
CANADA / JUDGMENT

S.M.F. v. D.W.B.

2013 BCSC 1629

COURT

Supreme Court of British Columbia

DECIDED

12 September 2013

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2013 BCSC 1629 S.M.F. v. D.W.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.M.F. v. D.W.B.,

2013 BCSC 1629

Date: 20130912

Docket: E110453

Registry: Vancouver

Between:

S.M.F.

Claimant

And

D.W.B.

Respondent

And

DSMF Inc.

Respondent

by Counterclaim

Corrected Judgment: The text of the judgment was corrected after paragraph 16 in the beginning of the Cohabitation Agreement.

Before: The Honourable Madam Justice Baker

Reasons for Judgment

Counsel for the Claimant:

Ben J. Ingram

The Respondent:

In Person

Place and Date of Trial:

Vancouver, B.C.

January 7-11, 2013

Place and Date of Judgment:

Vancouver, B.C.

September 12, 2013

- [1] S.M.F. ("Ms. F.") and D.W.B. ("Mr. B.") began living together in 1996; married on June 6, 1998 and separated February 1, 2010. They have two children - B., 11 years old, born in November 2001; and BR., 8 years old, born in January 2005.
- [2] In his counterclaim, Mr. B. seeks a divorce and Ms. F. does not oppose the divorce, but at time of trial neither party had obtained a Clearance Certificate or a Registrar's Certificate of Pleadings so no divorce can be granted at this time. The parties have lived separate and apart for more than three years now. Ms. F.'s income alone is sufficient to provide for the support of the children and I am making an order for child support. The parties are therefore in a position to obtain a divorce, once the necessary documents have been filed.
- [3] The parties agree that they should share joint custody and joint guardianship of B. and BR., pursuant to the Divorce Act. Ms. F. and Mr. B. disagree, however, on what the sharing arrangements should be for B. and BR. and what should occur if the parties are unable to agree on matters concerning the children.
- [4] Ms. F. is seeking an order that Mr. B. pay child support according to the Federal Child Support Guidelines, and that the parties share extraordinary expenses.
- [5] Mr. B. is seeking an order that Ms. F. pay spousal support of \$1,600 a month. Ms. F. is opposed to an order for spousal support and in the alternative, proposes that spousal support be in the low end of the range suggested by the Spousal Support Advisory Guidelines and also be time-limited.

- [6] The parties disagree about how their assets should be divided and about validity and enforceability of agreements about the division of assets entered into or alleged to have been entered into between the parties in 1996, 1998, 2010, and 2011.

CREDIBILITY ASSESSMENT

- [7] In order to decide the issues, the court must resolve some factual disputes between the parties.
- [8] Having carefully assessed the parties' testimony; their demeanour while testifying; inconsistencies revealed between Mr. B.'s testimony at trial and at his examination for discovery; the consistency of Ms. F.'s testimony in general and the consistency of her testimony with documents in evidence; I conclude that where Ms. F.'s testimony conflicts with that of Mr. B., Ms. F.'s testimony is the more credible and I accept it in preference to that of Mr. B.
- [9] Ms. F. impressed me as an honest and straightforward witness who has moved on with her life and was able to view the failure of the parties' marriage and subsequent events with some degree of objectivity.
- [10] Mr. B.'s testimony was less straightforward, compelling or persuasive. While a certain amount of animosity may be expected in most family law disputes, it is clear that Mr. B. continues to harbour a great deal of resentment towards Ms. F. and he demonstrated both anger and jealousy about her new partner, despite the fact that the latter relationship did not pre-date the parties' separation; and the fact that he has also formed a new relationship since separation.
- [11] I have concluded that Mr. B.'s resentment and anger has coloured his approach to this litigation and his approach to a consideration of what is in the best interests of the parties' children. In particular, Mr. B.'s approach to the sharing arrangements for the children seemed more focused on finding a way to reduce his child support obligations than arriving at a schedule for sharing the children's time that works for the children as well as for the parties.

FACTS

- [12] Ms. F. is currently 48 years old. She graduated from the College of Dentistry at the University of British Columbia in June 1991. After working as an associate in a dental practice in Abbotsford for two years, she borrowed money in 1993 to purchase the practice of a retiring dentist in White Rock. A corporation owned and controlled by Ms. F. - the Respondent "DSMF Inc." - was incorporated to own and operate the dental practice.

- [13] Mr. B. is currently 44 years old. After graduating from high school in Ontario, he worked for five years as a funeral director for Thorpe Brothers. In 1991, he moved to B.C. and began working in a funeral home owned and operated by the Loewen Group. In 1995, Mr. B. was given responsibility for opening and managing a new funeral home location for the Loewen Group, from which I infer that he was considered a valuable employee and was progressing well in his chosen career.
- [14] The parties met in 1995 and after dating for a couple of years, decided to move in together. Around the time they began living together as a couple, the parties entered into a Cohabitation Agreement ("the Cohabitation Agreement"). The Cohabitation Agreement is in writing, is dated May 29, 1996, and was prepared by a lawyer in Dawson Creek. Ms. F.'s parents lived in Dawson Creek at the time, and Mr. B. testified that the lawyer who prepared the Cohabitation Agreement - D. Mitchell - was a friend of Ms. F.'s parents.
- [15] In the preamble to the Cohabitation Agreement, the parties expressly acknowledged that Ms. F. already had an established dental practice in connection with which she owned "substantial properties"; that Mr. B. was a Funeral Director with a future in that career; and that the agreement was intended to provide for the parties' respective rights and obligations during cohabitation, in the event they ceased to cohabit, or on the death of either or both parties.
- [16] The Cohabitation Agreement is relatively concise and some of the terms are mirrored in the subsequent Pre-nuptial Agreement ("the Pre-nuptial Agreement"), so I have chosen to reproduce the Cohabitation Agreement here, in its entirety, for ease of reference.

THIS COHABITATION AGREEMENT made this 29 day of May 1996.

BETWEEN:

S.M.F., Dentist of

(hereinafter referred to as "S.")

OF THE FIRST PART

AND:

D.W.B., Funeral Director of

(hereinafter referred to as "D.")

OF THE SECOND PART

WHEREAS:

A. S. is a Dentist and has established a dental practice in the City of White Rock,
Province of British Columbia, and in relation thereto owns substantial properties.

B. S. is a spinster.

C. D. is a Funeral Director and has a future in that area.

D. The parties hereto plan to cohabit in a living together relationship to commence on the 1st of June, 1996 (hereinafter called the "date of cohabitation").

E. The parties intend this Cohabitation Agreement to provide for their respective rights and obligations during cohabitation or on the ceasing of cohabitation or on the death of either or both parties.

NOW THEREFORE IN CONSIDERATION of the mutual covenants contained in this Agreement and the payment of \$10.00 by S. to D. (receipt of which and the sufficiency of same is hereby acknowledged by D.) the parties hereto agree as follows:

Ownership and Division of Property

1. (a) Classes of Property to remain separate:

Subject to Clause 1(d) neither party shall under any circumstances acquire any interest in the following property (which is referred to collectively as "One Party Property") which shall be and remain the sole and exclusive property of the other party throughout their cohabitation, and in the event they separate or divorce and upon the death of either party:

(i) all real and personal property acquired by the other party prior to the date of cohabitation;

(ii) all real and personal property acquired by the other party in his or her name alone after the date of cohabitation;

(iii) all real and personal property inherited by the other party;

(iv) all income derived by the personal property from any source;

(v) all gifts acquired by the other party from any source; and

(vi) all property received by the other party as damages.

(b) The parties each have assets acquired prior to the date of cohabitation and do not wish to have those assets examined or valued and in particular D. acknowledges that S. has and may become entitled to very substantial assets.

(c) Exclusion of interest as a result of operation of law.

Without limiting the generality of the foregoing, neither party shall obtain any interest in any One Party Property or shall have the right to compensation by reason of any direct or indirect contribution of the party not having the interest in the One Party Property and, without limiting the generality of the foregoing, no party shall gain any interest in One Party Property by reason of:

(i) the assumption of child rearing responsibilities;

- (ii) the assumption of household management;
 - (iii) inadequate or no financial remuneration for work performed in the acquisition, management or improvement of One Party Property; or
 - (iv) financial assistance in the acquisition, management or improvement of any One Party Property.
- (d) Tracing and Compensation for Benefits

In the event the parties cease to cohabit for a period of greater than ninety days or if one party dies and if either party has converted any One Party Property or any part thereof into other real or personal property, which is not One Party Property, the value of the converted property (or the value of the part thereof) shall be traced into the other real or personal property before the division referred to in clause 1(f) hereof is effected (unless the party not converting the property elects in writing that the tracing shall not occur with respect to that particular property) and the party who converted the property shall be reimbursed or given credit for the value of the converted property (or the value of the part thereof) and the parties shall then share the net equity equally after deducting any liens, charges or other encumbrances from the market value or sale price at the time.

(e) Gifts between the parties

Nothing in this Agreement shall prevent either party from making gifts or testamentary dispositions to the other party, but the delivery of property of a value of over \$1,000 from one party to the other will be deemed not to be a gift unless evidenced in writing and signed by the party making the gift.

(f) Division of property on separation or dissolution:

Except as otherwise specifically provided in this Agreement, if the parties separate or if one party dies, all property, real and personal acquired during the marriage which is not One Party Property, shall be divided equally between the parties after having taken into account the Income Tax consequences of any transfer of interest and assets. If the parties are unable to agree as to the actual division of the assets, either party may apply to a Court of competent jurisdiction for an order allocating specific assets between the parties. If neither party applies for an allocation of assets to a Court of competent jurisdiction and the parties are unable to agree on the allocation of assets, the assets shall then be sold and the net proceeds shall be divided equally between the parties forthwith. If the parties are unable to agree on the terms of the listing agreement or of the sale of the asset or assets, either party may apply to a Court of competent jurisdiction for the determination of the dispute.

Support

2. Each of the parties is responsible for supporting and maintaining herself or himself, there being no express or implied agreement that either party has the responsibility to support or maintain the other party in whole or in part. The parties hereto each covenant and agree that at no time will either party make any claim for support and/or maintenance for himself or herself or take advantage of any right in law or in equity to make a claim for support or maintenance against the other party.
3. The parties hereto do not intend to have children, but if the parties hereto should have children, then the parties hereto covenant and agree that each party hereto shall be subject to all laws of the Province of British Columbia in relation to the support and maintenance of the said child or children.

Household Expenses

4. The parties hereto covenant and agree that they will share equally the cost of the parties in relation to all food and lodgings.
5. After the date of cohabitation any property acquired either by one of the parties or both of the parties as furnishings or articles for the home (other than gifts or inherited property) shall be owned equally and jointly as tenants in common by the parties hereto irrespective of the actual contribution of the parties unless the parties agree in writing to the contrary.

Estates

6. Subject to the provisions of this Agreement, neither party will claim any interest in the estate of the other except as specifically provided for by Will. In the case of an intestacy, no claim of any nature shall be made by the surviving party for any relief under any laws governing intestacy in the governing jurisdiction.

Documents

7. Each party shall do all things necessary to facilitate the fulfilment of the terms of this Agreement by both parties including, without limiting the generality of the foregoing, providing further information and executing further documents.

Entire Agreement

8. This Agreement constitutes the entire agreement between the parties and supersedes all previous communications, representations and agreements whether verbal or written, between the parties with respect to the subject matter hereof.

Severability

9. The invalidity of any particular clause or subclause of this Agreement shall not affect any other clause or subclause of this Agreement, but this Agreement shall be construed as if such invalid clause or subclause were omitted.

Applicable Law

10. The parties acknowledge that they are presently residing in British Columbia and that the laws of the Province of British Columbia govern this Agreement.

Heirs and Executors

11. This Agreement shall be also binding on the heirs, executors, administrators of the parties to this Agreement, who shall do all things necessary for the purpose of carrying out the terms of this Agreement as may then be applicable.

Legal Advice, Disclosure and Fair Agreement

12. Each of the parties acknowledges that he or she:
- (a) has had independent legal advice;
 - (b) understands his or her respective rights and obligations under this Agreement;
 - (c) is signing this Agreement voluntarily;
 - (d) believes that the provisions of this Agreement adequately discharge the present and future responsibilities of the parties to one another and that the contract will not result in circumstances that are unconscionable or unfair to either party.

Amendments

13. This Agreement may be amended only by written agreement between the parties and witnessed by at least one other person.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

SIGNED in the presence of:

"Bonnie Jean Robinson"

"S.M.F."

SIGNED in the presence of:

"Kevin Carmichael"

"D.W.B."

- [17] Ms. F.'s signature on the Cohabitation Agreement was witnessed by the receptionist at her dental office. Mr. B.'s signature was witnessed by K.C., a co-worker at the funeral home in Surrey where Mr. B. was employed.
- [18] Ms. F. testified that the Cohabitation Agreement was signed a few days before she and Mr. B. moved in together. Mr. B.'s recollection is that he and Ms. F. were actually living together before he signed the Cohabitation Agreement. He recalled that Ms. F.'s father came to the Lower Mainland for a weekend and presented the document to him and to Ms. F. It is not necessary to resolve this factual dispute.
- [19] Mr. B. testified he was familiar with contracts through his years of working as a funeral director and his involvement with opening up the new funeral home location for the Loewen Group. He read the Cohabitation Agreement before signing it and testified on examination for discovery that he understood its contents. At trial, Mr. B. did not testify that he had misunderstood the nature or effect of the contract. He said that he had not received full financial disclosure from Ms. F. prior to signing the contract, but he did not identify any assets or liabilities that were not known to him at the time.
- [20] Mr. B. testified he did not have legal advice before signing the document. He said that he did not have a chance to get legal advice because Ms. F.'s father wanted to take the signed document with him when he returned to Dawson Creek. Mr. B. testified he felt "pressured" to sign the document; but he could not recall discussing any reservations about signing the document with Ms. F. or anyone else at the time he signed or any later date. I am not persuaded that any undue pressure was applied to Mr. B. to compel or persuade him to sign the Cohabitation Agreement or that he could not have delayed signing the document in order to obtain legal advice, had he wished to. I conclude that he understood the contents of the document, that he chose not to seek legal advice before signing it, and that he had no issue with the terms of the agreement.
- [21] Mr. B. did not testify that he felt "vulnerable" or that there was any power imbalance between the parties at the time the Cohabitation Agreement was signed.
- [22] Two years after moving in together, the parties decided to marry and set the wedding date for June 6, 1998. In April 1998, the couple purchased their first home located at 14592 17th Avenue in Surrey ("the 17th Avenue home"), presumably as joint tenants. Ms. F. testified they borrowed money for the purchase and secured the loan with a mortgage over the property.

- [23] Soon after the home was purchased, Mr. B.'s employment with the Loewen Group came to an unexpected end. Ms. F. testified that Mr. B. came to her clinic one day after work and said he had lost his job. Ms. F. testified that she and Mr. B. had a mortgage to pay, so they decided that Mr. B. would work for the dental practice. DSMF Inc. terminated the employment of the receptionist who had been working in the practice and Mr. B. took over the receptionist duties and other administrative functions.
- [24] There is some disagreement about the exact extent to which Ms. F. delegated managerial functions to Mr. B., but there is no doubt that through his employment Mr. B. became thoroughly familiar with the financial status of DSMF Inc.
- [25] Ms. F. said that before Mr. B. came to work for DSMF Inc. she did the payroll herself, but after he was hired the payroll function was taken over by Mr. B. working with a payroll company. Mr. B. handled accounts receivable and he and Ms. F. jointly looked after human resources - hiring and firing of employees. Ms. F. selected the "locum" dentists but Mr. B. participated in the interviews. Mr. B. did month-end reconciliations and liaised with Ms. Vermeulen, DSMF Inc.'s outside accountant. When some renovations were carried out in the premises occupied by the practice, Mr. B. liaised with the contractor and sub-contractors. Ms. F. handled lease renewals with the landlord of the building in which the dental practice was located, but Mr. B. dealt with some issues that arose with the landlord from time to time. Both Ms. F. and Mr. B. dealt with the CIBC, DSMF Inc.'s bank. Both Mr. B. and Ms. F. did marketing for the practice. Mr. B. assisted Ms. F. to set up a web-site. Mr. B. joined the White Rock Chamber of Commerce and the Rotary Club.
- [26] A short time before the parties were married, they entered into a Pre-nuptial Agreement, prepared by the same lawyer who had drafted the earlier Cohabitation Agreement. The Pre-nuptial Agreement is dated May 1998 and I conclude it was signed in May, but the specific day on which it was signed is not indicated on the document. Ms. F. testified that she believes the document was signed a few days before the wedding on June 6, 1998 as Ms. F.'s signature was witnessed by her mother, who had travelled to the Lower Mainland for the wedding. Mr. B.'s signature on the document was witnessed by Ms. F.'s sister. Mr. B. testified that Ms. F.'s parents and sister came to the Lower Mainland the weekend before the wedding and that Ms. F. gave him the Pre-nuptial Agreement at that time.
- [27] The language of the Pre-nuptial Agreement is virtually identical to that of the Cohabitation Agreement, except that the preamble to the Pre-nuptial Agreement recognized that the parties were planning to marry on June 6, 1998 and that the Pre-nuptial Agreement was intended to provide for their respective rights and obligations during the marriage and on dissolution of the marriage.
- [28] One other small difference is found in clause 3 of the Pre-nuptial Agreement - the clause dealing with child support. The Cohabitation Agreement stated that the parties did not intend to have children; the Pre-nuptial Agreement clearly contemplates that the parties may have children and it reads:

3. If the parties hereto should have children, then the parties hereto covenant and agree that each party hereto shall be subject to all laws of the Province of British Columbia in relation to the support and maintenance of the said child or children.
- [29] Like the Cohabitation Agreement, the Pre-nuptial Agreement specified that neither party would make a claim for spousal support in the event of the breakdown of the marriage. The clauses dealing with Ownership and Division of Property are identical in both agreements except that in the Pre-nuptial Agreement, the word "marriage" is substituted for the word "cohabitation" where the latter word appeared in the Cohabitation Agreement.
- [30] I am satisfied that the parties intended the Pre-nuptial Agreement to supersede and replace the earlier Cohabitation Agreement, although it does not expressly say so. The Pre-nuptial Agreement covers all of the same subject matter.
- [31] Mr. B. testified that he was "under duress" when he signed the Pre-nuptial Agreement. He agreed, however, that he had read the document before signing it and understood it, and realized at the time that it was essentially the same as the Cohabitation Agreement he had signed two years earlier.
- [32] Some small changes were made to the document. In the preamble the description of Mr. B. as a "Funeral Director" was crossed out and the words "an administrator" substituted; the name "S." was crossed out and replaced with "S."; Mr. B.'s address was corrected; and later in the document a spelling error was corrected. Mr. B.'s initials, as well as those of Ms. F., appear next to each of these alterations.
- [33] Mr. B. testified that he and Ms. F. did not disagree about entering into the Pre-nuptial Agreement and that he did not voice any reservation, objection or complaint about entering into the agreement, either at the time it was signed, or at any later time prior to separation. He agreed on examination for discovery that nothing prevented him from telling Ms. F. he did not want to sign the Pre-nuptial Agreement in May 1998.
- [34] Mr. B. testified that he did not seek out or obtain legal advice before signing the document. He did not explain why he did not seek legal advice except that the days before the wedding were a busy time.
- [35] In his Amended Counterclaim, Schedule 5, Mr. B. is seeking an order that the Cohabitation Agreement and the Pre-nuptial Agreements both be set aside on the grounds:
- a. that they were obtained by duress and undue influence and there was a lack of disclosure of the value of the company shares and assets on the part of the Claimant Spouse; and
 - b. unconscionability and lack of independent legal advice.
- [36] I am satisfied on a balance of probabilities that Mr. B. did not sign the Cohabitation Agreement or the Pre-nuptial Agreement "under duress" and that Mr. B. was not subjected to any undue influence. I am satisfied he understood the contents of both agreements and the effect of the agreements. I am satisfied that had he wished to do so, he could have obtained

independent legal advice, but that he chose not to do so. I am not persuaded that the absence of a valuation of the shares of DSMF Inc. amounts to material non-disclosure on the part of Ms. F. I am also not persuaded that either Agreement was "unconscionable".

- [37] I do accept that in the circumstances - particularly the circumstances at the time the Pre-nuptial Agreement was signed - Mr. B. likely would likely have felt some embarrassment had he refused to sign the Agreement. Ms. F. testified that it was a bit "awkward" at the time. I am not persuaded, however, that the potential for embarrassment equates to undue influence or duress. Ms. F. testified that Mr. B. was very forthright about signing the document and he has not testified that he did not understand, or misunderstood, any part of the document or what the document would mean in the event the parties' marriage failed.
- [38] There is no evidence that Mr. B. was threatened or coerced into signing either Agreement, or that he was in position of vulnerability. There is no evidence that he was told - by Ms. F. or anyone associated with her - that she would require Mr. B. to move out of their shared accommodation; or that she would move out - if he did not sign the Cohabitation Agreement; or that she would not proceed with the wedding if Mr. B. did not sign the Pre-nuptial Agreement.
- [39] There is no evidence that Mr. B. believed the relationship would end or the marriage would not proceed if he declined to sign either Agreement or asked for changes to be made; or asked for an opportunity to consult a lawyer.
- [40] I am also satisfied that there was nothing preventing Mr. B. from obtaining legal advice had he chosen to do so. He was familiar with contracts and worked in a business setting in which the signing of contracts was a regular part of conducting business. There is no evidence that any objection would have been made by Ms. F. (or her family) if Mr. B. had stated a desire to consult a lawyer. In relation to the Pre-nuptial Agreement, it appears the document was presented to Mr. B. several days before the wedding.
- [41] I conclude that Mr. B. voluntarily entered into both Agreements and that neither Agreement is void or invalid by reason of duress, undue influence, lack of independent legal advice, or unconscionability.
- [42] I am also not persuaded that there was a material lack of disclosure about the value of the company shares or assets on the part of Ms. F. In both Agreements, Mr. B. agreed that " in particular D. acknowledges that S. has and may become entitled to very substantial assets" and that the assets include "substantial properties". He also specifically agreed that he did not wish to have his own, or Ms. F.'s assets valued.
- [43] In any event, by the time the Pre-nuptial Agreement was signed, Mr. B. had been in a relationship with Ms. F. for about four years and had already been working full time in the dental practice for more than a month. I am satisfied he knew about the assets owned by Ms. F. and her company. There is no evidence before the Court about the value of the shares of DSMF Inc. at any point in time - 1996, 1998 or at time of trial. Mr. B. did not testify that the

shares were worth more or less at the time he signed the Pre-nuptial Agreement than they are worth at present. He did not point to any assets owned by Ms. F. or her company of which he was unaware at the time the Cohabitation Agreement and/or the Pre-nuptial Agreement were signed.

- [44] The Cohabitation Agreement was signed before the Family Relations Act (R.S.B.C. 1996 c. 128) came into effect, so that Act does not apply to consideration of that contract. In any event, as stated earlier, I am satisfied the parties intended the Pre-nuptial Agreement to supersede and replace the earlier Cohabitation Agreement.
- [45] By the time the Pre-nuptial Agreement was signed, the Family Relations Act was in force and the Pre-nuptial Agreement is governed by the provisions of the Family Relations Act in relation to "marriage agreements". The provisions for division of property were made reviewable for fairness pursuant to s. 65 of that Act. At the time the trial of this action was heard, the new British Columbia Family Law Act had not come into force, but I note that s. 93 of the new Act states that the Court may only set aside or interfere with an agreement respecting the division of property or debt if satisfied that there was a failure to disclose significant property or debt; one spouse took significant advantage of the other's vulnerability; a spouse did not understand the nature or consequences of the agreement; or that there are other circumstances that, under the common law, would cause all or part of the contract to be voidable. I am not persuaded that any of those criteria have been established in this case. I shall return to the issue of the fairness of the Pre-nuptial Agreement later in these Reasons.
- [46] The parties were married, as planned, on June 6, 1998. Mr. B. continued to be employed by the Respondent DSMF Inc. until May 2005. If Mr. B. had discovered some undisclosed assets, or that his understanding of the value of the shares of DSMF Inc. in 1998 had been incorrect, he could have raised that issue and could have sought to amend or terminate the Pre-nuptial Agreement.
- [47] Lola Marie Vermeulen, the Chartered Accountant who has provided accounting and taxation services to the parties, and to DSMF Inc. since at least 2000, testified that she was in regular communication with Mr. B. about the finances of the dental practice.
- [48] Ms. Vermeulen also testified that the salary paid to Mr. B. by DSMF Inc. was higher than the salary that would have been paid to another employee performing the same functions because it enabled a form of "income splitting" that reduced the amount of personal income taxes that Ms. F. and Mr. B. would otherwise have paid.
- [49] During most years that Ms. F. and Mr. B. were together, Ms. F. generally saw patients four days a week, 10 hours a day. Mr. B. did not testify about his hours of work.

- [50] On November 27, 2001, the parties' daughter B. was born. Ms. F. did not work at the dental practice for six months after B.'s birth. However, the parties did not reduce their spending and cash flow in the practice began to suffer. In 2002, the parties borrowed \$100,000 on a line of credit secured against their home and injected the funds into DSMF Inc. to assist the company's cash flow. I infer that the money was lent to the company as a shareholder's loan.
- [51] The parties did not provide much detail about their childcare arrangements after Ms. F. returned to work following B.'s birth, but they did make references to having employed a series of nannies. I am satisfied that Ms. F. was the children's primary caregiver during the marriage (with the assistance of paid caregivers), but Mr. B. was also an involved parent.
- [52] For several years during the marriage, however, Mr. B. was, while working for DSMF Inc., also taking classes and studying to obtain a Master's degree in Business Administration. He also began volunteering as an auxiliary constable for the RCM Police. I conclude both of these activities limited the time he was able to spend caring for B. and BR.
- [53] In September 2002, DSMF Inc. purchased a home on Fairway Drive at Sun Peaks Ski Resort north of Kamloops, in the B.C. interior ("the Sun Peaks residence"). The Sun Peaks residence is part of a rental pool. Owners are permitted to use the residence for personal use, but give up a share of the rental pool proceeds when they do so; and are required to pay a housekeeping and maintenance fee at the end of each visit. In addition, Ms. Vermeulen testified, because the Sun Peaks residence is owned by DSMF Inc., Revenue Canada requires Ms. F. to pay the company an amount equivalent to the revenue the company would receive if the residence had been utilized in the rental pool, each time a family member or friend uses the residence.
- [54] Included in Mr. B.'s book of documents is an interim agreement for the purchase of the Sun Peaks residence on which Mr. B. is shown as the "Purchaser". The actual agreement of purchase and sale and the transfer documents are not in evidence. Mr. B. testified he believes that the property was originally purchased in the parties' joint names but that title was later transferred to DSMF Inc.
- [55] Ms. F. agreed with Mr. B.'s suggestion - put to her in cross-examination - that the Sun Peaks residence was purchased as an asset of DSMF Inc. for cash flow and tax planning reasons. She said that she and Mr. B. could not have afforded to pay the mortgage payments with after-tax dollars. Ms. Vermeulen testified that the Sun Peaks residence is a rental property and that the tax rate on income from an active business is much lower for a corporation than for an individual, so it was better to have the corporation own the asset.
- [56] In any event, there is no dispute that since shortly after it was acquired, or perhaps at the time it was acquired, title to the Sun Peaks residence has been registered in the name of DSMF Inc. The purchase price was about \$265,000. Most of the purchase price was borrowed from the CIBC and secured by a mortgage on the Sun Peaks residence. The parties increased the mortgage on their 17th Avenue home in late September 2002 and I infer that some of the funds obtained were used to assist the company to purchase the Sun Peaks residence. I infer

that the funds flowed through the company by way of a shareholder loan, but the parties' and Ms. Vermeulen's testimony on this point was not entirely clear.

- [57] The parties and their children used the Sun Peaks residence for recreational purposes from time to time during the marriage, but most of the time it was rented out through the management company that handled the rental pool properties. Ms. F. testified that it was traditional for the family to go Sun Peaks during the Christmas holidays. Ms. F. does not do downhill skiing, but skis cross-country. Mr. B. and the children do downhill skiing.
- [58] After separation, the parties had a dispute about the use of the Sun Peaks residence. Ms. F. was agreeable to Mr. B. using the property for holidays with the children, but after hearing that Mr. B. wanted to take some golf buddies to the property for a weekend, and also intended to auction off a stay at the resort property to raise funds for a charity he was supporting, Ms. F. wrote, in her capacity as President of DSMF Inc. to the management company indicating that her consent was required for any use of the Sun Peaks residence (outside of the rental pool arrangements, of course). Mr. B. sought an order from Justice Fitch that he could use the Sun Peaks residence for his own use, but Justice Fitch ordered that he could do so only when accompanied by the parties' children.
- [59] Ms. F. pointed out that following separation, she and her company have paid all of the expenses associated with the Sun Peak residence, including all of the mortgage payments, taxes and fees, maintenance and cleaning costs. She also paid all of the expenses associated with the former family home, including the mortgages, insurance and taxes on that property, until that home was sold in September 2010. Mr. B. did not have a credit card and used a "spouse" card associated with Ms. F.'s credit card until it was cancelled following separation. Ms. F. paid all of the credit card bills. Following separation, Mr. B. did not contribute to any of the expenses or debts and did not pay child support for B. and BR.
- [60] Ms. Vermeulen testified that during the years Mr. B. worked for DSMF Inc. the company's revenues did increase but profitability declined. She said that this was partly due to the two periods of time Ms. F. was away from her practice following the birth of the parties' children, but said also that the expenses, including the salary paid to Mr. B., were too high.
- [61] BR. was born on January 15, 2005. Ms. F. took only four and one-half months off work following his birth but her absence from the practice again meant that less income was coming in while the couple's expenses continued unabated.
- [62] As stated earlier, while working for DSMF Inc., Mr. B. enrolled in a Masters of Business Administration program and he completed the MBA in May 2005. Mr. B. testified that he decided it was time to utilize his new skill set and that he could not advance working in Ms. F.'s dental practice, so he stopped working for DSMF Inc. and took a job as Dean of a private post-secondary school called the Vancouver College of Dental Hygiene. This employment proved to be very short-lived. Mr. B. had a dispute with the owners and resigned after only a few months.

- [63] Mr. B. then took a job as a mortgage broker with Home Loans Canada, a subsidiary of the CIBC. In his chronology, he described this as a "mobile office job". He worked for Home Loans Canada for about two years.
- [64] In the spring of 2006, the parties decided to sell the 17th Avenue home and purchase a new home located on 133rd Street in Surrey ("the 133rd Street home"). They paid \$1,242,500 for the new property. They used the net proceeds of sale of the 17th Avenue home and obtained conventional mortgage financing of \$864,000 from the CIBC secured against the 133rd Street home. In addition, the Sun Peaks residence had gone up in value and DSMF Inc. re-mortgaged that property and lent the proceeds of the mortgage to the parties to contribute to the purchase price for the 133rd Street home. The company's loan was personally guaranteed by Mr. B. and Ms. F. The parties also took out a line of credit from the CIBC in the amount of \$120,000 to complete the purchase.
- [65] In September 2006, while he was working for Home Loans Canada, Mr. B. began volunteering as an auxiliary constable with the RCM Police in White Rock. He testified that in that role he was a volunteer with peace officer status when in uniform; and that he did "ride-alongs" in police cars, and attended special events. He testified that auxiliary constables are required to volunteer at least 120 hours a year, but that he exceeded that number of hours in both 2006 and 2007.
- [66] In 2007, Mr. B. left his employment with Home Loans Canada and began working for a private dermatology clinic. This employment also lasted a very short time, after which Mr. B. worked for a brief time at a funeral home in Delta.
- [67] In May 2008, DSMF Inc. again refinanced the mortgage on the Sun Peaks residence, which had continued to increase in value. The new mortgage, in the amount of \$452,000, provided sufficient funds to retire the previous mortgage and to pay off the CIBC line of credit the parties had obtained at the time the 133rd Street home was purchased.
- [68] In June 2008, Mr. B. became a member of the RCMP as part of a pilot project that did not require him to go to the RCMP depot for the usual pre-deployment training. His first assignment as an RCMP Constable was at the Surrey detachment as a community safety officer. At first, he worked a schedule involving four days of 12 hour shifts, followed by four days off. Two of the four shifts he worked were night shifts. His schedule then changed to four 10 hour shifts, followed by three days off. The shifts worked varied among days, nights, and afternoons. At time of trial, Mr. B. was working 7:00 a.m. to 5:00 p.m. Tuesday to Friday, in the RCMP's Economic Crime Division.
- [69] Following the economic downturn in North America in the fall of 2008, the Sun Peaks residence declined rapidly and significantly in value, and at time of trial, had not recovered. The BC Assessment value for the Sun Peaks residence as of July 1, 2012 was \$348,000. Even though DSMF Inc. had continued to pay down the mortgage following separation, the mortgage balance on the Sun Peaks residence was \$387,000. If the parties were able to sell the property, the sale would, Ms. Vermeulen testified, immediately trigger personal tax

liability for Ms. F. in the range of \$100,000.

- [70] By the fall of 2009, the parties' marriage was in difficulty and the couple began sleeping apart. On February 1, 2010, Mr. B. moved out of the family home and into a rented apartment in Cloverdale. Ms. F. and the two children remained in the 133rd Street home but it was immediately listed for sale.
- [71] By this time, both B. and BR. were in school. Ms. F. continued to utilize the services of a nanny to care for the children while she was working. Mr. B. did not contribute to the cost of the nanny or any other extraordinary expenses for the children.
- [72] After he moved out of the home, Mr. B.'s routine included picking the children up from school on Monday evenings and visiting with them. On Wednesday and Thursday mornings, Ms. F. left for work at 6:30 a.m. and Mr. B. went to the house and stayed with the children until the nanny arrived at 7:00 a.m. He also saw the children on weekends for daytime visits. Eventually the children began spending alternate weekends with Mr. B., from Saturday morning until Sunday evening. Some time prior to trial, the weekend visits were extended to include Friday evening.
- [73] Mr. B. testified that the limited amount of time he has had the children in his care since separation was imposed on him by Ms. F. Ms. F. does not agree and says that Mr. B. has not taken advantage of many opportunities to have the children for additional time. So far as the evidence before me indicates, Mr. B. never brought an interim application for an order to increase the amount of time he has been spending with the children.
- [74] In September 2010, the parties sold the 133rd Street home and retired the debts that were secured against that property. The parties agreed that the remaining sales proceeds, approximately \$216,000, would be held in an interest bearing account pending resolution of the financial issues. The funds were initially deposited into a term deposit in Ms. F.'s name only. Mr. B. strenuously objected to the account being in her name alone and she agreed to have the funds transferred to a CIBC term deposit (or Guaranteed Investment Certificate) in joint names. Ms. F. received repeated assurances from the CIBC branch manager that the funds could not be removed from the joint account unless both parties signed a consent form for the release of the funds.
- [75] In September 2010, while Ms. F. was searching for a rental home for her and the children, and while she was packing up the contents of the 133rd Street home in preparation for the sale of the home, B. began experiencing health problems. There was a delay in diagnosis, but eventually B. was diagnosed with a serious heart infection that led to her hospitalization for a couple of weeks. Mr. B.'s employer permitted him to take time off work so he could spend most of his time at the hospital; Ms. F. spent as much time there as she was able. At trial, Mr. B. suggested that Ms. F.'s failure to spend more time at the hospital was an indication of lack of parental care for B., but I reject this suggestion. Ms. F. was obliged to work to support both children; and she was responsible for getting the former family home ready for sale. In her testimony, Ms. F. expressed gratitude that Mr. B. was able to and did

spend most of his time at the hospital during B.'s stay there. B. eventually made an excellent recovery.

- [76] Following the sale of the 133rd Street home, Ms. F. and the two children moved into a rented home in Crescent Beach located very near the children's school. Ms. F. and the children continued to reside at that home at time of trial. Mr. B., who had also been living in rental accommodation, began working with a realtor to find a condominium to purchase for himself.
- [77] Mr. B. testified that during his marriage to Ms. F., he had no credit cards in his own name and used "spouse" cards associated with Ms. F.'s credit cards. Following separation, Ms. F. cancelled Mr. B.'s spouse cards. Mr. B. testified that he applied for a credit card in his own name, but was refused. If this is true, it is surprising as Mr. B. was then, as now, steadily employed with the RCM Police and earning a good salary, and he was not paying any child support or "family debts".
- [78] In 2010, both parties retained counsel but did not immediately commence a family law action as they hoped to arrive at a negotiated settlement of their affairs. Mr. B. was anxious to arrive at a settlement of the financial matters because he wanted access to funds held in the CIBC account to use to buy a condominium.
- [79] In December 2010, Mr. B. and his counsel at the time, Ms. Fiona Robin; and Ms. F. and her counsel, Mr. Ingram, had a four-way meeting. Following the meeting, at which the parties made progress but did not conclude an agreement, Ms. F. and Mr. B. encountered each other at a parent-teacher conference, chatted about the discussions that had taken place earlier at the four-way meeting; and then met at a restaurant to continue working out the terms of a settlement agreement. The meeting at the restaurant, I conclude, took place on December 16, 2010.
- [80] I accept Ms. F.'s testimony that during this face to face meeting on December 16, 2010, the parties reached agreement about all of the financial issues. Ms. F. agreed that she would have Mr. Ingram incorporate the terms that had been agreed into a written Separation Agreement to be sent to Ms. Robin.
- [81] At 1:40 p.m. on December 16, Ms. F. sent Mr. B. an e-mail, stating the following:
- D.,
- Just to clarify our discussions earlier today;
1. you pay 750. month child support
 2. I take over the entire liability of sun peaks.
 3. I don't feel that we necessarily have to detail your usage of sun peaks with the kids but can if you want to - I had said equivalent of 3 weekends in the winter (6 nights) and 7 nights in the summer.

4. you receive 80K from the proceeds of the house
5. we split the RRSP which was just less than 90 K at Jan 31 last year.
6. Vickers art up at sun peaks: when sp is sold at any time in the future I will either give you the RHV pictures or we will divide them equally between ourselves.

I understand that you are anxious to move forward on this and wish to access the \$ from the GIC at your earliest possible convenience so that you can purchase a home. I will check with Ben on this as soon as you confirm that I have not missed anything.

[82] Mr. B. replied to Ms. F's e-mail at 2:05 p.m. on December 16, as follows:

S.,

That is correct and proceed accordingly and I will sign off on this as agreed.

D.

[83] I note that the terms do not include a reference to spousal support. As noted earlier, both the Cohabitation Agreement and the Pre-nuptial Agreement provided that neither party would seek spousal support from the other.

[84] Mr. B. and Ms. F. remained in contact over the days following December 16. Ms. F. discussed the settlement terms with Ms. Vermeulen and also instructed Mr. Ingram to incorporate the settlement terms into a written Separation Agreement. Mr. Ingram prepared a Separation Agreement and sent it to Ms. Robin on December 20, 2010. I am satisfied that the Separation Agreement sent to Ms. Robin reflects the financial terms agreed by Ms. F. and Mr. B. and confirmed by the exchange of e-mails on December 16, 2010. There is no evidence that Ms. Robin or Mr. B. took any issue with the content of the Separation Agreement prepared by Mr. Ingram, although Mr. Ingram's letter to Ms. Robin invited her comments.

[85] Mr. B. found a condominium he wanted to purchase and realized that he would need more than the \$80,000 he had agreed to accept to make the down payment. Mr. B. and Ms. F. discussed this and they agreed that instead of the \$80,000 that they had agreed Mr. B. would receive from the proceeds of the sale of their former family home, he would be allocated \$110,000, which was slightly more than half of the equity in the former family home. In return, he would give up any claim on Ms. F's RRSP and each party would retain their own RRSPs. Mr. B. had little invested in RRSPs; this meant he would forego a roll-over of one-half of Ms. F's RRSP, and she would receive less than half of the equity in the former family home.

[86] In addition, Mr. B. intended to apply for mortgage financing. Realizing that he would have to satisfy the lender that he would have sufficient income to pay the mortgage, he asked Ms. F. to agree to have his obligation to pay child support taken out of the Separation Agreement and put into a separate Child Support Agreement, so that if asked, he could provide a copy of the Separation Agreement to his lender without revealing his child support obligations.

- [87] To accommodate Mr. B.'s desire for two separate agreements, Mr. Ingram sent another Separation Agreement to Ms. Robin on December 22, 2010, essentially in the same terms as the previous Separation Agreement, except that the child support provisions had been taken out and put in a separate Child Support Agreement that Mr. Ingram also sent to Ms. Robin on December 22, 2010.
- [88] Mr. B. was aware that Ms. F. planned to go to Sun Peaks with the children during the Christmas holidays. By this time, Mr. B. had made an offer to purchase the condominium and was anxious to conclude the settlement arrangements so he could get the funds he needed for the down-payment. He was concerned that Ms. F.'s absence over the holidays would prevent him from getting access to his share of the funds as soon as the Separation Agreement had been signed.
- [89] Ms. F. testified that she had not agreed to the release of any funds to Mr. B. until the Separation Agreement had been signed and I accept this testimony. She was agreeable however to making the necessary arrangements to ensure that as soon as the agreement had been signed, Mr. B. could withdraw \$110,000 from the joint term deposit so he could proceed with his planned purchase of a condominium.
- [90] Ms. F. routinely dealt with Lora Szeto at the CIBC. At 12:01 p.m. on December 22, 2010, Ms. F. sent the following e-mail to Ms. Szeto, and copied it to Mr. B.:

Hi Lora,

D. and I are working towards a separation agreement and may have some sort of resolution very soon. Letting no grass grow under his feet - D. has made an offer on a house and will require access to the funds possibly as early as December 27th. We are wishing to coordinate the logistics immediately as I will be leaving town on Dec 27 and will not be available for signatures etc. We are talking about releasing \$110,000 of the \$216,000.

>>

>> D., Lora is away at this time, MaryGrace is her associate - I believe she will be helping us with this.

>>

>> regards,

>>

>> S.

[91] I am satisfied that this e-mail did not authorize the immediate release of any funds to Mr. B. and did not authorize the bank to release the funds without Ms. F.'s written consent. I accept Ms. F.'s testimony that she sent the e-mail to alert Ms. Szeto that arrangements needed to be in place to allow Mr. B. to obtain the funds, when she later gave her consent to the release of funds. I am satisfied that Mr. B. knew that Ms. F.'s agreement to the release of the funds was conditional on his execution of the Settlement Agreement.

[92] At 8:31 p.m. on December 22, Mr. B. sent an e-mail to Ms. F. that he copied to Ms. Szeto and also to Mary Grace Evangelista at the CIBC. The e-mail read:

Hi,

There is a CIBC at 152 and Hwy. 10 in Surrey. If you can email the documents over to that branch I will be able to go in and sign them there. I am sure that if you also sent them to the CIBC at 128 and 16 branch S. will be able to go into that branch and sign them there.

[93] Mr. B. testified that the documents he was referring to were the banking documents. I conclude from this e-mail that Mr. B. knew that Ms. F.'s signature would be required before funds could be released from the joint account.

[94] Unfortunately, Ms. Evangelista at the CIBC misunderstood the situation and made a serious error that Mr. B. exploited to his advantage. Instead of replying to both Mr. B. and Ms. F., Ms. Evangelista sent an e-mail reply to Mr. B. only. Her message, sent on December 23, 2010, read:

Hi D.,

Are you referring to the debit slips for the GIC redemption? Please clarify. Did you remember if you have signed a Telephone/fax agreement with Lora? If so, we can do the redemption without you signing, we just need an advise from you thru phone and just let us know as to what account we are going to deposit the redemption. You can call me at the number indicated below. Thanks.

[95] I am satisfied that Mr. B. realized the bank's error and also realized that he could take advantage of Ms. Evangelista's unfamiliarity with the parties' situation and the assurances Ms. F. had received from Ms. Szeto. Without communicating further with Ms. F., Mr. B. immediately instructed Ms. Evangelista to release \$110,000 to him and without further communication with or signed authorization from Ms. F., the CIBC allowed Mr. B. to remove \$110,000 out of the joint term deposit.

[96] Ms. F. had no idea Mr. B. had withdrawn the money. She and the children went to Sun Peaks on December 27, 2011 and returned home in early January. On her return (Ms. Szeto was also back from holidays), Ms. F. learned, from the CIBC, that Mr. B. had removed \$110,000 from the joint account. She was shocked and immediately protested to Ms. Szeto.

[97] Ms. F. was reassured, however, by the agreement she had earlier reached with Mr. B. and his assurances that he would be signing the Separation Agreement that Mr. Ingram had sent to Ms. Robin. On January 3, 2011, Ms. F. sent the following e-mail to Mr. B.:

D.,

I am noticing that you have withdrawn funds from the GIC - this surprises me as I was under the impression that 2 signatures were required as specifically requested by you. I know that we had corresponded with w/ Lora prior to Christmas in order to give her the "head up" on this possible transaction - but as no one contacted me or requested my signature, I was under the impression that nothing was moving. In particular - It would be premature to release funds until a separation agreement signed and was in place.

I am concerned.

S.

[98] Mr. B. assured Ms. F. he would be signing the Separation Agreement. His reply to her e-mail is significant and confirms, in my view, that the parties had concluded an agreement on the terms contained in the Separation Agreement sent by Mr. Ingram to Ms. Robin on December 22, 2010; and that Mr. B. knew and agreed that he was only entitled to withdraw the funds from the CIBC because of the agreement concluded between the parties. His e-mail, sent to Ms. F., and copied to both Ms. Szeto and Ms. Evangelista on January 3, 2011 read:

S.,

As per your conversation with lora's assistant she informed me that signatures were not required at all and she transferred the funds into the joint account and then I got a bank draft that day.

Do not be concerned as I am signing off as per our conversation. (underlining added)

[99] I am satisfied that the sentence "Do not be concerned as I am signing off as per our conversation" was affirmation by Mr. B. that he and Ms. F. had reached an agreement that was accurately reflected by the terms included in the Separation Agreement forwarded by Mr. Ingram to Ms. Robin; and that he would be signing the Separation Agreement.

[100] Mr. B. did not, however, sign the Separation Agreement and eventually took the position that no agreement had been concluded. It is important to note, however, that he did not offer to return the funds he had taken from the joint account, even though he did not proceed with the purchase of the condominium he had offered to purchase.

[101] Mr. B. does not say that he had not agreed to the arrangements summarized in Ms. F.'s December 16, 2010 e-mail or the terms included in the Separation Agreement prepared by Mr. Ingram. His position is that he did not agree to the child-sharing arrangements included in the Separation Agreement and that therefore there was no concluded agreement on any issue. This is his position although, as stated earlier, neither he nor Ms.

Robin had communicated this reservation to Ms. F. or Mr. Ingram before, or for some considerable time after, Mr. B. withdrew the funds from the CIBC account.

- [102] I conclude that the parties had reached agreement about all of the financial arrangements on December 16, 2010 and that the Separation Agreement sent to Ms. Robin on December 22 accurately document the terms of the agreement, with the changes to the quantum of the pay-out and the RRSPs to which I have earlier referred. I believe the parties had also reached agreement on the child sharing arrangements, but even if that is not the case, I am satisfied that the parties had concluded a binding settlement in relation to the division of assets.
- [103] I do not believe Mr. B.'s testimony that he and Ms. F. had not reached agreement but that she had nevertheless agreed to release \$110,000 to him, no strings attached. I believe Ms. F.'s testimony that she had no intention of allowing any of the funds to be released until Mr. B. had signed the Separation Agreement and the Child Support Agreement and she did not agree to release the funds. I can think of no possible reason why she would have done so.
- [104] The fact that Mr. B. withdrew \$110,000 - the precise figure that had been agreed as part of the settlement, rather than, for example, one-half of the money in the joint account is a strong indication that he was acting in furtherance of the agreement the parties had made. If, as Mr. B. subsequently began to assert, he was not acting in furtherance of the settlement agreement the parties had made on December 16, 2010; then I would be bound to conclude that Mr. B. took the money from the account when he knew he had no right to do so. I would have to conclude that Mr. B. was, in essence, "pulling a fast one" on both Ms. F. and the CIBC. His actions would not only be a breach of the agreement he had made with Ms. F. in September 2010 - that the net proceeds from the sale of the former family home would be held until the parties had reached a settlement - but his behaviour would also reflect very adversely on his character and integrity, serious matters for someone who is employed as a police officer.
- [105] I conclude, however, that although Mr. B.'s actions were improper, his conduct is ameliorated by the fact that at the time he took the funds, he had accepted and agreed to the terms set out in the December 16, 2010 e-mail as subsequently modified, and that he did intend to sign the Separation Agreement that Mr. Ingram had sent to Ms. Robin. Mr. B. subsequently reneged on the agreement that had been reached, and he remains in breach of the agreement.
- [106] Throughout January 2011, Mr. B. continued to provide assurances to Ms. F. that he would sign the Separation Agreement. On January 5, 2011, Ms. F. sent an e-mail to Mr. B., as follows:

Hi,

I am just confirming your plans for and with the kids this weekend. BR. does have soccer@ 8:30 on Saturday and will you be taking the kids after that then? What do you think of taking them up to Grouse or Cypress to ski? I guess they have swim lessons starting again too.

Also, I am wondering when you will be seeing Fiona and signing all of the paperwork on the separation agreement. I would like to get this completed as I am sure you do too in order to complete your arrangements w/ house etc.

[107] Ms. F. e-mailed Mr. B. again on January 10, 2011 after, I infer, having been told by him that he would be meeting with Ms. Robin to sign the documents. Ms. F's e-mail read:

D.,

can you please advise exactly when you are meeting with Fiona to sign off on that agreement.

thanks,

S.

[108] Mr. B. replied the same day:

You should have documentation from her next week.

D.

[109] I conclude that "documentation" in Mr. B.'s e-mail is a reference to the Separation Agreement and that by his e-mail Mr. B. continued to affirm the settlement reached and to communicate to Ms. F. his intention to sign the Separation Agreement.

[110] On January 19, 2011, Mr. Ingram wrote to Ms. Robin, summarizing the events that had occurred in December, including the fact that Mr. B. had withdrawn the funds from the CIBC joint account; and the fact that Mr. B. had e-mailed Ms. F. to say that he would be signing the Separation Agreement. Mr. Ingram noted that he had received no comments from Ms. Robin about the documents he had sent to her and he inquired whether Mr. B. had signed the documents and if not, why not. He also stated that if Mr. B. did not sign the documents as he had agreed to do, Ms. F. would be forced to initiate court proceedings and seek a declaration that an agreement had been reached in the terms set out in the Separation Agreement.

[111] There is no evidence that Ms. Robin disputed the existence of the settlement agreement between her client and Ms. F. or took any issue with the content of the Separation Agreement Mr. Ingram had sent to her. Soon after Mr. Ingram sent his January 19, 2011 letter to Ms. Robin, she stopped representing Mr. B.

- [112] By February 11, 2011, Ms. F. had realized that Mr. B. did not intend to live up to the bargain he had made and this action was commenced. Mr. B. retained a new lawyer, and filed a Response to Family Claim on March 11, 2011. He denied having reached an agreement with Ms. F. but even then did not return, or offer to return the funds he had removed from the joint account.
- [113] At trial, Mr. B. testified that he had and Ms. F. did not have a deal in December because he had not agreed to the arrangements for sharing the children's time. As stated earlier, I do not accept this testimony. I am satisfied the parties had concluded an agreement about all of the financial issues and that they were content that the arrangements then in place for sharing the children's time would continue unless and until otherwise agreed. The fact that the agreement reached on December 16 and summarized in Ms. F.'s e-mail included the payment of spousal support by Mr. B. indicated that he acknowledged that Ms. F.'s home would continue to be the children's primary residence. The parties have consistently agreed that they should have joint custody and joint guardianship, although at trial Mr. B. advanced an alternative claim for sole custody.
- [114] In any event, I am satisfied that the parties had agreed on the resolution of the financial matters outlined in the December 16, 2010 e-mail exchange, as subsequently modified by the agreement to increase Mr. B.'s entitlement to the funds on deposit in return for Ms. F. retaining her own RRSP. Nothing in the exchange of e-mails or correspondence indicates that the parties' agreement on the financial matters was conditional on a concurrent final resolution of the sharing arrangements for the children.
- [115] While Mr. B. asserts that the parties did not reach a binding and final agreement in December 2010, he alleges that the parties did reach a binding and final agreement in April 2011.
- [116] In April 2011, Mr. B. and Ms. F. met with a family friend, Richard Cox, to attempt to resolve their differences. Mr. Cox is a former RCMP officer and a businessman. Mr. Cox testified at trial and an affidavit sworn by him on October 18, 2011 was also admitted as an exhibit at trial.
- [117] Ms. F. testified that by April 2011 she was feeling overwhelmed. She remained convinced that she and Mr. B. had made a binding agreement in December and she hoped to convince Mr. B. to agree to a resolution based on that deal, but she was desperate to bring the dispute to a close. The parties were expecting to attend a Judicial Case Conference in the next couple of weeks; legal costs were mounting.
- [118] Ms. F. telephoned Mr. Cox to wish him a happy birthday. The conversation turned to the status of the F./B. family law dispute. Mr. Cox suggested that he would be happy to try to help and if the parties wanted his help, he would meet with them on a weekend.

- [119] Mr. Cox is not a lawyer or a trained mediator; he's a businessman, currently working with a geo-thermal heating company. Ms. F. was aware, however, that Mr. Cox had been divorced twice and has children and step-children. He was a friend of both parties and also a patient in Ms. F.'s dental practice. Ms. F. was willing to meet with Mr. Cox and Mr. B. to talk.
- [120] Mr. Cox contacted Mr. B. and the parties agreed to meet at Mr. Cox's office on April 10, 2011. The meeting was expected to last for about two hours. Ms. F. gave Mr. Cox a copy of the December 22 agreement. She did not tell Mr. Ingram that she was planning to meet with Mr. B. and Mr. Cox. She testified that she thought the meeting would be informal and if any progress was made, she would get Mr. Ingram's advice after the meeting.
- [121] Ms. F. had dropped B. and BR. at a friend's home and had told the friend that she would be back in a couple of hours. B. had to be driven to a soccer game that would start at 2:00 p.m.
- [122] The meeting concluded at 1:50 at which time Ms. F. knew she was late and was frantic to get to her friend's home to pick up B. and get her to her soccer game.
- [123] At times during the meeting, Ms. F. was unable to continue because she was crying and upset. The parties did, however, discuss some terms that might form the basis for a new settlement of their differences. When Ms. F. knew she had to leave and began clearing up the dishes and food she had brought, Mr. Cox wrote up a one-page document setting out items on which he believed the parties had reached an agreement - at least an agreement "in principle". Ms. F. did not want to sign the document, and she asked that it be sent to her lawyer, but both Mr. Cox and Mr. B. urged her to sign it. Feeling anxious and upset, she signed the document and immediately departed to pick up the children.
- [124] At 2:14 p.m., Mr. B. e-mailed a copy of the document to his lawyer advising that an agreement had been reached and asking that documents be drawn up to reflect the terms. Upon leaving Mr. Cox's office, Ms. F. immediately began having second thoughts about what had taken place. At 3:51 p.m., she e-mailed Mr. Cox as follows:

Rick,

First of all, thank you for your time today - it was an immense gesture for which I will always be grateful. Your comments were extremely wise and I was really impressed the way you kept us out of the vortex (of hate) that we seemed to be constantly swirling towards .however I am panicking (?spelling) now I feel like I have agreed to something that was light years away from what was supposedly on the table in december and I don't know if I should have done that ? I know that I am grateful to have saved 50K in legal fees but I really feel like I have saved 50K for the privelege of now paying D. 80K on top of \$1600/month for the next 5 years!!! what was I thinking? this does not feel good to me at all !

S.

[125] The next day Ms. F. sent an e-mail to Mr. Ingram and Ms. Vermeulen telling them about the meeting on April 10 and the terms that had been discussed and expressing her reservations about the terms and asking for their advice. Ms. F. also sent an e-mail to Mr. B. indicating that she was having reservations about some of the things discussed the previous day and wanted to continue the discussions.

[126] Ms. Vermeulen told Ms. F. that the proposed agreement "looks awful"; that it did not say anything about Mr. B. paying back his share of the Sun Peaks debt and that since he had already received \$110,000 from the proceeds of sale of the former family home, she would be paying him twice.

[127] The one-page document handwritten by Mr. Cox and signed by Ms. F., Mr. B. and Mr. Cox read:

We agree to the following division of assets, we have both sought independent legal advice and agree to the following as of April 10, 2011.

1. Sun peaks property will remain the sole asset of S. and/or the "practice"
2. S. will pay D. \$5000 for the household contents; assets
3. D. will pay S. \$2000 to equal the division of the house assest (sic)
4. All RSP's will remain the sole asset of S.
5. D. will have free title to the BMW (indecipherable)
6. S. to pay D. a total of \$86,700.00 dollars in 5 equal payments over a period of five years for all interests or claims to the "Practice"
7. D. to pay child support to S. in the amount of \$950 per month or the amount prescribed by the Family Relations Act calculation.
8. S. to pay spousal support to D. in the amount of \$1600 per month for a period of 5 years.
9. S. & D. agree to joint custody of the children (B. & BR.) S. & D. agree to joint Guardians of the children.
10. S. & D. agree that as a goal one week on and one week off with each parent would be agreeable, with no change in the current living arrangements until September 2011. D. to have generous access until that time. At which time D. will have the children every other weekend including Monday and Tuesday of the weekend. In July of 2012 a one week on one week off with S. and D. will be put in place.

[128] On April 13, 2011, Mr. B.'s lawyer, Mr. Werb, wrote to Mr. Ingram stating that Mr. B. had told Mr. Werb that the parties had met and "with the aid of a mutual friend were able to settle the major issues in dispute on this file." Mr. Werb stated that he understood that Ms. F. was "still working out some of the tax implications with her accountant". He said that Mr. B. had instructed him to prepare a separation agreement for execution "once the final details of

settlement are finalized" and that Mr. B. was requesting that the Judicial Case Conference ("JCC") scheduled for August 15 be adjourned. He also stated that Mr. B. would prefer to meet with a mediator if the parties " find themselves at an impasse on the fine details of the separation agreement."

[129] Mr. Ingram replied on April 14 that Ms. F. did not agree that a new agreement had been made and that an agreement had been made in December 2010. He stated that the JCC should proceed as scheduled.

[130] Mr. B. decided to bring a summary trial application based on his contention that the parties had concluded a binding settlement on April 10, 2011 in the terms set out in the memorandum written by Mr. Cox and signed by the parties.

[131] On May 25, 2011, Mr. B. sent an e-mail to Mr. Cox asking that Mr. Cox provide an affidavit " stating that neither party was under duress, that you acted as a neutral mediator for both of us on initial request from S. and that the version of the agreement that were provided is a true copy of the original "

[132] Mr. Cox replied by e-mail to Mr. B., as follows:

Hi D.,

I can certainly provide an Affidavit, however to be fair; the agreement was subject to both of your lawyers approval and was not binding/ simply an agreement in principal to work from. I fully expected and we discussed once you both took the agreement back your lawyers there would probably be a need for changes and further mediation. I have copied S. on this email to be fair to both of you and act in a neutral capacity.

[133] In October 2011, Mr. Werb wrote to Mr. Cox and Mr. Cox replied as follows:

Dear Mr. Werb,

As I explained to D., my involvement in this matter was simply to try and save both D. and S. time and money by simply working out an agreement. I was clear to both of them at the time that any agreement worked out would have to be approved by their respective lawyers. There was never any expectation that the agreement signed was in stone but rather a starting point to hammering out a final deal. The fact that D. is hanging his hat on this being the final deal is simply not the case. I am friends with both of them and remain so but as I told D. last night in my opinion he is wasting my time and the courts time with this application which I am sure the judge will not look kindly on. I have agreed to provide an affidavit and will do so if needed; however my hope is that you move on to focusing on coming to a mutual agreement which I am sure you would agree would be in everyone's best interest.

- [134] Despite Mr. Cox's position that no binding agreement had been reached, Mr. B. brought his summary trial application before Justice Maisonville on October 26, 2011, seeking an order that a binding agreement had been reached in the terms of the memorandum written by Mr. Cox. The application was dismissed by Justice Maisonville on November 3, 2011.
- [135] Mr. Cox testified at this trial. He adopted the contents of the affidavit he had sworn on October 19, 2011 and reiterated his view that the agreement in principle reached on April 10, 2011 was not intended to be binding. He testified that at the outset of the meeting he told the parties it was unlikely they would reach agreement on all the issues and that it would not be a binding agreement - that both parties would go back to their lawyers.
- [136] Mr. Cox agreed that there were some financial issues that had not even been discussed at the meeting, for example, he did not recall Mr. B.'s RCMP pension being addressed at the meeting. Mr. Cox could not recall how the remaining house sale proceeds were to be dealt with. He said that he had been told that the parties had a pre-nuptial agreement but did not see it and could not recall its terms but believes he knew that the Pre-nuptial Agreement provided that Mr. B. would not have any claim to Ms. F.'s dental practice. He agreed that the tax consequences related to the debts on the Sun Peaks residence were not discussed on April 10 and he agrees that that was overlooked as reflected in a subsequent e-mail he sent to the parties.
- [137] Mr. Cox testified that he also made it clear to both Ms. F. and Mr. B. at the end of the meeting on April 10 that whatever transpired had to be vetted by their respective lawyers. He testified that the signatures on the memorandum he had written were not intended to make it a binding agreement; that this was what had been discussed and the parties were okay with at the time, but it was not a final agreement and the idea was that they would meet again to finish the agreement.
- [138] He agreed that Ms. F. wanted to leave without signing the agreement but that he said it was important to have something signed even though it was not going to be a final agreement.
- [139] I am satisfied that the parties did not reach a binding and valid agreement on April 10, 2011 and the memorandum the parties signed reflected no more than terms that the parties were prepared to consider, subject to advice by their counsel. There can be no doubt that Mr. Ingram did not approve of the terms, as reflected by his e-mail to Mr. Werb. Even Mr. Werb's letter to Mr. Ingram suggests that no final agreement had been reached.
- [140] On November 3, 2011, Justice Maisonville, with the consent of the parties, ordered that a custody and access report be prepared. The parties agreed that Dr. Michael Elterman should be retained to prepare the report and to provide recommendations to the court about the sharing arrangements that would, in his opinion, be in the best interests of the children.

- [141] Dr. Elterman's report is dated April 10, 2012. He agreed with Ms. F. and Mr. B. that joint custody and joint guardianship is an appropriate arrangement. He did not state expressly that Ms. F.'s home should be the children's primary residence but his report implicitly recognizes that her home has been and should continue to be the children's primary residence in the sense that he recommends that the children continue to spend much more than one-half of their time in their mother's care.
- [142] Dr. Elterman did not make a recommendation with respect to a model of guardianship. I conclude that the "Master Joyce" model, as it has come to be known, is the appropriate model in the circumstances of this case. As the model requires, the parties will have an obligation to discuss with each other any significant decisions affecting the children and to attempt to reach agreement, but failing agreement, Ms. F. shall have the right to make the decision and Mr. B. may, if dissatisfied, bring an application to court to vary the decision.
- [143] Dr. Elterman was aware that Mr. B. was proposing an equal sharing of the children's time and he addressed that issue with Mr. B., Ms. F. and both children, but he did not recommend the arrangements advocated by Mr. B. Dr. Elterman noted that Ms. F. had reported that during the time following separation Mr. B. had failed to take advantage of opportunities to spend more time with the children. He had, for example, declined to take the children for more than a week during the summer school holidays and had also returned the children to her home on Sunday evenings when he could have kept them until Monday - a day that he currently does not work. Mr. B. offered some explanations but did not directly dispute the truth of Ms. F.'s information.
- [144] In his report, Dr. Elterman recommended that the children's time be split up on a four week cycle. Based on his recommendation, in week 1, the children would be with Mr. B. from Saturday at 10:00 a.m. until Monday at 5:00 p.m. On week 2, the children would be with Mr. B. from Sunday at 10:00 a.m. until Monday at 5:00 p.m. On week 3, he would have the children from Sunday at 5:00 p.m. until Monday at 5:00 p.m. On week 4, Mr. B. would have the children from Sunday at 10:00 a.m. until Monday at 5:00 p.m. This schedule would result in the children having five over-night visits with their father in each four week cycle.
- [145] Dr. Elterman also recommended that the children spend two 10-day periods with Mr. B. during the summer school vacation; one 10-day period in July and the other in August. He recommended that the Christmas school vacation be divided with the children spending the first half of the holidays until 1:00 p.m. on Christmas day with one parent and the balance of the holidays with other parent; and alternating the next year. He recommended a single phone call lasting a maximum of 10 minutes per child for each parent on the days that the children are with the other parent. He recommended that the children spend some time with their mother on Mother's Day and with their father on Father's Day, regardless of who would ordinarily have the children on that day.
- [146] The parties provided the Court with the following authorities, which I have read and considered:

L.D.B. v. P.R.S., 2011 BCSC 1034

Wiest v. Middelkamp, 2003 BCCA 437

Smith v. Lau, 2004 BCCA 443

Miglin v. Miglin, 2003 SCC 24

Quelch v. Quelch, 2012 BCSC 667

Lee-Chin v. Lee-Chin, 1993 CanLII 5516 (ON SC)

Hartshorne v. Hartshorne, [2004] 1 S.C.R.

Stein v. Stein, 2008 SCC 35

DIVISION OF ASSETS

[147] The Pre-nuptial Agreement signed by the parties in May 1998 qualifies as a marriage agreement as defined by s. 61 of the Family Relations Act. Section 61(8) provides that if a provision of a marriage agreement is held to be void or voidable, it is severable from the other provisions of the agreement; in other words, the court may decide to set aside some parts of the agreement, but enforce others.

[148] Section 65 permits the court to set aside provisions in a marriage agreement relating to the division of property between spouses if satisfied that the provisions would be unfair having regard to the factors set out in subsections (a) to (f).

[149] As stated earlier, I am satisfied that the parties entered into a binding agreement on the division of assets on December 16, 2010, as modified by their agreement on December 20, 2010 to adjust Mr. B's share of the house sale proceeds to \$110,000 and that each party retain his or her own RRSPs.

[150] If the parties had actually signed the Separation Agreement prepared by Mr. Ingram in December 2010, the fairness of the agreement would be subject to review under s. 65(1) of the Family Relations Act. As the Separation Agreement was not signed, and based on the reasoning in L.D.B. v. P.R.S., cited earlier, it is subject to review for fairness (and possibly variation) pursuant to the provisions of s. 68 of the Family Relations Act. In doing so, it is necessary to consider factors similar to those set out in s. 65 of the Act, including duration of the marriage, duration of the separation, the date when property was acquired, whether property was acquired through inheritance or gift (not the case here); the needs of each spouse to become or remain economically self-sufficient; and any other relevant circumstances.

[151] The parties lived together for two years prior to marriage, were married for 12 years prior to separation, and by time of trial had been separated for just less than three years.

- [152] The evidence at trial is that the indebtedness secured against the Sun Peaks residence now exceeds the market value of that asset. As stated earlier, the property was assessed at \$348,000 as of July 1, 2012 and the mortgages registered against the property, taking into account payments made since separation, total \$387,000. The property could only be sold at a loss, based on the evidence before the Court at trial. Ms. F. has continued to bear the burden of the debt and all costs associated with that asset, which as stated earlier, is owned by her company. In addition, as Ms. Vermeulen explained, Ms. F. will have a considerable personal tax liability, estimated at no less than \$100,000 if the Sun Peaks residence has to be sold.
- [153] The Sun Peaks residence belongs to DSMF Inc. and the evidence does not support a finding that the company holds the asset in trust for Ms. F. But for the Pre-nuptial Agreement (leaving aside, for the moment, the December 16 settlement), however it is possible that the Court might conclude that the shares of DSMF Inc. are a family asset. Mr. B. certainly did make a contribution to the company during the time he was employed by the company, but he also was well-remunerated for his work. As noted earlier, the company paid Mr. B. a higher salary than he would otherwise have merited as a form of income splitting. However, the parties did borrow money secured by a mortgage on their residence to invest in DSMF Inc. at one point, which would support the conclusion that the shares would be considered a family asset, but for the Pre-nuptial Agreement.
- [154] In my opinion, however, Ms. F. would likely succeed in an application for reapportionment of the shares based on the facts that she had established her practice some years before she met Mr. B.; that Mr. B. has made no contribution of any kind to the company since 2007 and certainly not since separation; and that Ms. F. has paid all of the expenses of DSMF Inc. and in particular, all of the costs of the mortgages and other expenses associated with the Sun Peaks residence since separation.
- [155] Ms. F. retains her RRSP (Mr. B.'s share would have been approximately \$48,000 on a spousal roll-over) but Mr. B. received \$116,000 from the sales proceeds of the former family residence while Ms. F. will receive \$106,000, and Mr. B. will also retain his RCMP pension, valued at approximately \$6,600 in 2010. The parties shall each retain a motor vehicle roughly equal in value. Mr. B. retains his shares in "Filta Fry" - an investment he made with funds from his RRSP, which would otherwise have been a family asset. Ms. F. will retain the piano purchased by the parties (the children and Ms. F. are taking piano lessons) and Ms. F. will retain most of the household effects, although the agreement reached in December 2010 provides for Mr. B. to receive one-half of the Roy Vickers artwork in the Sun Peaks residence if it is sold.
- [156] Ms. F.'s company will retain the Sun Peaks residence, but also the liabilities associated with it that exceed, including Ms. F.'s personal \$100,000 contingent tax liability about which Ms. Vermeulen testified. In addition, Ms. F. will retain responsibility for a line of credit on which the parties owed \$50,000 at time of separation and which has since increased.

- [157] Mr. B. has had the advantage of having had the use of \$110,000 from the sales proceeds of the former family home since December 2010. Although he did not purchase the condominium on which he had made an offer at that time, he did subsequently purchase a different condominium which he has since sold. He has the use of his share of those funds while Ms. F.'s share of the proceeds have continued to be held. She has not had the advantage of the use of those funds to re-enter the real estate market.
- [158] Ms. F. has provided for the children since separation without benefit of child support from Mr. B., including the entire cost of childcare associated with the children's nanny. As the children will continue to reside primarily with her, she will need to organize her work to accommodate their needs and priorities to a greater extent than Mr. B. will be required to do. As Dr. Elterman's report and Ms. F.'s testimony indicated, she has rearranged her work schedule so that she will see patients Monday to Wednesday only; be available at the clinic to do administrative tasks on Thursday, and be available to the children on Fridays.
- [159] I am not persuaded that any unfairness has been established in relation to the division of assets and obligations agreed between the parties in December 2010.
- [160] The terms of the agreement reached are, I conclude, set out in paragraphs 14 to 23 of the Separation Agreement prepared by Mr. Ingram and dated December 20, 2010 as modified in respect to the pay-out of the CIBC term deposit and the parties' RRSPs.
- [161] I order that Ms. F.'s shares in DSMF Inc., her BMO Nesbitt Burns RRSP #81606621 and her BMO Nesbitt Burns RRSP #81603684 shall remain the property of Ms. F. free and clear of any claim by Mr. B.
- [162] I order that Mr. B.'s shares in 0817895 B.C. Ltd. (Optimal Fryer Services), the 1998 BMW automobile registered in his name; his RCMP pension and his Wellington West RRSP #4A24N8-R shall remain the property of Mr. B. free and clear of any claim by Ms. F.
- [163] The parties shall each retain the household contents and all other chattels presently in their possession, free and clear of any claim by the other party, except that in the event that DSMF Inc. sells the Sun Peaks residence, Ms. F. will cause the corporation to deliver half of the Roy Vickers art works to Mr. B.
- [164] The balance of the funds held in the CIBC Guaranteed Investment Certificate will be paid out to Ms. F. for her own use free and clear of any claim by Mr. B. Mr. B. shall sign any documentation required to allow Ms. F. to obtain the funds.
- [165] Neither party will apply for equalization of the parties' respective unadjusted pensionable earnings under the Canada Pension Plan.

- [166] Ms. F. shall be solely responsible for the payment of the liabilities associated with the Sun Peaks residence, including associated future tax consequences and Ms. F. indemnifies Mr. B. against any future liabilities that may accrue to him regarding the Sun Peaks funds used by the parties to finance the purchase of the former family home located at 2323 133 Street, Surrey, B.C.
- [167] So long as the Sun Peaks residence is owned by DSMF Inc., Ms. F. will allow Mr. B. to have overnight access to the property so long as he is accompanied by one or both of the children B. and BR.

SPOUSAL SUPPORT

- [168] In the Cohabitation Agreement and the Pre-nuptial Agreement Mr. B. and Ms. F. agreed that neither would pursue spousal support from the other. The December 16, 2010 e-mail makes no mention of spousal support. I am satisfied that the parties agreed that Ms. F. would not be obligated to pay spousal support to Mr. B. but that the agreement was largely dictated by the existence of the Pre-nuptial Agreement. Accordingly, in my view, Mr. B.'s application for spousal support requires consideration of the issue taking into account the objectives of the Divorce Act - specifically s. 15.2 - and the provisions of the Pre-nuptial Agreement.
- [169] As set out in *Miglin v. Miglin*, cited earlier, the Court may, on an original application for spousal support pursuant to s. 15.2 of the Divorce Act, make an order for spousal support despite a prior agreement between the parties (either a marriage agreement or a separation agreement) waiving spousal support.
- [170] *Miglin v. Miglin* contains a comprehensive consideration of the issues to be addressed and the approach to be taken and I do not propose to attempt to summarize the decision here. Justice Bastarache provided a helpful and very brief summary in the decision *Hartshorne v. Hartshorne*, at para. 41, as follows:

At paras. 70 to 91, we set out a two-stage approach requiring that courts look first to the circumstances of the negotiation and execution of the agreement to determine if one party took advantage of the other's vulnerability, or if the substance of the agreement at formation failed to comply substantially with the general objectives of the Divorce Act. Second, viewed from the time the application is made, courts should inquire if the agreement still reflects the original intentions of the parties and if it is still in substantial compliance with the objectives of the Divorce Act.

- [171] I have already considered the circumstances of the negotiation and execution of the Pre-nuptial Agreement and have concluded that nothing about those circumstances precludes Ms. F. from relying on Mr. B.'s agreement to forego spousal support in the event the marriage came to an end.

- [172] But for the Pre-nuptial Agreement (and its adoption by the parties in the Separation Agreement reached in December 2010), I consider it more probable than not that Ms. F. would be ordered to pay spousal support to Mr. B. The appropriate income figure for Ms. F. for calculating spousal support would, I conclude, be \$204,600 for Ms. F. (after adjusting her income downwards to reverse the gross-up for tax purposes of dividend income); and Mr. B.'s income is \$70,607. The Spousal Support Advisory Guidelines would provide a range of support of \$1,524 a month at the low end, \$1,776 mid-range, and \$2,032 at the high end. The Guidelines suggest duration of support of between 6.5 to 13 years.
- [173] Mr. B. submits that spousal support should both provide for his needs but also compensate him for the role he played in the marriage. I am not persuaded that any compensatory factors have been established. I have already said that although Mr. B. was an active and involved parent, Ms. F. was the parent who took primary responsibility for child care, assisted, of course, by paid caregivers. The evidence does not establish that Mr. B. sacrificed his career aspirations in any way. During the marriage he obtained a Master's degree in Business Administration - a considerable upgrade of his pre-marriage academic qualifications - and he also devoted many hours to volunteer work as an auxiliary peace officer - work that led directly to his present career. Mr. B. emerged from the marriage better educated and more employable than when he entered the relationship.
- [174] Ms. F. took time out from her career to give birth to the parties' two children and to care for them in the early months of their infancy. She has adjusted her work schedule to meet the needs of the children.
- [175] When the parties entered into the Pre-nuptial Agreement, Ms. F. was already established in her career. She had borrowed the entire purchase price of the dental practice she had acquired, and had been working to establish herself. Mr. B., as the agreement acknowledges, was advancing in his career as a funeral director. Ms. F. is a couple of years older than Mr. B., but he had been in the work force longer as she had had to attend university to equip herself for her career while Mr. B. began working immediately after high school graduation.
- [176] The parties likely did reasonably expect, at the time they entered into the Pre-nuptial Agreement, that Ms. F. would earn more than Mr. B., despite the fact they anticipated having children.
- [177] I am less certain, however, that the parties expected that the discrepancy between their respective incomes would be as great as it was at the date of separation and has continued to be in the years since separation. In 1998, Mr. B. was well-established in his employment with the Loewen Group and I conclude the parties expected his career to continue to take an upward trajectory. That has not happened. After leaving his employment with the Loewen Group, Mr. B. worked for DSMF Inc. for several years and since then has had several jobs. His current job likely takes advantage of his MBA, but is not highly remunerative. Mr. B. will likely receive pay raises, but unless he succeeds in advancing to a

much higher rank in the RCMP he is unlikely, I infer, to earn even half of the income Ms. F. is able to earn as a dentist.

- [178] Miglin v. Miglin emphasized that a marriage/separation agreement should not be set aside or ignored simply because its provisions may not provide for the same outcome that the court would have arrived at taking only the statutory provisions into account. Nevertheless, it does point out developments in the law and public policy relating to spousal support that suggests that large economic disparity between spouses following the breakdown of a marriage - particularly a marriage of medium to long duration - likely cannot be regarded as meeting the objectives of the Divorce Act.
- [179] I have in mind also the fact that Mr. B.'s obligation to pay child support will further widen the chasm between the income in his household compared to that of Ms. F.'s household, and the impact that chasm could have on the quality of life both parents will be able to provide to the children when in their respective households.
- [180] Ms. F. likely has the capacity to increase her income by seeing patients more days of the week. Her decision to organize her work week to make the care of the children a priority - especially at their current ages - is reasonable, but in future, as the children become more independent, she could work more and earn more. If Mr. B. remains with his current employer, he may be able to earn more by working some overtime, although there is no evidence on this point - but he will not have the same opportunities that Ms. F. has to increase her income by increasing her workload.
- [181] In Miglin v. Miglin, the Court cautioned that where parties have dealt with the issue of spousal support as part of a comprehensive agreement, as the parties have here, the court must be careful to avoid looking at a waiver of spousal support without looking at the agreement as a whole. In this case, however, I am not persuaded that it would be unfair to require Ms. F. to pay spousal support taking into account the other provisions of both the Pre-nuptial Agreement and the December 2010 Separation Agreement. I am not persuaded that Mr. B. received any particular consideration by way of division of assets, for example, in return for foregoing entitlement to spousal support.
- [182] Taking all of these factors into account, I am persuaded that I should make an order for spousal support, notwithstanding the provisions in the Pre-nuptial Agreement and the Separation Agreement.
- [183] I consider it appropriate, however, to award spousal support in the low to medium range, given that there are no compensatory factors to be taken into account, resulting in an order for spousal support of \$1,776 payable on the first day of each month commencing October 1, 2013 and continuing thereafter for a period of five years thereafter. Following separation, Ms. F. paid all of the expenses associated with the couple's former family home and all of the children's expenses, including child care, without contribution by Mr. B., a factor I believe should be taken into account in considering the quantum and duration of spousal support to be paid going forward.

THE CHILDREN

- [184] The parties are agreed that an order should be made for joint custody and joint guardianship of the children B. and BR.
- [185] Since separation, the children have spent the majority of their time in their mother's care and her home is, in fact, their primary residence. Mr. B. is seeking an order for equal sharing that would constitute a fundamental departure from the status quo. There is no evidence that the children are not thriving in the current arrangements or any evidentiary basis to conclude that their best interests would be met by the one week on, one week off arrangement proposed by Mr. B.
- [186] Despite the occasional conflict that B. has with her mother, as Ms. F. herself testified; B. told Dr. Elterman that although she enjoys the time with her father and would like to have more time with him, she does not want to spend "considerably more overnights at her father" BR. said he would like to see his father more, but that when he is with one parent he wants to see the other. Neither child indicated a desire to see a fundamental or major change to the living arrangements that have prevailed since the parties separated on February 1, 2010.
- [187] Ms. F. testified that she has arranged her work schedule so that she sees patients Monday to Wednesday and spends Thursday doing administrative functions or occasionally brief hygiene exams for patients who are seeing a dental hygienist in the clinic. She does not go to the clinic on Fridays.
- [188] As stated earlier, Mr. B. testified that he is currently working 7:00 a.m. to 5:00 p.m., Tuesday to Friday.
- [189] Ms. F. proposed in her Notice of Family Claim that Mr. B. have generous access to the Children, including overnight access, as agreed by the parties, with consideration given to the needs and wishes of the children. This was essentially the term included in the December 20, 2010 Separation Agreement.
- [190] At trial, and taking into account but not adopting Dr. Elterman's recommendations, Ms. F. proposed a schedule that would have the children being picked up Friday after school and staying with Mr. B. until Sunday evening every second weekend, with an evening, but not overnight, visit on Thursday from after school until being returned to Ms. F.'s home by 8:30 p.m. This schedule would have the children having only four overnight visits with their father in each four week period.
- [191] As Mr. B. does not work Mondays in his current position, it seems to me that it would be in the best interests of the children to have them stay with their father from Friday after school until school starts on Monday, unless there is a statutory holiday or a professional development day on the Monday, in which case the children could stay with Mr. B. until Monday evening. This schedule would mean that both parents would have some uninterrupted weekends with the children (which Dr. Elterman's proposed schedule does

not accommodate) and also take advantage of Mr. B.'s availability on Mondays and Ms. F.'s availability on Fridays.

- [192] I order that Ms. F.'s home shall be the children's primary residence. I order that Mr. B. shall have reasonable and generous access to the children, to be agreed between the parties, but to include every second weekend from Friday after school to Monday at the start of school, unless Monday is a statutory holiday or school holiday or professional development day, in which case the children shall remain with Mr. B. until 8:30 p.m. on Monday and then be returned to their mother's residence. In the week in which the children will not be spending the weekend with Mr. B., they shall spend at least one weeknight evening with him, from after school until 8:30 p.m.
- [193] This schedule will increase the children's time with their father to six overnights in each four week period. I would recommend, but am not ordering, that the parties also consider extending the weeknight evening visit to an overnight visit if the children express interest in doing so.
- [194] Mr. B. may have the children with him for two 10-day periods in each of July and August. He shall provide Ms. F. with notice no later than May 15 of each year of the two 10-day periods during which he intends to have the children reside with him.
- [195] The parties shall share the children's birthdays such that the children will spend time with each parent during part of the day on their respective birthdays. The children shall spend Mother's Day with their mother and Father's Day with their father, regardless of which parent would otherwise have the children with them on that Sunday. The Christmas holidays and the school spring break shall be divided with the children spending half of the holidays with each parent. In alternate years, the children will spend Christmas eve and Christmas morning with one parent; and Christmas afternoon and Boxing Day with the other parent. In 2013, the children will spend Christmas eve and Christmas morning with Mr. B. and Christmas afternoon and Boxing Day with Ms. F., with the reverse to occur in 2014 and alternating each year thereafter. The parties shall alternate trick or treating with the children on Hallowe'en, with the children to spend Hallowe'en in 2013 with Mr. B. and Hallowe'en in 2014 with Ms. F. and alternating thereafter.
- [196] Each parent may telephone the children once each evening during the days that the children are with the other parent, the conversation with each child not to exceed 10 minutes.
- [197] Each party will provide the other with a Travel Authorization upon request allowing each party to travel with the children within Canada and within the United States at any time during their access with the children. Reasonable notice of travel plans with the children will be given by the travelling parent to the non-travelling parent, including itineraries and contact information.

- [198] Ms. F. is authorized to apply for passports and passport renewals for the children and Mr. B. will sign any necessary documents to permit Ms. F. to obtain passports or passport renewals for the children. Ms. F. shall ordinarily keep the children's passports in her possession but shall provide the passports to Mr. B. for use by the children, along with the Travel Authorization referred to in the preceding paragraph, if required by Mr. B. for travel with the children. Mr. B. shall return the passports to Ms. F. at the end of each trip.

CHILD SUPPORT

- [199] As stated earlier, I find Mr. B.'s Guidelines income in 2012 to be \$70,607. In December 2010, the parties agreed that Mr. B. would pay less than the Guidelines amount of child support for two children (child support according to the Guidelines would have been \$970 a month based on Mr. B.'s income in 2010). They agreed on a figure of \$750 a month, payable on the 1st and 15th day of each month. I consider it likely that the agreement reflected the fact that Ms. F. would not be paying spousal support to Mr. B. I have now ordered the payment of spousal support.
- [200] Child support is, of course, the right of the children. More than two years have now passed since the December 2010 Separation Agreement. I conclude that an order should be made for child support based on the Guidelines. Mr. B. shall pay Ms. F. \$1,065 for the support of the two children, pursuant to the Divorce Act.
- [201] The parties agreed that they will share extraordinary expenses on an 80/20 basis, with Ms. F. paying 80% of the extraordinary expenses and Mr. B. paying 20% of the extraordinary expenses. The parent incurring the expense and seeking reimbursement shall provide the other parent with receipts or other proof of the expense at the end of the month or each month in which the expense is incurred.
- [202] The parties shall each file annual tax returns and each shall provide the other with a copy of his or her complete tax return, including all schedules and attachments, within two weeks after filing. Each party shall also provide the other with a copy of any Notice of Assessment or Notice of Reassessment within two weeks after receipt of same from Canada Revenue Agency.
- [203] Effective July 1 of each year, the parties shall adjust basic child support to reflect Mr. B.'s income.

COSTS

- [204] The parties asked for leave to make submissions about costs after Reasons had been delivered. They are at liberty to make written submissions about costs or to arrange with the Registry for a further appearance to make submissions about costs.

FURTHER DIRECTIONS

[205] Matters may have arisen or may arise as a result of the orders made herein on which the parties seek further directions. The parties are at liberty to seek directions if necessary to carry out any of the orders contained in this Judgment.

"W.G. Baker J."

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