
CANADA / JUDGMENT

S.M.M. v. J.P.H.

2019 BCSC 472

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 472 S.M.M. v. J.P.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.M.M. v. J.P.H.,

2019 BCSC 472

Date: 20190401

Docket: E75985

Registry: Nanaimo

Between:

S.M.M.

Claimant

And

J.P.H.

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Appearing in person:

S.M.M.

Counsel for the Respondent:

B. Rory B. Morahan

Place and Dates of Trial:

Nanaimo, B.C.

September 17-20,

December 4-7, 2018;

January 16, and

March 6-7, 2019

Place and Date of Judgment:

Nanaimo, B.C.

April 1, 2019

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INTRODUCTION and OVERVIEW

- [1] The parties have been litigating this family law action for a decade. In December 2012, Madam Justice Ross expressed concern that the proceedings might cause "further damage" to the children of the marriage "who are already victims of their parents' conflict". That concern fell on deaf ears and the relentless acrimony has continued unabated, likely to the detriment of the children.
- [2] S.M.M. and J.P.H. are the parents of three children, T, born in 1999, C, born in 2001, and J, born in 2004. The parties started living together in mid-1998, married in August 2001, and separated in September 2008, at which time this lawsuit was issued.
- [3] In November 2009, the parties entered into a "Shared Care Co-Parenting Support Agreement" (the "Agreement"). Financial issues between the parties were supposedly resolved by way of a Separation Agreement dated May 31, 2010 ("Separation Agreement") and filed in court on June 23, 2010.
- [4] Custody, guardianship and access issues relating to the children were determined by a 15-day trial in 2011. The reasons for judgment are indexed at 2011 BCSC 1084. At that time the court ordered:
1. sole custody and primary residence of the children with the mother, S.M.M.;
 2. joint guardianship on the Joyce model;
 3. reasonable and generous access to the father, J.P.H.; and
 4. permission for S.M.M. to move with the children to Courtenay.
- [5] S.M.M. and the children did in fact move to Courtenay. Disputes respecting child support and access/parenting issues ensued shortly thereafter and continue to this day. Various court orders have been issued including a comprehensive and precisely detailed order made by Madam Justice Gray of this Court on September 17, 2015 (the "Gray Order").
- [6] Justice Gray's reasons for judgment are indexed at 2015 BCSC 1666. J.P.H. appealed that judgment and the Court of Appeal's reasons dismissing the appeal on June 29, 2016 are indexed at 2016 BCCA 284.
- [7] Both parties have since filed applications seeking to vary or enforce the Gray Order insofar as it relates to custody and access to/parenting of the child J, as well as child support for all three children.
- [8] Dr. Elterman had prepared a "full" s. 211 Report respecting the family dynamics dated August 3, 2009 and an updated report dated April 6, 2011 for the trial that year. On February 8, 2017, the court ordered a further report from Dr. Elterman including an opinion respecting the custody and access arrangements "advisable and most beneficial" for J.

- [9] The court anticipated that the updated report would be available in March 2017; however, it was not received until February 9, 2018.
- [10] T is 19 and currently attending his second year at the University of Victoria. C is 17 and in grade 12 at a French immersion secondary school in Courtenay. Recognizing that T and C are older and mature enough to "vote with their feet", their parents agreed to a consent order on May 17, 2018, which varied the Gray Order to provide that "T and C shall make their own arrangements respecting parenting time".
- [11] By way of an order made May 22, 2018, Justice Thompson of this Court imposed some much needed discipline on the remaining unruly dispute between the parties. Among other things, he required:
- updated Notices of Application to be filed by August 3, 2018;
 - service of Amended Lists of Documents by June 8, 2018;
 - filed updated Form 8 Financial Statements and applicable income documents by August 8, 2018; and
 - trial of the applications for four days during the assize week of September 17, 2018 in Nanaimo.
- [12] Justice Thompson was unavailable to hear the trial and the matter was assigned to me. The assessment that the trial would take four days proved to be optimistic. The trial occurred in four instalments over eleven days and judgment was reserved at the conclusion of evidence and submissions.

THE GRAY ORDER and THE RELIEF SOUGHT BY THE PARTIES

- [13] As indicated earlier, the Gray Order was detailed and precise. It comprises some 45 paragraphs/subparagraphs addressing various aspects of parenting, custody, guardianship, decision-making, communication with the children, travel with the children, child support, arrears, fines for non-compliance, costs, and the like. I will not repeat all the provisions here, however the more significant include:
- S.M.M. retained sole custody of the children who would continue to reside primarily with her;
 - both parents would have joint guardianship of the children, however, in the event they were unable to reach agreement, S.M.M. was granted the final decision-making authority on major matters;
 - an "ordinary" 14-day rotating schedule of parenting time was imposed with the effect that T would spend six nights out of 14 with J.P.H., and each of C and J would spend three or four nights out of 14 with him;
 - on holidays the children were to spend equal time with each parent;

- restrictions were imposed on the amount of time the children could be left alone and monetary penalties were prescribed if the father was late in pick up/delivery of the children;
- various provisions of the filed Separation Agreement were affirmed/amended so that J.P.H. was to pay \$3,000 per month to S.M.M. as basic child support, along with \$1,100 per month as a contribution to the children's special and extraordinary expenses;
- the parties were to exchange income tax returns and other financial information annually so that child support could be reviewed and adjusted effective September 1 each year; and
- J.P.H. was declared to be in arrears of special and extraordinary expenses in the sum of \$25,255, which were to be satisfied by monthly payments to S.M.M. on the first day of each month until paid in full, without interest.

[14] The Separation Agreement provided for an "agreed-upon" imputed income for Federal Child Support Guidelines, SOR/97-175 ("Guidelines"), purposes of \$214,000 per annum for J.P.H. and \$43,600 per annum for S.M.M. The Agreement provided that J.P.H. would pay \$3,000 per month for basic child support and that the children's special or extraordinary expenses, as defined by s. 7 of the Guidelines, would be paid 83% by J.P.H. and 17% by S.M.M. As noted, the Gray Order continued the \$3,000 per month basic child support payment and also crystallized the s. 7 expenses obligation into a monthly payment of \$1,100. The monthly support obligation was thus \$4,100 "continuing for so long as the Children are eligible for maintenance pursuant to the Divorce Act (Canada) or otherwise at law".

[15] J.P.H. is an emergency room physician. He is the sole shareholder and director of Dr. [J.H.] Medical Services Ltd., an entity incorporated in December 2003 ("MedCo"). MedCo derives its income from the emergency room services provided by J.P.H. J.P.H.'s income is derived primarily from MedCo.

[16] J.P.H. is a chronically disorganized bookkeeper. His personal finances and those of MedCo have been in disarray for many years. Personal and corporate debt has accumulated in substantial amounts. J.P.H.'s personal residence was subject to foreclosure proceedings and a forced sale occurred in June 2017. Net proceeds were used to repay debt, including child support arrears, but the remaining debt is still substantial, particularly to Canada Revenue Agency (CRA), and, absent significant restructuring combined with disciplined financial practises, insolvency may be imminent.

[17] Both parties seek significant variations of the Gray Order.

[18] Among other things, J.P.H.'s Notice of Motion filed September 4, 2018 seeks orders granting him:

- joint custody of and primary residence with the children;
- roughly equal parenting time during the school year and holiday periods;
- primary parenting responsibility and final decision-making authority for J;

- a parenting schedule to be set by him two months in advance, which will accommodate his work schedule;
- a declaration that T is no longer a child of the marriage;
- imputation of Guidelines income to S.M.M. in the amount of \$80,000 per annum and reduction of his own Guidelines income to \$96,500 "until the CRA debt is paid off"; and
- adjustment of child support and s. 7 expense contribution accordingly.

[19] In support of his application, J.P.H. invokes, among other things, the "undue hardship" provisions of the Guidelines.

[20] For her part, S.M.M. has no sympathy for J.P.H.'s financial plight. She claims that it was caused by J.P.H.'s financial ineptitude and poor decision-making, matters for which neither she nor the children were responsible.

[21] S.M.M. recognizes that changes must be made to the Gray Order to reflect the parents' decision to allow T and C to determine how much time they wish to spend with each parent. However, in her application she seeks:

- imputation of income to J.P.H. for child support purposes in the amount of \$250,000 per annum prospectively and retroactive to September 1, 2012 and adjustment of his child support obligation accordingly (retroactively in the aggregate amount of approximately \$90,000 and on a going-forward basis);
- a declaration that T remains a child of the marriage for child support purposes, albeit in adjusted amounts to reflect income received by T from various sources;
- continued sole custody of the children with her;
- continuation of the current parenting schedule for J subject, however, to J being "permitted to make his own decision re the days when he sees his father";
- a declaration that J.P.H. be found in contempt of court for repeated breaches of the Gray Order and sanctioned accordingly;
- a declaration that J.P.H. is a vexatious litigant who must not bring any further court applications without first obtaining leave of the court; and
- an order of costs against J.P.H. "for failure to provide timely financial disclosure".

[22] In addition to retroactive child support "arrears" of approximately \$90,000, the increased income sought to be imputed to J.P.H. is claimed to increase ongoing basic child support to \$3,939 per month together with the continuation of the s. 7 expense contribution in the fixed amount of \$1,100, i.e. an ongoing aggregate child support payment by J.P.H. in the amount of approximately \$5,000 per month.

Custody and access to/parenting of the children

- [23] All orders granted in this litigation have affirmed the granting of sole custody of the children to S.M.M. In accordance with the 2011 trial order, S.M.M. and the children moved to Courtenay where they continue to reside and work or attend school. The orders have also repeatedly affirmed that the "primary residence" of the children will be with S.M.M.
- [24] Much of the friction between the parties following the Gray Order arose from J.P.H.'s demanding work schedule at the hospital where he works and the sometimes chaotic logistics necessary to accommodate the access/parenting requirements imposed by the court and the children's then busy schedule of extracurricular activities. J.P.H. accuses S.M.M. of a failure to accommodate/cooperate and, worse, deliberate obstruction and frustration of his parenting time with the children.
- [25] J.P.H. lost his permanent residence (a farm property) to foreclosure in the summer 2017. Since February 1, 2018, he and his new partner, Ms. T, have been living in rental accommodations in Courtenay in order to be closer to the children. This is intended to be their permanent residence for the foreseeable future and has resolved some of the conflict between the parties arising from geographical considerations.
- [26] During the year, S.M.M. acquired a second vehicle, which is now available for use by 17-year-old C and has facilitated transportation of the children to and from their parents' respective residences and their own extracurricular activities. This too has helped to ease some of the friction.
- [27] Notwithstanding these improvements, J.P.H. maintains he should have joint custody of the children and primary parenting responsibility for J based on a 50/50 parenting regime that accommodates his work schedule.
- [28] Much of the conflict between the parties can be traced to their markedly different personality traits. The same traits have been observed and commented on by the previous judges involved in this protracted family litigation.
- [29] The 2011 trial reasons observed that both parties were "intelligent, loving and committed parents" and I am satisfied this remains the case. However, the trial judge observed a one-sided sense of entitlement on the part of the father that was "only child-oriented to the extent that if he thinks something is in their best interests, it must be so." He went on to observe that the father "has not been and likely never will be willing to accept 'no' as an answer once he decides on a course of action" and expressed doubt that conflicts between the parents would be resolved "in the best interests of the children in a respectful and workable manner".

- [30] The 2011 trial judge also noted the mother's preference for discipline and structure. He stated that she was "the more adept parent in organizing and running the day-to-day lives of the children" and that she "pays attention to detail and is not easily distracted". What J.P.H. characterizes as "obstructive" behaviour is more often than not the mother's frustration at what she perceives as the father's inability to strictly comply with the parenting structure imposed by the court.
- [31] At the most recent trial, S.M.M. says she was "worried about [J.P.H.'s] mental health". She described him as forgetful, chronically disorganized, impulsive, prone to anger outbursts, and unable to meet deadlines ("late 70% of the time"). She says he has "never shown he can stay on track".
- [32] At various times during his testimony in the present trial, J.P.H. displayed obvious mental distress and, at one point, briefly broke down in tears. He had a very poor memory for dates and details, often had difficulty focusing on the question put to him, and on other occasions provided answers that meandered off topic.

Dr. Waterman's Evidence

- [33] Dr. Larry Waterman is a clinical psychologist who has occasionally provided expert evidence in the courts of Ontario and British Columbia. He has been preparing custody and access reports in family cases for a little over 35 years, and in British Columbia has prepared "hundreds" of reports of the sort contemplated by s. 211 of the Family Law Act, S.B.C. 2011, c. 25.
- [34] Dr. Waterman was not called as an expert witness in this case. Rather, he gave evidence about the clinical counselling he provided to J.P.H. between January 21, 2014 and September 10, 2018. He has diagnosed frustration, anger, distress, and high anxiety on J.P.H.'s part arising from the litigation process and "irregular access with his children". In April 2017, Dr. Waterman was so concerned about J.P.H.'s levels of stress and anxiety that he recommended that J.P.H. cut back to a 66% work schedule ("at most 75% time").
- [35] At his most recent appointment with J.P.H. on September 10, 2018, Dr. Waterman says he became even more concerned about the stress and anxiety displayed by J.P.H. The causes remain the same but have been intensified by the financial burden J.P.H. is carrying.
- [36] Dr. Waterman says J.P.H. displays "a very high level of hopelessness", has difficulties focusing and concentrating, a poor memory, and he digresses continually. He is irritable and quick to anger. Dr. Waterman believes a "dependable, regularized [parenting] schedule" would be very helpful for J.P.H. and he also strongly recommends desensitization and cognitive behavioural psychotherapy of the sort often employed in stress disorder cases.

- [37] Dr. Waterman expressed the opinion that J.P.H. was "quite capable of caring for his kids" and that he does not pose any risk to them. He stresses that J.P.H. must not return to a full-time work schedule and that if he did so a "complete psychological collapse" would be likely in a relatively short time.
- [38] Dr. Waterman acknowledged that he has never met the children or their mother and that he was unable to comment on the children's best interests. He also acknowledged that all factual background provided to him was self-reporting by J.P.H., and that he has no first-hand knowledge of either the litigation or the interaction between J.P.H. and his children.
- [39] Much of Dr. Waterman's testimony was technically inadmissible for lack of compliance with the Supreme Court Family Rules respecting expert evidence. However, given its alarming content and its implications for the custody/parenting decisions required in this case, I am inclined not only to admit the evidence but also to give it considerable weight. Suffice it to say, there is little in Dr. Waterman's evidence that militates in favour of varying any custody decisions previously made by the court.

The Elterman Report

- [40] Dr. Elterman's report is dated February 9, 2018. His assessment is based upon two interviews with J.P.H., one interview of S.M.M. and C respectively, and two interviews of J. These interviews were conducted in August and October 2017 when J.P.H. had not moved residence to be closer to the children. As well, and as is usual with these type of types of court-ordered reports, Dr. Elterman conducted telephone interviews of various "collateral sources" provided by the parents.
- [41] It should be noted that S.M.M. objects to the contents of Dr. Elterman's report as being biased. She says the report incorrectly focuses on her as a "gatekeeper" frustrating J.P.H.'s access to the children, something that is "simply untrue and unfair". She claims J.P.H. has repeatedly told the children over many years that she has blocked access, something they may have repeated to Dr. Elterman, who neither asked them for specifics nor gave her any opportunity to address in her own interview.
- [42] S.M.M. accuses Dr. Elterman of deliberately waiting until J.P.H. moved to Courtenay before writing his report (in J.P.H.'s favour).
- [43] S.M.M. was given the opportunity to call Dr. Elterman as a witness at the trial for cross-examination, however she declined to do so claiming that she could not afford to pay the expenses involved.

[44] I do not accept S.M.M.'s accusations of bias. It is an accusation that is almost invariably made by parties in family law cases who are dissatisfied with the observations or recommendations made by professionals asked by the court to prepare an assessment of family dynamics. As with all such reports, the court will give Dr. Elterman's assessment due consideration but will make its own determination based on all of the evidence tendered in the case.

[45] Dr. Elterman's report details his interviews with J. What emerges from those interviews is that:

- his father frequently discusses his conflict with the mother and (at the time) wanted him to move away to live with J.P.H. in Victoria;
- J was unwilling to move away because he liked living with his mother and he enjoyed his various friends and sporting teammates in Courtenay;
- J found himself being "smothered" by his father during his various visits and, unlike his mother, he tends to be more disorganized. However he enjoys being with his father, particularly doing activities with him, and "they get along fine" (as he does with his mother).

[46] Dr. Elterman spoke with J's counsellor at school. The latter expressed the view that J was not struggling and was doing well overall. J is well-settled in school and is socially connected, and there are "no significant concerns". J is a spirited and independent teenager and he can be challenging to authority. His "main unhappiness" is being stuck in the middle between his mother and father. He "wants to see his dad but does not want to do it on a schedule". He "is frustrated with both his mother and father at times depending on what demands each of them are making and how the parents are approaching it".

[47] Dr. Elterman recommends that:

- the parents should continue as joint guardians;
- based on J.P.H. living in the area and working a five-on and five-off schedule, J should reside with his father on three of his days off work;
- J.P.H. "will need to be sensitive to sports, arrangements and being with friends for someone of J's age. He will need to take seriously some of the issues raised by J about needing to balance time with his friends and not smothering him with attention as one might with a younger child";
- because of "problematic gatekeeping" by S.M.M., J.P.H. should have primary parenting responsibility for J relating to matters concerning his health, education and activities until December 2019, at which point it can be re-evaluated.
- it is highly unlikely that a shared parenting responsibility arrangement would work.

J's Troubles at School

- [48] The court has not been provided with all of J's report cards from school over the years. S.M.M. states that J is a straight-A student who is performing well academically. That may be so, however J has a history of misconduct at school, which has resulted in disciplinary measures including detentions and suspensions. His schools have also on occasion developed "behaviour support" and "collaborative behaviour" plans designed to address various stated concerns respecting J's "inappropriate behaviours affect[ing] the emotional or physical safety of others or their learning".
- [49] According to correspondence and documents produced by J's schools, J's misconduct has included physical aggression to others, impulsivity and challenging authority, demonstrations of "elevated anger", and the like. Specific incidents include making gun gestures at the head of a classmate, "giving the finger" to and swearing at classmates, receipt of a text/photo of a group of grade 7 girls piling on top of each other entitled "gang bang" (his cell phone was provided to the RCMP so they could investigate the matter), swearing at the teacher, and drawing graffiti on school property.
- [50] In the past six months J has been suspended twice and placed in detention once. The first suspension was for "bullying and harassment online"; J had obtained a copy of an examination answer sheet, passed it around electronically, and when ultimately confronted by authority, threatened a person whom he thought may have reported him with words akin to, "I have a baseball bat". This occurred in June 2018 and J was suspended for three days.
- [51] In early October 2018, J swore as he was walking away from a teacher and was suspended one day for "disrespect". In November 2018, J (along with others) was caught applying graffiti on the back of a school staircase and was placed on detention.
- [52] It is too trite to simply dismiss these behaviours and teacher concerns as "boys will be boys" conduct on the part of the immature. It is likely in play to some degree, but it is also likely that such matters are at least in part the product of exposure to the protracted acrimonious conflict between the parents.
- [53] J.P.H.'s new partner, Ms. T, gave evidence respecting her observations of J. She is a thoughtful, caring person who is clearly providing a great deal of much-needed support and structure to J.P.H., particularly insofar as his financial affairs are concerned. She too is divorced with a teenage son but her co-parenting experience with her former partner is cooperative and non-conflictual. She is taken aback by, and indeed seems weary of, the continual conflict between J.P.H. and S.M.M.
- [54] Ms. T says J can be a very pleasant child but he can also be aggressive, anxious and "very difficult". She describes him as "angry", particularly at the start of any access time with his father, and prone to denigrating comments to the latter. She says J.P.H. remains patient and nurturing notwithstanding these difficulties. She believes J needs "boundaries, warmth, and stable access to both parents".

Obstruction/Frustration of Parenting Time

[55] Ms. T has spent a great deal of effort and time in reviewing J.P.H.'s communications and documentation, and preparing binders of documents to be tendered as exhibits at trial. No doubt this is a testament to her perspicacity and organizational skills, but much of the material is not admissible evidence, even in family proceedings such as this one where the rules of evidence are often relaxed and the practical allowed to trump the technical.

[56] For example, Ms. T has looked through all of J.P.H.'s electronic communications and prepared cerlox-bound volumes of "reference material" respecting "infractions and breaches of S.M.M. against J.P.H.'s access or parenting time, the actual order [Gray Order], or any other serious topics". Each volume contains a five-page summary/breakdown of contents, dated April 17, 2017, grouped under headings such as:

- denial, obstruction, breach of order;
- interference of access;
- false, deviant or misleading application of the court order;
- denial of reasonable access outside parenting schedule;
- access conditional upon payment/finance;
- alienation of father;
- physical or psychological harm of children;
- control and power, citing false claims;
- no reasonable accommodation for J.P.H.'s work schedule and access;
- causing financial hardship of father; et cetera.

[57] With all due respect to Ms. T who, like all parties involved in this litigation, is well educated and highly intelligent, her characterization and self-described synopses of the documents is simply inadmissible argument that cannot be given any weight by the court.

[58] The actual email and text communications between the parties regarding access and parenting issues are properly admissible evidence. Many of the communications are fractious and disputatious. They are the product of each party's unique personality traits. They are also, in many instances, the product of the logistical challenges arising from J.P.H.'s non-residency in the Courtenay area.

[59] I do not doubt that on some occasions S.M.M.'s animus towards J.P.H. triggered deliberate frustration of the latter's parenting arrangements. I also do not doubt that forgetfulness, disorganization and tardiness on J.P.H.'s part has been a frequent source of exasperation to S.M.M.

[60] There is little point in dwelling over past conduct of the parties. Much water has gone under the bridge in the almost two-year period since the volume of electronic communications was compiled. The most significant development is J.P.H.'s move to the Courtenay area, which has eased many of the logistical conflicts that were the source of so much rancour. A second vehicle, which C is now licensed to drive, has also improved the logistical environment.

Law Applicable to Custody/Parenting Variations

[61] In reasons indexed at 2016 BCCA 284, the Court of Appeal noted that Madam Justice Gray had "correctly set out the law relating to the threshold test of a material change in circumstances" necessary for variation of any order respecting custody or parenting. Her summary of the law is found in the reasons for judgment indexed at 2015 BCSC 1666:

[66] The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 17(5), (6), and (9) provides as follows:

- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
- (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.
- (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[67] The Supreme Court of Canada has given guidance on the threshold issue of material change of circumstances. That is set out in the case of *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at paras. 11-12 as follows:

The requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. The court cannot retry the case, substituting its discretion for that of the original judge; it must assume the correctness of the decision and consider only the change in circumstances since the order was issued: *Baynes v. Baynes* (1987), 8 R.F.L. (3d) 139 (B.C.C.A.); *Docherty v. Beckett* (1989), 21 R.F.L. (3d) 92 (Ont. C.A.); *Wesson v. Wesson* (1973), 10 R.F.L. 193 (N.S.S.C.), at p. 194.

What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: *Watson v. Watson* (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: *MacCallum v. MacCallum* (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, *Child Custody Law and Practice* (1992), at p. 11-5.

[Emphasis in original]

[68] As set out in the Continuing Legal Education publication, the Family Law Source Book, at 2.45:

A change in circumstances must represent a clear and distinct departure from what the court knew of the circumstances or could reasonably have anticipated when making the order (*Canning v. Fearn*, 2000 BCSC 362). A change in circumstances will not be material unless it was not foreseen or could not reasonably have been contemplated by the judge in making the original order (*Dietrich v. Kujbida*, 2004 BCSC 455).

[69] As set out in *Carter v. Carter* (1991), 58 B.C.L.R. (2d) 45 (C.A.), a material change must be "substantial, unforeseen and of a continuing nature".

[70] The overall applicable law is summarized at para. 49 of Gordon as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;

- (b) the existing access arrangement and the relationship between the child and the access parent;
- (c) the desirability of maximizing contact between the child and both parents;
- (d) the views of the child;
- (f) disruption to the child of a change in custody;
- (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[62] Amendments to the Divorce Act, R.S.C. 1995, c. 3 (2nd Supp.) are presently being considered by parliament, which will have the effect of incorporating mandatory "best interests of the child" factors very similar to those found in s. 37 of the Family Law Act. That legislation requires consideration of all of the child's needs and circumstances and emphasizes the need to protect to the greatest extent possible the child's physical, psychological and emotional well-being.

Conclusion re Material Change

- [63] I am satisfied that a material change in circumstances has occurred, which would permit a re-assessment of the custody and access/parenting provisions of the Gray Order. First, J.P.H. has moved his personal residence to the Courtenay area on a permanent basis thereby ameliorating many of the logistical difficulties that had plagued the relationship between the parties and which were a primary determinant of the previous orders.
- [64] Second, T is now a legally independent adult and both parties agree that C is also sufficiently mature such that her wishes should govern ongoing parenting arrangements. Various aspects of the Gray Order must therefore be changed to accommodate these developments.
- [65] Third, J is now 3 1/2 years older than he was when the Gray Order was made. At that time one of the factors militating in favour of a change was C's maturity at age 13, which meant that her wishes should be given "significant weight". The Court of Appeal expressly endorsed this perspective noting [at para. 22] that "while a child's views and wishes are not determinative, the court should give considerable weight to the views of an older child, proportionate to their age and level of maturity". J is now 15 years of age and his wishes must be accorded more weight than what may have been the case when he was in his pre-teens.

Positions of the Parties re Custody/Parenting

- [66] S.M.M. acknowledges that the relocation of J.P.H. to the Courtenay area has reduced some of the conflict between the parties respecting parenting schedules. She submits, however, that "nothing has really changed" in almost all other respects. As has been the case since separation, J.P.H. is "fixated" on a 50/50 parenting regime and has engaged in a "relentless pursuit" of that goal even though it has entailed "constant exposure" of the children to conflict.
- [67] S.M.M. says she is "alarmed" by Dr. Waterman's diagnosis of J.P.H.'s mental health issues. From her point of view, J.P.H. remains impulsive, angry, disorganized and confrontational. She suggests it would be folly to grant J.P.H. custody, parenting responsibility, and final decision-making authority for C and J (T is now an independent adult). She opines, "Ultimately, it is J.P.H.'s seeking of treatment, not a fixed, half-time imposed parenting regime, that will aid in improving his relationships with the children."
- [68] Notwithstanding her various concerns respecting J.P.H.'s ability as a parent, S.M.M. submits that, as with T and C, J should also "be permitted to make his own arrangements as to when and where he sees and/or resides with either parent", albeit subject to "some minimal parameters on parenting time appropriate to ensure his continued success at school and emotional stability". She also proposes "approximately equal time" with each parent during holidays and school breaks.
- [69] For his part, J.P.H. emphasizes "the overarching principle of maximum contact with both parents" so long as it is in the best interests of the child. He submits that J should have little discretion to choose his parenting time because (1) he has only just turned 15 and is still relatively immature; (2) he is affected by the ongoing conflict between his parents, as demonstrated by his misbehaviour at school; (3) recent history has demonstrated that the conflict is substantially reduced when there are specific dates and specific times for exchange with little room for interpretation; and, (4) some minimal flexibility in the fixed schedule at the instance of J might accommodate the need of all teenagers to have some say in their personal schedule.

Analysis and Conclusions re Custody/Parenting

- [70] As noted earlier, T is now 19 years old and will be turning 20 in a couple of months. While he is still a full-time university student during the school year, he has also been running his own business as a landscaper when out of school. He says the income from that business combined with the scholarships he has been receiving covers his university costs, and that he is "self-sufficient, financially, and do[es] not rely on the income of either one of my parents".

- [71] T has sworn an affidavit in these proceedings attesting to his "financial independence". In that affidavit, he says, among other things, "I am an adult and I can control my own involvement with my parents" and that, when he is not in school, he will "try to spend my time equally with each of my parents and schedule my personal activities independently".
- [72] S.M.M. alleges that T's affidavit does not reflect his true voice but, rather, has been carefully contrived by J.P.H. in order to avoid child support obligations. However, when invited by the court to call T as witness to have his say and to address such matters, she declined to do so.
- [73] Having reached the age of majority, T is a legally competent adult and by all accounts an intelligent and industrious individual. He has chosen to enter the fray by swearing an affidavit, the contents of which have not been controverted. I accept his testimony and I find that T has withdrawn from the charge of his parents and, as a matter of law, no longer qualifies as a "child of the marriage" within the meaning of the Divorce Act. There is thus no obligation for either parent to pay child support on T's account. All references in the Gray Order to the parenting of and child support obligations for T should be modified or deleted as necessary.
- [74] I observe for the benefit of the parties that although T is currently no longer a child of the marriage, it is possible at law for him to re-acquire that status should his financial circumstances change for the worse. The law respecting whether an adult child who pursues post-secondary education may be considered a child of the marriage and thus entitled to some support is reviewed in *Tome v. Furtado*, 2018 BCSC 2280 at paras. 51-63, and is the analytical framework the court will likely apply should it be necessary in the future.
- [75] C has not yet reached the age of majority. She is 17 years old and will turn 18 in June. She is currently in grade 12 and in the past has obtained part-time work as a cashier outside of school.
- [76] C did not testify at the trial but she too has sworn an affidavit stating her preferences for parenting arrangements. Essentially, she says her mother has allowed her to make her own arrangements about staying with her father when he is not working out of town. C is content to continue with these arrangements.
- [77] Again, S.M.M. has expressed concerns about the manner in which this affidavit evidence was elicited on behalf of the father. Nonetheless, she agrees that C is old enough and mature enough to make her own decisions in this regard and S.M.M. is prepared to abide by such a regime.
- [78] It will be recalled that on May 17, 2018 Mr. Justice Thompson issued a consent order varying the Gray Order to provide that, "T and C shall make their own arrangements respecting parenting time". There is nothing in that order that in any way suggests it was only meant to be interim in nature, i.e. pending the outcome of the trial before me.

- [79] In his Notice of Application filed September 4, 2018, J.P.H. seeks joint custody of C and J along with an order requiring them to reside primarily with him. He also seeks a parenting schedule reflecting equal, shared parenting on a rotating schedule, all to be set by him in advance.
- [80] I decline to change the Gray Order respecting custody and primary residence of C and J. I also decline to change the final decision-making authority granted to S.M.M. respecting significant matters affecting them in the event the parents, after discussion, are unable to agree.
- [81] I recognize Dr. Elterman recommended that J.P.H. have primary parenting responsibility for J relating to matters concerning his health, education and activities, contingent on J.P.H. living in the Comox-Courtenay area. His rationale for that recommendation was "problematic gatekeeping by [S.M.M.]". I do not agree with this recommendation.
- [82] I have already acknowledged that S.M.M. has engaged in some "gatekeeping" from time to time, which has had the effect of occasionally frustrating J.P.H.'s parenting time with the children, particularly J. Some of this was triggered by forgetfulness, disorganization and tardiness on J.P.H.'s part. Since as early as 2011, however, this Court has recognized that S.M.M. has superior organizational skills and is the more adept parent in structuring the day-to-day lives of the children. That remains the case and is the primary reason why sole custody and final decision-making authority should continue to reside with S.M.M.
- [83] Further, I have some concern respecting the fragility of J.P.H.'s mental health as outlined by Dr. Waterman. The court certainly hopes that the changed parenting regime put in place at this time will alleviate some of the difficulties encountered by J.P.H. and will give him a better opportunity to forge the sort of relationship he seeks with his children, particularly J. Nonetheless, a cautious approach should be adopted in the circumstances and this militates against the drastic change he seeks in respect of formal custody and final decision-making authority.
- [84] Accordingly, the Gray Order is varied to delete all reference to parenting time respecting C and to simply insert the provision earlier endorsed by Justice Thompson, namely, that C shall decide and make her own arrangements respecting parenting time with J.P.H. and S.M.M.
- [85] I turn now to parenting arrangements for J.
- [86] The Gray Order of September 17, 2015 contemplated J.P.H. picking J up after school on the Friday and returning him to school on the following Monday or, if that Monday was a school holiday, the following Tuesday on an alternating week schedule. This order had the effect of J spending three or four nights out of 14 with J.P.H.

- [87] Dr. Elterman's recommendation reflected the fact that J.P.H. had moved permanently to the Courtenay area and thus additional parenting time of J with J.P.H. was appropriate and easily accommodated. Based on a five-day on, five-day off work schedule for J.P.H., he recommended three days of parenting time during each five-day off period, i.e. six days in each 20-day period.
- [88] Dr. Elterman seems not to have recognized that, while a five-day on, five-day off schedule might represent full-time work as an emergency room physician, J.P.H. is, based on Dr. Waterman's recommendation, only working a 75% schedule; for every 40-day cycle, his schedule is five days on and five days off, a further five days on and five days off, followed by five days on and 15 days off, before repeating itself.
- [89] The reality in this case is that the acrimony between the parents will probably continue. In my opinion, unlike T and C, J is not yet old or mature enough to dictate the scheduling of parenting time and it would not be in his psychological and emotional interests for him to be forced to choose between two parents who love and care for him equally, but who will invariably attempt to influence his decision-making respecting parenting time. Rather, J's need for stability and a healthy relationship with both parents militates in favour of a fixed parenting schedule, which can be changed from time to time with the consent of all parties, including J, when necessary to accommodate other interests or schedules.
- [90] At para. 27 of the Court of Appeal decision in this case, 2016 BCCA 284, the court stated:
- Rather than focusing on changing the circumstances of his work and living arrangements to facilitate parenting, the Father continues to try to bend the parenting regime around his changing circumstances and variable work schedule. The Chambers Judge aptly observed that the Father's circumstances do not provide J and C with needed stability. It is those circumstances which must change if there is to be a different parenting regime.
- [91] J.P.H. has made a substantial change in his circumstances; he has taken up permanent residence in the Comox Valley area in order to facilitate parenting time with his children. His 40-day work cycle will continue to impose some challenges but with a modicum of common sense, organizational discipline, and perhaps even a little good will, those challenges do not have to be a source of conflict between the parties but, rather, may allow the parents to display more cooperative behaviour for the benefit of all members of their family.
- [92] For the remainder of J's present school year and also for his 2019-20 school year, the following parenting schedule for J will apply:
1. J.P.H. must continue to maintain his permanent residence in Courtenay, which provides separate bedrooms for J and C and a third bedroom for J.P.H. and his partner;
 2. J.P.H. will provide to S.M.M. and J his anticipated 40-day cycle work periods at least 80 days in advance;

3. for each five-day period that J.P.H. is off work during each 40-day cycle, J.P.H. will have three days consecutive parenting time with J;
4. for each 15-day off work period during each 40-day cycle, J.P.H. will have seven consecutive days of parenting time with J;
5. for each such period of parenting time, J.P.H. will consult with S.M.M. and J respecting their preferred days having regard to convenience, activities, and the like, however, J.P.H. will select his consecutive parenting time periods and will inform S.M.M. and J accordingly at least two weeks in advance;
6. J will have the discretion to request one extra consecutive day of parenting time with J.P.H. for each of the parenting time periods referred to above;
7. the parenting time exchanges will be:
 - a) on school days: after the academic school day at J's school;
 - b) on non-school days: at 6:00 p.m. at the parent's home who is exercising parenting time prior to the exchange;
 - c) each parent will ensure J will be at the residence aforesaid for pick up by the other parent unless both parents and J have otherwise agreed and the parents have confirmed those alternate arrangements by an exchange of email at least 24 hours before the scheduled pick up;
8. unless otherwise agreed by both parents and J, J must be in the Comox Valley for all nights before a school day;
9. starting the calendar year 2019 and ending January 2, 2021, J will spend approximately equal time with each parent during J's Christmas, spring and summer school breaks. Unless the parties otherwise agree in writing about when J will be with each parent during J's Christmas, spring and summer school breaks, the school break parenting schedule will be:
 - a) for Christmas break, J will be with J.P.H. for eight nights, from Christmas day at 1:00 p.m. until January 2 at 6:00 p.m. J will spend the balance of the school Christmas holiday with S.M.M.;
 - b) for spring break, J.P.H. will have J from the Friday, which is the last day of school until 6:00 p.m. on the day that is the mid-point of the spring break. J will spend the balance of the spring break school holiday with S.M.M.;
 - c) for summer holidays, J.P.H. will have J for two periods of 17 nights each, as follows:
 - i. for the summer of 2019:
 - a. from Thursday, July 4 at 6:00 p.m. to Sunday, July 21 at 6:00 p.m. for a total of 17 nights; and

- b. from Tuesday, August 13 at 6:00 p.m. to Friday, August 30 at 6:00 p.m. for a total of 17 nights; and
 - c. J will spend the balance of the summer holidays with S.M.M.;
- ii. for the summer of 2020:
- a. from Thursday, July 2 at 6:00 p.m. to Sunday, July 19 at 6:00 p.m. for a total of 17 nights; and
 - b. from Friday, August 7 at 6:00 p.m. to Monday, August 24 at 6:00 p.m. for a total of 17 nights; and
 - c. J will spend the balance of the summer holidays with S.M.M.
- 10. the parenting schedule referred to above can be varied by agreement between the parties in written form, including text or email sent and acknowledged;
 - 11. when considering whether to agree to a variation of the parenting schedule, both parents agree to consider the best interests of J, including the need for time with family and friends, the need for stability, the need for one-on-one time with each parent, and the need for proper rest;
 - 12. if J is left alone for any period, the parent leaving him alone will ensure that he has immediate access to a telephone or texting device in order that he may easily contact his parents or any other appropriate adult;
 - 13. if either parent is not able to care for J for more than four consecutive hours on a school day, that parent will invite the other parent to care for J during that period. If either parent is unable to pick up J by 8:00 p.m. on such occasions, unless the parents agree otherwise, J will stay in the home he is in at 8:00 p.m.
- [93] In order to facilitate the drafting of an order reflecting these Reasons for Judgment, paragraphs 1(a) of the Gray Order is deleted in its entirety and the provisions set forth above are substituted therefor. I recognize that this deletes the provisions for monetary penalties upon J.P.H. should he be late in effecting J's parenting exchanges. I do so because the parties have ignored this mechanism as being generally ineffective and also because J.P.H.'s move of permanent residence to Courtenay should eliminate many of the logistical challenges that existed at the time of the Gray Order.
- [94] While it is not part of any formal order arising from these reasons, I would urge J.P.H. to abide by Dr. Elterman's recommendations about sensitivity to J's need for spending time with friends and not to be "smothered" or otherwise full-time occupied with paternal attention.

[95] Lastly, I have not expressly provided for J to ultimately become the final decision maker respecting his parenting time with each parent. Much like his elder brother and sister, I expect that as he becomes older such a transition will occur sooner or later. I leave it to the parents to work things out in this regard and to modify the currently prescribed regime by consent. In the absence of such consent or a further order of the court, the above parenting regime will apply by default.

VARIATION OF CHILD SUPPORT

Legal Principles

[96] Section 17 of the Divorce Act grants the court jurisdiction to vary, prospectively or retroactively, any child support order on application by either or both of the former spouses (parents). In that regard, the Act provides:

Order for variation, rescission or suspension

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; ...

Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

...

Guidelines apply

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

Court may take agreement, etc., into account

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

(a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and

- (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Reasons

(6.3) Where the court awards, pursuant to subsection (6.2), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

Consent orders

(6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

Reasonable arrangements

(6.5) For the purposes of subsection (6.4), in determining whether reasonable arrangements have been made for the support of a child, the court shall have regard to the applicable guidelines. However, the court shall not consider the arrangements to be unreasonable solely because the amount of support agreed to is not the same as the amount that would otherwise have been determined in accordance with the applicable guidelines.

[97] Section 14 of the Guidelines sets out what constitutes a "change of circumstances" giving rise to a possible variation of a child support order:

Circumstances for variation

14 For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

- (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
- (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support ...

[98] Section 14 of the Guidelines essentially provides that any meaningful change in the parents' incomes can trigger an adjustment of child support. It is for this reason that many such support orders contain provisions for an annual exchange of financial information and an automatic adjustment of child support by applying the updated income information to the applicable Guidelines table. Such a mechanism was incorporated into the agreements made

and orders issued throughout this case but did not in fact occur, mostly because J.P.H. failed to provide the information and documentation required.

J.P.H.'s Income for Guidelines Purposes

[99] In paras. [13] and [14] of these Reasons for Judgment I describe the child support provisions contained in the Gray Order. Essentially, the court:

- affirmed and repeated a "basic child support" obligation payable by J.P.H. in the amount of \$3,000 per month as originally stipulated in the Separation Agreement dated June 1, 2010 and filed in court on June 29, 2010;
- crystallized J.P.H.'s contribution to the children's special and extraordinary expenses in the amount of \$1,100 per month until further order or written agreement between the parties;
- determined arrears of special and extraordinary expenses in the sum of \$25,254.10, which had to be paid without interest by monthly payments of \$1,000 until paid in full; and
- re-affirmed and re-stipulated the document disclosure and annual child support adjustment mechanics to be effected on or before September 1 of each year in which an obligation to pay child support for one or more of the children continued.

[100] The Separation Agreement stipulated a present imputed income for child support Guidelines purposes of \$214,000 per annum to J.P.H. and \$43,600 per annum to S.M.M. Based on these numbers, the Separation Agreement required J.P.H. to pay S.M.M. \$3,000 per month as basic child support for the children. An 83% / 17% ratio was imposed for the payment of special or extraordinary expenses by J.P.H. and S.M.M. respectively.

[101] J.P.H. did not comply with the annual child support review regime specified in the Separation Agreement and incorporated into court orders. This was well known to the court when the Gray Order was issued and, indeed, fines were imposed upon J.P.H. for his repeated non-compliance. The court was also well aware at that time that J.P.H.'s earnings had in subsequent years substantially exceeded the \$214,000 per annum originally specified in the Separation Agreement; for example, the court was informed his earnings for calendar year 2014 were \$248,000. No adjustment was made to "basic child support" on that account but the court relied on that increased income to justify the reasonableness of a crystallized monthly payment of \$1,100 for ongoing special or extraordinary expenses.

[102] According to only recently produced corporate financial statements for MedCo and personal income tax returns for J.P.H., the following appears to be the gross / net revenues of MedCo and J.P.H.'s personal income (derived exclusively by dividends) in recent years:

2014

2015

2016

2017

MedCo gross revenue

\$346,542.00

\$247,532.00

\$366,403.00

\$308,406.00

MedCo net revenue

\$109,773.00

\$24,157.00

\$133,471.00

\$90,000.00

J.P.H. income

\$248,000.00

\$217,785.00

\$215,939.65

\$282,359.65

[103] The numbers do not "add up" in terms of the linking the corporate income to the dividends paid by MedCo to J.P.H. The MedCo financial statements also refer to significant annual "management fee" expenses presumably paid to J.P.H. but no reconciliation is available to determine any relationship between such management fees and dividends paid to J.P.H.

[104] According to J.P.H.'s accountant, his client's financial records were in complete disarray. J.P.H. drew little distinction between corporate and personal income over the years and he simply extracted cash as necessary to pay debts and living expenses (including child support obligations, which were consistently in arrears). In the result, the accountant attempted to calculate and allocate the cash J.P.H. appeared to have taken out of the business and simply treated such receipts as a taxable dividend for income tax purposes in any given year.

[105] In the meantime, J.P.H.'s debts were mounting including both corporate and personal liability for substantial income tax arrears. The Gray Order required him to maintain a residence in the Courtenay area in order to exercise parenting time with the children. This proved to be a significant expense in addition to the already substantial expense of maintaining his permanent residence (technically a farm for tax purposes) in the Duncan area.

- [106] Matters eventually came to a head in mid-2017 with the forced sale of his farm property at what J.P.H. claims was a price significantly below fair market value. Gross sale proceeds were a little over \$2 million. \$1.865 million was paid to discharge the mortgages on the property. \$60,000 was paid to FMEP on account of S.M.M.'s claim for outstanding child support. Various other amounts were paid for outstanding property taxes, accountant's fees, and the like. The sale also resulted in a substantial taxable gain which, once declared on his income tax return, J.P.H. was unable to pay.
- [107] In June 2018 J.P.H. was referred to a new accountant, Mr. Stuart Barry. The latter undertook a detailed review of J.P.H.'s finances and made recommendations for restructuring J.P.H.'s financial affairs with a view to terminating and capping the accumulation of debt and ultimately eliminating that debt with a more disciplined approach.
- [108] The sale of the farm property had eliminated significant mortgage debt and had also permitted repayment of various other debts owed by J.P.H. Mr. Barry's most pressing concern related to the accumulated debt owed to CRA and the negotiation of a payment scheduled within J.P.H.'s financial means. The total debt owed to CRA was approximately \$300,000, \$250,000 of which was owed personally by J.P.H. (as a result of reported dividend income) and approximately \$50,000 owed by MedCo (both for unpaid income tax and GST remittances).
- [109] CEPA is a group of emergency physicians contracted by Island Health to provide emergency services at the hospital in which J.P.H. works. As a member of CEPA he "owns" a 75% full-time equivalent position at the hospital. His annual remuneration is approximately \$250,000 with no additional benefits. In previous years J.P.H. also earned some additional income through locum assignments at other hospitals but, given Dr. Waterman's recommendations about curtailing his work hours, no such additional income has been earned in the past couple of years.
- [110] Mr. Barry's proposed significant restructuring of J.P.H.'s financial affairs, which the latter has accepted and is now implementing. All payments of "deemed dividends" from MedCo to J.P.H. have been terminated and instead he is now an employee of MedCo who receives a salary and in respect of whom income tax deductions and other remittances are paid by MedCo on a current basis. As well, an agreement has been negotiated with CRA for additional direct deductions/payments by CEPA on account of arrears which will eliminate that debt in several years.
- [111] Mr. Barry says that the arrangements with CRA have not yet been reduced to a formal agreement. He remains concerned about CRA's ability to demand full payment and to otherwise garnish funds and seize assets. His negotiations with CRA are continuing (J.P.H.'s file has recently been assigned to a new CRA "collector") and he is hopeful that he may yet be able to negotiate some forgiveness of interest and penalties.

[112] Mr. Barry prepared a "pro forma" of MedCo's annual income and reasonable expenses (including the CRA payment/obligation) in order to ascertain the maximum amount that might be available to J.P.H. as a salary. The income derived from CEPA is in a fixed amount. The expenses include:

- medical insurance - \$3,500;
- licences, dues, et cetera - \$15,500;
- (home) office rent - \$10,680;
- (home) office utilities & supplies - \$3,000;
- accounting, legal, bookkeeping - \$24,000;
- travel - \$9,600;
- vehicle costs - \$7,500;
- telecommunications (cellphones, internet) - \$4,000; and
- CPP (company portion) -\$2,600.

Based on these amounts Mr. Barry estimated that a reasonable annual salary that MedCo could pay J.P.H. would be approximately \$143,000.

[113] Ms. T is charged with the bookkeeping for MedCo and the disciplined handling of receipts (cash/bank accounts) and expenses (payments). Mr. Barry has explained to her the necessary details and structure of the new program and he is satisfied that she understands both the critical nature of the situation and what is required to keep matters on track.

[114] In *Wiebe v. Treissman*, 2017 BCSC 1523, I had occasion to determine the Guidelines income for child support purposes of a physician who was also operating through a medical corporation (and a holding company). I provided a copy of this case (and others dealing with child support principles) to both parties to assist their final submissions. Some of the principles were set out in *Treissman*:

Dr. Treissman's Guideline Income for Child Support Purpose

[87] The calculation of a spouse's income for purposes of child support is governed by sections 16-20 of the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines"). The starting point is provided by s. 16, namely the "total income" set out on line 150 of the spouse's income tax return. That amount is then to be adjusted in accordance with Schedule III of the Guidelines which, among other things, deals with deduction of certain employment expenses, deduction of spousal support and universal child care benefits, capital cost allowance for real property, et cetera.

- [88] Section 18 of the Guidelines addresses situations where a spouse is a shareholder, director or officer of a corporation. If such a spouse's annual income as determined under s. 16 (i.e., his line 150 income, as adjusted) "does not fairly reflect all the money available to the spouse of the payment of child support", the court can review corporate pre-tax income and impute all or part of that income to the spouse for child support purposes.
- [89] Section 21 of the Guidelines requires a spouse who controls a corporation to disclose the financial statements of the corporation and its subsidiaries as well as a "statement" of all amounts or benefits paid to persons who were not "at arm's length" to the corporation. Section 18(2) of the Guidelines requires all such non-arm's-length payments to be added back to corporate pre-tax income unless the spouse "establishes that the payments were reasonable in the circumstances".
- [90] One of the "benefits" enjoyed by a spouse who is able to structure his financial affairs through a wholly-owned corporation is the ability not only to "income-split" with third parties, and to distribute income by way of a mixture of salary and dividends, but also to have what are essentially personal expenses paid by the corporation. To the extent such expenses are personal and not bona fide corporate expenses, they are properly "added back" to the corporation's pre-tax income, all or part of which can then be imputed to the spouse for Guideline income purposes.
- [91] Section 19 of the Guidelines also permits the court to impute income to a spouse for child support purposes in a wide variety of circumstances. Among other things, this section permits adjustments where a spouse has derived tax advantages by structuring his or her affairs to attract a lower overall tax rate than the rate contemplated by the Guidelines. For example, subsections 19(1)(g) and (h) include situations where a spouse has unreasonably deducted expenses from income and/or where a spouse derives a significant portion of income from dividends, capital gains or other sources which are either exempt from tax or taxed at a lower rate.
- [92] It is of course central to any determination of a spouse's income for child support purposes that the spouse make full and proper disclosure of all financial information necessary for that determination. Non-disclosure has often been called the "cancer" of family litigation. Insofar as child or spousal support claims are concerned, s. 19(1)(f) permits imputing income to any spouse who fails to make proper disclosure of his or her income information.
- [93] The disclosure requirements set out in the Guidelines are supplemented by Rules 5-1 and 9-1 of the Supreme Court Family Rules which pertain to financial disclosure and discovery of documents respectively. Among other things, these rules provide for:
- mandatory production of detailed financial statements and supporting documentation;
 - ongoing and updated disclosure where information becomes inaccurate or incomplete by virtue of later changed circumstances;

- production of corporate documentation and information both by the spouse holding the corporate interests and by the corporation itself; and
- in the event of non-disclosure, imposing fines, drawing adverse inferences and/or attributing income in such amount as the court considers appropriate.

[94] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. It is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense. It is not the other party's responsibility to hire, nor is it the court's obligation to appoint, an accountant or other professional to assess and challenge the reasonableness of the deduction, although of course both are at liberty to do so in appropriate circumstances. For a recent affirmation of these principles, see *Cunningham v. Seveny*, 2017 ABCA 4.

[115] Mr. Barry has not undertaken any "auditing" of Ms. T's bookkeeping. At trial, however, considerable evidence was tendered respecting CEPA pay stubs in 2018, and the working of corporate/personal bank accounts and credit cards in an attempt to demonstrate "actual corporate expenses and personal benefits" for the six-month period mid-April to mid-October 2018. Counsel submits that this is "the most accurate method of determining the income of J.P.H. since he moved to the Courtenay valley". The numbers appear to substantiate J.P.H.'s Guidelines income for child support purposes in the amount of approximately \$152,000.

[116] J.P.H.'s previous income tax returns do not properly reflect the income available to him in 2018 or for any years in the future for many reasons, including:

- previous returns reflected deemed dividend income whereas he now has a salary with deductions at source;
- he is now working part time (75% full-time equivalent) based on medical advice and his gross income is approximately \$250,000;
- he is forced to deal with substantial CRA debt to avoid otherwise catastrophic financial paralysis;
- his employment at the hospital necessitates unusually high travel and accommodation expenses in order to earn an income; and
- the substantial capital gain in 2017 from the sale of his farm was a one-off transaction respecting his principal residence, the proceeds of which were used to entirely reduce debt and which would be excluded for Guidelines income purposes in any event.

- [117] I find as a fact that it was necessary and reasonable for J.P.H. and MedCo to restructure their financial affairs and, in order to solve crushing debt obligations, to treat J.P.H. as an employee of MedCo paid a reasonable salary subject to current tax deductions and related remittances.
- [118] Mr. Barry's assessment of an available salary from MedCo to J.P.H. in the amount of \$143,000 per annum reflects some expenses in MedCo that are of a personal nature or which may be somewhat overstated. I have in mind here expenses for the home office (rent, utilities, supplies - \$14,000) and professional fees (accounting, legal, bookkeeping - \$24,000). They may well represent reasonable expenses for the purposes of the Income Tax Act, but s. 19(2) of the Guidelines reminds us that reasonableness of an expense deduction is not solely governed by any CRA determination.
- [119] Part of the bookkeeping expense is a salary paid to Ms. T. There is no doubt that bookkeeping services are a necessity for J.P.H. and it is perfectly reasonable for Ms. T to assume that work. Nonetheless, once the restructuring has been properly finalized and receipts/expenses regularised, it is reasonable to assume bookkeeping will not involve as much work as may have been the case during any restructuring, start-up phase.
- [120] Similar observations may be made with respect to the expenses claimed for the home office. These are personal outlays (rent, utilities) that would be incurred by J.P.H. in any event and some or all of these expenses are also properly backed out for child support income calculation purposes.
- [121] While there is necessarily an element of "rough justice" in my determination, I find that J.P.H.'s Guidelines income for child support purposes in 2018 and for 2019 is properly set at \$160,000. It is an amount I consider to be fair and reasonable to all parties, including the children, in the unique circumstances of this case.

S.M.M.'s Income for Guidelines Purposes

- [122] In her final submissions, S.M.M. argued that J.P.H.'s status as a child support payor was at least part of his motive in demanding shared parenting. She expressed the wish to "de-couple" money issues from parenting issues stating that she was prepared to forego the former in exchange for "a lot less conflict". Ultimately, she advised the court that from this point forward the parties "should be deemed to have a shared parenting arrangement in respect of C and J for the purposes of child support".
- [123] As S.M.M. knows, such shared parenting, whether deemed or actual, triggers the child support regime specified in s. 9 of the Guidelines:

Shared custody

9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[124] This provision requires the court to determine the Guidelines income for both spouses including, of course, S.M.M. Her income would ordinarily have to be determined in any event in order to determine the ratio in which each parent must contribute to the payment of special or extraordinary expenses referred to in s. 7 of the Guidelines. In this particular case, both parties ultimately agreed in final submissions that no such expenses currently exist or will exist in the future except for post-secondary education and uninsured medical or dental expenses.

[125] S.M.M. is a commercial realtor. Her business development and positioning in that particular marketplace has only recently started to reap significant rewards. Her line 150 income in her filed tax returns for the past three years is:

2015 \$22

2016 \$15,565

2017 \$44,000

[126] As a real estate broker S.M.M. is a self-employed contractor to a commercial real estate and property management firm in the central Vancouver Island area. That entity charges her certain fees and also retains a portion of all commissions generated in respect of real estate transactions brokered to conclusion by S.M.M. In the year 2017, for example, S.M.M.'s gross commissions were approximately \$90,000 and the commission retained by the "employer" was \$35,000. After deducting relatively modest sums as additional expenses for motor vehicles, office operation/supplies and the like, S.M.M.'s net professional income for that year was approximately \$40,000.

[127] In 2018, however, S.M.M. experienced a substantial increase in professional income as various listings and other initiatives came to fruition. She provided the court with detailed calculations prepared following calendar year end confirming gross earnings of \$266,000, net earnings after employer commissions of \$185,000, and \$160,000 net of other expenses related to her self-employment.

[128] Both parties are agreeable to using the most recently available information for the purposes of determining their respective Guidelines incomes for 2018 and 2019. This is consistent with s. 2(3) of the Guidelines. In the case of S.M.M., that results in a Guidelines income for 2018 in the amount of \$160,000 (the same amount as J.P.H.).

[129] The next question is whether that figure should also apply for the purposes of child support calculations for 2019. Not surprisingly, J.P.H. submits such should be the case, given that the result under s. 9 of the Guidelines would generally be the payment of no child support. S.M.M., on the other hand, argues that:

- 2018 was an extraordinary year for her and is not likely to be repeated;
- S.F., managing broker at S.M.M.'s business location, testified that a commercial realtor working in central Vancouver Island earns gross commissions in the \$60,000 to \$100,000 range although wide fluctuations can occur; and
- J.P.H.'s income is essentially fixed (and may increased in the future if his health improves), whereas her income as a realtor is not guaranteed and entails much greater entrepreneurial risk.

[130] S.M.M. points out that in the last three years her income was \$16,000, \$40,000, and \$160,000, resulting in an average annual income of \$72,000. She says she is "hopeful" she will be able to earn a line 150 income in the range of \$36,000 to \$60,000 per annum in the future and she asks the court to use the \$60,000 figure for future Guidelines purposes.

[131] Section 17(1) of the Guidelines provides:

Pattern of income

17(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[132] S.M.M.'s income for 2018 is conceded to be \$160,000. There is nothing unfair in using that figure for the purposes of determining child support obligations in 2018 on a retroactive basis.

[133] However, I do agree with S.M.M. that 2018 was likely an unusual year and it will not likely be repeated in 2019. Her annual income has increased in each of the past three years but it is unlikely this pattern will continue. Some averaging should thus be applied to determine an amount that is fair and reasonable for child support purposes in 2019. A three-year average is \$72,000 and a two-year average would be \$100,000. Given her testimony regarding various long-term projects that are "in the works", I am inclined to the upper end of these averages as being the fair and reasonable approach and I fix S.M.M.'s Guidelines income for 2019 in the amount of \$100,000.

Assessment of Child Support for 2018 and 2019

[134] Based on a deemed shared parenting regime and the Guidelines income determinations set out in the previous section of this judgment, it is apparent that,

- for 2018 neither parent should have paid child support to the other; and
- for 2019 J.P.H. is required to pay basic child support to S.M.M. for C and J in the amount of \$755 per month.

[135] Both parents agree that there are no special or extraordinary expenses incurred with respect to the children for 2018 and that none will be incurred in the future except perhaps for post-secondary education and uninsured medical or dental expenses.

[136] S.M.M. has been enrolled in the Family Maintenance Enforcement Program (FMEP) for many years. Thanks to the substantial payment received from the proceeds of the sale of J.P.H.'s farm (and to other payments that may have been made), all arrears of child support owing to S.M.M. by J.P.H. were reduced to zero as of April 30, 2018.

[137] Given the above conclusions respecting child support obligations in 2018 and 2019, J.P.H. might be said to have "overpaid" child support and, indeed, he claims a "credit" against his 2019 support obligations in that regard. For several reasons, I do not agree with this analysis nor do I agree that any sort of "credit" or "refund" is in order.

[138] J.P.H. has repeatedly failed to provide timely financial disclosure over the years as required by the Separation Agreement and subsequent court orders. The fact he is an inept bookkeeper is not an excuse for conduct that arguably amounts to contempt of court. He was fined by Madam Justice Gray in 2015 for such conduct and yet it continued. Further "punishment" is in order.

[139] Second, S.M.M. has an arguable claim against J.P.H. for certain income tax assessments "wrongly" levied by CRA against her. Pursuant to the Separation Agreement, J.P.H. was to pay S.M.M. a settlement amount of approximately \$356,000. He arranged a mortgage on certain property beneficially owned by the couple's holding company Queen's Cove Ventures Ltd. and had that entity make the \$360,000 payment to S.M.M. His later filings on behalf of Queen's Cove Venture Ltd. saw this payment treated as a dividend to S.M.M. and triggered a CRA assessment of significant income taxes payable by the latter.

[140] S.M.M. spent two years attempting to correct the situation with CRA, incurring significant costs for lawyers and accountants to argue her case with CRA. The matter was eventually settled with CRA (not entirely to S.M.M.'s satisfaction) and S.M.M. now claims \$25,000 "as damages for her out-of-pocket costs for correcting the [dividend] errors arising directly from J.P.H.'s breach of contract [the Separation Agreement]".

- [141] When all of these matters are taken into consideration, it is clear there are no equities operating in J.P.H.'s favour sufficient to warrant any credit for "overpayment" of child support from May 2018 to present and any claim in that regard is dismissed.
- [142] In her final submissions, S.M.M. asks the court to "fix" the amount of child support that must be paid for the balance of C's and J's tenure as a "child of the marriage". She wishes to avoid any annual exchange of information and any resulting adjustment in child support because of the conflict it invariably engenders. She hopes that such fixed support combined with the deemed shared parenting arrangement and surrender of s. 7 expense claims will be enough to prevent further attendances to court, along with all related stress and expense.
- [143] The court has essentially fixed the child support for 2019. Regrettably, however, it is otherwise unable to accede to S.M.M.'s request. This is because child support, and any related variation of same, is the right of the child, not of the parent seeking support on the child's behalf. Parents have a joint and ongoing legal obligation to provide financial support for their child in a way commensurate to their income and, in that regard, have a further legal obligation to earn as much as they reasonably are capable of earning so that the child receives an appropriate level of support. In such circumstances the court cannot endorse any regime, no matter how well-intentioned, that might have the effect of limiting the amount of financial support to which a child may otherwise be entitled.
- [144] In Treissman, I outlined the ongoing financial disclosure obligation in child support cases. A similar obligation was crystallized in the Separation Agreement between the parties and affirmed it para. 1(f) of the Gray Order. I decline to vary that paragraph as requested. Should the parties be able to agree regarding alternative approaches on this subject, for practical reasons and without a court order, so be it.
- [145] Each party made claims against the other for retroactive variation (increase/reduction) of child support based on imputed income to J.P.H. of \$250,000 per annum back as far as 2012 and to S.M.M. of greater sums because of alleged "underemployment" over that time frame. Neither claim has merit in the circumstances.
- [146] It was known by the court in 2015 that J.P.H.'s income was \$248,000. That sum was actually factored into the decision by the court to crystallise a s. 7 expense obligation into a monthly payment of \$1,100. J.P.H. paid that amount through April 2018, and perhaps beyond, even though the amount of actual (i.e. properly claimable) s. 7 expenses decreased over the intervening years. Since the court made a decision based on the arguably "correct" number, both at the time and at present, any further re-assessment is inappropriate.
- [147] Counsel for J.P.H. concedes that if no retroactive re-assessment of child support is made as against his client, then the "counterclaim" for imputing higher income to S.M.M. over the same period should also fail.

[148] Lastly, S.M.M. acknowledged during final submissions she was no longer pursuing any remedies against J.P.H. for contempt or for "vexatious litigant" status. There is thus no need to address such matters in this judgment.

COSTS

[149] S.M.M. asks that the costs of this trial proceeding be awarded in her favour. She relies in part on what she describes as "misuse of the court process" on the part of J.P.H. and his counsel.

[150] Neither party has been entirely successful in their respective applications referred to trial. In my view, neither party has enjoyed "substantial success" in that regard either. In these circumstances, the appropriate order is for each party to bear their own costs.

"KENT J."

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