jehovah's Witness faith but I accept that from the births of the children they were actively involved in the faith and while he may not have expressly agreed the fact is that their religious upbringing at the time of trial had been determined implicitly. It appears that Mr. M ceased attendance at the Kingdom Hall shortly after the birth of his son in 2001.
- [19] There is no doubt that there was a division of labour in this family brought about by Mr. M's concentration on his trucking business which included dispatching, owner/operators and driving his own truck when required to do so. Ms. M, I conclude, was a stay-at-home mother who not only cared primarily for the children but also attended to bookkeeping entries and coordinating the accounting for the proprietorship and later the corporate business with the accounting firm. It is certainly not unusual to see this type of division of labour where the husband is required to be on the road, so to speak, for five to six days out of seven. There is no doubt that Mr. M's focus at the time was primarily on his business, but he did make time available for his children by taking them on trips in his truck and having them around him when he was doing maintenance on the truck at the family home.

- [20] Over the years there were altercations between the parties, which included abusive language used by Mr. M against his wife. There were separations and arguments relating to the disciplining of their oldest child.
- [21] In many ways the resolution of the access regime must be viewed in light of the responses of the oldest child to his mother and his father. The difference in disciplining between the parties was detailed in an episode that happened at the residence of a neighbour, J.H., in the winter of 2007/2008. Mr. H has known Ms. M since 1977 along with her parents and family. He is also a member of the Jehovah's Witness congregation in Prince George. He and his family were friends with the M family and the M family would often visit with their two young children. Mr. H referenced a time when the oldest child and his father were skating. Mr. M developed a muscle problem and the skating was curtailed. He testified to an event that occurred shortly after when S was sitting on Mr. M's knee and described S's behaviour at that time as jabbing Mr. M in his leg to cause him pain. While Mr. M did not protest in any way, even when S called Mr. M "a loser", Ms. M reacted by striking S with her open hand to the side of his head. He described it as not being a light slap but insisted that Ms. M hit him as hard as she could resulting in S's head bobbing to the side.
- [22] Mr. M gives similar evidence. Ms. M could not remember the details. This type of difference in the parenting regime was once again brought to the forefront in February 2008 when S was in grade 1. All four members of the family were at home with Mr. M getting ready for work. According to Ms. M, S was being rough with R and pushing and hitting him. She took S to the bathroom and asked Mr. M to deal with him. She was not present when the discipline took place. Regretfully, S received a black eye. Mr. M explained how he did attempt to physically discipline S but due to S making a sudden move his eye was blackened. Upset occurred between the parties with Mr. M screaming at his wife that she was never again to ask him to discipline the children.
- [23] Although Ms. M attended at school with S on the Monday to explain to the teacher that it was just an accident the teacher, as she was obligated to do, called the Ministry and an investigation was started. As a result of that incident Mr. M attended an anger management course accompanied by his wife and S was enrolled in a counselling program put on by the John Howard Society.
- [24] By a letter dated June 12, 2009, Tom Wainwright, a family violence counsellor, provided an overview of his counselling. The family counsellor reported that Mr. M asked for anger management because of a potential for violence within his immediate family. Mr. Wainwright reported that Mr. M did well in the program but did not choose to do follow-up work.
- [25] After that early involvement with Mr. Wainwright, Mr. M again attended after he was charged with assaulting his wife in March 2009.

- [26] Aside from the issue of February 2008 there is no evidence and no suggestion of any physical violence between Mr. M and either of his sons. What is important, I believe, is that although the plaintiff gave evidence with respect to a number of incidents involving the son S and conduct by the defendant that she says are relevant to his ability to act as a parent, most of these incidents are matters that occurred after the date of separation up to and including the time of trial. They also include tape recordings of incidents that occurred shortly after this trial started. In particular, there are recordings that she made of S's interaction with her involving her son's displeasure involving guns that had been given to the boys by Mr. M and the taking away of a cell phone that had been provided to the children by Mr. M. I understand Ms. M's position to be that she felt this was an attempt to undermine parental authority.
- [27] One of the exhibits includes reports, of March 2 and 3, 2009, from Dr. Hay, consulting paediatrician. The correspondence is addressed to the family doctor, Dr. Kelly. They relate to two appointments. It would appear from the letter of March 2, 2009, that Dr. Hay first saw Ms. M and S on a request by Dr. Kelly. The first consultation was the 19th of December 2008 and the second was January 23, 2009. The appointments were done without any input from Mr. M or his knowledge. Dr. Hay's diagnosis resulting from the first attendance in December 2008 was that a toxic family situation existed and had existed over the term of the marriage. At the time of this attendance, S was 7 years, 4 months old. Ms. M obviously gave Dr. Hay an insight into her perception of S including him having behavioural problems at school and at home. Dr. Hay also makes a note of Ms. M having told her that she should have brought S to Dr. Hay two years ago but that her husband was opposed to this course of action. Dr. Hay comments that Ms. M advised her that she thinks her son, S, may have a mental illness because of his competitive nature.
- [28] Under diagnosis Dr. Hay referred to the family situation as being toxic, with both parents suffering from mental illnesses. Ms. M testified that she had never been diagnosed with a mental illness and she does not know how Dr. Hay would have come to this conclusion. She also, under diagnosis, states that S was a witness to significant domestic violence and refers to both parents having had a significant past trauma. Dr. Hay also refers to Ms. M having said that "discipline" does not help. By way of discipline it would appear from the report that the discipline that is being referred to is physical discipline administered by Ms. M, although she also advised Dr. Hay that "Mr. M hits S now and then". With respect to this information imparted to Dr. Hay I must say that there is no evidence of any physical violence between Mr. M and the children other than the February 2008 incident in the bathroom which I have already referred to.
- [29] Of some importance is that in December 2008 Dr. Hay recommended, inter alia, that there needed to be an immediate moratorium in the family with regards to hitting, swearing and yelling with both adults and children needing time out for any hitting, swearing or yelling; that the family have meals together to build communication and rapport.

[30] On the second visit to Dr. Hay on January 23, 2009, the one reference to Mr. M's yelling and swearing in the home is that Mr. M at that time continued to yell and swear at her and put her down in front of the children. Without any input from her husband Ms. M requested that S be given the medication Strattera. Strattera is used to treat attention deficit hyperactivity disorder by helping to increase attention and decrease restlessness and impulsiveness in children and adults. I would interject at this time that according to my notes of Mr. M's testimony he is opposed to any medical intervention for his son. In passing this could be a direct reaction to his own dependence on medication as he was diagnosed as being bipolar in the early 1990's and has experience with his medication that is not positive. In passing and dealing directly with the correspondence from Dr. Hay to family physician Dr. Kelly, this evidence was not tendered as expert evidence and Dr. Hay was not called to give evidence and was not cross-examined with respect to her conclusions or her diagnosis. As such, the weight to be given to her reports is not great but it does assist in the chronology and the information provided to Dr. Hay by Ms. M and Ms. M's version of the family structure and the events leading up to the parties' eventual separation in March 2009.

[31] Of somewhat more assistance with respect to better understanding the dynamics of S are the report cards and misbehaviour reports. The report cards are troubling. As early as May 23, 2008 it is reported by the school that name calling, pushing other students, and disrupting lessons were noted. The school principal, A.G.B., in a misbehaviour report dated May 14, 2008, said this:

Today at lunch time S spent his time splashing other students while they were playing by the little water area that they have all played nicely in. He would grab large pieces of grass and throw it in the water right in front of a student who was playing and this would soak that student. . . . S has had a number of problems on the playground. His consequence this time will be to stay at the office at recess and lunch for five days.

[32] In a second misbehaviour report dated January 29, 2009, the school principal reported that his homeroom teacher "had had enough of S not allowing her to teach or allowing the students to learn". He refers to S's conduct on attendances at his office:

When S came to the office he was laughing and continued to laugh as I tried to talk to him about his behaviour. He even laughed when I was on the phone to his mother. After that phone call he laughed even more. When I spoke of consequences for his behaviour choices he laughed. This is completely unacceptable.

[33] As a result of that episode S received an in-school suspension for a morning, was ordered to attend for recess and lunch at the office for one day and was not permitted to attend music until further notice but would sit in the office doing work assigned by the principal.

[34] In a further report of February 5, 2009, it is noted that S had been rude and disrespectful to his teacher and his peers and the principal also commented:

When I asked S about this he began to laugh as he did yesterday when I was talking to him. S continued to laugh until I raised my voice to him and told him to sit in the hallway until I could deal with him. He then stomped out of my office.

- [35] This, of course, was within a few days of the January 29th episode. The primary progress report of March 5, 2009, for the first time, shows a major drop in fine arts, work habits, attitude and effort. However, in the second report, dated June 25, 2009, some two months post-separation, work habits, attitude and effort were improving but were still relatively low as compared to previous reports.
- [36] This school information must be judged in correlation with the chronology of what was happening between the parties following their separation in March 2009, and the evidence of the school principal who gave evidence at trial.
- [37] Chronologically, as a result of the police involvement on March 9, 2009 when the parties' separated following the physical altercation, Mr. M did not have any access to the children until interim supervised access was granted by court order dated Friday May 1, 2009 following a Judicial Case Conference. The supervised access was for two hours per week and continued through to August 2009. Thereafter, in or about September 2009, Mr. M was permitted unsupervised access for two hours, twice a week, which was subsequently expanded to overnights occasionally. Thereafter, during the months of October and November 2009, with the assistance of an intermediary, Dr. Anthony, in the last week of November negotiations took place with respect to increasing access and as a result a draft order came into effect on an interim basis whereby a parenting schedule was agreed to as follows:

The parenting schedule of the parties shall include the following and such other times as the parties may both agree:

i.

The plaintiff shall ordinarily have the Children from Saturday at 6:00 PM to Wednesday at 9:00 PM, at which time the defendant shall pick up the children at the Kingdom Hall in Prince George, British Columbia;

ii.

The defendant shall ordinarily have the Children from Wednesday at 9:00 PM to Saturday at 6:00 PM;

iii.

At Christmas time, 2009, the defendant shall pick up the Children that [sic] 8:45 PM on December 23, 2009 and shall have them until 6:00 PM on December 25, 2009;

iv.

The plaintiff shall have the children from 6:00 PM on December 25, 2009 until 12:00 PM on December 31, 2009, to accommodate a trip to Edmonton by the plaintiff;

v.

The defendant shall have the Children from 12:00 PM on December 31, 2009 to 6:00 PM on January 2, 2010 and thereafter be [sic] ordinary weekly rotation, as described above, shall continue.

The parenting schedule for summer vacations shall be, until further order of this honorable court or written agreement of the parties:

a.

The plaintiff shall have the children with her in July in even numbered years and in even numbered years the defendant shall have the children with him in August;

b.

The plaintiff shall have the Children with her in August in odd numbered years and in the odd numbered years the defendant shall have the Children in July;

c.

Prior to booking any travel arrangements, whether domestic or international, the party who will have the Children with him or her shall provide to the other party the proposed dates of travel, a full itinerary and contact numbers where reasonably practicable for the Children;

d.

If the Children are not to be traveling beyond 50 km from Prince George for a week or more of a summer month in which they are to be with one or the other of the parties, the ordinary rotation will apply to that time.

[38] A.G.B., the principal of the elementary school that both children attended, gave evidence with respect to both the past and present situation regarding S. A.G.B. has known S since kindergarten. He testified that in the earlier grades there were the problems as evidenced by the reports I have referred to but his comment now was that the problems were not as great. He testified that S's conduct first came to his attention when he was in kindergarten and included pushing and shoving other children although he saw no pattern, however he recalled that on Mondays, following the weekend that the teachers would have to talk to him about S's conduct. He testified to being able to phone Ms. M at most times and found her to be very supportive in that she would offer to help out at home and would voluntarily come to the school to discuss S with him. He testified to S being disruptive in 2008 and confirmed the reports I have referred to in the misbehaviour reports. In particular, he referred to S's disruptiveness and disobedience and the situation in January and February of 2009. He became aware of the parties' separation in March 2009 when Ms. M came with her mother and advised him that Mr. M and she had separated and that there was a no contact order in

place. In contrast to the earlier reports regarding S, the October 2009 report disclosed S's improving behaviour and, in his words he said, "S had become just another kid in school". He also added under direct examination that he hadn't had to talk to S about any behaviour this year.

- [39] It is important to note that at the time he made that comment it was at time of trial. He was also asked to comment with respect to R, who was then in kindergarten, and his comments were simply that R was just another kid in the classroom and that he was a normal kid. Under cross-examination he agreed that since September 2009 S was just like any other student and was behaving well. He admitted that before he came to testify at trial he hadn't checked on S's activities with his homeroom teacher but he did recall an occurrence before the spring break which involved S being mad at other kids in the gym and being inappropriate. His recollection of the teacher's report to him was that she thought he was tired that day.
- [40] The principal also testified that S was showing signs of learning coping behaviours with assistance and that the principal was aware that since September 2009 Mr. M had been accessing the children fairly regularly as Ms. M had advised him that Mr. M did have more visitation with the two boys.
- [41] This evidence represented the only current information regarding S with respect to his current involvement in the school system.
- [42] During the trial I was provided with evidence relating to occurrences which had occurred in March 2010. Ms. M by that time had given her evidence in chief and had been cross-examined but she was re-sworn to provide evidence with respect to events that had occurred March 20 and March 22. Primarily the conversation dealt with the fact that Ms. M had taken the cell phone which had been provided to S. S had reacted negatively to this. There is no doubt that the language used by S must be viewed as objectionable language being used with one's mother but at the same time I appreciate the significance of cell phones in a child's life and what, in the circumstances, this cell phone represented to this seven year old who has been reported by his mother to lack self esteem. The cell phone represented a way of communicating with his father and I recognize that Mr. M had had the phone programmed so that it could only be utilized by S to communicate with his father. Cell phones to a generation just a few years older than S represent to these older children a means of communicating with the world at large. One just has to walk down any street in almost any city to become aware of the fact that young children, either in their early teens or even younger, hold their cellular phones close to their bosoms. I am not suggesting that S's lack of respect for his mother can be condoned on this episode however, notwithstanding that, one can easily understand S's reaction and his verbal reaction no matter how inappropriate his language was. As an aside, Ms. M had stated that S's swearing had only begun while the parties were in Czechoslovakia the previous year.

- [43] Ms. M has suggested that the parenting schedule presently in place as a result of the consent order the parties' were able to negotiate with the assistance of Dr. Anthony, should be modified so that she would have the children from Saturday at 6:00 p.m. to Friday morning prior to school, with the proviso that if Friday is a pro-d day or a statutory holiday or otherwise a non-instructional day at school, the plaintiff shall have the children until Thursday morning prior to school, and that the defendant shall ordinarily have the children from Friday after school to Saturday at 6:00 p.m., with the same proviso, for a non-instructional Friday, the defendant shall have the children commencing Thursday after school.
- [44] She states that this reduction in Mr. M's parenting is required because S's behaviour is deteriorating. This is contrary to the evidence provided by the principal A.G.B. In my view such a regime would not take into account the love that both children appear to exhibit towards their father.
- [45] During the trial I had an opportunity to observe both parties to this divorce action while each of them gave evidence and the other observed. I have no doubt whatsoever that an extremely toxic relationship exists between them. The toxicity of that relationship was raised once again after the trial of this matter concluded and the parties were again before the court on the 24th day of June 2010 obtaining orders that each of them be restrained from communicating or attempting to communicate with the other pursuant to s. 37 of the Family Relations Act, except for communications with respect to matters concerning the children of the marriage which communication was to be by text message or e-mail or in the event that a text message or e-mail was not feasible or in an emergency then by telephone or such other means that is reasonable in the situation. I do not know what the circumstances were leading up to that order but it does show that the toxicity of their relationship extended past the trial date and will no doubt extend into the future.
- [46] This factor does not mean however that using the criteria established in *Robinson v. Filyk*, supra, that the children should be deprived of as much contact with each of their parents as is reasonably possible while continuing at the same time to be in their best interests.
- [47] In *Marino v. Marino*, 2008 BCSC 1402, Mr. Justice N. Smith, in my view, correctly stated this with respect to whether or not I should deal at length with respect to the very private issues that involve the parties to this litigation when he stated at para. 12:
- [12] The plaintiff relies on a number of incidents of conduct by the defendant that she says are relevant to his ability to act as a parent. These reasons for judgment are a public document and I do not consider it necessary to describe these incidents in any detail. It is sufficient to say that the defendant has not always been able to appropriately control his anger at the plaintiff when in the presence of the children. . . .
- [48] I have also determined that it is not necessary for me to review in any great detail the multitude of examples provided by Ms. M. The parties are obviously from very different backgrounds and cultures. Each of them, in my view, deliberately seeks to identify the

problems primarily with S as arising from the other parent's disciplinary techniques. The apparent facts are that while R is not established as being anything but a normal 6 year old, S does have attributes, both at home and in the school setting, of a child that may require further involvement with medical personnel and teachers. As indicated previously, my principal concern lies with respect to the child S as there is nothing in the material to indicate that R is any type of problem whatsoever, although the defendant has referred to his youngest son as being an instigator however that is quite normal for a child of his age.

- [49] In the opening of this decision I referred at length to Madam Justice Huddart's decision in *Robinson v. Filyk*, supra. Some five years later Joyce J. discussed further factors to be considered by a court in relation to a custody order in *Jordan v. Jordan*, 2001 BCSC 1058 at para. 21, when he stated:
- [21] In my view, some other factors that are relevant to this enquiry include: (i) the ability of each parent to make proper decisions for the child; (ii) the extent to which the child will reside with each parent; (iii) the geographic distance between the parents' homes; (iv) the extent to which the parties' "parenting styles" may differ and, consequently, the extent to which their different parenting styles may provide the opportunity for disagreement; (v) the harm that may be caused to the child if the parents' disagreement on issues creates an atmosphere of conflict; and (vi) the nature of the disagreements in the past, particularly whether they relate to "access issues" that are likely to be resolved by the court order or whether they concern matters of child rearing that are likely to continue to arise. These are not necessarily all of the factors that have a bearing on what sort of custody order is in the best interests of the particular child but they are, I think, some of the important ones.
- [50] In this case there have clearly been difficulties in communicating between the parties. One of those difficulties included the defendant preparing a type of feel-good list for S and he hoped that Ms. M would also join in but she chose not to do so because of her feeling that it was too competitive. I, for one, was not able to determine why a parent would feel that way when there are attempts to build up a child's self esteem which has been identified in S as being low. I am hopeful however that because of the love they both show towards their children that this, with help from counsellors in the years to come, will be met.
- [51] The fact in this case that is so demonstrable of the ability of the parties to communicate is the fact that they were able to negotiate a very extensive parenting agreement through a third party. In my view the existence of that negotiated parenting agreement in 2009 demonstrates an ability to communicate in the best interests of the children notwithstanding the toxic relationship that exists between them.
- [52] Similarly, the existence of positive remarks by S's school principal over the five months since the terms of the parenting agreement were reached demonstrates to me that the amount of access the parties negotiated in November 2009 has had a positive affect on S. When I make this statement I do so with the acknowledgement that Ms. M takes a different view in that she sees the relationship between herself and S disintegrating as a result of the extended

time spent with Mr. M. All I can say is that in parental disputes such as this I, as fact finder, must take into account the independent sources that are available to me as quite often the views of interested parties become so focused on negative aspects that the positive aspects are clouded over. That is certainly something that a s. 15 Family Relations Act report would have assisted me in; however, I must deal with the facts and inferences arising from those facts that naturally arise.

- [53] In keeping with the additional factors outlined by Joyce J. in *Jordan v. Jordan*, supra, I have repeatedly considered in my mind the very different parenting styles and ideas held by the parties as to what is or is not in the best interests of the children. I have no doubt that these parenting differences were a source of dispute between the parties but not to the same scale that the disagreement between the parties over lifestyles had become.
- [54] I am satisfied that the principal differences between the parenting styles is the main issue between these parties rather than what was said by Mr. Justice Warren in *Larkin v. Glase*, 2008 BCSC 387, where his Lordship said, at para. 410:
- [410] There is no doubt that the period since the separation has been an extremely difficult and trying time for the parties and their children. The relationship between the parents was at times highly acrimonious. For reasons that are not entirely clear, I conclude that the defendant was extremely angry with the plaintiff and that this drove him to acts that were extremely detrimental to the children. In the presence of the children, he has spoken harshly to their mother and called her foul and abusive names. As well, he has allowed his anger to interfere with the best interests of the children, including their access to counselling and learning aids. In my view of the evidence, his recalcitrance has been driven only by his determination to maintain a presence in the lives of the children and his anger at the plaintiff, rather than a selfless attempt to do what is best for the children.
- [55] In this case I am more than satisfied that the defendant's anger at the plaintiff and the plaintiff's anger at the defendant has primarily contributed to the communication problems that exist between them.
- [56] I have concluded that Mr. and Ms. M are very intelligent in their own spheres. Mr. M is a highly successful business man in a very competitive business. Ms. M is a devoted mother and is seeking to upgrade her professional skills. When Mr. M was working long hours in his business Ms. M was primarily caring for two children and also doing many hours per week of bookkeeping services for the business.
- [57] They are both highly industrious and motivated people and I cannot help but conclude that it was that motivation that led to the ability to conclude a very all-encompassing interim access agreement with Dr. Anthony. Regretfully, I am of the view that the views held by each of them of the other's makeup over the months leading up to the trial regarding their son S have clouded their ability to see that based on the views of third parties, including the school teacher, the school principal and even Ms. M's father, are relatively quite positive. For this reason I have concluded that the plaintiff and the defendant will share joint custody of the

infant children of the marriage with primary residence of the children with the plaintiff pursuant to s. 16 of the Divorce Act.

[58] In addition, the plaintiff and defendant shall be joint guardians of the children of the marriage with joint guardianship for the purpose of this order to be defined as follows:

- a) The parents are to be joint guardians of the estates 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 plaintiff will have the obligation to advise the defendant in writing of any matters of a significant nature affecting a child;
- d) The plaintiff will have the obligation to advise the defendant in writing of any significant decisions which have to be made concerning a child, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of a child;
- e) The defendant will be entitled to provide the plaintiff in writing with his views regarding the foregoing issues and the plaintiff will be obligated to take the defendant's views into account in making her decisions regarding major decisions concerning the children;
- f) The plaintiff will have the right to make decisions concerning the children;
- g) The defendant will have the right under s. 32 of the Family Relations Act to seek a review of any decision which he considers contrary to the best interest of the children;
- h) Each parent will have the right to obtain information concerning the children directly from third parties including teachers, counsellors, medical professionals and third party caregivers.

[59] With respect to the weekly parenting, the parties had agreed on an interim basis that the plaintiff would ordinarily have the children from Saturday at 6:00 p.m. to Wednesday at 9:00 p.m. at which time the defendant would pick up the children at the Kingdom Hall in Prince George, B.C., with the defendant ordinarily having the children from Wednesday at 9:00 p.m. to Saturday at 6:00 p.m. The 9:00 p.m. commencement of Mr. M's parenting time was changed by mutual agreement to 8:30 p.m.

[60] Mr. M, in his evidence, advised the court that he would like a change to this weekly parenting regime so that he would pick up the children Thursday after school and return them to Ms. M at 10:10 a.m. on Sunday just prior to the Sunday church service at Kingdom Hall in one week, and then on alternating weeks he would pick up the children Friday after school and drop them off at school on Monday morning. This change was requested because of his need to be able to drive his own truck and meet with his contacts at various locations.

- [61] This change, in my view, would adversely affect the weekend time that Ms. M presently has with the children and would adversely affect their attendance to the Kingdom Hall on alternating Sundays. The children have, to this point, been very active in the activities at the Kingdom Hall on Sundays and such a change would not be, in my opinion, in their best interests. This is especially true with the plaintiff becoming enrolled in further academic studies.
- [62] I therefore order that the parenting schedule of the parties shall be as follows:
- a) The plaintiff shall ordinarily have the children from Saturday at 6:00 p.m. to Wednesday at 8:30 p.m.;
 - b) The defendant shall ordinarily have the children from Wednesday at 8:30 p.m. to Saturday at 6:00 p.m.;
 - c) The children will be picked up by the defendant at Kingdom Hall and the plaintiff will pick up the children from the defendant's home;
 - d) The plaintiff shall have the children with her in July in even numbered years and in even numbered years the defendant shall have the children with him in August, until further order of the court or written agreement of the parties;
 - e) The plaintiff shall have the children with her in August in odd numbered years and in the odd numbered years the defendant shall have the children in July, until further order of the court or written agreement of the parties;
 - f) The party who will have the children with him or her for proposed travel away from Prince George shall provide to the other party the proposed dates of travel, a full itinerary and contact numbers where reasonably practicable for the children;
 - g) At the time of each exchange of the children between the parties the parent who last had the children shall deliver to the other parent the "Information Book" which shall be used to transmit important information in regard to the children's health, education and welfare, including information in regard to the children's school progress and events at school as well as any health issues that have arisen during the time the children have been with the parent providing the information;
 - h) If a parent is to be unavailable to take care of the children during a time when otherwise that parent would be caring for the children for periods longer than 4 hours, the other parent shall be given, wherever practicable, 24 hours notice of that fact and the opportunity to take care of the children during the unavailability of the other parent; the children's daily routines, in such case, shall be as little interrupted as reasonably practicable;
 - i) The children shall spend their birthdays and those of the defendant with him except if the birthday falls on a Sunday in which case the children shall be with the defendant after the meeting at the Kingdom Hall until 6:00 p.m.;

- j) Should the birthday fall on a Saturday, which is ordinarily shared between the parties, there shall be no change in the access schedule;
- k) If the birthday falls on a day that the children would be with the plaintiff, the children will return to the plaintiff at 6:00 p.m. or such other time as it is mutually agreeable to the parties;
- l) In the event that Father's day conflicts with the annual Jehovah's Witness annual convention, the children will attend the convention and the plaintiff will provide to the defendant alternative time with the children on another day acceptable to the defendant for the purpose of replacing his time with the children on Father's day;
- m) On Father's Day following the completion of the Jehovah's Witness meeting at the Kingdom Hall, the children will spend the remainder of the day with the defendant to not later than 6:00 p.m.;
- n) In the event that either parent should wish to have the children beyond the times which are ordinarily provided for herein for some special event, wherever practicable such request shall be made at least 48 hours before the expected occurrence of the event;
- o) In the event that either parent believes that the parties require assistance in parenting the children, either parent may give the other parent notice, whereupon both parents will participate and cooperate in receiving counselling with Dr. Michael Anthony or such other counsellor as the parties can agree upon, or failing agreement, appointed by the court, with the cost being shared between the parents on the same basis as the sharing of costs for extraordinary expenses;
- p) Either parent will have leave to apply to the court for directions concerning the scheduling and content of counselling with Dr. Anthony or such other counsellor, either as agreed upon or appointed by the court;
- q) Save and except in emergencies, during times when the children are with a parent, the other parent may have telephone access between the hours of 6:00 p.m. and 7:00 p.m. provided telephone access does not interfere with the daily routine of that parent's home, and in the event that there is no answer or the children are not available then the children will return the phone call to the other parent as soon as practicable;
- r) The defendant shall make all reasonable efforts to accommodate the plaintiff so that she and the children may attend at the following observances of the Jehovah's Witness faith - Assembly Day (in March), Memorial of Jesus' Death (usually April), District Convention (June), Annual Circuit Assembly (September) and the plaintiff will provide to the defendant alternative time with the children on another day acceptable to the defendant for the purpose of replacing his time with the children on any of these special observances;

- s) Civic or traditional holidays will follow the ordinary weekly schedule. These holidays include New Year's Day, Good Friday, Easter Monday, Mother's Day, Victoria Day, Father's Day, August civic holiday, Labour Day, Thanksgiving Day, Christmas Day and Boxing Day;
 - t) Spring Break will be shared by annual rotation so that the children will be with the defendant in the even numbered years and with the plaintiff in odd numbered years, with spring break beginning on the last regular school day of the week preceding the designated break identified by the school district with the regular weekly rotation resuming at 6:00 p.m., or at a time the parents mutually agree to, on the Saturday before school resumes.
- [63] Of some concern is the fact that Mr. M wanted to have the court deal with what sports Mr. M would be entitled to register the children in while he is exercising his parenting time. Regretfully, even with the change in parenting time requested by Mr. M this presents a problem given that most sports occur at times that would be in conflict with the parent's split parenting regime. I hope as the joint parenting regime progresses, both the parties and the children will be able to agree on age appropriate sports for the children to become enrolled in. I recognize that Ms. M holds the view that S, at a young age, had become too competitive in hockey. I am hopeful that the coping skills he is developing at school will allow him to once again enjoy hockey. Organized sports continue to be excellent for young children, such as these boys. S is keenly interested in hockey. The parties should wherever possible attempt to obtain schedules for sports they are interested in having the children involved in and provide those schedules to the other party. Only after providing the schedules and a budget for the sport should there be meaningful communications in writing respecting either parent's choice of sports. In the event they cannot agree then the matter should be referred to a mediator and if that proves unsuccessful then the party seeking such child's involvement in a sport will have the right under s. 32 of the Family Relations Act to seek a review of any decision which that party considers contrary to the best interests of the child.

THE FINANCIAL MATTERS

- [64] Prior to the trial of this matter, no s. 57 declaration under the Family Relations Act had been made, but on April 29, 2010 I granted a divorce to the plaintiff. As such, as of that date, each of the parties became entitled to an interest in each family asset as of April 29, 2010.
- [65] In *Stein v. Stein*, [2008] S.C.J. No. 35, 2008 SCC 35 (S.C.C.), the court found that both assets and debts need to be considered in order to ensure fairness upon a breakdown of a marriage. In this case, because of the write offs taken by the companies, which I have found to be family assets, I am not able to consider the complete family situation of both Mr. and Ms. M. As I am not in a position to fully value the net values which ought to be known at the time of separation I am satisfied that a contingent liability may be found to be due and owing and that such contingent liability has been incurred for use within the then family unit. This has led me to conclude that fairness under s. 65(1) of the Family Relations Act requires that I order that the parties shall share equally in any liability relating to any tax

liability to be incurred by reason of the two companies operated by Mr. M while the parties cohabited.

[66] As indicated in the opening of these reasons, that declaration shall include all the outstanding shares in 625237 B.C. Ltd. and M Transport Ltd. Historically, the defendant first carried on business as indicated earlier utilizing a proprietorship and shortly after the marriage in 2001 the company was incorporated for the sole purpose of splitting income between the parties. Subsequently, in 2008 the assets of the proprietorship were rolled into the corporation M Transport Ltd. After the parties separated the defendant transferred monies that were on deposit at the TD Canada Trust Bank, as at February 27, 2009, for his own use and utilized part of those proceeds to acquire additional assets in his own name, being two Peterbilt trucks and a 2009 Ram pickup truck. As a result those assets, in his name only, acquired after separation also have become family assets.

[67] As such I declare the following assets to be family assets -

- a) The former family home, legally described as PID: 009-372-458, Lot 8, District Lot 618, Cariboo District Plan 21620;
- b) Cash surrender value of the life insurance policy with Empire Life owned by the defendant;
- c) Cash surrender value of the life insurance policy with Empire Life owned by the plaintiff;
- d) Household goods and personal items in the plaintiff's possession;
- e) Household goods and personal items in the defendant's possession;
- f) RRSP holdings with Fisgard owned by the defendant;
- g) RRSP holdings with Fisgard owned by the plaintiff;
- h) Lake Okanagan Resorts Vacation (2001) Ltd. lease (timeshare condo);
- i) The sum of \$93,555.14 formerly on deposit in TD Canada Trust Bank account at February 29, 2009;
- j) All outstanding shares in 625237 B.C. Ltd.;
- k) All outstanding shares in M Transport Ltd.;
- l) 2009 Dodge Ram pickup truck;
- m) 2009 Peterbilt truck serial number 1XPWD49X79D775731;
- n) 2010 Peterbilt truck serial number 1XPWD40X8AD113304

[68] During the trial the court became aware of another asset which the parties agreed was not a family asset and which property is owned by the plaintiff and defendant together with Ms. M's parents. Mr. M through his counsel agreed that that asset would be transferred into the names of Ms. M's parents solely provided that a release and indemnity was provided by Ms. M and her parents. I therefore order that the defendant's interest in PID: 023-825-537, Lot A,

District Lot 620, Cariboo District, Plan PGP 41436, be transferred by Mr. M upon him receiving a full release and indemnity from the plaintiff and her parents.

- [69] With respect to 62537 B.C. Ltd., the sum of \$47,082.91, being the net balance owing on the T4 earnings declared by 62537 B.C. Ltd. to the plaintiff for the 2008 tax year, are sought be paid by the numbered company to Ms. M.
- [70] I have already indicated that this numbered company was incorporated solely for the purpose of splitting income between the parties. The financial records for 62537 B.C. Ltd. were reviewed in some detail along with the corresponding tax summaries for the parties. In no year previous to 2008 have I been able to determine that the actual T4 slips represented monies advanced to Ms. M. With respect to the 2008 T4, under cross-examination Ms. M admitted that she did not ordinarily get cheques for the amounts shown as salary, dividends, bonuses during the time of her cohabitation with the defendant although it is clear that she shared in the net benefits from the business. Rather, it would appear that monies were made available to her solely for the purpose of income tax as a result of the issuance of the T4. This is a form of income splitting that is not unknown to business people. I have determined that it would be as suggested by Mr. Fletcher a form of double-dipping if I were to make an order in the form sought by the plaintiff given that the family unit would have already received the benefit of the T4 in question.
- [71] I therefore decline to make the order sought.
- [72] The next matter to be dealt with is the family home. The family home is the home in which the plaintiff and the children are primarily resident. Ms. M has been resident in the home with her family since approximately 1981 and it was acquired on very favourable terms when the parties returned to Prince George in 2000. It is the only home which the children have known. It is located within a few minutes of the plaintiff's parents' home. It is located very favourably as well to her future place of employment. Her parents often babysit for the children at that location. The plaintiff therefore seeks an order that she have the option to acquire the former family home.
- [73] Mr. M takes the position that because he constructed a garage on the family home property that it would be more appropriate for him to be awarded the family home. He points to the fact that having a garage on the same property as the house in which he would be living would save his companies money and permit him to spend time there with his children. The property can not be subdivided and there is a question as to whether or not the activities previously carried on by the defendant relative to his companies are in conformity with existing land use. Mr. Fletcher spent some time reviewing the case law relating to said use by his client however I have determined that this is not an issue that would be appropriate for me to determine at this time nor would the savings which Mr. M and the companies would achieve by him being awarded the former family home meet the more positive benefits that would be achieved by Ms. M being awarded the family home. In the particular circumstances of this family and particularly the child S I am of the opinion that Ms. M

should have the first opportunity to acquire the former matrimonial property.

[74] In coming to this conclusion regarding the former matrimonial home, I am aware that the garage and certain gravel have been recorded as being corporate assets and the ultimate transfer of the former family home into her name may have to await a determination of any tax consequences. As such, from an income tax point of view, the former matrimonial home referred to will include particular assets having come out of the business and some amount of tax no doubt would be attributed to the defendant as sole share holder. At the time of trial that amount was, in effect, a yet unknown contingent liability.

[75] The plaintiff seeks reapportionment of the former family home property in the amount of 70% pursuant to s. 65 of the Family Relations Act. Section 65 provides as follows:

- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
 - (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

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

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[76] The plaintiff's argument centres on s. 65 (1)(e) and (f) and her position that she has greater need to become self sufficient given Mr. M's ability to earn significantly more than she earns or is capable of earning. This marriage is a 9 ½ year marriage. It is likely that Ms. M will continue in non-arms length occupations while Mr. M will continue to be self-employed. On the other hand, Ms. M will not be subject to the ups and downs of the trucking industry. She

is being paid spousal support at the higher end of the Spousal Support Advisory Guidelines to ensure that she can complete her accounting upgrading over the next two years. In *Blackett v. Blackett*, B.C.C.A., File No. CA009428, the court stated that it is often necessary to have an idea of the value of an asset as of the triggering event. In this case the parties have agreed on the value of the former matrimonial home property, however, I am satisfied that I cannot determine the liability, if any, of Mr. M for a contingent personal tax liability that could attach to him by reason of his proprietorship and later corporate involvement. That is a matter that will have to await rulings by the Canada Revenue Agency.

- [77] Ms. M is 33 years of age and each of the parties will have RRSP's in excess of \$80,000 and Ms. M, if she exercises her option to acquire the former matrimonial home, will have a home valued at \$414,000 with approximately \$26,000 owing on it. Theoretically, the further adjustment still to occur with respect to the companies will result in her, at age 33, owing only that same amount.
- [78] The other adjustments and options of first refusal contemplated by this order should also result in additional financial enhancements to her financial circumstances. Both parties are relatively young and I do not find that there are any significant features which result in a finding that Ms. M is a disadvantaged spouse as a result of this marriage coming to an end. In *Bain v. Bain*, 2008 BCCA 49, [2008] B.C.J. No. 179, , 49 R.F.L. (6th) 17 (B.C.C.A.), the court held that a finding that both parties can remain self sufficient does not neutralize s. 65(1)(e) with the analysis of the need of both parties also beginning with the standard of living both parties enjoyed during the marriage. In this case I do not find any indication or even evidence that the standard of living of Ms. M will differ from that which was enjoyed during the marriage as I find that it is probable that any increased standard of living that the parties enjoyed was no doubt due in large part to the additional net income available to the family unit as a result of write-offs employed by the business for which there is still yet to be a resolution of.
- [79] In the circumstances of this family and the family assets to be divided between them, I have determined that an equal division would not be unfair. I therefore deny the plaintiff's application to have the former family home reapportioned in the plaintiff's favour.
- [80] There is time needed for the net value of the family assets, other than the former matrimonial home, to be determined. Given these contingent liabilities I order that the plaintiff will have sole and exclusive possession of the former family home legally described as PID: 009-372-458, Lot 8, District Lot 618, Cariboo District Plan 21620 and is entitled to a first option to purchase the defendant's interest in the former family home in accordance with the following formula -
- a) \$414,000 appraised value less amount owing on agreement with the plaintiff's parents X 50% (being the amount of the defendant's interest in the former family home).

- b) In the event that the plaintiff does not choose to exercise her first option to purchase the former family home it will be sold and each of the parties will be entitled to 50% of the net proceeds of sale.
 - c) The plaintiff has also requested that she be given a first option to purchase the numbered company's asset, being the Infinity motor vehicle. At trial there was some disagreement with respect to the value of that motor vehicle and the possible income tax consequences of its ownership by 625237 B.C. Ltd. The vehicle has not been physically appraised but it is described as having a black-book value of \$27,873. The plaintiff may have the option of purchasing the aforesaid motor vehicle at the greater of black-book value or appraised value.
 - d) I was not provided with values pertaining to the household goods and personal items which are in either party's possession. Household furniture is normally appraised at fire-sale values notwithstanding Mr. M's position that he left without any of the furnishings. No values were attempted to be obtained by Mr. M. Therefore, with respect to the household goods and chattels and personal items in the parties' respective possession I order that the plaintiff shall have sole and exclusive ownership and right to possession of the following assets:
 - i. Household goods and chattels and personal items in her possession and located in and around the former family home;
 - ii. All bank accounts in her name alone.
 - e) With respect to Mr. M I order that he shall have sole and exclusive ownership and right of possession of the following assets:
 - i. Household goods and personal items in his possession;
 - ii. All bank accounts in his name alone.
- [81] As earlier stated, the plaintiff seeks an order that the two companies along with the after acquired assets purchased by Mr. M which I have found to be family assets. This submission proceeded on the basis that the defendant, even without the assets of the two companies, could still carry on a form of business restricted to dispatching.
- [82] While there is agreement by the plaintiff that the actual tax and other liabilities must be determined in order to determine what exactly the net values of the family assets are before distribution, this does not, in my view, meet the business model which has for a number of years paid to the family unit the incomes that have been enjoyed by both the plaintiff and the defendant.
- [83] There does not appear to be any disagreement with the fact that Mr. M, as the operating mind of the two companies, has been successful in his business without any contracts but based solely on his own personal abilities and endeavours. Mr. M was quite clear and very convincing that the success of his business is wholly dependent on his own ability to fix whatever goes wrong in a very timely manner. If one of his dispatched drivers is unable to

haul then he makes the trip himself utilizing his own vehicle. He gave evidence that he acquired the second vehicle so that when called upon he would be able to provide the second vehicle at times. Alternatively, he may decide to hire his own driver rather than use a contract-hauler. Mr. M clearly stated that an essential part of keeping his customers was having a truck available to him that he could use in the event that it became necessary to meet a customer's requirements. When he is required to make a trip, which he hopes to do on a more regular basis and that is why he asked for a change in the parenting schedule for the children, he uses that time to keep current with his various contacts. It would be highly speculative of me to conclude that Mr. M could enjoy the same income and business simply by using his cellular telephone when his own evidence is that he is in a very highly competitive business. Mr. M's evidence with respect to how he runs his business and how it requires his personal attendance from time-to-time was not a subject of cross-examination.

- [84] The ability of the defendant to earn the type of income that has been earned through his companies for the past several years should not be put in jeopardy when his obligations to Ms. M are substantial over a short period of time and the financial obligations to his two young children will continue for the foreseeable future. Mr. M only knows trucking and he is very successful with the business model that he has developed and followed.
- [85] Mr. Fletcher, on behalf of his client, has suggested that the business be allowed to continue. The problem that faces these parties is the contingent tax liabilities that might exist as a result of accounting practices followed by the businesses previous accounting firm. I am not prepared at this time to order that the companies be wound up. I do order that as a result of the granting of the divorce that Mr. M holds 50% of the issued and outstanding shares in both companies in trust for Ms. M.
- [86] The costs attendant with liquidation and a Registrar's hearing would be high and may not be necessary. I do not propose to initially order the liquidation and accounting proposed by the plaintiff.
- [87] Mr. M shall have the option to purchase Ms. M's 50% interest in the companies (50% of the issued shares in M Transport Ltd. and 625237 B.C. Ltd.) at any time within 180 days of the release of these reasons on the following terms and conditions -
- a) The price of the shares to be determined by an independent chartered accountant agreed to by the parties within 30 days of the release of these reasons, and failing such agreement, then by a chartered accountant appointed by the court on application by either party;
 - b) The shares of the companies to be valued in accordance with generally accepted accounting principals but excluding the value of gravel and the garage located on the former matrimonial property and the value of the Infinity automobile but specifically including any reassessments by the Canada Revenue Agency;
 - c) Failing the completion of the sale of shares as aforesaid, 625237 B.C. Ltd. is to be wound up, the assets sold and the debts of the company including any reassessments to be paid;

- d) The net value of 625237B.C. Ltd. will be divided equally between the plaintiff and defendant;
 - e) Failing the completion of the sale of shares as aforesaid, M Transport Ltd. will be wound up, the assets sold, and the debts of the company paid, including any reassessments to be paid;
 - f) On a winding up of the companies, the defendant will have first option to purchase equipment from M Transport Ltd. and 625237 B.C. Ltd. at the average of either the purchase price of the asset less any security owing at the date of purchase, or at the average of the appraised value set out in the Exhibits filed at trial, or at an amount agreed to by the parties.
 - g) The net value of M Transport Ltd. will be divided equally between the plaintiff and the defendant;
 - h) Each of the plaintiff and the defendant will have leave to apply for directions concerning the winding up of 625237 B.C. Ltd. and M Transport Ltd.;
 - i) If the plaintiff and defendant cannot agree on the manner of winding up 625237 B.C. Ltd. and M Transport Ltd. the matter will be referred to the Registrar for an inquiry, assessment and accounting, pursuant to R. 32 (now R. 18-1) of the Rules of Court and the result of the inquiry, assessment and accounting will be certified and the Certificate, when filed, shall be binding on the parties to the proceeding;
 - j) The defendant will have first option to purchase the plaintiff's interest in the 2009 and 2010 Peterbilt trucks as well as the 2009 Dodge Ram pickup truck at the average of either the purchase price of the asset less any security owing on the purchase, or at the average of the appraised values set out in the Exhibits filed at trial, or at an amount agreed to by the parties provided that if the option granted to the defendant to acquire the three vehicles is not exercised within the 180 days following the release of this judgment the vehicles will be sold and the net proceeds of sale will be divided equally between the plaintiff and the defendant.
- [88] Time shall be of the essence if a party exercises an option granted by this order and the contracts brought into existence by such exercise shall be completed within 30 days of the party exercising the option.
- [89] Other housekeeping orders sought at the trial by the plaintiff were not formally opposed by the defendant. With respect to the orders sought I would order as follows -
- a) The plaintiff and the defendant shall, pursuant to the provisions of the Income Tax Act (Canada), cause to be rolled over to each other sufficient funds from their respective RRSP's in order to equalize between them the amounts in the RRSP's accumulated by the parties to the date of this order, plus interest thereon at the rates set forth in the plans, or to be determined between the parties, or to be determined by court order, and the correct sum to be transferred between the parties shall be determined either by agreement of the plaintiff and the defendant, or alternatively, by such manner as the court may direct;

- b) The cash surrender value of the Empire Life Insurance policies will be equalized between the parties as of the date of this order;
- c) The defendant will maintain the plaintiff and the plaintiff in trust for the infant children of the marriage as irrevocable beneficiaries upon his life insurance policy with Empire Life Insurance, in a face amount of not less than \$200,000, pursuant to the Insurance Act, R.S.B.C. 1996, c. 226, as amended and shall not change that designation of beneficiary for so long as he is obligated to pay spousal and child support for the plaintiff and the children of the marriage. Upon the defendant's obligation to pay spousal maintenance terminating, the defendant may remove the plaintiff from the policy, retaining the plaintiff in trust for the children as the irrevocable beneficiaries until such time as his obligation to pay child maintenance ceases;
- d) In the event that the defendant, in violation of this agreement, removes the plaintiff and/or the children as beneficiaries from his life insurance policy contrary to the terms of this order, the plaintiff or any person acting on behalf of, and as guardian ad litem for the children shall be entitled to commence action against the estate of the defendant for the full face amount of the life insurance policy;
- e) The defendant shall deliver to the administrator of the life insurance policy a copy of this order and authorize the administrator of the policy to provide to the plaintiff information requested by her from time to time relating to her and the children's right and interest in the policy and any benefits derived thereunder;
- f) In the event the defendant refuses and/or neglects to deliver to the administrator of the life insurance policy authorizations to provide the plaintiff with information, the plaintiff shall be entitled to bring an application to compel production of the information concerning the policy with respect to the designation of beneficiary from either the defendant or the administrator of the policy and to an order for costs on a solicitor and own client basis;
- g) In the event of the defendant's death and a third party becomes entitled to apply and does apply for any life insurance benefits payable pursuant to the policy, the interest of the plaintiff and children is enforceable against that third party forthwith after that third party has had actual or constructive notice of the interest;
- h) The defendant shall provide to the plaintiff copies of all communications between himself and third parties including the administrator respecting the plaintiff's and children's interest in the defendant's life insurance policy within 10 days from such communication;
- i) The plaintiff will maintain the defendant and the defendant in trust for the infant children of the marriage as irrevocable beneficiaries upon her life insurance policy with Empire Life Insurance pursuant to the Insurance Act, R.S.B.C. 1996, c. 226, in a face amount of not less than \$100,000 and shall not change that designation of beneficiary for so long as the children are children of the marriage;

- j) In the event that the plaintiff, in violation of this agreement, removes the defendant as guardian for the children as beneficiaries from her life insurance policy, the defendant or any person acting on behalf of, and as guardian ad litem for the children, shall be entitled to commence action against the estate of the plaintiff for the full face amount of the life insurance policy;
- k) The plaintiff shall deliver to the administrator of the life insurance policy a copy of this order and authorize the administrator of the policy to provide to the defendant information requested by him from time to time relating to the children's right and interest in the policy and any benefits derived thereunder;
- l) In the event the plaintiff refuses and/or neglects to deliver to the administrator of the life insurance policy authorizations to provide the defendant with information, the defendant shall be entitled to bring an application to compel production of the information concerning the policy with respect to the designation of beneficiary from either the plaintiff or the administrator of the policy and to an order for costs on a solicitor and own client basis;
- m) In the event of the plaintiff's death and a third party becomes entitled to apply and does apply for any life insurance benefits payable pursuant to the policy, the interest of the children is enforceable against that third party forthwith after that third party has had actual or constructive notice of the interest;
- n) The plaintiff shall provide to the defendant copies of all communications between herself and third parties including the administrator respecting the children's interest in the plaintiff's life insurance policy within 10 days from such communication;
- o) The defendant will transfer to the plaintiff all his interest in and to the time share condo and the plaintiff will henceforth be liable for all administrative charges and costs for the time share condo;
- p) The Canada Pension Plan credits in the name of the plaintiff and defendant shall be divided upon application of either party to the administrator of the Canada Pension Plan for a division of the Canada Pension Plan credits or unadjusted pensionable earnings standing in the other's name, upon judgement for divorce being granted pursuant to Sections 53.2 or 53.3 of the Canada Pension Plan Act.

COSTS

- [90] In this case, although custody is not the primary issue as it was in *Morrison v. Morrison*, 2001 BCSC 909, where the court held that in custody matters the court does not view success in terms of winners and losers, the issue of access was still as hard fought as custody often is. The difference in parenting styles and the amount of parenting time that should be shared by each parent took up the majority of time covered in this trial. The best interests of the children became the central issue in this trial. I do not find any conduct of either party as being subject to censure or worthy of rebuke.

[91] In *P. (P.E.) v. P. (D.W.)*, 2004 BCSC 1590, Mr. Justice Macaulay came to the conclusion that costs in custody cases should not be governed by *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.). The rationale for that decision are found at para. 9 where the court stated:

[9] I consider it significant that *Gold* and all the cases referred to in it dealt with property division issues and not custody. *Gold* is authority, in my opinion, for the proposition that the purpose of the judgment sought is relevant to determining whether costs should be awarded. Division of assets cases are closer to traditional forms of civil litigation, in that they involve monetary and property interests. Child custody cases, on the other hand, involve primarily non-economic considerations.

[92] I agree with that statement in the circumstances of this case. As a result I order that each of the parties bear their own costs.

"Chamberlist J."

[1] *Baker v. Baker*, 8 R.F.L. (2d) 236; *Kruger v. Kruger* (1979), 11 R.F.L. (2d) 52; *Gordon v. Goertz*, [1996] 2 S.C.R. 27; *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357

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