

CANADA / JUDGMENT

S.P.L.L. v. H.I.C.

2024 BCSC 1510

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1510 S.P.L.L. v. H.I.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.P.L.L. v. H.I.C.,

2024 BCSC 1510

Date: 20240816

Docket: E240098

Registry: Vancouver

Between:

S.P.L.L. also known as S.L.

Claimant

And

H.I.C. also known as R.C.

Respondent

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Claimant:

T.R. Bell

Counsel for the Respondent:

S.Y.S Kim

Place and Date of Hearing:

Vancouver, B.C.

July 30-31, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 16, 2024

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Introduction

- [1] These matrimonial proceedings began in the Provincial Court in 2022. The Provincial Court proceedings were consolidated with related proceedings initiated in this court in 2024. Issues between the parties in the action include: an order for divorce, orders respecting children, orders for spousal support, and orders for division of property.

- [2] The focus of the two applications now before this court include: (1) interim parenting arrangements; (2) occupation of the residence at 3095 East 1st Avenue, Vancouver, BC ("Home"); (3) whether to retain an expert to prepare a section 211 report and/or retain a parenting coordinator; and (4) interim prospective spousal and child support. Related to some of these issues, the respondent asks this court to set aside various orders made by the Provincial Court. I will address the Provincial Court orders in the course of my reasons relating to specific topics. As well, both parties agree that all discussions related to household tasks or the children of the marriage moving forward should be by OurFamilyWizard.

Issues

- [3] For the reasons that follow, I make the following orders:
- a) The Orders made by Judge MacLean on December 21, 2022 and by Judge Bond on July 17, 2023 in Robson Square Provincial Court File #22-32708 are set aside.
 - b) The application to set aside other orders made by the Provincial Court is dismissed.
 - c) After Labour Day, pursuant to Part 4 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the claimant will have primary residence of the children and the respondent will have parenting time on an alternating weekly basis, as follows:
 - i. Monday to Friday: 3:30 PM to 8:00 PM;
 - ii. Saturday to Sunday: 10:00 AM to 8:30 PM.
 - d) After the respondent has obtained suitable accommodations as determined by agreement of the parties, by a parenting coordinator, or by further order of this court, the parties will share parenting time equally on a week-on/week-off basis or as otherwise agreed between them or directed by a parenting coordinator.
 - e) Pursuant to s. 90 of the FLA, the claimant is to have exclusive occupancy of the Home until trial.
 - f) Pursuant to s. 211 of the FLA, Dr. Michael Elterman or Dr. Simon Elterman is appointed to prepare a written report concerning the needs of the children, the views of the children, and the ability and willingness of the parties to satisfy the needs of the children ("s. 211 Report").
 - g) The cost of the s. 211 Report shall be shared equally by the parties.
 - h) Pursuant to ss. 15 and 225 of the FLA, a parenting coordinator shall be retained in the form of the 1st prayer for relief in the claimant's notice of application.

- i) If the parties and the parenting coordinator agree, the parenting coordinator may assist the parties by determining whether the respondent's accommodations are suitable for the purpose of moving to equal parenting time, including overnight parenting time. If there is no such agreement, then the respondent is at liberty to apply to court for a determination of that issue.
- j) Pursuant to s. 19 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] the respondent is found to be a resident of British Columbia and is imputed to have a gross annual income of \$34,104.
- k) For the purposes of calculating support payments under the Spousal Support Advisory Guidelines [SSAG], the claimant's income is set at \$80,000 a year for 2024 and the respondent's income is set at \$34,104 for 2024.
- l) Pursuant to ss. 161 and 162 of the FLA and the SSAG, the claimant will pay to the respondent for his interim support, the amount of \$576 per month, commencing on September 1, 2024 and continuing on the first day of each and every month thereafter until further agreement of the parties or court order.
- m) Pursuant to s. 149 of the FLA and s. 3 of the Guidelines, the respondent will pay to the claimant for interim child support \$730 per month for the support of the children, commencing on September 1, 2024 and continuing on the first day of each and every month thereafter, for as long as the children are in the primary care of the claimant.
- n) When the parties move to shared parenting, the claimant will pay to the respondent interim child support of \$889 per month for the support of the children on the first of each and every month thereafter for as long as the children are eligible for support under the FLA or until further agreement of the parties or court order.
- o) By consent, all discussions between the parties related to household tasks or the Children moving forward shall be by OurFamilyWizard.
- p) The claimant will have her costs of both applications in the cause.

Background Facts

Relationship History

- [4] The parties began dating in 2006 and were married on May 12, 2008 in South Korea.
- [5] Shortly after marriage, the respondent moved to Toronto where the claimant was enrolled in post-secondary education. The respondent pursued his career as a clarinetist, tutored in math and English, and offered translation services.
- [6] In 2010, the parties relocated to Boston where the respondent was enrolled in graduate studies. Although the respondent was accepted into a Doctor of Music Arts in clarinet performance at Boston University, he did not attend that program.

- [7] Instead, the parties relocated to Vancouver in 2014.
- [8] In 2020, the parties purchased the Home. The down payment for the Home included money from the claimant's parents. It is contested in this litigation whether the money from the claimant's parents was a gift or a loan and I will not determine that issue on these applications.
- [9] There are three children of the marriage, namely:
- a) M.C., born August 2011 ("M.") (age 12);
 - b) E.C., born December 2016 ("E.") (age 7); and
 - c) L.L.C., born July 2021 ("L.") (age 3).
- (collectively, the "Children")
- [10] The parties separated on June 7, 2022. It is uncontested that the parties' separation was precipitated by an incident in which the respondent hit L. in the head ("2022 Incident"). L. was approximately 10 months old at the time. Following the 2022 Incident, the hospital diagnosed L. as having an abrasion or superficial skin injury on his scalp. The Ministry of Child and Family Development ("MCFD") became involved. The respondent vacated the Home and entered into a safety plan with MCFD whereby he would not reside at the Home. The respondent was also criminally charged. In December 2022, a release order was made in the criminal proceeding that included a term that the respondent have no contact with the claimant or the Children and also that he have no access to the Home. The criminal charges were stayed in March 2024.
- [11] Since the separation, it is undisputed that the claimant and the Children have continued to reside in the Home and that the claimant has been primarily responsible for the Children's care.

Procedural History

BC Provincial Court

- [12] The respondent initiated proceedings in the Provincial Court in or around October 2022 seeking, among other things, shared parenting. For clarity in these proceedings, I will continue to refer to him as "the respondent" in describing those Provincial Court proceedings. Various orders were made by the Provincial Court which will briefly be described here.
- [13] On December 21, 2022, Judge MacLean ordered that:
- a) The respondent would have one day per week of parenting time as agreed to by the parties, commencing December 15, 2022; and

- b) The respondent's parenting time would be supervised by a third party agreed to by the parties in advance.

("MacLean Order")

- [14] On May 23, 2023, the parties attended a Family Management Conference before Judge Daley in which various conduct orders were made.
- [15] On July 17, 2023, Judge Bond varied the MacLean Order to provide that the claimant was permitted to attend the respondent's parenting time ("Bond Order").
- [16] On July 23, 2023, the parties attended a subsequent Family Management Conference before Judge Boblin and entered into the following orders on an interim and without prejudice basis:
 - a) BY CONSENT, the respondent is permitted to communicate with the Child, M.C., through the 'E.C.' child account in Messenger Kids only.
 - b) BY CONSENT, the respondent shall not question M.C. regarding her mother, her mother's adult family, or her mother's adult friends, including where they are, or what they are doing.
 - c) BY CONSENT, the respondent shall not intentionally start conversations with M.C. regarding events or situations which are likely to result in her feeling hurt, loss, or sadness.
 - d) BY CONSENT, the respondent shall not request a video chat from M.C.
 - e) BY CONSENT, the respondent is permitted to video chat with M.C., and the other children, in the event that they are on or near the call, only if M.C. requests that she and the respondent have a video chat in Messenger Kids.
 - f) BY CONSENT, if the claimant gives her written consent, including via text message or email, the respondent may attend at the Home. The claimant's written consent shall indicate the specific date, time, and purpose of such attendance. On performance of the purpose as written, the respondent will immediately leave the property.
 - g) BY CONSENT, the respondent shall not enter the Home without the claimant's written consent, including via text message or email.

BC Supreme Court

- [17] On January 15, 2024, the claimant filed her notice of family claim in the BC Supreme Court.
- [18] On March 23, 2024, the respondent filed his response to family claim and counterclaim.
- [19] The parties exchanged financial statements on June 6 and 11, 2024.
- [20] The parties attended a Judicial Case Conference on June 13, 2024 before Associate Justice Krentz. The following orders were made at the JCC ("JCC Order"):

1. BY CONSENT, the Respondent shall have parenting time from after school until 8 PM on the following days:
 - a. Monday, June 17, 2024;
 - b. Wednesday, June 19, 2024;
 - c. Friday, June 21, 2024;
 - d. Monday, June 24, 2024; and,
 - e. Wednesday, June 26, 2024 ("Weekday Parenting Time").
2. BY CONSENT, the Respondent shall have parenting time from 3 PM to 8 PM on Saturday, June 22, 2024 and from 8:30 AM to 3 PM on Sunday, June 23, 2024 ("Weekend Parenting Time").
3. BY CONSENT, the parties are at liberty to apply on 3 days notice to vary, in the event of a breach of the Conduct Order terms.
4. BY CONSENT, the parties are to follow Conduct Order terms and conditions including but not limited to the following:
 - a. The parties will:
 - i. Put the best interests of the children before their own interests;
 - ii. Encourage the children to have a good relationship with the other parent and speak to the children about the other parent and parent's partner in a positive and respectful manner; and
 - iii. Make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the children.
 - b. The parties will not:
 - i. Question the children about the other parent or time spent with the other parent beyond simple conversational questions;
 - ii. Discuss the children in any inappropriate adult, court or legal matters; or,
 - iii. Blame, criticize or disparage the other parent to the children.
 - c. The parties will encourage their respective families to refrain from any negative comments about the other parent and their extended family, from discussion in front of the children concerning family issues or litigation.
5. The parties will exchange their initial list of documents within 30 days.
6. A one-day hearing is set for July 5, 2024 before any presider for an emergency family application.

7. BY CONSENT, the provincial court action file no. 2232708, Robson Square, will be consolidated into this action, File No. E240098 pursuant to section 194 of the Family Law Act, S.B.C. 2011, c. 25.
8. The judicial case conference ("JCC") is complete. The parties are released from the JCC program.
- [21] The parties attended court on July 5, 2024 as contemplated in the JCC Order. On that date, Justice Fitzpatrick determined that the issues raised were too voluminous to be addressed at a one-day hearing. Two days were set later in July to accommodate the parties. Justice Fitzpatrick made the following contested interim parenting orders:
- a) Parental Time for the respondent:
 - i. July 5, 2024, 3:30 PM to 8:30 PM;
 - ii. July 6, 2024, 10:00 AM to 8:30 PM;
 - iii. July 10 to July 12, 2024, 3:30 PM to 8:30 PM;
 - iv. July 13, 2024, 10:00 AM to 8:30 PM;
 - v. July 14, 2024, 2:00 PM to 8:30 PM;
 - vi. July 17, 2024, 3:30 PM to 8:30 PM;
 - vii. July 22 and July 23, 2024, 10:30 PM to 8:30 PM;
 - viii. July 24, 2024, 11:30 to 8:30 PM;
 - ix. July 25 and July 26 2024, 10:30 AM to 8:30 PM;
 - x. July 27, 2024, 10:00 AM to 8:30 PM; and
 - xi. July 28, 2024, 2:00 PM to 8:30 PM.
 - b) Costs of today's attendance will be adjourned over to the Presider hearing the matter on July 30 and 31, 2024.
- [22] There have so far been no child or spousal support orders made. Although some evidence was led concerning post-separation expenditure of funds and financial contributions to household expenses, I have not been asked to make any retroactive orders and will not discuss those issues further.

Analysis

What Legislation Governs this Court's Orders with respect to Parenting Arrangements?

- [23] The respondent notes that both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [Divorce Act] and FLA apply. The claimant agrees and argues that since it was amended, the Divorce Act aligns materially with the FLA. She also notes that various orders made in this proceeding by Associate Judge Krentz were made under the FLA such as the conduct orders, and the order consolidating the Provincial Court and Supreme Court proceedings.
- [24] I agree that both the Divorce Act and FLA are available as sources of jurisdiction. In light of the history of proceedings, and the availability of both statutes, the orders that follow will be grounded in the FLA which is not materially different than the Divorce Act on the particular issues in question.

What Parenting Arrangement Should be Made?

Position of the Parties

- [25] In the notice of application, the respondent seeks to have the MacLean Order and the Bond Order set aside. Orally, he also asked that various conduct orders made by the Provincial Court also be set aside. He seeks shared parenting on a week-on/week-off basis.
- [26] The claimant properly concedes the MacLean Order and the Bond Order have been overtaken by subsequent orders of the court and agreement of the parties. She argues other conduct orders should remain in place. She wishes to get back to a place of healthy co-parenting with the respondent in the future but argues that such an order at this juncture is premature. Her proposal is as follows.

For the summer, (alternating weeks):

- i. Wednesday to Friday: 2:00 PM to 8:00 PM; and
- ii. Saturday and Sunday 2:00 PM to 8:00 PM.

After Labour Day, (alternating weeks):

- i. Monday to Friday: 3:30 PM to 8:00 PM;
- ii. Saturday: 11:00 AM to 8:00 PM; and
- iii. Sunday: 2:00 PM to 8:00 PM.

Once the respondent has a residence and her agreement confirmed in writing:

- i. Alternating Monday-Saturday 8:45 AM Monday pick up E. for school and L. for daycare at Home. M. will go to school with the claimant.
- ii. Returning on Saturday at 8:00 PM.

Analysis

- [27] As can be seen from the procedural history articulated above, the MacLean Order and the Bond Order have largely been overtaken by subsequent orders of this court. In particular, since June 2024, the respondent's parenting time has not been supervised, it has been considerably more frequent than contemplated in the MacLean Order and the claimant has not been attending the respondent's parenting time. The claimant properly concedes there has been a material change since these orders were made.
- [28] Pursuant to s. 37(1) of the FLA, the court must only consider the best interests of a child when making an order respecting parenting arrangements under Part 4 of the FLA. Section 37 sets out a mandatory and non-exhaustive list of factors for a court to consider in assessing the best interests of the child.
- [29] In cases like this where family violence is alleged, the factors set out in s. 38 of the FLA must also be considered.
- (a) the child's health and emotional well-being
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member
- [30] The respondent argues that he is better equipped to attend to the Children's health and emotional well-being than the claimant because he was the stay-at-home parent during the parties' marriage. He says that he took the Children to most of their appointments and that the claimant has not taken steps to have the Children evaluated and treated for various health conditions since they have been under her primary care starting in 2022. He argues that since he has had increased parenting time, he has observed the Children's moods improve. He says while the Children love them both, they are more expressive of their feelings with him.
- [31] The claimant deposes that she was an involved parent before separation and has had primary care of the Children for the past two years. She deposes that since 2022, the Children have been healthy and happy. She has been managing their medical appointments and any health issues that arise. She says sometimes the respondent will interfere with her ability to do so by changing scheduled appointments or changing contact information with care providers. Despite these alleged challenges, she argues that the Children's health and well-being are best served by two parents attending to their needs and putting their needs first. Indeed, her position is that eventually the parties should have shared parenting.
- [32] Allegations of family violence are raised on both sides in this proceeding and these allegations are significant to a consideration of the Children's health, emotional well-being, safety and security.
- [33] The definition of "family violence" in the FLA is:

"family violence" includes, with or without an intent to harm a family member,

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[34] Without attempting to be exhaustive in respect of all of the allegations of family violence that have been made, I have significant evidence of family violence before me including the following:

- a) Each party claims the other has a long history of abusive behaviour, including physically abusive behaviour towards the other and the Children. Each party denies many allegations levelled by the other. Both parties acknowledge some instances where disagreements became physical and reframe some of the incidents as an example where the physicality was a result of their efforts at defending themselves from the other party.
- b) The claimant alleges the respondent hit his dog while they were living in Toronto and threw the dog down the stairs causing her to have a bowel movement on the floor. She says he then berated her for the dog's bowel movement and continued to physically discipline the dog. Although the respondent denies each and every fact alleged by the claimant in a general way, he makes no specific response to this allegation.
- c) The respondent alleges that the claimant assaulted him on a subway train in 2008. The claimant acknowledges pressing the emergency button on the train in an effort to get away from the respondent. She claims he was verbally abusing her at the time.
- d) In 2009, the respondent alleges that the claimant tried to cut her own wrist with a kitchen knife. The claimant acknowledges this and says it was a very difficult time and she did not know how else to make the respondent stop controlling her. She deposes that she did not try to take her life and did not break the skin.

- e) The police were involved with this family as early as 2012. At that time the parties were residing in Boston. Police responded to a report of domestic violence. The police report indicates that when the police responded to the call, the claimant was locked in the gym with her 11-month-old baby. She told the officers that she had an argument with the respondent in their apartment and he slapped her, pushed her, and punched her in the face and under the left eye. She told officers she fled the apartment with her daughter and went to the gym where he could not gain access. The police report states that her face was swollen, her eyes were bloodshot and she had a bruise under her left eye. It states that the claimant declined medical attention. The respondent was placed under arrest. The claimant requested an emergency restraining order which was made. The claimant testified that the parties separated for three months after this incident but ultimately reconciled.
- f) The respondent acknowledges that the claimant reported an incident of domestic violence to police in 2012 but deposes that the claimant attacked him first, throwing fists and charging at him. He says he was pushed into a corner and had to protect himself. He deposes that he pushed her face and this left a bruise. He notes that the claimant later recanted her version of events. While I cannot resolve all of the conflicts in the evidence on this application, I am satisfied on a balance of probabilities that this 2012 incident is an example of physical abuse of the claimant by the respondent. That is the conclusion supported by the documentary evidence such as the police report that records the observations of the police. While I acknowledge that the claimant recanted her version of events in 2014, the recantation was made after the parties reconciled and in the context of their hopes to adopt more Children. The version of events set out in that unsigned recantation also does not align with either parties' version of events. I place no weight on it.
- g) In 2014, the claimant alleges that the respondent pulled her across the living room floor by the hair. The respondent denies this. I cannot resolve this conflict in the evidence.
- h) In 2015, the claimant says she reported two more domestic violence incidents to the police. In one, she says the respondent pushed her down the stairs. The respondent denies this and says that he was the victim of assault on this occasion. The second report concerned a physical altercation in a parking lot following a counselling session. The respondent says he also called the police following the altercation that came after the counselling session but nothing violent happened. He confirms that the police instructed the claimant to drive home alone. The parties agree that they separated briefly again in 2015 and during this time they attended counselling sessions with a psychologist. Ultimately, they reconciled.
- i) In November 2015, the parties completed a safety plan with MCFD in which the parties agreed, amongst other things, to not become physical with each other or verbal with each other in front of the M. They also agreed to call the police and their senior pastor if things became physical. This is some evidence that a pattern of physical violence was an ongoing concern in the household.

- j) In January 2016, the respondent says the claimant slammed his hand in a door and punched him in the face. The claimant says his account of events is misleading. She describes him berating her in front of M. and trying to close the door to the bathroom to prevent M. from hearing anymore. She describes him forcing the door open. She does not recall punching him in the face. The police were involved. I cannot resolve, on the record before me, precisely what transpired on this occasion but on either version of events it is an example of M. being exposed to family violence. The parties separated again for a number of months but ultimately they reconciled again.
- k) In 2016, the respondent says the parties had an unpleasant conversation on a skytrain. The claimant pressed the emergency button. He then discovered she had been surreptitiously recording the conversation and when he attempted to reach for her phone, she kicked him. The claimant acknowledges pushing the emergency button and says she was trying to get away from the respondent. The incident was reported to MCFD.
- l) The respondent alleges that the claimant assaulted him on a few occasions between 2018 and 2020. This is denied by the claimant. I place little weight on these allegations as they are very general.
- m) The respondent alleges the claimant had a history of losing her temper while driving. This is denied by the claimant. The claimant alleges the respondent would constantly provoke her while driving.
- n) In January 2022, the respondent alleges that the claimant threatened M. with a kitchen knife. This is denied by the claimant.
- o) In February 2022, the respondent alleges that the claimant punched him repeatedly in the face in front of E., kicked him and choked him. The claimant denies this. The claimant says that during the incident in question, it was the respondent who was aggressive. In particular, she says he yelled at E. and forced her to eat food and her own vomit while she cried. In this incident, the claimant acknowledges trying to push him away from E. She says the respondent then pushed her to the floor and knocked her over a few times before she hit him accidentally in the face. She says E. remains fearful about what happened. I cannot resolve, on the record before me, precisely what transpired on this occasion but on either version of events, it is an example of E. being exposed to family violence.
- p) The 2022 Incident has been described above. This is an example where physical violence against L. is admitted by the respondent. Following the 2022 Incident, the parties exchanged text messages in which the claimant asked the respondent what happened to L.'s head and the respondent replied "Mam Mae". The claimant then stated: "You made a promise. To not hit kids about the neck." The respondent replied: "No I didn't". And: "I said I will try not to". This text exchange suggests that this instance of physical violence against the Children was not an isolated incident. This is at least partially admitted by the respondent who acknowledges that he "tapped" E.'s head on a previous occasion which he says was not appropriate.

- q) In October 2022, the respondent alleged to MCFD several incidents of historic domestic violence which are described above. He explained why he had not reported previous incidents of violence to police or to MCFD.
- r) Both parties allege continuing family violence after separation. The respondent tendered photographs of bruises, scrapes, and what were described as "puncture marks" on L. that he says put into question the claimant's ability to provide for the Children's health and emotional well-being. I do not find the photographs to be probative of the claimant's ability to provide for their needs and emotional well-being nor to be evidence of family violence. The "puncture marks" appear to be insect bites. I find that young children will get bruised, scraped and bitten by insects and without more this court cannot attribute that to family violence.
- s) The respondent alleges that the claimant has been overly controlling in respect of his parenting time with the Children. The claimant deposes that she was simply acting in accordance with the court orders imposed at any particular time. In light of the court orders in place at the relevant times, I do not find that the claimant's conduct with respect to parenting time amounts to family violence.
- t) The claimant deposes that she is concerned that the respondent is stalking her and the Children. She recounts numerous occasions between August 2022 and June 2024 in which she or the Children have observed the respondent at the school, near the Home, at her workplace, or by the church. The respondent denies stalking anyone but acknowledges that he has been to these locations to see the claimant and/or the Children. He says he stopped on the advice of counsel.
- u) The claimant deposes that she feels intimidated and harassed by the respondent's actions which have included frequently dropping off food and other items at the Home in a manner that contravenes court orders. She says the food and other items have been unwanted and that the respondent uses the occasions to linger at the Home where he is not permitted to be. The respondent acknowledges dropping off food but disputes that this is unwanted by the claimant. He refers to certain communications with the claimant where they discuss the food. The claimant says she acceded to the respondent's demands to deliver items because when she resists he becomes hostile. If there was any confusion about whether the food was wanted, in the wake of this application it is abundantly clear that it is not.
- v) The claimant deposes that on dates between April 2023 and August 2023, the respondent interfered with the internet, BC Hydro and Fortis BC at the Home without her consent. She also deposes that the respondent used the home security system to monitor the Children and the claimant and to communicate with them after he was removed from the Home. She deposes that he instructed M. to reset the system. She says the respondent also instructed M. to reboot the modem in the Home. The respondent questions why it is important to the claimant that utilities be in her own name and denies monitoring her through the security system.

- [35] I must consider these allegations in light of the factors set out in s. 38 of the FLA:
- (a) the nature and seriousness of the family violence;
 - (b) how recently the family violence occurred;
 - (c) the frequency of the family violence;
 - (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
 - (e) whether the family violence was directed toward the child;
 - (f) whether the child was exposed to family violence that was not directed toward the child;
 - (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
 - (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
 - (i) any other relevant matter.
- [36] I am satisfied that the evidence of the claimant together with the documentary evidence and some of the respondent's own admissions are sufficient to establish that there is some history of family violence perpetrated against the claimant and the Children by the respondent in this case. I am not able to resolve the conflicts in the evidence sufficiently to find, on the record before me, that there is a history of family violence perpetrated by the claimant against either the respondent or the Children.
- [37] The family violence that has been established is serious and spans more than a decade of these parties' relationship.
- [38] In terms of frequency, it is of some significance that the parties themselves have, on various occasions, acknowledged an ongoing pattern of family violence and attempted to agree to put a stop to it.
- [39] Some of the events described include coercive and controlling behaviour. They also describe violence that was either directed at the Children or to which the Children were exposed.
- [40] Although the parties have been living separate and apart since 2022, some of the incidents of coercive and controlling behaviour by the respondent have continued after separation such as the respondent's interference with the home utility and security systems. The respondent's insistence on showing up at the Home despite court orders prohibiting this without the claimant's written consent is another example.
- [41] I have evidence that L. has sustained a fairly minor physical injury as a result of the 2022 Incident. I do not have the benefit of expert evidence about the Children's psychological or emotional safety. Nevertheless, I take note of the Supreme Court of Canada's finding in

Barendregt v. Grebliunas, 2022 SCC 22 at para. 143 that "children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives" and that "[h]arm can result from direct or indirect exposure to domestic conflicts". I am satisfied that exposure to family violence such as that described in the record before me would put the Children's physical, psychological and emotional safety at risk.

[42] The parties have both taken steps to prevent further family violence from occurring.

Following the 2022 Incident, the claimant contacted the police and MCFD, and obtained conduct orders to put in place certain boundaries between the parties. The respondent consented to the safety plan imposed by MCFD, agreed not to reside in the Home, attended counselling and worked with a psychologist. Between November and December 2023, the respondent took an array of courses directed at, among other things, understanding children and babies, child psychology, anger management and conflict resolution, parenting, children and violence, child development, and child well-being and mental health.

(b) the child's views, unless it would be inappropriate to consider them

[43] None of the Children are of an age where their views would be determinative.

[44] On the record before me, it appears that the Children enjoy spending time with both parents. They have enjoyed seeing the respondent and when his parenting time has increased incrementally in the course of these proceedings, there is no evidence that the Children have meaningfully resisted spending time with either parent.

(c) the nature and strength of the relationships between the child and significant persons in the child's life

[45] Both parties argue that they have a strong and close bond with the Children. Both parties accept that the Children love their other parent. The claimant's position on this application together with her evidence about the Children's relationship with the respondent, satisfy me that if she continues to have primary residency of the Children she is capable of supporting and does support their relationship with the respondent provided it is safe and in the Children's best interests.

(d) the history of the child's care

(e) the child's need for stability, given the child's age and stage of development

[46] Turning to the history of the Children's care and the Children's need for stability, given their ages and stages of development, on an application for interim relief, caution is warranted and preserving the status quo is normally preferred absent a compelling reason to change: Fitzgibbon v. Fitzgibbon, 2014 BCCA 403 at paras. 22-24.

- [47] The parties dispute what the status quo is in this case. The respondent says that before the 2022 Incident, he was the primary parent. He stayed home to look after the children while the claimant worked. Although she acknowledges that the respondent stayed home while she worked, the claimant disputes that the respondent was the primary parent. She argues they were equal parents although both exercised parenting time at different times of the day.
- [48] On the basis of the record before me, I am not able to resolve whether either party was the "primary parent" prior to the 2022 Incident. However, there is no dispute that since the 2022 Incident the claimant has been primarily responsible for the care of the Children. Until recently, the respondent has had relatively limited parenting time with them. Viewed from the perspective of the Children, that two-year period is the majority of L.'s life. It is also a significant portion of both M. and E.'s lives.
- [49] The respondent disputes that this most recent two-year period can give rise to a change in the status quo. Relying on cases such as *E.D. v. B.L.*, 2020 BCPC 114, *J.R.S. v N.R.S.*, 2021 BCPC 340, and *T.T. v. S.Z.T.*, 2020 BCSC 1628, he argues that situations that have been unreasonably or unilaterally created by one party to the detriment of the other, to create a tactical advantage, do not give rise to a new "status quo".
- [50] The claimant disagrees that the new parenting arrangement arose unreasonably or unilaterally, was created by her, or was put in place to gain a tactical advantage. Rather, she says, the change in circumstance was thrust upon her by the respondent's actions during the 2022 Incident.
- [51] I accept the claimant's argument that the change in parenting arrangement that has prevailed since the 2022 Incident was not the result of any bad faith actions by the claimant. Rather, it arose because of the respondent's physical interactions with L. The respondent does not dispute that the 2022 Incident occurred, indeed, his submission is that he takes responsibility for the 2022 Incident and deeply regrets it. The fallout from that 2022 Incident is that the MCFD became involved, the police became involved, and a decision was made to criminally charge the respondent. Obviously, the claimant was not responsible for the 2022 Incident nor for the involvement of the state that it precipitated. In the wake of the 2022 Incident, the claimant commenced family law proceedings in Provincial Court. That was her decision and I reject that it was done for tactical advantage. The Provincial Court made a number of orders, and later this court has made a number of orders addressing parenting. The parenting arrangement that has prevailed since those orders were made arose in conformity with them.
- [52] I find that since the 2022 Incident, the status quo is that the claimant has been primarily responsible for the Children's care. Both parties wish to return, eventually, to a shared parenting regime. The respondent says his ultimate goal is to be the primary parent. Either way, the question is how to get from the current situation where the claimant has primary care of the children, to one where the respondent has increased and more regularized parenting time which both parties argue is in the Children's best interest.

- [53] I find that both of these factors argue in favour of a graduated increase in parenting time for the respondent.
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs
- [54] Both parties have demonstrated ability to exercising parenting responsibilities.
- [55] It appears that despite this history of family violence, the interim parenting arrangements recently imposed by the court have been relatively successful. There is significant evidence about disagreements about pick-up times and places, supervisors, and other details relating to parenting time exercised under the Provincial Court orders. Things appear to have gone more smoothly under Fitzpatrick J.'s order. I conclude that these parties are better able to care for the Children and meet the Children's needs when they are apart and when there is a clear separation of their parenting time.
- [56] In the affidavit evidence before me, the respondent has deposed that he has been homeless since separation, couch surfing, sleeping in cars, and sometimes at shelters. He says that more recently he has had the free use of a friend's furnished one-bedroom apartment but only for those times when he has parenting time with the Children.
- [57] On the second day of this hearing, the respondent's counsel attempted to hand up an unfiled affidavit addressing a number of issues not all of which are raised in the applications before me. I do not admit this affidavit into evidence. I do accept the respondent's counsel's submission that the respondent will be able to rent that same one-bedroom apartment if this court declines to order a nesting arrangement but is satisfied there should be shared parenting.
- [58] The claimant argues that the respondent's lack of suitable housing impairs his ability to care for the Children during overnight parenting time. She does not believe that the current one-bedroom apartment is big enough for overnight parenting with three children.
- [59] I am concerned about the respondent's unstable housing situation. I am not convinced that it is in the best interest of these Children, whose ages range from 3 to 12, to share a single-bedroom apartment with the respondent on an ongoing and regular basis, even if that apartment has a pull-out couch in the living room. I am concerned that the close quarters could interfere with school and leisure activities. I am also concerned, in light of the history of family violence, that the close quarters could exacerbate tensions which is not in the best interests of the Children.
- [60] I will not order overnight parenting time until the respondent secures stable and suitable housing.

- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members
- [61] As I will discuss at more length below, this factor is a significant driving concern in my conclusion that a "nesting arrangement" would be unworkable in this case, and also that a parenting coordinator should be appointed to help smooth parenting time transitions and generally to assist the parties resolve issues affecting the Children.
- [62] There is obviously significant acrimony between the parties in this litigation. Nevertheless, the claimant is supportive of moving gradually to a shared parenting arrangement with the degree of cooperation that would require.
- [63] I do not find this factor to militate against graduated increases in parenting time for the respondent with a goal to return to shared parenting once the respondent has suitable housing, provided that the parties are able to maintain their autonomy and provided sufficient supports are in place.
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- [64] As noted, the criminal proceedings have been stayed. There are no other civil or criminal proceedings relevant to the Children's safety, security or well-being.

Schedule of Parenting

- [65] At the conclusion of this hearing, I ordered that on an interim basis while this judgment was on reserve, the respondent would have the following parenting time for the month of August on an alternating weekly basis:
 - a) Wednesday to Friday: 3:30 PM - 8:30 PM; and
 - b) Saturday and Sundays: 10:00 AM - 8:30 PM.
- [66] I order that after Labour Day, on an alternating weekly basis, the respondent have parenting time as follows:
 - a) Monday to Friday: 3:30 PM to 8:00 PM;
 - b) Saturday to Sunday: 10:00 AM to 8:30 PM.
- [67] Once the respondent has obtained suitable accommodations, the parties will move to equal parenting time on a week-on/week-off basis or as otherwise agreed between them or directed by a parenting coordinator. I discuss how to resolve whether the accommodations are suitable below in the context of my discussion about the need to retain a parenting coordinator.

Other Provincial Court Conduct Orders

[68] I decline to vary or set aside any of the other conduct orders made by the Provincial Court. The issue was not raised in the notice of application nor has a sufficient basis for doing so been articulated. In particular, I do not find the Provincial Court conduct orders to be subsumed in the JCC conduct orders, nor do I agree with the submission that they no longer serve any purpose in light of the history set out above.

What arrangement should be made with respect to occupancy of the Home?

Position of the Parties

[69] On this application, the respondent asks this court to impose a "nesting" arrangement on the parties, wherein the Children remain in the Home and the parents alternate occupation of the Home on a week-on/week-off schedule. As well, he asks that during times when the Claimant has exclusive occupancy of the Home, he be permitted to exercise parenting time with the Children within the Home during the day, while the Claimant is at work. He argues that when the Claimant comes home, he will leave the Home immediately and without any interaction with her. If necessary, he suggests parenting exchanges could occur at a local RCMP detachment. He says a nesting arrangement will reduce periodic moves for the Children, ameliorate his housing situation, and allow him to resume his primary care of the Children.

[70] In the alternative, he argues he should be granted exclusive occupancy of the Home. He says the claimant has family nearby with whom she can reside whereas absent this order, he has been and is likely to remain homeless.

[71] Although not pleaded in his notice of application, he asks that certain related orders made by the Provincial Court be set aside. In particular, Judge Boblin ordered:

BY CONSENT, if the claimant gives her written consent, including via text message or email, the respondent may attend at the claimant's residential address. The claimant's written consent shall indicate the specific date, time, and purpose of such attendance. On performance of the purpose as written, the respondent will immediately leave the property.

BY CONSENT, the respondent shall not enter the claimant's residential address without the claimant's written consent, including via text message or email.

[72] The claimant opposes the orders sought. She argues that shared occupancy of the Home is a practical impossibility because the respondent has proven himself unable to respect her boundaries including when those are imposed by court order. She argues a nesting arrangement has also not been sufficiently thought out and planned.

[73] She argues the balance of convenience favours her maintaining exclusive occupancy of the Home. She and the Children have resided in the Home since the parties separated. She has been primarily responsible for the care of the Children for all that time. She has been

primarily responsible for the costs of maintaining the home in that time. She also denies the respondent's suggestion that she has other places to stay nearby and says requiring her to vacate the Home will cause her unwarranted financial strain and disrupt both her and the Children.

Analysis

- [74] Pursuant to s. 90(2)(a) of the FLA, this court has jurisdiction to make an order granting a spouse, for a specified period of time, exclusive occupancy of a family residence. This jurisdiction includes the authority to make so-called nesting arrangements with the children remaining in the house and the parents alternating occupation and also orders for exclusive occupancy of the family home.
- [75] A nesting arrangement requires a high degree of cooperation between the parties. It also must be thought out and carefully planned: *S.T.C. v. D.J.B.*, 2019 BCSC 1967 at para. 86.
- [76] In *Bateman v. Bateman*, 2013 BCSC 2026 at para. 44, Justice Greyell noted that a party seeking exclusive occupation of a family home must establish that the shared use of the family home is a practical impossibility and that the claimant is the preferred occupant of the home on a balance of convenience.
- [77] I will not order a nesting arrangement on these facts because I am satisfied that shared use of the Home is a practical impossibility. There have been many allegations that fall within the definition of family violence in the record before me, which I have set out above. The allegations come from both parties. Some of the allegations are denied, but some are admitted. For some, no matter which version of events is preferred, what is described meets the definition of family violence. The allegations thrown in the face of each of these parties are sufficient to conclude they do not enjoy the level of cooperation required for this type of housing arrangement. This relationship is too volatile to have these parties share the Home and such an order is not in the best interests of the Children.
- [78] The request made in this case is also not for a straightforward week-on/week-off schedule. The respondent wishes to have access to the Home during the weeks that the claimant enjoys parenting time so that he may care for the Children while she is at work. I consider this proposal to be a gross invasion of the claimant's privacy and autonomy and one that is not in the best interests of the Children. It is likely to further exacerbate the hostilities between the parties and undermine the goal of moving towards a functional co-parenting relationship. The claimant is entitled to leave the Children in the care of competent and trusted individuals when she is at work or otherwise engaged. I make no order requiring that she rely on the respondent for childcare during her parenting time.
- [79] The respondent's proposal is also not sufficiently developed for me to conclude it is a viable option at this time. In particular, I cannot conclude on the record before me that the respondent's assertions that the claimant has other places to stay is accurate. That assertion is disputed by the claimant and the evidence has not been tested on the record before me.

Nor, does it appear, that the respondent's own assertions that he is currently "homeless" is completely accurate. In the course of his submissions, the respondent acknowledged having access to a one-bedroom apartment free of charge for periods of time up to every other week if he had care of the Children. He also acknowledged it was open to him to rent this apartment for \$2,500 per month and stated that he would do so if this court ordered shared parenting.

- [80] Turning to the balance of convenience, I am satisfied that the claimant is the preferred occupant of the Home. As noted above, since shortly after the 2022 Incident, the claimant has had exclusive occupancy of the Home with the Children. Requiring her to vacate the Home now while she remains primarily responsible for the care of the Children will be disruptive to both her and the Children and is not in their best interests.
- [81] The claimant is to have exclusive occupancy of the Home until trial. The respondent needs to get stable accommodation so that he can increase his parenting time with the Children, as outlined above. This is the solution that best safeguards the best interests of the Children and their need for long-term stability in light of the reality that their parents have separated.

Section 211 Report and Parenting Coordinator

Position of the Parties

- [82] The respondent asks that this court order that a s. 211 be prepared. He argues that the claimant has and continues to make unilateral decisions for the Children without notifying or consulting him, unilaterally denies and restricts his parenting time, and communicates inappropriately with the Children about this litigation. The claimant does not dispute that a s. 211 report would be beneficial if a trial is necessary but opposes the order sought on the basis that she agrees to eventually return to a shared parenting arrangement so that a trial may not be necessary. She also argues that it is an expense the parties cannot afford. The parties agree that if the court is of the view that a s. 211 report is required, the parties should share the cost equally.
- [83] In contrast, the claimant asks that a parenting coordinator be appointed on specific terms. She says the history of conflict, animosity and communications argues in favour of this request. The respondent opposes the order sought arguing that the parties can ill afford the services of a parenting coordinator.

Analysis

- [84] Section 211 of the FLA provides that the court may appoint a person to assess, for the purpose of a proceeding under Part 4, one or more of the following:
- the needs of the child in relation to a family law dispute;
 - the views of a child in relation to a family law dispute; and

c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

[85] In *J.B. v J.P.*, 2018 BCSC 2521 at para. 60, this court explained that the general principles regarding these reports are as follows:

- a) they are a tool to determine the best interests of the child;
- b) they introduce some neutrality into emotionally-charged situations;
- c) the evidentiary threshold to order a report is low;
- d) the court takes a broad and generous approach to applications for these reports;
- e) information for these reports may be based on questionnaires, interviews and observations of the child/parent interaction and collateral references; and
- f) the court has the ultimate discretion to independently assess all of the evidence at trial and may come to a different conclusion as to the best interests of the child.

[86] The cost of the preparation of a s. 211 report is a legitimate countervailing concern in considering whether to make those orders: e.g. *S.A.H. v. J.J.G.V.*, 2018 BCSC 2278.

[87] However, on the record before me, it is not apparent that the cost should be prohibitive in this case. The parties' financial statements paint a modest financial picture. However, the evidence suggests that outside financial means are contributing to their lifestyle. For example, the respondent is unemployed and receiving income assistance but hopes to travel to South Korea and/or Japan with the Children. As well, the claimant's parents have provided a significant contribution towards paying off her student loans, the mortgage, and RESP's for two of the Children. Both parties seek orders that require them to incur additional expense, they simply disagree about which order is preferable.

[88] I am satisfied that a s. 211 report will be of significant assistance to the court in addressing the best interests of these Children in this high conflict family law dispute. A neutral report is more important in a proceeding like this one where family violence is alleged so that the trial judge can better assess all of the evidence in light of the factors under ss. 37 and 38 of the FLA. I do not share the claimant's optimism that a trial will not be necessary because the respondent's submission on this application is that he intends to seek primary parenting of the Children. Unless his intentions change, that issue would require a trial even if the parties have moved to shared parenting in the meantime.

[89] I am also satisfied that a parenting coordinator would be of significant assistance to the parties in this case and may actually reduce costs in this litigation.

- [90] As a majority of the Court of Appeal explained in *Fleetwood v. Percival*, 2014 BCCA 502 at para. 44 [Fleetwood], Division 3 of Part 2 of the FLA establishes a basic framework for the work of "parenting coordinators". Such coordinators may be put in place by agreement of the parties or by court order. Their role is to assist the parties by "building consensus" (s. 17(a)) or by making determinations (s. 17(b)). The court has a supervisory role in respect of determinations, as set out in s. 19 of the statute.
- [91] In cases like this where there is a history of conflict, animosity, and delayed responsiveness, parenting coordinators have been ordered: *Fleetwood* at para. 46; *D.C. v. B.C.*, 2013 BCSC 915 at paras. 45, 58.
- [92] I am of the view that these parents could benefit from the appointment of a parenting coordinator to set up a parenting plan that incorporates my order and any details required to give effect to my order. I do not share the respondent's optimism that the pattern of disagreements which has emerged in this litigation to date will dissipate with the pronouncement of this court's present parenting order. It is predictable that there may be conflicts, for example, about where parenting exchanges will occur, routine medical care for the Children, whether the respondent's new accommodations are "suitable", and what extra-curricular activities the Children should be enrolled in. All of these conflicts are visible in the record before me.
- [93] The claimant's submission was that the parenting coordinator could determine whether the respondent's new accommodations were suitable. The respondent's position was that this was outside of the jurisdiction of a parenting coordinator. Suitability of the respondent's accommodation for the purpose of accessing overnight parenting time might fall within s. 6(4)(a)(i) and there is no question that it falls within s. 6(4)(a)(ix) as a matter that could be determined by a parenting coordinator if the parties and the parenting coordinator agreed. The parties may be able to agree on whether the respondent's new accommodations are suitable. If not, I order that if the parties and the parenting coordinator agree, the parenting coordinator may assist the parties by determining whether the respondent's accommodations are suitable for the purpose of moving to equal parenting time, including overnight parenting time. If there is no such agreement, then the respondent is at liberty to apply to the court for a determination of that issue.
- [94] When other inevitable conflicts continue to erupt, a parenting coordinator may well be the most effective and inexpensive means by which they can be resolved in the Children's best interests.
- [95] For these reasons, an order appointing a parenting coordinator shall be made in the form of the 1st prayer for relief in the claimant's notice of application.

Prospective Interim Child and Spousal Support

Positions of the Parties

[96] The respondent seeks prospective interim spousal support of \$1,704 per month, payable on the first day of each and every month. He also seeks prospective child support in the setoff sum of \$1,765 per month, payable on the first day of each and every month.

[97] In her notice of application, the claimant asks that the respondent be found to be a resident of British Columbia and be imputed a gross annual income of \$50,000. In her submissions, the claimant provided DivorceMate calculations assuming the respondent had an income of \$34,104, \$40,000 or \$50,000. She opposes the interim spousal support order sought. She also seeks prospective child support based on his imputed income, payable on the first day of each and every month.

Analysis

The Claimant's Income

[98] The respondent asks for support based on the claimant having an income of \$87,000 which was set out in a financial statement filed in 2023 in Provincial Court.

[99] On the evidence before me, including a 2024 financial statement filed in this Court, the claimant's income has been:

- a) 2021: \$65,054;
- b) 2022: \$95,520;
- c) 2023: \$92,185, and,
- d) 2024: \$80,000.

[100] Although the respondent did not specifically ask to have additional income imputed to the claimant, he questions the credibility of the assertion that her income decreased in 2024.

[101] I find the decrease in the claimant's income to be adequately explained in the claimant's June 2024 financial statement. In December 2022, she was laid off from her employment. She received severance which was reported on her 2023 tax return. In April 2023, she found new employment and her salary is now approximately \$80,000 a year.

[102] I also find her current income of \$80,000 to be reasonable considering her age, education, and work history.

The Respondent's Income

[103] The respondent's income has been:

- a) 2021: \$0;
- b) 2022: \$3,974;

- c) 2023: \$13,210; and,
- d) 2024: \$16,740.

- [104] He explains that he was a stay-at-home parent during the parties' marriage. After separation in 2022, he says he has been homeless. In his 2023 financial statement, he stated that he was trying to find a more stable job but that he had been out of the normal job market and opportunities were limited. In his 2024 financial statement, he deposes that he is currently homeless and doing whatever he can to earn income including teaching clarinet lessons, trying to get performance.
- [105] Section 19 of the Guidelines gives the court a broad discretion to impute income to either or both spouses and is not subject to ss. 16, 17 and 18. The section contains a list of circumstances in which it would be appropriate to impute income, but the list is not exhaustive: *Ouellette v. Ouellette*, 2012 BCCA 145 at para. 66.
- [106] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37 [*Marquez*].
- [107] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge v. Moge*, at 870, *Bracklow v. Bracklow*, [1999] S.C.R. 420 at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).
- [108] The respondent argues that it would be inappropriate to impute any income to him on an interim application.
- [109] The case law does not go that far. Rather, previous cases have held that income should not be imputed on an interim application unless there is a properly developed evidentiary basis for doing so or other appropriate circumstances: *Fang v. Fang*, 2024 BCSC 1271 at para. 64. The party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding: *Marquez* at para. 36.
- [110] The respondent argues he lacks the capacity to earn even minimum wage because of health issues. He also argues that being unable to reside in the Home and his lack of stable housing has impacted his ability to earn money because he has not had a suitable location from which to provide clarinet lessons.

- [111] I am satisfied that in the circumstance of this case, it is appropriate to impute income to the respondent on an interim basis. There is a sufficient evidentiary basis for an interim award based on an imputed income. In particular, I find that the respondent has the capacity to earn at least minimum wage. In making this finding, I consider:
- a) The respondent was born in 1983 and is 41 years old.
 - b) He is educated and has completed a graduate studies program in 2012.
 - c) Although he has led some evidence about health issues, he has not led any medical or other evidence that persuasively supports his position that he is unemployable in any capacity. Where a spouse contends they are completely, or substantially, incapable of remunerative employment for a significant period of time, compelling evidence is required to establish this: *Hagman v. Yasmina*, 2024 BCSC 807 at para. 157 [*Hagman*]. I conclude that even if the respondent has the health issues he claims (dry eyes, atopic dermatitis, irritable bowel syndrome) and even if these conditions cause him discomfort, these should not prevent him from holding full-time employment.
 - d) The respondent has worked in the past. When the parties lived in Toronto in 2008, he worked as a clarinetist and took additional positions as a math and English tutor, and offering translation services. In 2011, he performed the clarinet professionally on stages in the US and abroad. He has performed with an impressive array of orchestras. The claimant says and I accept that these performances earned only minimal, if any, income. After the parties moved to Vancouver in 2014, he worked at Arts Nova in North Vancouver. He says he left that position in 2015 and continued offering clarinet lessons for up to six hours a day from the parties' home. There is evidence that he predominantly stayed home with the Children after their births and there is some evidence that this was a source of tension in the parties' relationship as the claimant wanted him to be more gainfully employed. After separation, the respondent has not been steadily employed and has mostly relied on income assistance. However, in 2023, he secured part-time employment coaching orchestra, chamber music and clarinet at St. James Academy. He was terminated in March 2024. He says he still tries to earn money teaching clarinet lessons and trying to get performance requests. Persistence in unremunerative employment may entitle the court to impute income: *McCaffrey v. Paleolog*, 2011 BCCA 378 at para. 46.
 - e) As noted above, the parties have been living separate and apart since June 2022. In the two years since then, the claimant has had primary care of the Children. The respondent has therefore been available for work. I find the statement in his financial statement that he is looking for work "while also trying to be available" to look after the Children because of his limited parenting time after separation. A desire to simply stay at home with a child is not sufficient to invoke the exception in s. 19(1)(a) of the Guidelines: *Shapiro v. Simpson*, 2016 BCSC 211 at para 176. Much less so when the parent expressing that desire has limited parenting time.

f) The fact that the respondent cannot undertake his preferred job from his preferred location is not a sufficient explanation for the respondent's failure to earn even minimum wage in the past two years.

[112] The respondent's age, education, health and work history all suggest that he should be able to earn at least minimum wage. I accept that his absence from the workforce may limit his earning capacity, at least in the near term. Minimum wage in BC is \$17.40 per hour (effective June 1, 2024). Minimum wage at 40 hours per week, 49 weeks per year, is \$34,104. The claimant has led evidence of various positions that are available for someone with the respondent's skill set that pay between minimum wage and approximately \$50,000. Given this is an interim application being argued on affidavit evidence alone, I will take a cautious and conservative approach to the imputation of income. I find that it is appropriate to impute an income of \$34,104 per year to the respondent.

Is the Respondent Entitled to Interim Spousal Support and if so, How Much?

[113] Sections 161 and 162 of the FLA provide:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the parties;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[114] Entitlement to spousal support is a threshold issue, which must be established before the court analyzes the appropriate quantum: Hagman at para. 149.

[115] There are three grounds for entitlement to spousal support:

- a) compensatory support;
- b) non-compensatory support; and
- c) contractual support.

[116] Compensatory entitlement arises where, as a result of the parties' roles during the marriage, one spouse suffers economic disadvantage, or has conferred economic advantages on the other. It most often arises where one spouse has sacrificed career opportunities to take on more of the family's household or child-rearing responsibilities. Non-compensatory entitlement arises from the concept that spouses, by virtue of marriage, have some ongoing responsibility to care for one another. Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon the breakdown of a marriage. Finally, contractual entitlement arises out of agreements entered into by the parties: *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 26-28; *Chutter v. Chutter*, 2008 BCCA 507 at paras. 54-55.

[117] Turning first to entitlement, there is no basis upon which to find a contractual basis for support. The record before me contains conflicting evidence that would be relevant to an assessment of entitlement to compensatory support. The respondent argues on an interim application, the applicant's needs and the respondent's ability to pay assume greater significance. As well, he argues that the court should not embark on an in-depth analysis of the parties' circumstances, which is better left to trial. I do not propose to resolve that conflict in the evidence on this application.

[118] Instead, I am satisfied that there is a sufficient evidentiary basis to find the respondent is entitled to non-compensatory support. This was all but acknowledged by the claimant in oral submissions. While I recognize that income disparity alone does not create legal entitlement, in the circumstances of this case where, following an approximately 14-year-long marriage, the respondent is so far unemployed and under-housed as a result of the breakdown of the marriage, there is a need to narrow the gap between the needs and means of these spouses. That having been said, I accept the claimant's submission that the respondent has a responsibility to work towards economic self-sufficiency including by financially contributing towards his own support given his capacity to do so. This is addressed by imputing income to the respondent as I have set out above.

[119] For the purposes of calculating support payments under the SSAG, the claimant's income is set at \$80,000 a year for 2024 and the respondent's income is set at \$34,104 for 2024.

[120] In *Chutter* at para. 121, the Court of Appeal approved the factors set out in the SSAG in determining the appropriate amount of spousal support within the calculated range summarized as follows:

1. A strong compensatory claim may be a factor that favours a support award at the higher end of the ranges for amount and duration.
 2. Where the recipient has limited income and/or earning capacity due to age or other circumstances, the recipient's need may warrant an award at the higher end of the ranges for amount and duration. An absence of need may suggest an award at the lower end.
 3. An absence of property to be divided might suggest an award at the higher end; an unequal division in favour of the recipient may indicate an award at the lower end is more appropriate.
 4. The need and limited ability to pay of the payor spouse may push an award to the lower ends of the ranges.
 5. Self-sufficiency incentives may push in either direction.
 6. Low work incentives for the payor may push an award to the lower ends of the ranges, in that the marginal gain in net income from additional income earned may be negligible.
- [121] While the decision in Chutter arose out of an appeal from a trial decision, the factors in the SSAG do provide some assistance to the court in assessing the appropriate amount of interim spousal support for the claimant. As the Court of Appeal said, the summary set out above is not intended to exclude consideration of other factors: *J.L.A. v. M.J.G.G.*, 2014 BCSC 1391 at para. 30.
- [122] Having regard to these factors and in particular, the means and needs of both parties, I am satisfied the support should be calculated in the mid-range. I find that the respondent is entitled to interim spousal support commencing September 1, 2024. Pursuant to ss. 161 and 162 of the FLA and the Guidelines, the claimant will pay to the respondent for his interim support, the amount of \$576 per month, commencing on September 1, 2024 and continuing on the first day of each and every month thereafter until further agreement of the parties or court order.

What Order for Interim Child Support is Appropriate?

- [123] Pursuant to s. 147 of the FLA parents have a duty to provide support for their Children.
- [124] The central factors that are usually to be considered on an interim application for either child or spousal support are the means or ability to pay support, and the needs of the spouse and children: *Loesch v. Walji*, 2008 BCCA 214 at para. 20.
- [125] Pursuant to s. 150 of the FLA child support must be determined in accordance with the Guidelines.

[126] As set out above, the Children currently reside in the claimant's primary care. Using the claimant's actual income of \$80,000 and the respondent's imputed income of \$34,104, the child support payable by the respondent to the claimant under the Guidelines is \$730 per month. On the same basis, if and when the parties achieve shared parenting, the claimant will pay \$889 per month in child support to the respondent.

Costs

[127] As to costs, the claimant was substantially successful here and made reasonable concessions on issues where the respondent succeeded. She will have her costs of both applications in the cause.

"Latimer J."

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