
CANADA / JUDGMENT

R.T.C. v. N.M.C.

2021 BCSC 2273

COURT

Supreme Court of British Columbia

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2021 BCSC 2273 R.T.C. v. N.M.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.T.C. v. N.M.C.,

2021 BCSC 2273

Date: 20211123

Docket: E180643

Registry: Vancouver

Between:

R.T.C.

Claimant

And

N.M.C.

Respondent

Before: The Honourable Mr. Justice Majawa

Reasons for Judgment

The Claimant, appearing in person:

R.T.C.

Counsel for Respondent:

T. Magder

Place and Date of Trial:

New Westminster, B.C.

October 5-9, 2020

February 22-26, 2021, and September 13-15, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 23, 2021

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INTRODUCTION

- [1] The parties to this high conflict family law matter seek a divorce and orders respecting parenting time and responsibilities, child support, and spousal support. The divorce was granted during the course of trial by way of an order dated September 15, 2021. The parties originally sought orders respecting the division of assets; however, they came to an agreement on these matters in the first week of trial and a consent order was issued on October 13, 2020. During the course of the trial, the parties subsequently agreed to evenly divide the amounts held in the children's bank accounts. Unfortunately, the parties were unable to come to an agreement with respect to the remaining issues.
- [2] The trial of this matter took 17 days of court time spread over the span of nearly one year. It began in October 2020, continued in February 2021, and was again adjourned after I ordered that a report be prepared pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] to assess the needs and the views of the parties' children, parenting time and contact, parental responsibilities, and the ability or willingness of the parents to satisfy the needs of the children. The Court had the benefit of the s. 211 report when the trial resumed, and ultimately concluded, in September 2021.

BACKGROUND FACTS

- [3] The claimant, R.C., and the respondent, N.C., were 37 and 32 years of age when the trial started. They began dating in 2007 when the claimant was approximately 24 years of age and the respondent was 19 years old. They moved in together in late 2009 and were married on July 28, 2012. They separated at the end of May 2017.
- [4] The parties have three children. Their first child and only daughter, C.C., was born in 2010. R.C. was born in 2013, and H.C. was born in 2015. Thus, the children were six, four, and just under two years of age at the time the parties separated. Since their middle child, R.C., shares the same initials as the claimant, I will identify him as R.Y.C. for clarity reasons. This is out of no disrespect to the parties but for ease of reference.
- [5] The respondent was an office manager for a home inspection company when the parties began dating. She took maternity leave for approximately one year after C.C. was born in 2010. In or around 2012, N.C. commenced a program to become a mortgage broker and she finished that program in the spring of 2013 while she was eight months pregnant with R.Y.C. She started working as a mortgage broker in 2014 after her maternity leave ended. N.C. continued to work as a mortgage broker at the time of trial.
- [6] The claimant was a red-seal sheet metal worker when the parties began dating and he worked for various employers on construction sites. In or around 2010, R.C. obtained his insurance broker licence, and together with his family, purchased an insurance brokerage business which they eventually sold in 2015. R.C. worked part-time in the insurance business and continued to work as a tradesperson in the period between 2010 and 2015. In 2019, R.C. enrolled in a training course to begin the process of becoming a red-seal refrigeration technician and gas fitter in the heating, ventilation and air conditioning (HVAC) field. In 2020, R.C. started his own business with a partner (the "Company"). The Company's business includes sheet metal work, refrigeration, and HVAC and is currently R.C.'s source of income.

Summary of the Relationship and Separation

- [7] The parties do not agree on when they began living together. N.C. testified that they began living together in October 2009, whereas R.C. believes it was closer to the end of 2009 or early 2010. In my view, nothing turns on this slight discrepancy. What is clear is that within months of moving in together, N.C. became pregnant with C.C.
- [8] N.C.'s pregnancies were challenging and she experienced various health issues during each pregnancy. She spent one week in the hospital in August 2010 after she went into early labour while pregnant with C.C. N.C. was ordered to go on modified bed rest and she did not return to work before C.C. was born. She remained off work until approximately September 2011.

- [9] N.C. developed kidney stones in her 25th week of pregnancy with R.Y.C. and had to undergo surgery and follow-ups. She was ordered to go on bed rest and took medical leave from her employment beginning in or around January 2013. R.Y.C. was born in the spring and N.C. did not return to work until February 2014, at which time she returned part-time.
- [10] N.C. developed a kidney infection when pregnant with H.C. and was told to ease off on her activities. H.C. was born three weeks early. N.C. took approximately 11 months of maternity leave after H.C. was born and returned to the workforce in or around the summer 2016.
- [11] While I accept that R.C. contributed to the care of the children during these early years, I find that N.C. was the primary provider of direct care for the children. R.C. took approximately one week off work after the birth of each child and then returned to work. For much of this period, R.C. was working as both a tradesperson and an insurance broker. He worked long hours, often leaving before 7:00 a.m. and also working on some weekends. I accept that he occasionally contributed to picking up and dropping off the children at daycare. However, I find that during this time, N.C. was primarily responsible for making and taking the children to appointments and enrolling them in and transporting them to activities. She was also responsible for the vast majority of the household duties during this time, including cooking and cleaning. I find that this arrangement generally persisted until the parties separated in 2017.
- [12] The parties' relationship deteriorated rather quickly. N.C. testified that she was unhappy with the relationship most of the time and that it got particularly bad following H.C.'s birth in 2015. She described R.C. as being frequently angry and often dissatisfied with his employment. The parties attended counselling on a few occasions but R.C. did not want to continue. They began to argue over household finances; specifically, with respect to N.C.'s spending habits. R.C. controlled the household bank accounts; however, N.C. made most of the purchases for the maintenance of the house on credit cards. There were occasions where R.C. would take N.C.'s credit cards and hide them from her. She began purchasing gift cards at the grocery store in an effort to disguise her spending or to stop R.C. from making so many inquiries.
- [13] In 2016, N.C. advised R.C. that she wanted a divorce and she moved to the spare bedroom downstairs in July. In August, the parties' relationship began to improve somewhat and N.C. moved back to their bedroom upstairs in November 2016. However, by the end of the year, the relationship had deteriorated again and N.C. moved back to the basement in January 2017 and remained there until she moved out of the house in June of that same year.
- [14] N.C. testified that she separated from R.C. because he was emotionally, physically, and verbally abusive towards her. There was no suggestion that he was directly physically abusive to the children; however, N.C. testified that the children witnessed his verbal abuse of her, which included yelling and swearing. N.C. described an incident of physical abuse where R.C. pinned her down on the bed with his arm and she could not breathe. On another occasion, she testified that he came home intoxicated one evening, woke her up, grabbed

her arms, and locked her in the bathroom. R.C. denies these incidents occurred as described by N.C.

- [15] R.C. provided little evidence as to his view of the reasons for the parties' separation other than his suspicion that N.C. was engaging in an extra-marital affair. The parties agree that they were officially separated by May 2017 and that N.C. moved out of the family home on June 15, 2017.
- [16] Shortly after the parties separated, R.C. was advised by L.B., a former close friend of N.C., that N.C. planned to try and take the children away from him. N.C. denied ever telling L.B. this. R.C. testified that as a result of the statement made by L.B., he became "suspicious" and began to explore files on the family laptop computer. R.C. found documents, texts, and compromising photographs that he believed supported his suspicions with respect to N.C.'s alleged affair. At some point, R.C. sent some of the compromising photos of N.C. to L.B. and possibly to other individuals. N.C. became aware of this in the spring of 2018. Not surprisingly, N.C. was very upset about this breach of her privacy, and also not surprisingly, this had a very negative effect on the parties' ability to communicate effectively post-separation. R.C. did not attempt to enter any of the compromising photos into evidence in the trial, nevertheless, I admonish him for sharing photographs of such a private nature without the explicit consent of the person depicted in the photographs.
- [17] By way of a consent order of Master Taylor dated June 18, 2018, R.C. was required, among other things, to delete all documents belonging to N.C. from the laptop computer, to provide all nude, semi-nude, and provocative pictures and any other documents belonging to N.C. to her counsel. He was also required to provide an affidavit confirming the destruction of those documents. R.C. has not yet provided the required affidavit. As I understand it, since R.C. ultimately represented himself in these proceedings, he, as opposed to his counsel, required access to some of the documents that were the subject of the July 18 order. There is no longer any need for R.C. to retain the documents that were the subject of the July 18 order. To the extent that those documents were not entered as exhibits at trial, R.C. is ordered to provide a sworn affidavit confirming the destruction of any of N.C.'s personal information, including photographs, documents, and electronic documents, as well as confirming the other matters set out in paragraphs 4(i), (ii), (iii), (iv) and (vi) of the June 18 order. This affidavit is to be provided to N.C.'s counsel within 30 days of the date of these Reasons for Judgment.
- [18] Almost immediately following N.C.'s departure from the family home, the parties' shared parenting time equally on a 2-2-5-5 schedule. This arrangement has persisted for over four years without any variations being ordered by the Court or agreed to by the parties. However, the parties have had significant difficulties in communicating about matters respecting the children since their separation. Copious amounts of text messages and emails were entered into evidence in the trial of this matter. I have also reviewed video evidence of interactions between the parties. My review of the evidence leads me to conclude that both the claimant and the respondent have at times been unreasonable, stubborn, positional, and

uncooperative and this has hindered them from acting in the best interests of the children at times. I am, however, encouraged by the fact that the parties' most recent communications demonstrate an improvement in their approach to resolving issues and in the tone of the discourse. There is a long way to go but the parties seem to be moving in the right direction, albeit in a somewhat incremental fashion.

- [19] Both parties were employed full time when they separated and the children were enrolled in a daycare program at Daycare S. R.C.'s sibling's children also attended this daycare. R.C. was particularly happy with Daycare S as its hours permitted him to drop the children off early enough for him to get to his various job sites. The choice of daycare and the eventual move to another daycare would prove to be one of the largest points of contention and distrust between the parties.
- [20] After separation, the youngest child, H.C., began demonstrating some behavioural issues which the daycare staff found concerning, such as being violent with other children, running away from the daycare, being defiant, and having significant difficulty controlling his impulses. They raised these issues with both R.C. and N.C. R.C. was of the view that H.C. required a referral to a pediatrician for his behavioural issues. However, N.C. was not as receptive to these concerns and was reluctant to pursue an assessment with a professional; she was of the view that the main reason for H.C.'s behavioural problems was the parties' dysfunctional relationship and its effect on him.
- [21] N.C.'s reluctance to seek a professional assessment for H.C. contrasted with R.C.'s desire to obtain one is a theme that has caused significant conflict between the parties since separation. I do not find that N.C.'s reluctance was in any way neglectful or indicative of an unwillingness to seek assistance. N.C. has demonstrated a willingness and commitment to do so by obtaining counselling for all the children on a regular basis over the past two years. I do, however, find that this reluctance is rooted in the parties' dysfunctional relationship post separation and has not necessarily served the best interests of the children.
- [22] In or around October 2018, the staff at Daycare S recommended to R.C. that H.C. see a supportive child development consultant. This consultant would assess H.C. at the daycare, meet with the parents, and determine what resources may be needed to assist the child and address his behavioural issues. R.C. agreed and completed an intake form to initiate the referral. Although the intake form listed both R.C. and N.C. as H.C.'s parents, only R.C.'s contact information was listed on the form. Consequently, the consultant did not have any obvious way of contacting both parents.
- [23] Despite the fact that the staff at Daycare S were aware that the parties were separated and that they had a high conflict relationship, the daycare staff did not make any attempts to contact N.C. to seek her consent for the referral or to advise her that it was made. Instead, they were content to rely on R.C.'s consent and his assurance that he would advise N.C. of the referral. The owner of Daycare S testified that it is not the daycare's policy to inform both separated parents when such a referral is made. Given the nature of the parties' relationship

and the daycare's knowledge of it, it was, in my view, very unwise to not seek the consent of both parents before making this referral. The daycare had no reason to believe that R.C. had sole decision-making authority for the children in this area and he, in fact, did not.

- [24] There were some significant delays in seeing the supportive child development consultant and, as I understand it, H.C. had not been fully assessed by the time N.C. found out about the referral in April 2019. However, R.C. spoke with the consultant in December 2018 and met with her one or two times in January and March 2019. Nonetheless, by April 2019, R.C. had still not told N.C. about the referral. While he denies he kept it a "secret" from N.C., R.C. acknowledged on cross-examination that he did not tell N.C. about the referral because he knew it would likely result in a confrontation given the parties' different views on the necessity of assessments regarding H.C.'s behaviour. Whether or not you call it keeping a secret or delaying telling her, I find that R.C. withheld information about H.C.'s health and possible treatment from N.C.
- [25] N.C. found out about the referral in or around April 2019 following a text message exchange with R.C. that led her to believe that the daycare had made a recommendation for H.C.'s care that she was unaware of. She arrived at the daycare on April 4, 2019, and a verbal confrontation ensued. N.C. was surprised that the daycare staff had not advised her of the consultant's involvement; she felt like she had purposefully been left out and was very upset. The evidence I heard from N.C. and the daycare staff who were present that day leads me to find that all parties raised their voices at times during this confrontation. As I understand it, the daycare still did not provide N.C. with the consultant's contact information until April 8, 2019. The consultant confirmed that she had encouraged R.C. and the daycare to inform N.C. about the referral.
- [26] On or around May 29, 2019, the daycare informed N.C. that she was no longer welcome at the daycare and that the children were not allowed to attend on days that they were in her care. In a letter of that same date, counsel for the daycare advised N.C. that they took this step based upon the conflict that occurred on April 4 and based upon N.C. having not paid for the daycare services in a timely manner. N.C. provided evidence that, although payment for the daycare services was formally due at the beginning of the month, she historically did not pay until the second or third week of the month, but that the daycare had accepted such payments without protest in the past. I accept that this is what did occur in the past. It appears to me that the real reason that N.C. was no longer welcome at the daycare was solely due to the conflict that arose over the referral made to the behavioural consultant and the daycare's failure to notify her of the same. After hearing the testimony from the daycare staff, although it is not clear to me why, it is evident that the Daycare S staff have aligned themselves with R.C. and have adopted his point of view towards N.C.
- [27] Although the parties' children were still welcome at Daycare S on days where they were to be picked up and dropped off by R.C. or members of his family, N.C., felt that the children could no longer practically attend that daycare. This is not surprising. N.C.'s family also sometimes picked the children up and N.C. was advised by the daycare that they too were

not welcome at the premises. It would not have been practicable for R.C. to do all the drop offs and pick up on days when the children were in N.C.'s care. However, R.C. was adamant that Daycare S was the only daycare that worked for the children and he would not agree to move them to a different daycare.

- [28] Consequently, N.C. made an application before Master Baker in which she sought, and was granted, sole decision-making authority in respect of the choice of the children's daycare. I accept that N.C. asked R.C. for his input on alternative daycares that would work for both of them. However, I find that R.C. was fixated on Daycare S being the only appropriate daycare for the children. R.C. provided no evidence that he researched other daycares or provided N.C. with any other suggestions. I further accept that N.C. considered R.C.'s work hours when she chose Daycare K as the children's new daycare. It was her evidence that, of the three different daycare options she provided to R.C., Daycare K had the longest hours and allowed for the earliest drop off. This evidence was not contradicted.
- [29] Unfortunately, Daycare K's hours proved to be incompatible with R.C.'s work hours and R.C. was frequently late to work on days that the children were in his care. In November 2019, R.C.'s employment with Company M was terminated. T.T., one of the owners of Company M, testified as to the reasons for R.C.'s termination. He testified that they tried to make accommodations for R.C. after his daycare situation changed in the summer of 2019, but they were unable to find a workable solution. Despite indications on the Record of Employment prepared by Company M that R.C.'s employment was terminated due to a lack of work, I accept that R.C.'s employment was terminated because of his frequent tardiness.
- [30] From R.C.'s extensive evidence on this issue, it is evident that he blames N.C. for the loss of his job with Company M. In his view, N.C. is entirely responsible for the children being removed from Daycare S. Despite his acknowledgement during cross examination that he understands why N.C. was upset about the referral being made to the behavioural consultant without her knowledge, he does not appear to accept any responsibility for the events that led to the removal of the children from Daycare S. In his view, the children could have continued to attend Daycare S on his parenting days. However, as mentioned above, the staff at Daycare S seem to be intractably aligned with R.C. and his family. It is reasonable that N.C. would not trust them to inform her of issues regarding the children.
- [31] The issue of which daycare the children should attend has played a disproportionately large role in the parties' relationship since the summer of 2019. It is but one example of how the parties' stubbornness has contributed to their inability to communicate effectively. The daycare issue has ultimately formed the basis of a claim by R.C. for spousal and child support, which will be discussed later in these reasons.

- [32] The parties' differing views on how to address the health problems of their children has also played a significant role in their inability to communicate effectively. R.Y.C., the middle child, has been diagnosed with Crohn's disease and is required to undertake various treatments at the hospital and at home. As will be discussed later, Dr. LaTorre, the s. 211 report writer, also has some concerns about R.Y.C. and H.C.'s psycho-educational needs.
- [33] There is no doubt that the parties' three children have been negatively affected by the high conflict nature of their parents' relationship. However, it is also clear that R.Y.C. and H.C. in particular have medical and/or behavioural concerns that are independent from their parents' dysfunctional relationship and that will require a coordinated approach for assessment and management. I will address this later in these reasons.
- [34] The animosity between the parties post-separation has been exacerbated by their mutual distrust of one another. However, R.C.'s distrust and suspicion led him to take certain steps that had a particularly negative effect on the parties' relationship. In addition to sharing photographs of N.C. as discussed above, R.C. accessed documents belonging to N.C. on the shared family computer over which she arguably had some expectation of privacy. He also went to what I will call some extraordinary lengths to access N.C.'s Amazon account as part of his "investigation" as to where N.C. was working and whom she was earning income from.
- [35] Due to the way in which the account was originally set up, R.C. was also able to gain access to N.C.'s mobile telephone records following separation. As I understand it, R.C. logged into her mobile account hundreds of times in a period of six months. It appears that he used the information he found there in order to gain insight into N.C.'s whereabouts. At trial, R.C. did not provide an explanation that would justify these significant intrusions into N.C.'s privacy. Not surprisingly, these actions made N.C. feel very uncomfortable and had a negative impact on the parties' ability to communicate effectively.
- [36] N.C. is not without blame for the deterioration of the parties' relationship post-separation. For example, on the evidence before me, there were numerous occasions where N.C. was unreasonable in the way in which she approached the flexibility of parenting time.

History of Proceedings

- [37] N.C. commenced proceedings in Provincial Court in December 2017, seeking orders respecting guardianship, parenting time, allocation of parental responsibilities, and child and spousal support. At that time, N.C. took the position that parenting time should continue to be shared on an equal basis but sought to have all parental responsibilities allocated to her.
- [38] R.C. commenced proceedings in this Court in March 2018.

- [39] No child support was paid by R.C. in the one and a half years following separation and N.C. obtained an order for interim child support from the Provincial Court in November 2018. Eventually, the Family Maintenance Enforcement Program was engaged to collect child support owing under the Provincial Court order.
- [40] The trial of this matter was originally scheduled to commence in January 2020, but was adjourned by consent.
- [41] In February 2020, Master Harper ordered that the family home be listed for sale and that the parties were to have joint conduct of that sale. While the joint sale went less than smoothly, and I find both parties bear the blame for this, the home eventually sold in August 2020 and this trial commenced in October 2020.

PARENTING TIME AND RESPONSIBILITIES

The Parties' Positions

- [42] N.C. does not want the current equal parenting time arrangement to continue. Rather, she seeks that primary residence of the children be with her on a 9-5 basis such that the children would reside with her for nine days commencing on Sunday evening at 5:00 p.m. The children would then reside with R.C. for five days commencing on the following Tuesday at 3:00 p.m. She acknowledges that nine days without seeing one parent may be a long time; however, she notes that it will not actually be that long because of R.C.'s attendance at the children's various activities during her parenting time. In light of the high conflict nature of the parties' relationship, N.C. seeks a very detailed parenting time plan.
- [43] N.C. argues that the current number of exchanges in the 2-2-5-5 schedule is not in the best interests of the children. She submits that her proposed schedule will benefit the children by creating more stability and reducing conflict amongst the parties.
- [44] Moreover, she is of the view that she is better suited to prepare the children for the school week and her proposed schedule will provide her with parenting time on all Sunday evenings so that she can do this. In her view, she is the more organized parent in terms of taking the children to appointments and attending to urgent medical needs. She also notes that the children, through the s. 211 report, have indicated that they enjoy time at her house more and that R.Y.C. is better behaved there.
- [45] N.C. submits that R.C. is not able to adequately attend to the children's needs when they are in his care. In support of this position, she points to the fact that R.C.'s family members "often" take care of the children on his parenting days. N.C. says that R.C. has shown poor judgment when parenting the children including involving them in the marital conflict, leaving them without adequate supervision, using physical discipline on occasion, and expressing anger verbally with the children. She also submits that R.C. has not taken sufficient steps to address his parenting issues by, for example, regularly attending counselling.

- [46] N.C. does not take the position that R.C. is not a good father. Rather, she submits that reducing his parenting time will enable R.C. to increase the bond he has with the children by giving him more time to work on issues that effect his parenting such that he will be a better parent when he has the children in his care.
- [47] N.C. seeks final decision-making authority in accordance with the Joyce Model. She proposes that any objection by R.C. to a decision she has made can be resolved by a parenting coordinator. This, she submits, will prevent the parties from needing to return to court to settle disputes that may arise in the future.
- [48] N.C. argues that she should have final decision-making authority for a number of reasons. She states that she makes better efforts to keep R.C. informed about decisions that involve the children. N.C. argues that she has made efforts to separate her conflict with R.C. for the best interests of the children and cites her active participation in co-parenting counselling in support of this. She also references this Court's previous orders in which N.C. was granted decision-making authority in respect of the choice of daycare and the continuation of the children's counselling sessions as evidence that she is best suited to exercise decision-making authority.
- [49] R.C. wants the equal parenting time arrangement that has been in existence since 2017 to continue. He argues that the 2-2-5-5 schedule that has been in place for nearly four years since separation is working and that the children are used to it. R.C. argues that N.C. has not made any persuasive submission as to why he should not continue to have equal parenting time. The slightly more contact time for the parties during exchanges in the 2-2-5-5 arrangement is, in his view, inconsequential as he and N.C. see each other frequently at the children's activities in any event.
- [50] Like N.C., R.C. candidly admits that he can improve on his parenting skills. However, he points out that, while he can improve, the children are fed healthy food while at his house and their needs are taken care of. He admits he is not as tidy as N.C. but submits that his residence is kept in a state that is perfectly suitable for the children.
- [51] Despite the fact that he seeks equal parenting time, R.C. does not seek shared responsibility for decision-making authority. Rather, he seeks the final say in decisions involving the children. In the alternative, he would be agreeable to a parenting coordinator having that responsibility.
- [52] R.C. cites a number of reasons why, in his view, it would be in the children's best interests for him to have equal parenting time and final decision-making authority. He argues that he is attuned to the children's social and emotional needs. He submits that N.C. is dismissive about the children's health needs and has caused delays in them receiving appropriate treatment. In support of this position, he cites N.C.'s reluctance to seek a pediatrician referral for H.C. R.C. is also concerned that N.C. prioritizes her relationship with her new partner, H.S., to the detriment of the children.

- [53] R.C. submits that he is just as capable of taking the children to their medical appointments as N.C. and is also supportive of the children receiving counselling; although I do note that he is not supportive of the children's current counsellor because of what he perceives to be a bias against him. He emphasizes that he is currently receiving counselling in an effort to improve his parenting, amongst other things.
- [54] R.C. submits that, as stated by Dr. LaTorre in the s. 211 report, the children are attached to both parents. While he acknowledges that C.C. may be more aligned with N.C., he suggests this may be due, in part, to gender and their shared interest in dance. He points out that the children's views can change quickly and are susceptible to what is happening in the moment. For example, he referenced a recent incident where N.C. and C.C. had a dispute and C.C. did not want to go back to N.C.'s residence at the time. R.C. acknowledges that his relationship with R.Y.C., in particular, is challenging. However, R.C. is of the view that R.Y.C.'s expressed preference for his mother's house may be due in part to more strict rules at his house.
- [55] During submissions, R.C. referenced Dr. LaTorre's conclusion that the children seek and would benefit from some alone time with each parent. R.C. noted that his family members can help facilitate this while the children are in his care and stated that he will also work with N.C. to help provide one-on-one time. Certainly, in his view, the time the children spend with his family should not be a reason to reduce his parenting time.
- [56] R.C. submits that his ability and history of encouraging the children to have relationships with both sides of the extended family militate in favour of him retaining equal parenting time. He is concerned that the children will not see his side of the extended family as much if N.C. is provided with the parenting time she seeks. Clearly, R.C.'s relationship with his family is important to him; he has fostered the children's relationship with his father as well as with their cousins, aunts, and uncles.
- [57] R.C. denies that he has ever physically abused N.C. He admits to spanking the children on rare occasions and while he stopped short of guaranteeing that he would never spank them again, he does not intend to do so.
- [58] R.C. pointed out two specific incidents in which N.C. and C.C. appear to have been involved in some sort of a physical altercation. The first incident occurred in early 2020 when N.C. bit C.C.'s finger during what was described as C.C. having a temper tantrum. The second incident occurred in the summer of 2021. It is not exactly clear what occurred during this incident, but there appears to have been some sort of a physical interaction between N.C. and C.C. following a physical altercation that started between C.C. and her brother that N.C. tried to break-up. R.C.'s view is that these incidents, like his use of spanking, are not indicative of a pattern of violence that should impact either party's parenting time.
- [59] The parties agree that they should both remain as the children's guardians and I will issue an order to that effect.

Applicable Law

[60] Both the respondent and the claimant referred to s. 37 of the FLA in framing their submissions on parenting arrangements. However, in their pleadings, both parties seek parenting arrangement orders under both the FLA and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA]. During the course of the proceedings I reminded the parties that changes to the DA had come into effect on March 1, 2021, and that even though this matter commenced before the amendments came into force, the amending act provided that the amendments would apply to this proceeding. The language of the DA is now more in line with the language used in the FLA and the parties indicated their agreement that the orders sought could be made under either the DA or the FLA.

[61] The definitions of "parenting order" and "parenting time" in s. 2 are important to the new provisions of the DA:

parenting order means an order made under subsection 16.1(1);

parenting time means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time;

[62] The relevant portions of the new s. 16.1 provides the following:

Parenting order

(1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

(a) either or both spouses; or

Contents of parenting order

(4) The court may, in the order,

(a) allocate parenting time in accordance with section 16.2;

(b) allocate decision-making responsibility in accordance with section 16.3;

(c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and

(d) provide for any other matter that the court considers appropriate.

Terms and conditions

(5) The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate.

Family dispute resolution process

- (6) Subject to provincial law, the order may direct the parties to attend a family dispute resolution process.

[63] Much like under the FLA, s. 16(1) of the DA provides that the court is only to consider the best interests of the children in making a parenting order. Section 16(3) of the DA sets out a non-exhaustive list of factors that the court must consider in determining the best interests of the children which are very similar to the factors set out in s. 37 of the FLA:

16 (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- (d) the history of care of the child;
- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;
- (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
- (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
- (j) any family violence and its impact on, among other things,
- (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
- (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
- (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

- [64] Subsection 16.2(1) of the DA provides that parenting time may be allocated by way of a schedule. Subsection 16.2(2) provides that, unless the court otherwise orders, a person to whom parenting time is allocated has exclusive authority to make day to day decisions affecting the child during that parenting time. Nonetheless, the court may allocate decision-making responsibility in respect of a child, or any aspect of that responsibility, to either spouse or both spouses pursuant to s. 16.3 of the DA. Decision making responsibility under the DA is akin to parenting responsibilities as that term is used in the FLA.
- [65] Subsection 16(6) requires that, when allocating parenting time, the Court is to "give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child." This is somewhat different than s. 40(4)(a) of the FLA which explicitly eliminates the presumption of equal sharing of parenting time. Nonetheless, in both provisions it is clear that the best interests of the child is the determining factor for the allocation of parenting time: *M.W. v. N.L.M.W.*, 2021 BCSC 1273 at para. 95. And, as noted by Justice Veenstra in *M.W.* at para. 96:
- [96] although the FLA makes clear that there is no presumption in favour of equal parenting time, the connection between a child's emotional well-being and a healthy relationship with both parents is a matter often recognized by the courts: see *D.A.B. v. C.A.S.*, 2020 BCSC 807 at paras. 151 and 155 and cases cited therein.
- [66] Similar to s. 37(4) of the FLA, s. 16(5) of the DA prohibits the consideration of past conduct of the parents "unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility..." While this wording is arguably more permissive than s. 37(4) of the FLA which restricts consideration of past conduct to a situation that "substantially affects" a factor to be considered in determining the best interests of the child, the difference in wording is not likely to give rise to a different result given that both statutes focus on the best interest of the children: *M.W.* at para. 94.
- [67] I agree with Justice Veenstra that the differences between the FLA and the recently amended DA are mainly a difference in emphasis that will likely have little effect in application: *M.W.* at para. 98. Like in that case, applying either the DA or the FLA provisions in this case would lead to the same result, regardless of the difference in wording or emphasis in the Acts.
- [68] Given the modernization of the language of the DA and that the orders are sought corollary to an action for divorce, I have decided to make the order in respect of parenting time and arrangements under the DA with reference to the language used in the recently amended Act.

Analysis

Summary of Conclusions

- [69] I have considered the factors set out in s. 16(3) of the DA and I have concluded that it is in the best interests of the children for the parties to have equal parenting time. I am not persuaded that either parent is incapable of exercising their responsibilities as parents such that the balance tips in favour of one or the other having significantly more parenting time as was suggested by N.C.
- [70] However, although I find that equal parenting time is in the best interests of the children, I am of the view that the parenting schedule should be modified such that the children reside with the parties on a week-on/week-off schedule. While seven days away from one parent may be a long time, the current schedule already requires the children to be away from one parent for five days and N.C.'s proposed schedule would require nine days of separation. The week-on/week-off schedule is not substantially different given the ages of the children. This new schedule will begin during the children's 2021 school winter holiday as detailed later in these reasons.
- [71] I agree with N.C. that such a schedule will permit the children to better acclimatize to each parent's residence and different parenting styles. It will also reduce the amount of time that the parties must interact and communicate because the number of exchanges will be reduced. I also agree with N.C. that, in the circumstances, a Sunday evening 5:00 p.m. change in parenting time is appropriate. In this way, each parent will have Sunday evening to spend time with the children and prepare them for the school week ahead. I have considered the benefits of an exchange time during the week after school such that the parties do not need to interact with one another, but I am satisfied that the parties will be able to handle the contact required during one exchange per week.
- [72] N.C. submits that R.C. has demonstrated poor judgement overall and that this should be considered when determining parenting time and responsibilities. While I agree that R.C. has, at times, engaged in conduct that demonstrates poor judgement such as the previously discussed data intrusion, mobile phone account tracking, and recording the children, and he is at times focused on finding N.C. to be at fault for certain matters, I do not agree that this behaviour leads to the conclusion that R.C. is incapable of making decisions that are objectively in the best interests of the children.
- [73] I have determined that the parties will share decision-making authority in respect of the children under s. 16.3 of the DA. If the parties are unable to agree, the disagreements will be resolved by a parenting coordinator as opposed to resorting to a court application. The parties have agreed to the appointment of a parenting coordinator under the standard terms. In my view, in the particular circumstances of this case, and in light of the fact that both parties will share parenting time equally, it would not be conducive to a relationship that puts the best interests of the children first if one of the parties had sole decision-making

authority or if one party was able to make the decision in the first instance and then the other had to turn to the parenting coordinator.

Parenting Time

- [74] My conclusion on the parenting arrangement was also informed by Dr. LaTorre's detailed s. 211 report. After a lengthy discussion of the many interviews he conducted, Dr. LaTorre recommends a parallel parenting model based upon three main assumptions.
- [75] The first assumption that Dr. LaTorre makes is that both parents, at times, have put their animosity for one another ahead of the children's best interests. I find that this assumption was founded in the evidence. For example, the parties have had lengthy disputes about who made a particular doctor appointment or who was to take R.Y.C. to the hospital for treatment for his Crohn's disease. The parties both seemed to lose sight of the importance of the treatment appointment and instead focused on who was right and who was wrong.
- [76] Dr. LaTorre's second assumption is that the parties are resistant to change. While I agree that some of their past conflict has been rooted in such a resistance and some resistance certainly still exists, I do not agree that they are entirely resistant to changing themselves. N.C. has demonstrated a commitment to self-improvement through extensive regular participation in counselling. While R.C. has not been engaged in as extensive counselling as N.C., he has also demonstrated a commitment to improving his abilities as a parent by participating in and completing the 14-week Confident Parents Thriving Kids program. Moreover, R.C. has recently engaged in private counselling to address some of the issues identified by Dr. LaTorre and I am optimistic that he will continue with this counselling. It is also encouraging that the parties' email communications have improved somewhat.
- [77] However, I do find that the parties are resistant to changing the way in which they view each other as well as their views of what has occurred in the past. R.C. is particularly focused on who is to blame for past actions. N.C. is particularly focused on the actions that R.C. has taken that are now long in the past. I do not expect that there will be a change in the fundamental nature in which they view each other. Unfortunately, their views of one another and the conflict that arises do not lend themselves to an ability to engage in positive co-parenting.
- [78] The final assumption that Dr. LaTorre makes is that the children all have emotional and behavioural issues, particularly so with H.C. and R.Y.C., and that some of these are attributable, or at least exacerbated by, the nature of the parties' high conflict relationship. I agree with Dr. LaTorre's assumption; the evidence bore this out.
- [79] Dr. LaTorre opined that co-parenting in these circumstances is doomed to fail and instead recommended a model of "parallel parenting". In testimony before me, both N.C. and R.C. agreed that parallel parenting is a more appropriate model for them. Dr. LaTorre described parallel parenting as follows:

While parenting in parallel, parents separately choose how to raise the children in their own households and they make daily decisions on their own. It is meant for parents who are unable or unwilling to cooperate in order to raise the children in a healthy manner. It is for parents whose pain, anger, resentment and so forth, arising typically from a failed relationship, prevents them from communicating with one another or from communicating without hostility. A strength of this model is that it limits interactions between the parents and, therefore, limits hostile flare ups between parents and in front of flexibility (flexibility allows the introduction of parental interaction and, consequently, conflict)

- [80] In my view, the week-on/week-off schedule will better permit for a parallel parenting model than the current 2-2-5-5 schedule which necessitates more closely coordinated schedules, drop offs and pick ups, and interactions amongst the parties. It is also better suited for parents who have demonstrated an inability to communicate effectively. The parallel parenting model and the 7-7 schedule minimizes the need for the parents to cooperate on such a frequent basis.
- [81] I also find that the 7-7 schedule is in the children's best interests considering R.C.'s and N.C.'s different parenting styles. In summary, the evidence supported that N.C. has a more permissive parenting style than R.C. The 7-7 schedule will allow each of them to parent in the ways they see fit during their parenting time, and provides sufficient time for the children to become used to each style. Such a schedule provides for more stability over the course of the week that the children spend with each parent and negates the need for them to frequently adjust themselves to meet the different expectations in the different residences.
- [82] Dr. LaTorre expressed a slight preference for N.C. to have more parenting time than R.C. This was based upon his view that N.C. was more likely than R.C. to quickly address her identified parenting issues. However, I am satisfied on the evidence before me that R.C. can successfully make substantive changes in his parenting in a relatively short period of time such that unequal parenting time is not necessary to meet the children's best interests. As referenced above, R.C. has completed the 14-week parenting course and R.C. described how he has begun to use the strategies he learned there as an effective method of dealing with his children's behaviour issues. While he only recently started to attend private counselling on a regular basis, I am encouraged by what he has described as his focus in these sessions. In my view, R.C. has demonstrated that he is committed and capable of making positive changes in his parenting style. I am also of the view that once this litigation is concluded, R.C. will have the means, both financially and emotionally, to continue with this counselling.

- [83] I do not agree with N.C. that the fact that R.C.'s family members take care of the children on occasion during R.C.'s parenting time indicates that he is unable to adequately attend to their needs. Little to no evidence was led in support of R.C. engaging his family to assist him for this reason. Rather, I find that R.C.'s family's involvement has been necessary for childcare reasons and is also explained by the importance that R.C. places on the relationship his children have with his family.
- [84] I am not persuaded that R.C. has demonstrated a pattern of leaving the children without adequate supervision such that it would not be in the best interest of the children to spend equal time with him. While it may not have been wise for R.C. to leave C.C. to watch over her younger siblings at the arena while R.C. played a hockey game, there is no indication in the evidence that this happened on more than one occasion or that the children were in any danger.
- [85] I am concerned that R.C. has used physical discipline on the children in the past. However, there is no allegation, nor is there any evidence to indicate, that this has risen near to a level of abuse. In his report, Dr. LaTorre conveyed C.C.'s description of the physical discipline as consisting of a "single swat" to the brothers' bottoms. H.C. reported that his father had spanked him but "no longer does so". As I understand the evidence, including that of R.C. and the information conveyed to Dr. LaTorre, R.C. has spanked the children on a handful of occasions. While he has not ruled out doing so again in the future, he acknowledges that it is not constructive and has committed to attempting to not do so in the future. I am optimistic that his continued participation in counselling will help to equip him with tools that he can use in the alternative to spanking.
- [86] In her testimony, N.C. described occasions where R.C. was allegedly physically violent with her before their separation. R.C. denied the allegations. There are other allegations referred to in Dr. LaTorre's s. 211 report for which I heard no evidence and which I will make no findings in respect of. Whether or not the incidents occurred as alleged by N.C., it is clear to me that there has been no physical violence between the parties since their separation in 2017 and the children have not witnessed anything of the sort before or since.
- [87] The main parenting issue that R.C. must address is his use of profanity and his tendency to raise his voice in front of the children. I accept R.C.'s testimony that he does not swear "at" the children; rather, he will sometimes use profanity as an expletive when he becomes frustrated with their behaviour. The children all told Dr. LaTorre that they do not like it when R.C. swears or raises his voice. However, I am persuaded that R.C. is aware of the negative effect that this has on his children and that he is committed to making changes in this respect as evidenced by his participation in the parenting course, counselling, and his description of the way in which he has implemented the strategies he has learned.
- [88] Similarly, I accept N.C.'s evidence that the two incidents that I heard testimony about regarding physical altercations she had with C.C. were not intentional. The incident involving N.C. biting C.C.'s finger and the other incident where C.C. left N.C.'s residence

following a physical altercation that started between C.C. and her brother are, in my view, more likely related to what appears to be unintentional and accidental responses to a pattern of physical temper tantrums by C.C. They are not indicative of a pattern of physical abuse that would affect the time that the children spend with N.C.

- [89] I have considered the factors in s. 16(4) of the DA and conclude that any past physical violence that may have occurred between the parties does not impact my decision that equal parenting time is in the best interests of the children. As discussed above, I have considered R.C.'s use of physical discipline and profanity and the steps he has taken, and is taking, to address this and am satisfied that it does not effect my decision to provide the children with equal time with each parent.
- [90] I have also considered the views of the children as they were expressed to Dr. LaTorre. While the children have expressed a slight preference for the time they spend with their mother, I have considered this in light of their respective ages. Given the children's ages and the parties' different parenting styles, it is likely that the slight preference they have expressed for N.C. is at least in part due to her more permissive parenting style. The children's main concern, particularly for C.C., is a desire to spend more one-on-one time with each parent. Both R.C. and N.C. have testified that they can and will facilitate this and both have family members nearby who can help them accomplish this. The parties are to make their best efforts to enable this.
- [91] What is clear to me from Dr. LaTorre's report, and from the evidence I heard from the parties and their respective witnesses, is that all the children have a level of attachment to both parents. It is not clear to me that N.C. spends more time with the children when they are in her care compared to the time R.C. spends with them while in his care. On the evidence before me, both parties engage in activities with the children and both parties sometimes do work from home while the children are in their care. There is certainly nothing in the evidence to suggest that either parent abdicates their responsibilities during their parenting time.
- [92] The children have also complained about the time that N.C. spends with her new partner. While Dr. LaTorre and R.C. referenced some incidents of allegedly inappropriate behaviour in front of the children, N.C. addressed these to my satisfaction. I am not of the view that she and her partner have inappropriately discussed or engaged in sexualized behaviour in front of the children. Rather, it appears that despite appropriately locking their bedroom door when together after the children have gone to bed, they have been interrupted. In my view, the week on / week off schedule will be beneficial for the children because it will allow N.C. to arrange a schedule where she is able to spend time with her new partner at times when she does not have her children.
- [93] I am also not persuaded that R.C. is unable to adequately provide healthy food or a clean house for the children. While it may be that N.C. is more organized and tidier than R.C., as the children reported to Dr. LaTorre, the standard sought is not perfection. While I did see

photographs of R.C.'s residence that depict a state of disarray, those photos are quite old and there is no indication that this is the current state of his house. Dr. LaTorre did not report on any issues of cleanliness after visiting R.C.'s residence. The evidence also shows that, despite the children expressing a preference for N.C.'s food, R.C. provides his children with an appropriate diet. In recent years, he has moved away from a reliance on fast food in favour of pre-prepared meals that use fresh ingredients. There is nothing in the evidence to lead me to believe that R.C.'s food preparation abilities are such that it would not be in the children's best interest to maintain equal time with him.

- [94] As referenced above, the children are attached to both parents. The children have benefited from both parents' involvement in their lives. For example, R.C. has coached, and continues to coach, some of the sports that the two boys are involved in. N.C. is very involved in C.C.'s extensive dance program. Both parents regularly attend games and performances. Both parents engage in activities with the children such as swimming and camping. Both assist with homework. This level of involvement can continue with the equal shared parenting time.
- [95] I find that the children have a strong relationship with R.C.'s family, including their cousins. In particular, R.Y.C. has an especially strong relationship with R.C.'s father. The children also appear to have a strong relationship with N.C.'s mother and grandmother. I am of the view that the children's relationship with R.C.'s family will be negatively impacted if N.C. was to have significantly more parenting time than R.C. Although she testified that she would be more flexible in allowing the children to go to R.C.'s family's events during her parenting time, I am not persuaded that will actually occur given the parties' history in this regard, and in particular, N.C.'s reluctance to be flexible in this area in the past. Attendance at R.C.'s family events has been used as a bargaining chip by N.C. in the past.
- [96] The history of the children's care does not, in my view, support reduced parenting time for R.C. On the evidence before me, there is no doubt that N.C. was the children's primary caregiver while the parties were together. She took three approximately one-year maternity leaves while R.C. took approximately one week away from work after the birth of each child. This is not to say that R.C. was not involved in the children's upbringing; I accept that he took them to events, activities and appointments and would pick them up from daycare. Since the parties separated more than four years ago, they have had equal parenting time. This is not an inconsequential period of time. During this time, no applications have been brought by either party to modify the equal shared parenting regime.
- [97] Given the significant emotional and behavioural issues that present for H.C. and R.Y.C. (and as will be discussed in depth later in these reasons), Dr. LaTorre has opined that the children's need for stability is high. I agree. I also note that the need for stability does not mean that the status-quo is necessarily to be preferred. In my view, the need for stability in the circumstances requires a routine that is easy for the children to follow and anticipate and that retains equal time with both parents. While the children are used to the 2-2-5-5 schedule, the 7-7 schedule provides the children with more stability and predictability in

their home environments.

- [98] I am satisfied that both N.C. and R.C. are willing and able to meet the children's needs. While the evidence has shown that they each have different parenting styles, neither has demonstrated an inability or incapacity to meet the children's needs. The evidence reveals that each have the ability to provide proper food and clothing for the children and have demonstrated that during the past four years. They are both engaged in their children's lives; they assist them with homework and engage in activities and play. Each of them has strengths and weaknesses as is to be expected; perfection is not what is being strived for. I have no concerns that there are any risks to the children when in either of the parents' care.
- [99] The children's health and emotional well-being has undoubtedly been negatively impacted by their parents' acrimonious divorce and high conflict relationship. It is not clear whether the divorce or the relationship is the cause of the children's emotional and behavioural issues. What is clear, however, is that the children's emotional well-being is a significant factor in determining what is in their best interests.
- [100] According to Dr. LaTorre, all three children have engaged in concerning self-critical or self-demeaning talk. In his view, C.C. has expressed more resilience and her behaviour is less concerning. R.Y.C. has threatened to cut himself and the daycare has recently reported that they observed him engage in some self-harm. Dr. LaTorre describes R.Y.C. as presenting with possible social skills deficits. He recommends that R.Y.C. be assessed by a child psychologist or psychiatrist to rule out Autism Spectrum Disorder.
- [101] H.C. has expressed suicidal ideation on occasion. H.C. is sometimes violent with other children, adults, and his parents. The parties and the support teacher from his school have indicated that H.C. has been provided with a Designation H. As described by Dr. LaTorre, H.C. was provided a Designation H as a student who requires intensive behavioural intervention. Dr. LaTorre describes the designation as follows: "to receive this designation, students must display antisocial, extremely disruptive behaviour that is consistent or persistent and serious enough to warrant intensive intervention by other agencies or service providers. These students are considered to be a serious risk to themselves or others." Dr. LaTorre recommends that H.C. be assessed for Attention-Deficit/Hyperactivity Disorder (ADHD) and that a child psychologist or psychiatrist also rule out conduct and mood disorders.
- [102] I agree with Dr. LaTorre that H.C.'s behavioural manifestations are "very significant" and require the intervention of mental health professionals. I do not find that either parent has had a more negative effect than the other on the children's emotional well-being. On the evidence before me, I agree with Dr. LaTorre that their high conflict relationship, which is displayed in front of the children, has exacerbated the children's difficulties. What is important moving forward is that the children obtain the necessary supports.

- [103] In my view, both parents are concerned with the children's well-being. Both take an active interest in their physical and mental health. Both parents take them to doctor appointments. The children's best interests will be met by the continued equal involvement of both parents in their mental and physical health needs.
- [104] R.C. has demonstrated a keener interest in obtaining medical intervention for H.C. by pushing for him to be seen by a pediatrician. N.C. did express some reluctance to this in the past and she stated on cross-examination that she does not think that H.C. needs medication. Nonetheless, I do not find that N.C. is dismissive of the need for H.C. to see a pediatrician. She explained that she wanted to explore other options first and has since cooperated with a pediatric referral.
- [105] However, N.C. has demonstrated a resistance to taking the children to various care providers for assessments. There may be a number of reasons for this including a reluctance to have her children "labelled". It may also be due to scheduling issues as R.C. has taken the lead in making these appointments. It may also be that N.C. truly believes that all of the children's issues are as a result of their parents' high conflict relationship. Whatever the reason, my appreciation of the evidence, including Dr. LaTorre's report is that there are significant concerns with H.C. and R.Y.C. that require professional assessment.
- [106] I agree with Dr. LaTorre's recommendation that H.C. and R.Y.C. would benefit from an in-depth psychological assessment by a qualified Psychologist practicing in child psychology in order to rule out such things as ADHD, Autism Spectrum Disorder, Conduct Disorder, Mood Disorder, Anxiety Disorder, Learning Disability and so forth. As Dr. LaTorre notes, "one comprehensive assessment could then serve as a basis for deciding upon appropriate resources, the form of further therapy or counselling, remedial services and even, possibly, further and more highly specialized assessment." R.C. has begun the process of obtaining these assessments and has, as I understand it, made the initial intake appointments for himself with a properly qualified agency. N.C. has also indicated that she will cooperate. The cost of these assessments should be shared by the parties proportionate to their current incomes.
- [107] While N.C. may be reluctant to obtain these assessments, she indicated a willingness to do so after having read Dr. LaTorre's report. Moreover, it should not be ignored that she has facilitated the children's participation in counselling with Athena Pilarinos on a regular basis for more than one year. R.C. is also supportive of mental health intervention and has investigated the involvement of Child Youth and Mental Health services for H.C. However, he is opposed to the children continuing to see Ms. Pilarinos because he believes that she is biased against him. While he testified that he would like to find other counsellors for the children, and N.C. invited him to do so on a number of occasions, he did not provide any examples of attempts to actually find other counsellors for the children.

- [108] During the course of the trial, I made an interim order that R.C.'s consent is not required for the children to continue to attend counselling appointments with Ms. Pilarinos and I ordered N.C. to pay for those sessions. Now that the evidence is concluded and I have the benefit of Dr. LaTorre's report, I conclude that the children should continue to see Ms. Pilarinos until the assessments referenced above are completed. The cost of the children's past and future counselling sessions should be shared in proportion with the parties' incomes as a s. 7 expense. Once the assessments are complete, the children's need for continued counselling should be re-evaluated based on the professionals' recommendations. If the parties are unable to agree on the continued involvement of Ms. Pilarinos or on a new counsellor at that time, then the parenting coordinator will decide.
- [109] On the evidence before me, the parties require a detailed parenting schedule for the winter, spring break, and summer holiday periods. Considering the relevant factors, I have determined that the following holiday schedules are in the best interest of the children.
- [110] It was clear on the evidence that Christmas is an important holiday to both parties and their families, perhaps slightly more so for R.C. and his family who have a number of annual traditions. Unfortunately, the children are bound to miss out on some activities of one family or the other given that their parents are separated. Nonetheless, I am of the view that given the importance of the holiday to both families, it would not be in the best interests of the children to be taken from the Lower Mainland without the other parent during Christmas Eve or Christmas Day. Consequently, I order that the parties are to evenly split the two weeks of the school winter holiday. Specifically, the parties' current 2-2-5-5 parenting schedule will be modified as follows beginning in the 2021-2022 winter school holiday period:
- a) N.C. will have parenting time during the week that includes December 25, from Sunday at 5:00 p.m. to the following Sunday at 5:00 p.m.
 - b) R.C. will have parenting time during the week of the holiday that does not include December 25, from Sunday at 5:00 p.m. to the following Sunday at 5:00 p.m.
 - c) In the following year, the schedule will be reversed and the parties will alternate parenting time in subsequent winter school holidays.
 - d) The parent that does not have parenting time during the week that includes Christmas Day will have the children from 4:00 p.m. to 9:00 p.m. on Christmas Eve.
 - e) The parent that has the children during the week that does not include December 25 may leave the Lower Mainland for vacation with the children during that week.
- [111] The week-on/week-off parenting schedule will continue during the school's two-week spring break period. The parents are at liberty to leave the Lower Mainland with the children during their week of spring break parenting time.

- [112] During the school summer holiday period, the week-on/week-off parenting schedule will continue. However, each parent is entitled to two consecutive weeks of uninterrupted parenting time during the summer period during which the regular parenting schedule is suspended. Those two weeks are to commence at the beginning of a regular parenting week and will end at 5:00 p.m. on the Sunday evening two weeks later. The parties are to agree on their two weeks of consecutive parenting time by May 31st or earlier. Should they be unable to agree, they may apply to the parenting coordinator for directions. The parents are at liberty to leave the Lower Mainland with the children during their two weeks of summer holiday parenting time and during other parenting time in the summer holiday period.
- [113] The parties agree on parenting time during Easter, Thanksgiving, Father's Day and Mother's Day. Thus, an order will issue consistent with paragraphs 10, 11 and 12 of the Draft Order submitted by N.C. The parties will have parenting time on Halloween in accordance with the regular parenting schedule.

Decision-Making Responsibility

- [114] I agree with N.C. that any order made with respect to decision-making responsibilities should be one that prevents the parties from returning to court, as much as that is possible, given their demonstrated inability to communicate effectively. However, I do not agree that only one parent should have final decision-making authority, particularly given that I have concluded that equal parenting time is in the best interest of the children. Thus, I have concluded that the parties will share decision-making authority under s. 16.3 of the DA. For clarity, that includes the specific responsibilities listed under s. 41 of the FLA.
- [115] The parties agree that it would be appropriate to appoint a parenting coordinator. Thus, pursuant to s. 15 of the FLA, the parties are to engage the services of a parenting coordinator within 60 days of the date of these Reasons for Judgement for a period of two years. Within 30 days of the date of these Reasons for Judgement, R.C. is to propose three names of certified parenting coordinators who are available and willing to assist the parties. N.C. will choose the parenting coordinator from those three names provided by R.C.
- [116] An order will issue that the parties will share decision-making responsibility under a modified Joyce Model. The modification being that in the event the parties cannot agree despite their best efforts, either party is entitled to apply to the parenting coordinator for directions.
- [117] For clarity, the parties will share the decision-making authority with respect to the daycare the children will attend while in their care. Whatever daycare is chosen must be willing and able to communicate with both parents. At this time, Daycare S would not be an appropriate choice as a daycare for the children given that the daycare has indicated that N.C. and her family are not welcome there and I am not persuaded that they will communicate with N.C. regarding matters affecting the children. Despite a litany of complaints made by R.C. in regards to Daycare K, he ultimately testified that he is content with the children being at

that daycare at this time and the hours appear to be more compatible with his current work situation. The parties can also apply to the parenting coordinator for directions with respect to the childcare arrangements should it be necessary.

- [118] Furthermore, both parties will share the responsibility for scheduling and taking children to medical doctors. Each party shall inform the other of the date, time, and location of any such appointment within a reasonable time of the appointment being scheduled.
- [119] The children shall have phone or video chat access to the other parent when in the other's care. The parties have managed to make this work over the years without the need for a formal schedule and both submit that a schedule is not needed now. Thus, I will order that such access is to be reasonable and the communication not be less than once every two days. Should it be required in the future, the parties can apply to the parenting coordinator for further directions in this regard.
- [120] Each party will maintain copies of documents of the children such as MSP cards and birth certificates. I am satisfied that where it is not possible to have a second copy, N.C. will be the parent to keep the original. N.C. will be required to provide R.C. with access to such documents upon reasonable notice and shall not unreasonably deny such access. The original is then to be returned to N.C.
- [121] I have determined that N.C. will be the parent responsible for obtaining the children's passports as the primary applicant and that R.C. is to provide his signature on such applications within one week of being requested. Each parent is permitted to take the children across the Canada/U.S. border for periods not exceeding one week without the other's written permission. Permission for extended trips should not be unreasonably withheld.

CHILD SUPPORT

The Parties' Positions

- [122] Both the parties agree that child support is the right of the child and should be paid to the recipient based on the Federal Child Support Guidelines, SOR/97-175, [Guidelines] since separation. They also agree that there has been shared parenting since separation.
- [123] The parties also agree on how much child support has been paid by R.C. to N.C. in the past. The parties agree that up to the commencement of trial in October 2020, R.C. paid \$3,451 before the Family Maintenance Enforcement Program became involved in collection and \$8,554.78 after. Only \$18 has been paid since the trial began in October 2020 and I note that the parties agreed that child support would not be payable from one to the other during this time without prejudice to the final determination of the matter. Consequently, the total amount of child support paid to date by R.C. to N.C. is \$12,024.

- [124] The parties disagree, however, on their respective incomes for the purposes of the calculation under the Guidelines. Both parties submit that the other should have additional income imputed to them.
- [125] R.C. states that he owes N.C. a small amount of child support for the period since separation. However, he is of the view that additional income should be attributed to N.C. for 2017, 2018, and 2019, which would significantly reduce the amount payable. He submits that N.C. was intentionally under-employed during this period and / or not reporting all of her income. In summary, he argues that N.C.'s job changes since separation were not necessary and that if she had remained in the job she had at separation she would have earned a higher income sooner than she did. He also argues that N.C. was receiving remuneration for work done for her new partner but not declaring that income.
- [126] N.C. does not agree that income should be imputed to her as submitted by R.C. She argues that her changes in jobs were reasonable in the circumstances and notes that she has not been unemployed at all since separation. She does, however, agree that her income for 2018 should be imputed as \$35,000 because she lost income that year due to a motor vehicle accident and is currently pursuing a wage-loss settlement with the insurer. She submits that \$35,000 would be reasonable because it is the same amount of income she earned in 2017. N.C. adamantly denies that she received any income from her new partner "under the table" and submits that there is no cogent evidence to support such an allegation.
- [127] N.C. submits that R.C. should have income imputed to him on the grounds that he has been intentionally under-employed since 2018. She submits that his income should be imputed to be \$80,000 per year since 2018. In particular, N.C. is of the view that R.C. has been available for and able to work full time since his employment was terminated by Company M in November 2019. She says it was his choice to start his own business and that he could have instead found full time employment earning much more than he has reported earning from his business.
- [128] R.C. says that no additional income should be imputed to him. He submits that he lost his employment due to the change in daycares and his inability to get to work on time with Daycare K's hours. He blames N.C. for this as she chose the new daycare, which had hours that were, according to R.C., incompatible with his work schedule. R.C. argues that it is impossible for him to get to any job in his trade on time with Daycare K's hours. Thus, he says that he had no choice but to start his own business in order to take care of the children during his parenting time. He also notes that starting his own business is something that he has been planning to do for some time and submits that his decision to do so was reasonable.

Applicable Law

[129] Parents are obligated by statute to provide support for their children to the extent that they are capable of doing so: DA s. 26.1(2). A child support order recognizes each parent's obligation to support their children and the Guidelines apportion that obligation. A court making an order for child support must do so in accordance with the Guidelines and must consider the objectives set out in s. 1: DA s. 15.1(3).

[130] The objectives of the Guidelines are:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[131] Income for child support purposes is generally determined using parties' Total Income on the Canada Revenue Agency T1 General form, in accordance with s. 16 of the Guidelines. However, s. 19(1)(a) of the Guidelines gives the court discretion to impute income to a spouse when the court finds that a spouse is intentionally under-employed or unemployed.

[132] The relevant portions of s. 19 provide:

19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment 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 or health needs of the spouse;

()

- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

[133] *Drygala v. Pauli* (2002), 61 O.R. (3d) 711, 219 D.L.R. (4th) 319 (O.N.C.A.) is the leading case in regard to the imputation of income under s. 19(1)(a) and stipulates three questions that the court must answer when deciding whether to impute income to a spouse:

1. Is the spouse intentionally under-employed or unemployed?
2. If so, is the intentional under-employment or unemployment required by virtue of the spouse's reasonable educational or health needs or the needs of a child of the marriage?

3. If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?

- [134] The party seeking to have income imputed to their former spouse bears the onus of showing, on a balance of probabilities, that their former spouse is intentionally under-employed: *Windle v. Windle*, 2010 BCSC 18 at para. 88. A spouse is intentionally under-employed when they choose to earn less than what they are capable of earning: *Barker v. Barker*, 2005 BCCA 177 at paras.18-19. Section 19(1)(a) does not apply where, through no fault or act of their own, the spouse is terminated from their employment or given reduced hours: *Drygala* at para. 28. In British Columbia it is not necessary for a party alleging under-employment to show that their former spouse is under-employed with the intent of avoiding support obligations: *Barker* at paras.18-19.
- [135] Once a party has adduced sufficient evidence to show that their former spouse is earning less than they are capable of earning, the onus shifts to the under-employed spouse to show that their under-employment is by virtue of their reasonable educational or health needs or the needs of a child of the marriage: *Drygala* at paras. 38-41. If the under-employed spouse cannot show that their under-employment is required by their reasonable educational or health needs or the needs of a child of the marriage, the court must exercise its discretion in deciding whether, and in what amount, to impute income to the spouse.
- [136] In exercising its discretion under question three of the *Drygala* framework, the court must consider whether the spouse's under-employment is reasonable in the circumstances having regard to the spouse's employment history, age, education, skills, health, available employment opportunities, and the standard of living enjoyed during the marriage: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37; *Drygala* at para. 45.
- [137] In respect of spouses who have made post-separation career changes that reduced their income, the court must consider whether that career change was reasonable in the circumstances. Children should not bear the burden of their parent's career changes: *Montgomery v. Montgomery*, 2000 NSCA 2.

Analysis

Should Income be Imputed to N.C.?

[138] N.C.'s reported T1 income since 2014 is as follows:

2014

\$21,735

2015

\$33,080

2016

\$4,744

2017

\$35,714

2018

\$20,199

2019

\$47,884

2020

\$103,644

2017

[139] In 2017, N.C.'s Line 150 and Guidelines income was \$35,714. R.C. argues that additional income should be imputed such that N.C.'s Guidelines income should be between \$60,000 and \$70,000. In support of his position, he relies on a document originating from a Google document that N.C. testified was a working paper in respect of her income and commissions in 2017. He also points to various "Commissions Payable" printouts that appear to have been printed by N.C.'s employer at the time, Company B, which depict her income earned from July to December 2017.

[140] As I understand his argument, from these documents, he surmises that because N.C. appears to have earned approximately \$35,000 in commission income in the latter half of the year, her income should be imputed to be \$70,000 for the entire year to recognize what she made in the last half of the year since they separated in or around May 2017. I cannot accept R.C.'s argument in this respect. I am not aware of any authority that would permit me to pro-rate N.C.'s income based on what she made for part of the year and I know of no basis in law to do so.

[141] R.C. also alleges that in 2017, N.C. was receiving cash "under the table" for work she did for her new partner. He relies on hearsay testimony provided by a former friend of N.C., L.B., in which she stated that N.C. told her that she was receiving under the table payments from H.S. N.C. denied that she received any such payments in her testimony before this court. In my view, L.B.'s evidence on this was vague. She did not provide a time nor a place nor the circumstances in which N.C. allegedly told her this and had no specific details at all. She never witnessed N.C. use large amounts of cash, despite the fact that they often shopped together. On cross-examination, L.B. admitted that although she was of the view that N.C. loved to spend money, she was not of the view that N.C. was extravagant and she in fact admitted she was thrifty in her purchases.

- [142] R.C. also points to e-transfers sent from H.S. to N.C. in 2017 as being evidence of under the table payments. N.C. testified that these amounts were loans from H.S. for three months of rent and for moving expenses, which she borrowed from him shortly after she moved out of the family home and which she has since paid back. The evidence shows that the amount transferred from H.S. to N.C. is equivalent to three months of N.C.'s rent at the time plus \$400 for moving expenses. Furthermore, R.C. provided no explanation as to why H.S. would pay N.C. under the table by way of easily traceable e-transfers. The evidence does not support a finding that these transfers were income to N.C.
- [143] I am also not persuaded that the CIBC account opened by N.C. in May 2017 was used for any significant amount of time or that it was used by N.C. to hide income. I accept N.C.'s evidence that she did not use the account because she experienced administrative issues when she tried to open the account. While the documentary evidence does not definitively show how long the account was active for, on a balance, the evidence supports N.C.'s version of events. Without evidence to the contrary from the financial institution itself, I am not prepared to conclude that this account was used for the purposes R.C. alleges.
- [144] R.C. has not met the onus upon him of proving that N.C. underreported her income in 2017. Thus, I decline to impute income to her and find that her Guidelines income for 2017 is \$35,714.

2018

- [145] In 2018, N.C. has reported her Line 150 income to be \$20,199. R.C. argues that N.C. was intentionally under-employed in 2018 and her income should properly be between \$60,000 and \$70,000. R.C. submits that N.C. could have earned more if she had not left her employment at Company B because in doing so, she gave up a book of business that she had been developing. R.C. also argues that N.C. was earning income under the table from H.S. and he relies on photographs taken by a private investigator he hired that show N.C. present at premises where H.S. had or was establishing business operations.
- [146] Like in 2017, the evidence falls well short of establishing that N.C. earned and did not report income from H.S. in 2018. The photographs taken by the private investigator do not establish that N.C. was working for H.S. nor that she was receiving remuneration from him. N.C. testified that she did assist H.S. with some tasks such as receiving parcels and meeting contractors when he was establishing his new business in 2018, but that she was not remunerated for it. I do not find this to be unusual. In fact, N.C. provided similar services without remuneration to R.C. when his family was operating the insurance brokerage business. It is not unusual for a partner to gratuitously help the other partner in such circumstances.

- [147] Moreover, I accept N.C.'s testimony that at the time the photographs show her at H.S.'s business premises, the business was not yet in operation. The private investigator was not able to confirm that the premises were open for business. I accept that she would use those premises to do her mortgage brokerage work, for which she was employed full time, while she waited for contractors to attend to do various tasks.
- [148] I also find that the evidence falls short of establishing that N.C. was intentionally under-employed in 2018, due to her change of employment. N.C. started working as a mortgage broker at Company B shortly after receiving her qualification in 2014. She left Company B of her own volition in March 2018. She testified that she did so because the work environment there had become toxic as a result of R.C. and his family members attending at the offices to ask her co-workers about her personal business and to confirm where she was at any given time. N.C. testified that she was led to believe that R.C. was receiving updates from her co-workers on her whereabouts. She found this to be stressful and it had a negative impact on her mental health. While R.C. denied taking these actions, they are, in my view, consistent with other behaviours he has engaged in to track N.C.'s whereabouts, such as reviewing her phone records and hiring a private investigator. In my view, it was reasonable for N.C. to leave her employment in these circumstances.
- [149] It is also important to note that N.C. did not leave her employment at Company B until she had already secured another position at a local credit union. The position at the credit union was not ideal in that she was not hired as a mortgage broker and would be required to work on Saturdays. However, shortly after she started at the credit union, she was offered a job as a mortgage broker with another company, Company X. She did not leave her position at the credit union until she had already started the onboarding process with Company X in the spring of 2018.
- [150] N.C. did not find that Company X offered her the opportunities and support she had hoped for and shortly thereafter she heard about a position as a mortgage broker at Company U. However, N.C. testified that there were some significant administrative issues at that firm with respect to the transfer of her brokerage license. Around this time, N.C. applied for a position as a mortgage broker with Company T. This position was appealing to her because it offered both a base salary and a commission structure on top of the base salary. N.C. started her position with Company T in January 2019 and remained employed there at the time of trial.
- [151] At no time during 2018 was N.C. unemployed. Although she made a number of job changes, I find that those changes were reasonable in the circumstances. The reasons that she provided for her changes of employment post Company B were not effectively challenged by R.C.
- [152] N.C. does, however, concede that there was a period of time in January, February, and March 2018 where her ability to earn income was impacted. In January 2018, N.C. was involved in a car accident. Her uncontroverted evidence is that she suffered a concussion

from that accident and that she worked reduced hours during January to March 2018 as a result. N.C. states that, had she not had the accident, she would have earned a similar amount to what she earned in 2017. She also notes that she is pursuing a settlement with ICBC in respect of lost income for 2018. She concedes that it would be reasonable to impute additional income of approximately \$15,000 to her in 2018. I agree. Consequently, N.C.'s 2018 income for Guidelines child support purposes is \$35,000.

2019

[153] In 2019, N.C.'s reported Line 150 income was \$47,884. Factoring in her reasonable business expenses and Schedule III adjustments, her income for Guidelines purposes was \$42,187. R.C. also argues that N.C.'s income should be imputed to be between \$60,000 and \$70,000 in 2019. The basis for his argument is essentially a "flow-through" from the position he took in respect of the earlier years: he submits that had she not left her employment with Company B in 2018, she would have been making \$60,000 to \$70,000 per year by 2019. For the same reasons that I did not impute income to her in 2018, I decline to do so in 2019. Moreover, there is little evidence beyond speculation to ground the figure that R.C. has submitted should be imputed. The advertisements for mortgage brokers are not, in my view, supportive of what N.C. could have made. There is no evidence that she was not working to her full potential in 2019. Rather, her increased income is indicative of an individual gaining experience in her field and building a career. Consequently, I find that N.C.'s income for Guidelines child support purposes in 2019 is \$42,187.

2020

[154] R.C. does not take issue with N.C.'s reported income since 2020. In 2020, N.C.'s Line 150 income was reported to be \$103,644. N.C.'s Guidelines income, factoring in her reasonable business expenses, was reported to be \$96,644. Evidently, N.C.'s employment at Company T is a good fit for her as she has significantly increased her income. I accept that her 2020 Guidelines income is \$96,644. N.C.'s uncontroverted testimony at trial was that she expects her 2021 income to be similar. Thus, for the purposes of the Guidelines I find that her 2021 income is also \$96,644.

Should Income be Imputed to R.C.?

[155] N.C. submits that I should impute income to R.C. on the grounds that he has been intentionally under-employed since 2018. In light of his historical earning ability, she submits that his income should be imputed to be \$80,000 per year since 2018.

[156] R.C.'s reported Line 150 income since 2014 is as follows:

2014

\$90,079

2015

\$95,050

2016

\$83,156

2017

\$85,225

2018

\$73,983

2019

\$62,540

2020

\$54,424

[157] As stated earlier, R.C. was a red-seal sheet metal worker when the parties began dating and he worked for various employers on construction sites. In or around 2010, R.C. obtained his insurance broker licence, and together with his family, purchased an insurance brokerage business which they eventually sold in 2015. R.C. worked part-time in the insurance business and continued to work as a tradesperson in the period between 2010 and 2015.

[158] I accept that R.C. has had an interest in the HVAC field for some time, and N.C. appears to agree. The sheet metal and HVAC industries are closely related and have overlap. In 2014, R.C. completed what I understand to be a basic certification in the HVAC field. In or around that time, he began working in the sheet metal / HVAC industry as a project manager/ estimator.

[159] At the time the parties separated in 2017, R.C. was working in a unionized position for Company B.O. where, by 2018, he earned \$38.85 per hour. In accordance with his interest in refrigeration and cooling, R.C. obtained a position in that field with Company M in August 2018 at \$36 / hour. T.T., the part owner of Company M, confirmed that R.C. was paid at a rate much higher than his level of HVAC certification warranted, which would have been approximately \$17 / hour. T.T. paid R.C. approximately double this amount in recognition of his red-seal sheet metal qualification, extensive experience in that area, and his leadership potential.

[160] While employed by Company M in May and June 2019, R.C. enrolled in training to begin the process to become a red-seal refrigeration technician and gas fitter in the HVAC field. He completed that program with very high marks and, as I understand it, he is now an apprentice refrigeration and gas fitting technician.

- [161] As discussed earlier, R.C. was terminated from his employment with Company M in November 2019. I accept that R.C.'s employment was terminated because of his frequent tardiness arising from his inability to get to work on time on days when he had the children in his care. T.T. testified that he tried to accommodate R.C.'s schedule for approximately four months but that he had to lay him off after receiving numerous complaints from customers that R.C. was habitually arriving late or leaving early.
- [162] I also accept R.C.'s testimony that his lateness was attributable to the need to drop off and pick up his children from Daycare K. However, I do not accept that N.C. is to blame for R.C.'s loss of his job. As was discussed earlier, R.C. played a significant role in the events that led to the April incident at Daycare S and the subsequent change in daycares.
- [163] R.C. provided evidence that all jobs in his trade were incompatible with his childcare arrangements because they would all require him to be on site by between 7:00 a.m. and 8:00 a.m. which he was unable to do on days when he had to drop his children off at the new daycare. T.T., R.C.'s father, and R.C.'s business partner all provided evidence that the standard start time in the industry is between 7:00 a.m. and 8:00 a.m.
- [164] In February 2020, R.C. started the Company with a partner, K.B. The Company's business includes sheet metal work, refrigeration and HVAC and is currently R.C.'s source of income. I accept that R.C. had a long-standing desire to start his own business in his trade area. N.C. and other witnesses confirmed this. R.C. also testified that he started the business because he believed it would provide him with a greater income earning potential in the long-term and, as owner, he would have the flexibility required to meet his parenting responsibilities.
- [165] R.C. and K.B. are equal partners in the Company. K.B. is a red-seal certified refrigeration and gas-fitting technician. As discussed earlier, R.C. is a red-seal certified sheet metal worker and an apprentice refrigeration and gas-fitting technician. When the Company was first incorporated, R.C. was the primary labourer, estimator, and bookkeeper. Despite being an equal shareholder, K.B. was to slowly increase his time commitment to the Company as he was employed full-time elsewhere.
- [166] Shortly after the Company was incorporated, the Covid-19 pandemic was declared. Unsurprisingly, this proved to be challenging for a newly established business. On advice from his accountant, R.C. applied for and collected the Canadian Emergency Relief Benefit (CERB). In 2020, he collected \$14,000 of CERB payments. In addition, he drew \$11,000 of employment income from the Company.

2017 and 2018

- [167] N.C. argues that R.C.'s income in 2018 should be imputed to be \$80,000. In 2017, R.C.'s total reported Line 150 income was \$85,225 of which \$74,865 was employment income. In 2018, R.C.'s total reported Line 150 income was \$73,983 of which \$72,417 was employment income. In my view, N.C. has not met the burden upon her of proving that R.C. was under-employed in 2018. In fact, R.C.'s employment income in 2018 was only approximately \$2,500

less than his 2017 employment income. The bulk of the difference in the 2017 and 2018 total income is due to a reduction in investment income and the fact that the suite R.C. rented out at the family home at the time was not tenanted for a couple of months in 2018. After taking into consideration the relevant deductions, I find that R.C.'s income for Guidelines child support purposes was \$81,718 in 2017 and \$72,309 in 2018.

2019

- [168] N.C. submits that R.C.'s 2019 income should also be imputed to be \$80,000. In 2019, R.C.'s total Line 150 income was \$62,540 of which \$53,386 was employment income. This is the year that R.C. lost his job at Company M. It is also the year that he attended six weeks of training towards his HVAC apprentice qualification.
- [169] I agree that R.C. was intentionally under-employed during the period he did not receive employment income due to his attendance at the training course, and therefore, he chose to earn less than he was capable of earning: Barker at paras. 18 and 19. However, the HVAC training was something that R.C. had expressed a desire to do for many years. He began the training in 2014 and delayed completing it so that N.C. could complete her mortgage broker training. Completing the training would provide him with an increased earning potential as a tradesperson. The amount of time he was away from his employment was approximately six weeks, which is not unreasonable. I am satisfied that R.C. has met the burden of proving that the period of unemployment due to the HVAC training was in respect of his reasonable educational needs, and therefore, I decline to impute income to him for that period of unemployment.
- [170] N.C. also submits that R.C. was intentionally under-employed following the termination of his employment from Company M in November 2019. She argues that R.C. could have made alternative childcare arrangements, and if had done so, he would not have lost his job.
- [171] If R.C. lost his job through no fault of his own, then the attribution of income under s. 19(1)(a) of the Guidelines does not apply: Drygala at para. 28. However, I earlier found that R.C. contributed to the situation that eventually resulted in him losing his job. Namely, he contributed to the situation that gave rise to the April incident at the daycare which in turn led to the children being removed from Daycare S and placed in Daycare K. N.C. argues that in these circumstances, it cannot be said that R.C. lost his job through no fault of his own, and therefore, his unemployment was intentional for the purposes of s. 19(1)(a). R.C. argues that he lost his job because of the needs of the children, specifically their childcare needs, and therefore, income should not be imputed to him.
- [172] In the circumstances of this case, the analysis under s. 19(1)(a) and the relevant authorities is admittedly difficult and the outcome is not clear-cut. On the one-hand, it does appear that R.C. lost his job because of the needs of the children. On the other hand, I have little evidence of any steps R.C. took to mitigate the situation.

- [173] While it may be the case that many jobs in R.C.'s industry start at a time that was incompatible with Daycare K's hours, R.C. provided no evidence of efforts he made to find alternative childcare during the four months leading up to his termination. There was no evidence that he investigated the possibility of retaining a morning babysitter, nanny, or the possibility of having a family member assist. He simply dismissed these possibilities as being not feasible. He did not investigate other daycares or propose alternatives to N.C. Taking these steps would have been the reasonable thing to do in the circumstances, since R.C. was obviously aware that his employment was in jeopardy. Without this evidence, it is difficult to conclude that he does not bear some responsibility for the loss of his job.
- [174] I heard limited evidence in respect of R.C.'s search for a job following his termination from Company M in November 2019. He testified that in December 2019 he was subcontracted by an HVAC company, but the hours again proved to be incompatible with his parenting responsibilities. R.C. did not remember how many jobs he applied for or whom exactly he spoke with in his search for employment. He did provide a handful of emails that he sent between January and April 2020 inquiring about various jobs and enclosing his resume. He testified that he was not contacted by any of these potential employers until August 2020.
- [175] Rather than focusing on finding alternative childcare in the months leading up to his termination or searching for employment following the termination, it appears to me that R.C. was more focused on maintaining his position that Daycare S was the only daycare that was acceptable to him and on blaming N.C. for moving the children to Daycare K and the subsequent loss of his job. In the circumstances, I am not satisfied that R.C. was under-employed because of the needs of the children.
- [176] In my view, it would be fair and reasonable to impute income to R.C. in the 2019 year that would approximately equate to what he would have continued to earn at Company M had he not lost his employment. R.C.'s last day worked at Company M was on November 7, 2019, and he was making approximately \$36 per hour. Given the amount of time remaining in the year, I find that \$10,000 of additional income should be imputed to R.C. in 2019 such that his total Guidelines income after appropriate adjustments for 2019 is \$67,496.

2020 and 2021

- [177] N.C. also argues that I should impute additional income to R.C. in 2020 such that his income should be increased from the reported \$54,424 to \$80,000. As discussed earlier, R.C. started the Company in February 2020.
- [178] In my view, it was reasonable for R.C. to start his own business by February 2020. R.C. had expressed a desire to start his own business for many years and thus starting the Company was consistent with his previous career aspirations. R.C. had completed training in 2019 to become an apprentice in the HVAC field and had gained experience applying his red-seal sheet metal qualifications to the HVAC field during his time at Company M. Therefore, I find that the decision to start the Company was also consistent with his previous educational and work experience.

- [179] Given the loss of his job the preceding November, and his perceived inability to find employment compatible with his childcare obligations, it was not an unreasonable time to start the Company. Of course, he could not be expected to have predicted the onset of the Covid-19 pandemic or its effect, and while the evidence of the availability of other employment was lacking, starting the Company was consistent with R.C.'s desire to find employment that provided for more flexibility with his childcare needs. This proved to be true as he has managed to make the new daycare hours work with his continued operation of the Company.
- [180] Given my finding that R.C.'s decision to start the business was reasonable, it would not, in my view, be appropriate to impute income to him on the grounds of under-employment solely based upon his decision to start the business: *Hanson v. Hanson*, [1999] B.C.J. No. 2532, 1999 CanLII 6307 (B.C.S.C.) at paras. 15-18. However, this is not the end of the income imputation issue for 2020 and 2021.
- [181] The problem for R.C. is that I have not been provided with sufficient evidence to determine if the income that he has reported for Guidelines purposes accurately represents the income available to him in these years. Thus, pursuant to s. 18(1) of the Guidelines, I am not satisfied that the calculation of R.C.'s Guidelines income under s. 16 is a fair determination of the amount of money available to R.C. for the payment of child support.
- [182] I have not been provided with any financial statements of the Company and therefore, the financial state of the Company is not clear to me. R.C. testified that he has reinvested significant amounts into the Company for equipment. He testified that he did not take a salary from the Company until the end of 2020; rather he was content to collect CERB. On the evidence before me, I am not satisfied that the \$11,000 of income that he reportedly received from the Company in 2020 accurately reflects the amount available to him for support purposes.
- [183] Since June 2021, R.C. testified that he is receiving a salary of \$2,000 from the Company every two weeks (i.e. \$52,000 per year). While the very limited testimony he provided in respect of the Company's purchases indicate that some of them may have been reasonable in the circumstances, I still do not know the overall financial state of the Company and whether the amount R.C. declared as employment income is reasonable compared to the Company's gross and net revenues. Nor do I know if the Company's expenses are reasonable overall.
- [184] R.C. stated that the Company's business has picked up. They have hired another worker. K.B. is now also working full time in the Company. According to R.C., they are now working at approximately 90% of full capacity. Although I have not seen any documentation to support this, R.C. tells the Court that despite being equal shareholders, K.B. is being paid approximately \$1,000 more per month than R.C., for a total of approximately \$65,000 per year. R.C. says that this arrangement was necessary because K.B. left a job that paid \$48 per hour (approximately \$94,000 per year) in order to work full time at the Company and that

K.B. was not willing to take a larger pay cut to do so. R.C. says that they have an agreement to equalize profits in the future but I was not provided with any of the details of this arrangement. In cross-examination, R.C. stated that if he was employed in a unionized position, his HVAC and sheet metal qualifications and experience would earn him approximately 60-70% of what K.B. was making before he began with the Company full time, which would be approximately \$56,400 to \$65,800 per year.

[185] On the evidence before me, it is not clear whether R.C. controls the Company. However, in my view, given his role in the Company, he is obliged by s. 21(1) of the Guidelines to provide the financial statements of the Company in order to prove his income for support purposes. He has not done so. In these circumstances, it is within my discretion to impute income to R.C. under s. 19(1)(f) or to determine a fair income under s. 17(1) of the Guidelines.

[186] Having regard to R.C.'s income in the three years preceding the Company's commencement of operations, as well as the evidence I have heard in respect of the amount that K.B. earns from the Company and the amount that R.C. would likely earn in the marketplace, I find that a reasonable amount of income for Guidelines purposes is \$70,000 in 2020 and \$75,000 in 2021. In my view, finding R.C.'s income to be \$80,000 as N.C. suggested would inappropriately consider sources of income that are no longer recurring, such as investment and rental income.

Summary of Child Support Determination

[187] I have determined that the parties' Guidelines incomes for the relevant years are as follows:

Claimant (R.C.)

Respondent (N.C.)

2017

\$81,718

\$35,714

2018

\$72,309

\$35,000

2019

\$67,496

\$42,187

2020

\$70,000

\$96,644

2021

\$75,000

\$96,644

[188] The parties have shared parenting of the three children since separation and will continue to do so in the future pursuant to my determination above in respect of parenting time. Consequently, both parties have an obligation to pay support to the other and the amounts owing by each spouse will simply be offset against the amount owing by the other.

[189] Given my determination of the parties' incomes above, the amounts owing in each year since separation to the time of trial are as follows (positive amounts indicate amounts payable from R.C. to N.C. and negative amounts indicate amounts payable from N.C. to R.C.):

Amount payable by R.C. to N.C. per month

Amount payable by N.C. to R.C. per month

Net Amount Payable per month

Net Amount Payable

For the Year (six months for 2017)

2017

\$1,651

\$762

\$889

\$5,334

2018

\$1,468

\$748

\$720

\$8,640

2019

\$1,373

\$883

\$490

\$5,880

2020

\$1,422

\$1,924

-\$502

-\$6,024

2021

(to 9/30/2021)

\$1,522

\$1,924

-\$402

-\$3,618

Total Amount payable from R.C. to N.C. from separation to September 30, 2021

\$10,212

[190] R.C. has paid \$12,024 to N.C. on account of child support since the parties' separated in 2017. Therefore, he has overpaid \$1,812 up to September 30, 2021.

[191] Commencing on October 1, 2021, and based on the annual incomes found above, the amount of child support payable from N.C. to R.C. is \$402 per month. This amount is to be paid on the first day of each month for as long as the children are eligible for support under the DA or until further order of the Court. The parties are to exchange financial information, including notices of assessment, business records, and relevant corporate financial statements no later than June 30th of each year. The amount of child support payable is to be adjusted annually based on the parties' income.

Section 7 Expenses

[192] On October 13, 2020, the parties entered into a consent order whereby they agreed that all claims in respect of s. 7 expenses have been satisfied up to and including October 13, 2020. There is no dispute that the parties should share the children's special and extraordinary expenses since that time in proportion with their respective incomes. In light of the findings I have made in respect of the parties' incomes, N.C. is to pay 58% of the s. 7 expenses for the remainder of 2020 and 56% of the expenses incurred in 2021. R.C. is to pay the remainder.

[193] Within 30 days of this order, N.C. is to provide R.C. with proof of payment for special expenses incurred since October 14, 2020. Any disputes regarding these special expenses may be referred to the parenting coordinator for directions. Going forward, the party incurring special expenses is to provide the other party with a receipt proving payment, and reimbursement is to be made within 30 days.

[194] The following expenses are to be considered to be s. 7 expenses:

- a) Daycare fees;
- b) Tutoring;
- c) Counselling for the children;
- d) Psychoeducational assessments referred to in para. 106 above;
- e) School supplies and field trips;
- f) Extra-curricular activities for the children; and
- g) Stem cell storage fees.

[195] Shared special expenses incurred for extra-curricular activities such as dance lessons and martial arts classes must be agreed upon by the parties. If the parties are unable to agree, then they can apply to the parenting coordinator for directions.

SPOUSAL SUPPORT

The Parties' Positions

[196] R.C. submits that starting in 2020, N.C. should pay spousal support to him on both compensatory and non-compensatory grounds. The main reason he says he is entitled to spousal support is because he says his income in 2020 was so low in comparison to N.C.'s income that he had to draw on his savings. He blames this on N.C. because, as discussed earlier, he says he lost his job because of N.C.'s choice of Daycare K as the children's daycare. Consequently, he says he suffered a financial consequence that arose from his need to take care of the children and is entitled to support. N.C. opposes paying spousal support to R.C.

[197] N.C. seeks spousal support on a compensatory basis for 2017, 2018, and 2019. She states that the parties cohabitated for seven to eight years and have three children together. She argues that she took one year away from the workforce after the birth of each child and this affected her income earning ability because she was responsible for the childcare responsibilities during these periods. As a result, R.C. was able to establish a good paying career during this time. R.C. is opposed to paying spousal support to N.C.

Applicable Law

- [198] Spousal support orders may be made under either the FLA or the DA. Given that spousal support is sought corollary to divorce, any order made in this matter will be made under s. 15.2 of the DA. However, the objectives and factors that must be considered for spousal support are the same under both the FLA and the DA: *Li v. Liu*, 2014 BCSC 1110 at para. 35.
- [199] Section 15.2 of the DA sets out the objectives for spousal support and the factors to be considered. In making an award, I must consider all the factors as no single element is of paramount importance: *Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 at para. 53.
- [200] The nature of compensatory support is discussed in *Moge and Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577. More recently, in *Chutter v. Chutter*, 2008 BCCA 507, Madam Justice Rowles described the purpose and rationale underlying the compensatory grounds for spousal support at paras. 50-53:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:
- The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.
- [51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).
- [52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater the presumptive claim to equal standards of living upon its dissolution.

[Emphasis added, internal citations omitted.]

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

[11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet, it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

[Emphasis added.]

[201] The non-compensatory model of support is grounded in the "social obligation" model of marriage. This model views marriage as an interdependent union and requires a former partner, as opposed to the state, to meet the needs of disadvantaged spouses upon dissolution of marriage: *Chutter* at para. 54. One party's need may be a sufficient ground to claim non-compensatory spousal support: *Bracklow* at para. 43.

[202] If entitlement to spousal support is established, it is well accepted that the Spousal Support Advisory Guidelines (SSAG) are to be used as a guide in determining both the quantum and duration of support: *McEachern v. McEachern*, 2006 BCCA 508; *Redpath v. Redpath*, 2006 BCCA 338; *Tedham v. Tedham*, 2005 BCCA 502; and *Yemchuk v. Yemchuk*, 2005 BCCA 406.

Analysis

Is R.C. Entitled to Spousal Support?

- [203] After considering the factors set out in s. 15.2 of the DA, I have concluded that R.C. has not established an entitlement to spousal support under either compensatory or non-compensatory grounds.
- [204] R.C. testified that he delayed starting his business so that he could support N.C. in obtaining her mortgage broker license in and around 2014. He says that as a result, he forewent a larger income in order to support her, and therefore, he has been disadvantaged. While R.C. may have wanted to start his business earlier, the evidence falls short of establishing that he would have done so in 2014 had he not supported N.C. in her pursuit of her qualifications. Furthermore, it is merely speculative to say that he suffered an economic disadvantage. In fact, the evidence is that his income increased in 2015 compared to 2014.
- [205] I am not persuaded that R.C. has suffered any financial disadvantage arising from the marriage as that term is understood in the context of compensatory spousal support. N.C. was the parent primarily responsible for taking care of the children during the marriage. She is the one who was removed from the workforce in order to raise the children. There is no evidence that R.C. assumed a role during the relationship that impaired his ability to retain his economic autonomy. To the contrary, R.C.'s role in the marriage permitted him to continue to work and earn a good wage.
- [206] Similarly, the fact that he suffered a financial consequence from the loss of his job arising from the care of his children some two and half years after the parties separated, is not, in my view what is contemplated under the compensatory head of support. In any event, as discussed earlier, R.C. bears responsibility for the loss of his job in November 2019 and I imputed income to him in that year.
- [207] There is also no basis, in my view, for a spousal support award on non-compensatory grounds. In my view, R.C. suffered no economic hardship arising from the breakdown of the marriage. R.C. was economically self-sufficient at the time of the marriage breakdown in 2017 and he continues to be self-sufficient. In fact, in 2017, 2018, and 2019, R.C.'s income was greater than N.C.'s income, even without the amount of income imputed to him in 2019. The lower amount of income he has made since 2020, compared to earlier and compared to N.C., does not arise from the breakdown of the marriage. Rather, it arises from his shared responsibility for the loss of his job, his decision to start a business, and N.C.'s success in her career. N.C. should not be responsible for compensating R.C. for his role in the loss of his job and his decision to start a business some two to three years following separation.
- [208] While we are left with a disparity in income since 2020, income disparity alone does not entitle a party to support: *Lee v. Lee*, 2014 BCCA 383.

Is N.C. Entitled to Spousal Support

- [209] After considering the factors set out in s. 15.2 of the DA, I have concluded that N.C. has established an entitlement to spousal support on compensatory grounds from separation in mid-2017 to the end of 2019.
- [210] Unlike R.C., N.C. did suffer an economic disadvantage that arose from the marriage. In particular, the disadvantage resulted from the parties' decision that N.C. would remain home with the children following each of their births and be the primary care-giver during their early years.
- [211] In my view, the role that N.C. assumed during the marriage negatively impacted her career progression. N.C. began the program to obtain her mortgage broker certificate in 2012. During this time, she was still the primary caregiver of the parties' daughter. N.C. received her qualification in 2013, and shortly thereafter, she gave birth to R.Y.C. and was away from the workforce for approximately one year. She commenced her career as a mortgage broker in 2014 but then gave birth to H.C. in 2015 and again was away from the work force for approximately one year following his birth. She did not return to full time work until shortly before the parties separated. The fact that her career progression was hindered by the role she took on during the marriage is evidenced by the increase in her income in the years since the parties separated where she was able to work full time.
- [212] Having regard to the factors set out in chapter 9 of the SSAG, I find that support in the mid-level range is appropriate. While her compensatory claim is strong in light of the roles assumed by the parties, N.C. was not out of the workforce for an extraordinarily long period of time. She has a solid base of employment opportunities as evidenced by her ability to obtain a number of different jobs since separation until she found one that best suited her. Moreover, N.C. is still relatively young and has many years in which to continue building her career.
- [213] The midpoint amount under the SSAG for 2017 is \$172 per month and for 2018 it is \$90 per month. In 2019, the mid-point is zero.
- [214] Consequently, I award N.C. spousal support retroactive to June 1, 2017, until December 31, 2019 in the amount of \$2,284. There is no further entitlement to spousal support following this date.

CONCLUSION AND COSTS

- [215] I remind the parties that pursuant to the Consent Order dated October 13, 2020, the amount owing to each party arising from this judgement should be made payable from the funds currently held in trust by counsel for N.C.
- [216] In my view, success was divided. N.C. was unsuccessful in her claim for increased parenting time. R.C. was unsuccessful in his claims for the imputation of income to N.C. and in his claim for spousal support, while N.C. was successful in her claim that income

should be attributed to R.C. and in establishing her entitlement to a modest amount of spousal support. Consequently, my initial view is that each party should bear their own costs. As stated earlier, the cost of the s. 211 report should be shared proportionally with the parties' 2021 incomes as I have determined them.

[217] However, N.C. has requested an opportunity to speak to the issue of costs, including the apportionment of the cost of the s. 211 report. Should she still wish to do so after having reviewed these reasons, she has leave to do so by arranging with Supreme Court Scheduling to speak to the matter before me. Any such arrangements must be made within 45 days of the date of these Reasons for Judgement.

[218] I decline to dispense with the need for R.C.'s signature approving the form of the final order. Should the parties be unable to agree on the terms of the Order within 14 days of these Reasons for Judgment, they may send it to me for my review.

"The Honourable Mr. Justice Majawa"

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