
CANADA / JUDGMENT

S.R.M. v. N.G.T.M.

2020 BCSC 468

COURT

Supreme Court of British Columbia

DECIDED

30 March 2020

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2020 BCSC 468 S.R.M. v. N.G.T.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.R.M. v. N.G.T.M.,

2020 BCSC 468

Date: 20200330

Docket: E120604

Registry: Vancouver

Between:

S.R.M.

Claimant

And

N.G.T.M. also known as N.T.M.

Respondent

Before: The Honourable Mr. Justice Basran

Reasons for Judgment

Counsel for the Claimant:

M. Huberman

Counsel for the Respondent:

A. Lessing

Place and Dates of Trial:

Vancouver, B.C.

September 9-13, 16-20, 23-25, 30,

October 1- 2, 7-9, 11, and

15-18, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 30, 2020

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INTRODUCTION

- [1] The parties in this high-conflict matter separated over ten years ago, divorced in 2013, and were involved in a five-week trial between June and December 2013 before Justice Butler. In reasons for judgment from that trial issued on March 17, 2014 (the "RFJ") and indexed at 2014 BCSC 442, Justice Butler made determinations on parental decision making, parenting time, child support, and spousal support. He also concluded that the respondent's right to participate in a Business Succession Program ("BSP") was a family asset.
- [2] Unfortunately, the conflict between the parties has not abated. The respondent brings these proceedings on the basis that there has been a material change in circumstances since Justice Butler issued the RFJ that justifies a reconsideration of parental decision making responsibilities and parenting time. He suggests that child support should not be reviewed.
- [3] The claimant points out that the respondent's income has more than doubled over the past five years and that this constitutes a material change of circumstances in relation to child support. However, she submits that there has been no material change of circumstances that warrants a review of parental decision making and parenting time. She asserts that the order of Justice Butler ought to remain in force in respect of these two issues.
- [4] For the reasons that follow, I have concluded that the significant emotional strain on the parties' children justifies a reconsideration of Justice Butler's ruling on parental decision making. I will also review child support in light of the significant increase in the respondent's income over the past five years. No adjustment to parenting time is warranted aside from a minor change to the parenting schedule that the parties agree to. I have also made findings in respect of the valuation of the BSP.

BACKGROUND

Relationship History

- [5] The parties began dating in 2000, cohabited in 2001, and married in July 2005. N was born in January 2007 and was diagnosed with autism spectrum disorder in February 2009. L was born shortly thereafter in April 2009. The parties separated in August 2009. In March 2010, N was diagnosed with cancer.

2014 Trial Decision

- [6] In the RFJ, Justice Butler decided that the parties would have joint custody and guardianship of the children, equal parenting time, and share parenting responsibilities, with a parenting coordinator ("PC") to be appointed to assist with decision making.
- [7] Justice Butler noted in the RFJ (at paras. 10-12) that the event precipitating the parties' separation was the claimant's false allegation that the respondent had sex with their family dog. The claimant admitted during the trial that her statement that she found the respondent having sex with the dog was not true. However, she maintained that she had reasonable grounds to believe that the respondent was having sex with the dog. Justice Butler found that "her reasoning does not stand up to any scrutiny" in this regard (at para. 14).
- [8] The claimant also alleged that the respondent sexually abused the children. She formed this belief around the time that the parties separated and maintained it even though several physicians who examined the children told her that there was no evidence of sexual abuse.
- [9] In June 2012, the claimant obtained an order suspending the respondent's access to the children because of her concerns regarding potential sexual abuse. After a lengthy investigation, Dr. Michael Elterman prepared a s. 15 report on the issue of whether the respondent posed any risk of harm to the children. He concluded that, "the allegation that [the respondent] sexually abused the children is improbable" (at para. 30). The respondent's parenting time was accordingly reinstated in January 2013, but during the intervening seven months, neither the respondent nor his parents were able to see the children.
- [10] In assessing the claimant's allegations of sexual abuse of the children by the respondent, Justice Butler concluded that, "[h]er reasoning process regarding the possibility of sexual abuse was similar to her flawed reasoning about the bestiality" (at para. 21). He also concluded that she had no insight into the damage that these false allegations had, and continued to have, on the respondent.
- [11] In assessing the parties' ability to parent the children, Justice Butler found that the claimant had a tendency to reach conclusions about others and then look for evidence to support these conclusions. He also noted that her over-protectiveness remained a concern and that, "[s]he appears unable to be deterred from a conclusion once she has acquired her belief" (at para. 41). He concluded that she could not be permitted to make critical decisions because of her tendency to ignore evidence, logic, and advice in favour of her own "over-valued ideas".
- [12] As for the respondent, Justice Butler found that he had a tendency to be aggressive, critical, rigid in his views, blind to his own shortcomings, and prone to leveling personal attacks based on a sense of self-justification. Nevertheless, Justice Butler found that both parties were good parents who were entirely devoted to their children. He concluded that the respondent's tendency to reject the claimant's concerns about the children and downplay their problems could be ameliorated by shared decision making combined with the appointment of a PC to deal with issues involving N's treatment and therapy, which tended to

be a particular area of contention.

- [13] Optimistically, Justice Butler believed that "the parties [would] use the litigation experience and the sobering effect of these reasons to restrain themselves from further fighting ... [and would] realize that the litigation has been more about themselves than N" (at para. 80).
- [14] On parenting time, Justice Butler found that it would be in the best interests of the children for the parents to share parenting time equally. He noted that the children had strong relationships with both of their parents, especially their mother.
- [15] Justice Butler found that the respondent's Federal Child Support Guidelines [Guidelines] income was \$900,000. He observed that the parties did not have a lavish or extravagant lifestyle prior to separation, but noted that this was not the only factor to be considered. He concluded that the means and needs of the children could be met by a lesser amount, \$9,000 per month, than the Guidelines amount of childcare of \$11,554 per month.
- [16] With respect to spousal support, Justice Butler found that the claimant had a strong claim for non-compensatory support. She contributed to the respondent's success as an investment advisor because she assumed the bulk of the childcare duties before and after separation, thereby facilitating the respondent's ability to grow his business. He ordered spousal support of \$11,500 per month.
- [17] Justice Butler concluded that the respondent's book of business was a family asset and the value of the respondent's right to receive payments, as of the date of the triggering event under the BSP, was to be used as a proxy for the value of the asset. There was insufficient evidence to determine the present value of the respondent's interest in the BSP at the time of the first trial.
- [18] Justice Butler further ordered that the value so determined be discounted by taking into account other circumstances relevant to determining the parties' interest in the asset. He also noted that a factor relevant to the value of the claimant's interest was that the respondent's assets under management ("AUM") increased by \$47 million in the year prior to separation, but the respondent paid for two-thirds of this increased AUM after separation.

Findings of Facts Relevant to Parenting

- [19] In the time since the RFJ were released by Justice Butler, the parties have had a number of disputes that are relevant to determining their ability to effectively parent their children.

Use of Parenting Coordinators

- [20] The respondent believes that the claimant uses the PC process as a way to avoid engaging with him directly. He believes that they should discuss issues instead of going directly to a PC. The claimant's position is that the respondent dismisses, diminishes, and blames her when she raises issues, so she reverts to using a PC to resolve their disputes.

- [21] Morag McLeod was the parties' first PC. She worked with the parties from March 2015 to October 2016. She testified that the respondent had a distinct view of how the PC process ought to be engaged. He did not accept that it was the right of either parent to engage this process. He thought that the parties should try to resolve issues before going to the PC and that information should be exchanged. Ms. McLeod believed that the claimant was entitled to engage the PC process unilaterally and it was obvious that the parties could not agree on parenting issues.
- [22] Ms. McLeod recalled that the respondent was less cooperative with her than the claimant, who viewed her as someone who could help get decisions made. She also stated that the parties triggered each other.
- [23] Ms. McLeod withdrew as the parties' PC for two reasons: the respondent stopped cooperating with her and he did not pay her accounts. In her view, the respondent was having a hard time dealing with the details of the false allegations. He was unhappy with the PC process, so he stopped cooperating and paying in hopes that the "problematic PC" would go away.
- [24] Ms. McLeod recalled that from the outset, the dynamic between the parties was strained and it would have been pointless for her to do anything other than make decisions for them. They were unable to exchange information and amicably resolve disputes on their own.
- [25] Dr. Nicole Aubé prepared a s. 211 report. During this process, she spoke to Ms. McLeod who told her that the respondent was angry and controlling, that the claimant made an effort to make the PC process work whereas he did not, and that he undermined the claimant. Ms. McLeod testified that this remains her view. She described the respondent as an angry, controlling, and upset person.
- [26] Ms. McLeod does not think that the respondent appreciated the effect his attitude and anger had on those who dealt with him. The claimant reacted defensively to him and although she may not have been optimally forthcoming with information, the claimant probably did as much as she could in the circumstances.
- [27] I note that Ms. McLeod's involvement with the respondent took place at a time after the first trial when the respondent was still very angry because of the false allegations. The claimant asserts that the respondent continues to be an angry and controlling person. The respondent believes that he has learned from his mistakes of the past and has adjusted his behaviour accordingly.

Autism Ambassador

- [28] The parties disagreed on the opportunity for N to be the "Autism Ambassador" for a fundraising campaign. The respondent sent the claimant an email regarding this issue. When he received no response within a month, he proceeded with plans for N to fulfill this role. He signed the parent waiver and provided the foundation with a family photo and a couple of videos. The claimant is not included in the photo. He indicated that if the claimant had shown any interest in this endeavour, he would have included a photo with her.
- [29] The respondent did not copy the claimant on subsequent correspondence on this issue because he thought she was uninterested. When the claimant voiced her disapproval, he did not immediately cease N's participation as the Autism Ambassador because he thought N would enjoy the role and he wanted to try to resolve this with the PC. The respondent believes that he was simply trying to help raise money for the foundation and he believed that N would enjoy being the centre of attention for that year's campaign.
- [30] The claimant's version of these events is that she thought an answer to the respondent's email was not immediately required because the fundraising walk was 11 months away. She recalls that at this time, there was ongoing conflict over the Children's Wish Foundation ("CWF") (which will be discussed below), her volunteering at the children's school, and their activities, so she thought this issue would lead to even more conflict. She replied five months later when she discovered that N was the Autism Ambassador and refused to consent, stating concerns about N's privacy. I note that she expressed no similar concerns over his involvement with a wish trip to Disneyland provided by the CWF that presumably also involved some publicity.
- [31] In my view, both parents bear some responsibility on this issue. The claimant should not have waited five months to respond to the respondent's inquiry. The existence of the parties' concurrent conflicts has been an unfortunate and ongoing feature of their post-separation lives. I do not accept the existence of these conflicts as an excuse for the claimant's failure to reply to the respondent. However, having not received a response, the respondent could have simply followed up with the claimant on this issue. He also could have copied her on his communications with the foundation to ensure she was up to date on the issue of N becoming the Autism Ambassador.

Vaccinations and Other Health Care Decisions

- [32] The respondent testified that the claimant was strongly opposed to vaccinating the children. While married, he agreed with her views on this issue but indicated that after N's chemotherapy concluded, he expected that the children would be vaccinated. His basis for this belief was unexplained and five years passed between the end of N's cancer treatment and the date when the respondent raised this issue.

- [33] In April 2018, he began what turned out to be a yearlong process, involving multiple physicians and their PC, to ensure that the children were vaccinated. He testified that the claimant continued to oppose vaccinations and she would not seek, and subsequently did not accept, the advice of the children's family doctor. Even after a pediatrician spent 90 minutes explaining why vaccinations were important, she continued to oppose them. The PC ordered a doctor's recommendation on this issue and even after receiving it, and while attending an immunization clinic at Children's Hospital, the respondent still resisted vaccinating the children. Eventually she agreed to the immunizations and both children are now vaccinated. This issue began in April 2018 and the children were not vaccinated until March 2019.
- [34] The claimant's position on this issue is that she believed that N's vaccinations might be different because he had cancer. This is why she wanted to meet with an immunologist who could provide advice on immunizations for children with prior immune system issues. Over an 11-month period, the parties had five meetings with physicians to discuss vaccinations. They all strongly recommended vaccinating the children. When asked why she delayed vaccinating L, who did not have cancer, the claimant replied that she thought it was preferable that the children proceed with the immunization process together. Her explanation regarding N is somewhat plausible, but her explanation for delaying the vaccination of L suggests that she was generally opposed to vaccinations but then eventually relented in the face of overwhelming medical advice in favour of them.
- [35] This is an example of poor decision making. The claimant unnecessarily resisted vaccinating her children and only agreed when it was obvious that her position was unreasonable and unsustainable. As described by Justice Butler in his RFJ, her conduct suggests that she forms an opinion and then avoids or obstructs all advice and expertise that runs counter to her views. She did eventually agree to vaccinate the children and these immunizations have taken place as scheduled.
- [36] Between the times when N was born in 2009 until April 2018 when the respondent took up this issue, the respondent agreed, or at least acquiesced, with the claimant's view on vaccinations. I also note that the claimant does not seem to be generally opposed to conventional medical advice. She concurred with all of the treatment recommendations when N was diagnosed with leukemia and she has followed all other medical advice involving the children from various healthcare providers. The evidence indicates that her views on vaccinations were completely unsupported by medical advice and it would have been prudent to immunize the children when they were infants on a schedule recommended by medical practitioners. However, I do not view her decision making on this issue to be indicative of a general unwillingness to follow medical advice involving the children.

Counselling for the Children

- [37] The claimant testified that L made comments about suicide for the first time in 2015. He mentioned this three times within a month in that year but then not again until the summer of 2017. The claimant says that she did not mention L's 2015 comments to the respondent because of the level of conflict that arose whenever they communicated. She believes that he minimizes her concerns, blames her, or denies that there is a problem, so she decided not to raise this issue with him. Notwithstanding her concerns regarding the nature of her communications with the respondent, her concerns about L's wellbeing should have taken precedence and she should have discussed this matter with the respondent to determine if he had noticed similar behaviour. Doing so would have enabled them to make the best possible decisions for L instead of focusing on the conflict between them. The claimant did not disclose L's comments to the respondent until 2017.
- [38] In 2017, she sent a message to the respondent indicating that L had been making suicidal comments for the past two years and that she wanted counselling for him. She sent this message two days before a scheduled meeting with Carol Hickman, who was their PC at this time. During that meeting, the claimant reiterated her request for counselling for L. Her rationale for not pursuing this issue for the previous two years was that she did not think L would actually hurt himself, but as a result of his most recent utterances, she believed he needed counselling. The respondent did not agree to counselling for L; he preferred that they focus on parenting strategies and he wanted a new s. 211 report to be completed. This response validates, to some extent, the concerns expressed by the claimant that she would be disbelieved, dismissed, or blamed for L's problems.
- [39] I find the respondent's response to the claimant's request that L receive counselling disconcerting. Instead of dealing with what may have been an imminent risk of harm to his son, he tried to use this issue as a lever to obtain a review of the claimant's parenting ability. To use an analogy he used while testifying, he focused on why a proverbial cow was stuck in a ditch instead of dealing with the immediate need to get the cow out of the ditch.

ABA Team

- [40] Since N was diagnosed with autism spectrum disorder, he has received an intensive therapeutic program of Applied Behavioural Analysis ("ABA"). A regular component of this program is a weekly team meeting that includes N, all members of the ABA team who work with him, and his parents. The ABA team includes the ABA consultant, who supervises and oversees the program; an ABA social worker, who works with N in his school; and several other therapists who work with N one-on-one in his homes. The purpose of the weekly team meeting is to exchange information on N's progress, identify areas for further program delivery, and ensure that all members of the team are taking a coordinated approach to delivering N's ABA therapy. SD, the team leader of N's ABA team, described these meetings as a useful opportunity to hear how N is doing in his everyday life, in his relationships with peers, and for all to provide updates on their sessions with him. It is also an opportunity to

see if there are certain behaviours that N exhibits with some people and not others or in different places or situations.

- [41] With the exception of a period in October 2014, the claimant attended the ABA weekly team meetings from March 2014 to early 2017. She ceased attending these meetings in January 2017 and resumed attending them, by telephone, in July 2019. As a result, the claimant did not attend the weekly team meetings for over two-and-a-half years from January 2017 to July 2019.
- [42] In October 2014, the claimant stopped taking N to ABA team meetings. He missed three or four of these meetings during that period. She wanted a change of day and location for these meetings. She knew that N was supposed to attend these meetings and benefitted from them, but she put her needs ahead of his by not taking him to them.
- [43] The claimant asserts that she stopped attending the ABA team meetings in January 2017 because they conflicted with her attendance in a professional development program that she enrolled in with a view to becoming a teacher. She did not register for the September 2017 to December 2017 term but resumed attending this program in January 2018. During that term, she found the demands to be overwhelming so she quit the program and eventually decided to pursue another course of studies.
- [44] The claimant did not return to attending the ABA team meetings in the fall of 2017 when she took a semester off from the program in which she was enrolled. Instead, she picked up L from school on these days and spent time with him. She characterized this as an opportunity to spend one on one time with L while N was attending the ABA team meeting.
- [45] In October 2018, the claimant began a practicum for a Master of Arts program. It took place from 10:00 a.m. to 6:00 p.m. on Wednesdays and therefore conflicted with the weekly ABA team meetings. I do not accept that this practicum was a reason why the claimant did not attend weekly ABA team meetings. She did not attend these meetings from September 2017 to the commencement of this practicum, when there was no conflict with the time of these meetings. The claimant asserts that the ABA team meetings were uncomfortable for her because the respondent persistently dismissed what she said, invalidated her comments, and limited her ability to contribute to the discussions. None of these allegations are confirmed by NS, SD, or MV, N's ABA therapists, all of whom regularly attend the weekly ABA team meetings.
- [46] In particular, NS testified that the respondent was open and receptive to feedback but the claimant was not. Other team members spoke to NS about their problematic interactions with the claimant but there were no such issues involving the respondent. NS recalls that the respondent's interactions with the claimant were professional and polite and that he listened to her and seemed to welcome her ideas. She recalls that he was not dismissive of her. This objective evidence of how the respondent treated the claimant during the weekly ABA team meetings she attended is persuasive.

- [47] The claimant believes that her ongoing email communication with the ABA team was sufficient and she minimized the importance of parental involvement in the weekly ABA team meetings. This evidence is contrary to the views expressed by NS, SD, and the respondent on the importance of the weekly ABA team meetings. I prefer their evidence on this issue. In my view, the claimant's excuses for not attending the ABA team meetings from January 2017 to July 2019 are nothing more than an after-the-fact justification for her failure to attend ABA team meetings for over two-and-a-half years, largely motivated by her unwillingness to prioritize what was best for N over her own needs. This is another example of poor decision making.
- [48] There was a dispute over the location of the meetings. The claimant did not want to attend meetings at the respondent's home and she did not want him to attend meetings in her residence. After an agreement was reached in September 2017 that the meeting location would alternate between her home and the respondent's, the claimant somehow concluded that this also meant that neither parent would attend ABA team meetings in the other parent's residence. The basis for this belief is entirely unclear and is completely inconsistent with the purpose of weekly team meetings, which is to ensure that everyone involved in N's ABA treatment has an opportunity to meet with him and his parents to discuss his ABA therapy.
- [49] In my view, the claimant unreasonably withheld N from attending the ABA team meetings in October 2014 and she had no reasonable basis for assuming that neither parent would attend ABA team meetings in the other parent's residence. This may have been her desired outcome, but there is no evidence to suggest that this was the basis for agreeing to alternate locations of the meetings between the parents' residences. This is an unfortunate example of the claimant prioritizing her own needs over those of N.
- [50] SD began working with N in summer 2015 and became the team leader of N's ABA team in August 2016. Largely as a result of an incident on February 9, 2017, the claimant wanted SD removed from N's ABA team. On that day, SD notified the claimant by text that she was not able to drive to the claimant's residence for her scheduled ABA session with N due to inclement weather. There were apparently several school closures near the claimant's residence that week due to heavy snowfall. The claimant insisted that SD attend on that day and admonished her for unilaterally deciding not to attend. SD wrote back to reiterate that she did not think she could safely drive to the claimant's home and would not be attending on that day. She also noted that N would not be missing any therapy because there was insufficient time for therapy before she took him to his hockey practice. The claimant disputed this assertion but I accept the view of SD on this issue. She has expertise in delivering ABA therapy and is best placed to determine if there is sufficient time for therapy to take place in conjunction with N's other activities, such as hockey. This exchange prompted the claimant to demand that SD be removed from the ABA team.

- [51] SD sent an email to the claimant and respondent setting out her version of these events and requested a meeting with both of them. SD pointed out that contrary to the claimant's allegations, she was not tardy and did not unilaterally and on short notice change her shifts. She had never previously been advised of alleged unprofessional conduct by the claimant, the respondent, the ABA consultant or anyone else. In particular, she noted that the claimant had not previously raised any concerns with her.
- [52] The respondent objected to the request to remove SD, a team leader on the ABA team, because he considered her to be one of the most reliable members of N's ABA team and noted that she often volunteered to cover for other ABA therapists who were unable to attend their scheduled sessions with N.
- [53] The claimant provided submissions to Ms. Hickman on removing SD from the ABA team but did not pursue a PC determination on this issue. SD continues to be the ABA team leader of N's ABA team but up to the date of this hearing, the claimant did not permit SD to conduct ABA sessions with N in her home. As a result, SD has not observed N's behaviour or interactions in the claimant's home since February 2017. This is a clear example of the claimant prioritizing her own needs and interests over what is in the best interests of N.
- [54] The claimant also had an ongoing issue with TM, an ABA social worker who worked with N for four years, and wanted her removed from the ABA team. She also wanted the ABA consultant, NS, and another senior member of the ABA team, KZ, removed.
- [55] During the trial, the claimant denied that she wanted TM, NS, and KZ removed from the ABA team but her evidence in this regard conflicts with the answers she gave during an examination for discovery that took place on May 7, 2019. The evidence at trial is clear that disputes over the composition of the ABA team occupied a great deal of PC time and money and were the subject of a large volume of communications between the parties and involving their PC.
- [56] I accept that by 2017, the claimant wanted four of the six members of the ABA team replaced. She raised this issue with Ms. Hickman, the PC at the time. The claimant wanted these members replaced because she believed that they were biased against her and favoured the respondent.
- [57] The claimant persists to this day in wanting to change the day of the ABA team meeting but instead of canvassing the other members of the team to determine if another time is possible, she clings to her demand that the day be changed and expects others to conform to her wishes. This is notwithstanding the fact that she has been attending the now bi-weekly team meetings, by telephone, since July 2019. I note that she recommenced attending ABA team meetings only a few weeks before this hearing commenced.
- [58] The respondent has attended over 90% of the ABA team meetings since March 2014.

- [59] The claimant agrees that her communications with the ABA team members have not always been respectful and with hindsight, she regrets some of her responses to them but she thinks her communications with the ABA team have improved. She nevertheless believes that she is not treated well by the current ABA team. She believes that the parents should set the general direction of ABA therapy and she would like to retain some "flexibility" to direct certain ABA programming that focuses on things she thinks are important. In my view, the respondent properly defers to the expertise of the ABA team in directing N's ABA therapy.
- [60] Importantly, the claimant acknowledges that from 2017 to 2019, N has been doing very well with his current ABA team.
- [61] As Justice Butler held in the RFJ, "[a]utistic children need consistency". The claimant continuing to suggest changes in the ABA team despite no evidence that they acted improperly, unprofessionally, or were not working well together or with N is a further example of poor decision making that fails to separate her personal feelings towards individuals from what is objectively best for her child.

CWF

- [62] Shortly after N completed his leukemia treatment, the CWF notified the claimant that N qualified for a wish. She believed that N would enjoy a trip to Disneyland because he watched Disney movies and played with Disney themed toys throughout his course of treatment. The claimant asked the respondent to sign the necessary forms for the CWF to provide a trip to Disneyland but he declined to do so because he believed that N could not formulate a wish and did not express a desire to go to Disneyland. He believed that the claimant wanted to go to Disneyland and was using this opportunity for her own purposes. The claimant understood that the opportunity for the CWF to grant a wish was available for five years so he wanted to wait for N to grow older in order for him to be able to express his wishes.
- [63] Ms. McLeod was the parties' first PC. The CWF wish trip to Disneyland was one of the issues she was asked to determine. She concluded that N should be able to go on the CWF trip to Disneyland with the claimant during her parenting time. Ms. McLeod spoke to ABA team members who confirmed that N enjoyed playing with Disney characters. Ms. McLeod did not think it was realistic for them to split the trip given the acrimony between them. The respondent nevertheless refused to sign the necessary forms because he believed that Ms. McLeod misunderstood the relevant facts. The respondent then asked to split the time during the trip with the claimant but she refused because she thought doing a transition of the children while on this trip would be difficult.
- [64] The respondent admits that his emotions got the better of him and he regrets some of his comments and actions on this issue. The respondent eventually agreed to the CWF wish trip to Disneyland. A great deal of time, effort, and money was wasted on what should have been an easy issue for N's parents to agree on.

L's Hockey

- [65] The respondent revoked his consent for L to play hockey with a minor hockey association over a dispute with the claimant. In the fall of 2014, L was five years old and enrolled to play his first year of organized hockey. The claimant asked that L be moved to another team because she alleged that the coach of his team made unwanted and repeated advances to her. She did a Google search and found that this coach had been fired from his job as an RCMP officer for having sex with a domestic abuse complainant. The claimant sent these articles to the respondent. He responded by asking for the texts/emails in which these purported advances took place. She refused to provide them. Incredibly, the respondent wrote to the coach and indicated that the claimant had made similar allegations in the past. He also emailed a copy of the anonymized and confidential RFJ of Justice Butler to this coach and the hockey association.
- [66] The respondent says that he deeply regrets withdrawing his consent for L to play hockey and sending the RFJ to the hockey association. He assumed the allegations were false. Bizarrely, he still thinks that there was insufficient reason to move L to another team. He further asserts that the hockey association "lied" to him because they told him that they moved L because of "numbers".
- [67] For reasons that are unclear, he thinks he was entitled to be part of the discussion between the claimant and the hockey association on this issue. He wanted L returned to the original coach's team unless he received a "good" reason for the move. His ex-wife's assertion that their son's coach was making unwanted advances was not sufficient for him to agree to his five-year-old son moving from one team to another within the same hockey association.
- [68] In August 2015, the respondent provided the Butler RFJ to the hockey association along with a detailed cover letter. He sought to justify his behaviour by making a nonsensical reference to the documents being public, even though the reasons were confidential and anonymized. He apologizes to the claimant for doing this and admits he handled this situation horribly. He characterizes his behaviour as a major error in judgment. He says he panicked and made a poor decision. In Justice Butler's reasons for judgment on costs for the first trial, he considered this incident and found that the respondent's actions were done "in an attempt to manipulate a parenting decision and, at the same time, embarrass the claimant" (at para. 33).
- [69] The respondent takes responsibility for his mistake and says it was a poor decision. He justifies his conduct by saying that he was concerned about what the claimant was telling the hockey association about him given her history of making false allegations. He did not give the claimant the benefit of the doubt because he has been the victim of false accusations. He thinks he was paranoid and admits his conduct was heavy-handed.

Claimant's Efforts to Volunteer at the Children's School

- [70] As part of the claimant's efforts to upgrade her skills, she decided to undertake a professional development program with a view to becoming a teacher. In order to qualify for this program, she needed to volunteer at a school. She wanted to do these volunteer hours at the school that the children attended.
- [71] The respondent was opposed to the claimant volunteering at the children's school and he threatened to provide the RFJ along with a summary of them to the principal of the school if she persisted in trying to volunteer there. As a result of the threat, the claimant did not volunteer with the school.
- [72] The respondent's threat was completely unwarranted and constitutes an example of an inappropriate action that was intended to control the claimant without regard for the impact this would have on her and on their children.

The Children's Activities

- [73] The parties have frequently disagreed about the children's activities. By all accounts, L is a proficient young athlete. The parties disagree on which sports he should focus on. The claimant purports to pay more attention to L's wishes in this regard and she believes that he prefers hockey to soccer. Unsurprisingly, the respondent favours soccer. The hockey and soccer seasons run concurrently. While it may be possible to play one sport at an advanced level and the other at a recreational level, the parties seem to agree that it will be difficult if not impossible for L to play both sports at an advanced level. Nevertheless, because of their inability to agree on L's activities, as of the commencement of the trial in September 2019, he was registered to play both sports at the advanced level.
- [74] The respondent believes that the claimant favours hockey and directs L to this activity. He says that he wants balance between the various sports L plays and defines this balance as a mathematical calculation of the relative time he spends playing each sport. L is a hockey goaltender and in his league, the expectation is that goaltenders will play 50% of the games in net and the other half as a skater. The respondent insisted that L play 33% of the games as a goaltender and the remaining games as a skater. He expected the hockey coach and the claimant to accede to his wishes but the evidence suggests that this caused problems between the parties because of miscommunication over whether L would be playing games as a goaltender or a skater. While seemingly inane, this is yet another example of the respondent's assertive and insistent behaviour.
- [75] The respondent insisted that L not attend a free goaltender camp, even on the weekends when the children were with the claimant. This is an example of unreasonable behaviour.

- [76] The respondent refuses to pay for L's hockey until all outstanding s. 7 expenses are addressed. As a result, the claimant pays the considerable expenses associated with playing hockey at an advanced level and the respondent pays for his other activities, which are not nearly as expensive as hockey.

Police Record Check

- [77] In March 2019, N was scheduled to attend an overnight camping trip organized by his school. The respondent sought to volunteer as a chaperone for this trip. The school required that volunteers obtain a police record check. When the respondent received this record it showed that he was a suspect for bestiality and sexual assault. This is presumably based on the false allegations made by the claimant. The respondent immediately asked the claimant to provide a statement to the police confirming that these allegations were false. At that time, she refused to take any steps to assist the respondent in resolving this issue. The respondent was therefore unable to attend the camping trip with N.
- [78] Shortly after her examination for discovery on May 7, 2019, the claimant says that she "indirectly" sought information on the issue of the respondent's criminal record check. Her evidence on this issue was vague other than to assert that she was told that there was nothing she could do to resolve this issue. She did not record the name, rank, position, or any other information regarding the person with whom she allegedly spoke. She also did not confirm that the person she spoke to worked in the department that deals with criminal record checks.
- [79] During the course of this hearing, the claimant says she called the RCMP to determine if she can do anything in respect of the false allegations on the respondent's criminal record check. She was apparently told that there was nothing that she could do. She says that she was referred to Crown counsel. When she spoke to someone in that office, she did not mention Justice Butler's findings that she admitted that these allegations were false, nor did she mention the parties' ongoing litigation. Again, she made no record of any of the details and does not recall with whom she spoke. She also did not inquire about a redress or appeal procedure. She took no steps on this issue prior to the examination for discovery.
- [80] The claimant will not commit to writing a letter to help expunge or suppress the respondent's criminal record information. She says that she is afraid of the ramifications for her of writing such a letter and vaguely explained that she had a right to be protected by the police. Although she says that the best interests of the children motivate her, she admits that the children would benefit from the respondent being able to attend overnight camps and other similar activities with them. The claimant was evasive during this line of questioning. She reverted to the position that she does not think a letter will assist so she will not write one. She says that she would agree to send the RFJ but reiterated that she had a right to be protected by the police.

- [81] I find that this behaviour demonstrates the claimant putting her own vaguely articulated interests ahead of those of her children.

Parental Communication

- [82] One of the parties' most persistent problems is their inability to communicate effectively with one another. The claimant believes that the respondent dismisses, diminishes, and minimizes her concerns or blames her for any issues that she brings forward. These concerns are the reason why she prefers working with others instead of directly with the respondent. The respondent is frustrated with the claimant's lack of consistent communication with him and feels that she too readily and frequently refers issues to their PC instead of speaking with him directly.
- [83] One example of the parties' inability to communicate effectively involved a conflict between N and L that the claimant recorded on her phone. The boys screamed at one another and became physical. The claimant indicated that this was the most defiant L had ever been and the most escalated that she had seen N. In the moment, she focused on safety and tried to separate the boys to prevent harm to either of them. The claimant was concerned about this altercation and forwarded it to the respondent to determine if similar problems arose when the children were at his residence.
- [84] The respondent found the recording to be extremely disturbing and indicated that he had never heard that level of aggression from the children. He took this behaviour at the claimant's residence as an indication that she was not effectively parenting and controlling the children. This response validated the claimant's concern that the respondent tends to blame her instead of working collaboratively with her to resolve issues between the children.
- [85] The respondent believes that he regularly reports to the claimant on issues involving the children but she does not reciprocate. She counters that she responds to the vast majority of the respondent's emails and that the volume of these communications has been high because of their significant conflict. She did not agree to exchange weekly updates on the children because the level of conflict between the parties was escalating and there was a complete lack of trust and respect between them. She believed that communicating directly with the respondent would escalate their already significant level of conflict. She says that she wanted to reduce the conflict by relying on their PC to make important decisions.
- [86] The claimant also would not agree to a "unity meeting" that was proposed by the respondent because she thought doing one lacked authenticity and the children would see through an artificial attempt to project an image that was not genuine given their level of ongoing conflict. The claimant points to the respondent's failure to support her on the hockey coaching issue and her desire to volunteer at the children's school as examples of the respondent's disingenuous treatment of her. The claimant believes that the respondent's conduct towards her has taken a significant financial and psychological toll on her. She feels

that whenever she raises an issue with him, he either denies it, insists that she prove it, or blames her.

- [87] Justice Butler noted that the respondent tended to be somewhat heavy-handed and intimidating in his communications. An example of this was his suggestion that she could alleviate her financial concerns by accessing the equity in her home. He denies that he was financially intimidating the claimant but admits that he provided rental listings to her in the event that she had to sell her home.
- [88] Over the past six years, the parties have been unable to communicate effectively with each other. As a result, they have been incapable of working together to make timely and informed decisions regarding the needs of their children. For the sake of the children, this must change. A different approach to parental decision making is required.

Dr. Aubé's s. 211 Report

- [89] Dr. Aubé, an experienced registered psychologist, was appointed to do a report pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. She completed her assessment of the parties, their children, and various other collateral contacts in December 2018 and completed her report on January 16, 2019 (the "Aubé Report"). The Aubé Report addressed the issues of guardianship, parenting time, and parental decision making. It also focused on the views and needs of each child.
- [90] During Dr. Aubé's interview of the respondent, he recounted the history of the claimant's past allegations of bestiality and sexual abuse of the children. In particular, he told her that the claimant took their dog to a veterinarian for testing that concluded that there was no evidence of sexual abuse. He also described the four different forensic medical examinations of the children that concluded that there was no evidence of physical or sexual misconduct. He further detailed the RCMP and Ministry of Child and Family Development investigations that did not find evidence of sexual misconduct and noted that he was unable to see his children for a seven-month period from May to December 2012 during the latter investigation.
- [91] The claimant told Dr. Aubé that she believes the current ABA team is biased against her and she believes that they are aligned with the respondent. She did not think that SD not coming to her house was detrimental to N. The claimant went on to detail her significant efforts in caring for N during his cancer treatment and told Dr. Aubé that the respondent did not see N's oncologist during this period. At the hearing, it became clear that this was not true. The respondent was familiar with N's oncologist.
- [92] Dr. Aubé found that both N and L are comfortable with having two homes. Interestingly, N prefers to be at his father's home while L prefers to have more time at his mother's residence. L told Dr. Aubé that he would prefer to have one week with one parent followed by one week with the other parent instead of their current 2-2-5-5 arrangement.

- [93] Several of the current ABA team members, MV, TM, and NS, indicated that both parents are supportive of N and the ABA team. TM described good communication between the team and the parents. NS noted that the claimant had not been attending weekly team meetings but she communicated regularly with her by email to provide her with relevant information. SD, the ABA team member that the claimant banned from attending from her home, noted that the team does not get feedback on how N is doing at the claimant's home. PM, the principal of the elementary school that the children attend, told Dr. Aubé that both parents were supportive of the children.
- [94] Notwithstanding the clear feedback she received from several of the ABA team members to the contrary, Dr. Aubé concluded that the claimant has an "ambivalent" relationship with the ABA team. She also concluded that the claimant's failure to attend ABA team meetings was significant and speculated that it may have been motivated by a desire to withdraw or sabotage the work of the ABA team. This view, although advanced strenuously by the respondent, was not supported by the information she received from current ABA team members. Based on no clear evidence that was before her, Dr. Aubé concluded that the claimant does not receive a great deal of information from the ABA team and does not contribute effectively to it. This finding runs completely contrary to the clear views expressed to her by MV, TM, and NS.
- [95] Dr. Aubé's clinical impression is that the respondent's rigidity accentuated after the release of the RFJ and his narcissism and resentment towards the claimant obstructed his judgment in some of the parental decisions he made. However, on balance, she found him to be a devoted father and an excellent advocate for his children.
- [96] After recounting a detailed history of the false allegations, Dr. Aubé found that the claimant underestimates the seriousness of the damage that these false allegations have caused to the respondent and by extension, to the children. Dr. Aubé also went beyond the scope of her s. 211 report in concluding that the claimant suffers from General Anxiety Disorder ("GAD") and has many of the features of Borderline Personality Disorder ("BPD"). Dr. Aubé reached these conclusions based on limited information and without explicitly applying the relevant DSM-V guidelines and diagnostic criteria in her report.
- [97] Although she went on to say that the claimant's attachment to her children is solid, unconditional, and they are the centre of her life, she believes that the claimant shares too much information with L. She also suspects that the claimant gives implicit messages to L to encourage him to side with her. Dr. Aubé provided no foundation for this suspicion or examples of these "implicit messages".
- [98] Based primarily on information from the respondent, and not from either the claimant or L, Dr. Aubé went on to conclude that the claimant engages in adultification and parentification of L. She described adultification as exposing a child to adult responsibilities and sharing decision making that should only be made by adults. Parentification occurs when a child feels like they must provide support to one of their parents.

- [99] Dr. Aubé's most striking and important finding is with respect to L. He told her that two years ago he felt sad and wanted to die. He linked this statement to his brother's autism and cancer diagnosis. He said that he is very sad in his heart and feels compelled to keep his sadness inside. He thinks that some of his sadness is because his parents dislike one another.
- [100] Dr. Aubé concluded that L is a child in a great deal of distress, turmoil, and pain as a result of an amalgam of confusion, anger, and sadness which is largely caused by his parents' ongoing conflict. She thinks both parents are to blame for this situation and strongly believes that L is in need of psychological help.
- [101] Dr. Aubé thinks that the children must be shielded from their parents' ongoing disputes and that, after a decade of litigation, they need a more efficient mechanism for decision making. She recommends that the respondent be given primary decision making authority based on her clinical assessment of each parent, concerns regarding the claimant's emotional stability, and perception of the relationship between the parents and the ABA team.
- [102] Dr. Aubé recommended that the parents retain joint guardianship. On parenting time, she came to the conclusion that equal parenting time should continue on two conditions: first, that the claimant resume attending the weekly ABA team meetings; and second, that she attend an intensive course of Dialectical Behavioural Therapy for people with BPD. In the event that these conditions are not met by the claimant, she recommended that the children spend weekdays with their father, from Monday to Friday, and have three weekends a month with their mother during the school year. During the rest of the year, she recommended that the children spend one week with one parent and the following week with the other parent.

Dr. Korpach's Critique of Dr. Aubé's s. 211 Report

- [103] Dr. Mary Korpach, who is also a registered psychologist, does not think that diagnoses should be made in the context of s. 211 assessments because the subjects are often stressed and in a heightened state of conflict. They also may not reveal as much as they would in a clinical setting. She accordingly believes that it was improper for Dr. Aubé to prescribe intensive treatment for BPD absent a solid foundation to make this diagnosis. Dr. Aubé noted only a couple of traits of this disorder. Dr. Korpach indicated that BPD is a very serious diagnosis and if Dr. Aubé did not make a complete diagnosis of it based on detailed clinical information assessed against the criteria set out in the DSM-V, she should not have referred the claimant for intensive treatment that is intended to address severe BPD.
- [104] In reviewing the results of the standardized psychological tests administered to both the claimant and the respondent, Dr. Korpach concludes that the Aubé Report is biased because she did not subject the respondent's markers of paranoia to a treatment requirement even though his scores were higher for this condition than the claimant's

results were for BPD. She thinks Dr. Aubé's reliance on her own clinical judgment is subject to significant cognitive bias and relies unduly on intuition. Instead, Dr. Korpach recommended that Dr. Aubé should have relied more substantially on objective data from multiple sources. Dr. Korpach confirmed that there is no psychopathology in the claimant's scale reports, but there was for the respondent. Dr. Korpach also believes that Dr. Aubé was biased because she made a diagnosis for GAD for the claimant but did not make the same finding for the respondent even though his scores were higher than hers for this particular disorder.

- [105] Dr. Korpach thinks that the methods and procedures relied on by Dr. Aubé in diagnosing the claimant were not based on scientific findings and are therefore based on little more than her own intuitive clinical judgment.
- [106] According to Dr. Korpach, Dr. Aubé should have validated her recommendations by asking further questions. Dr. Aubé may have unwittingly become subject to the primacy effect, where one is influenced by the first story they hear. Dr. Korpach noted that Dr. Aubé set out several pages of the respondent's narrative and only two paragraphs of the claimant's story. Furthermore, there is an over-emphasis on the claimant's mistakes but no mention of the respondent giving the RFJ to the hockey coach and hockey association or threatening to give them to the principal of the children's school.
- [107] Dr. Korpach concludes that it appeared that there was bias in the Aubé Report because she did not use a consistent forensic approach. Dr. Korpach asserts that the report shows bias in methods, procedures, approach, and conclusions. Data was treated in a non-parallel manner and the psychologist's code of conduct requires the use of parallel procedures whenever the rights of two or more people are involved or a discussion of the limitations of the findings because of not having done so.

Analysis of s. 211 Report and Critique

- [108] Dr. Aubé did not list or rigorously apply the DSM-V criteria for GAD or BPD. Accordingly, I accept that she should not have made these diagnoses and should not have set out a treatment plan for BPD as a condition of the claimant retaining equal parenting time.
- [109] I further accept that Dr. Aubé tempered and minimized the respondent's mistakes and errors in judgment. As Dr. Korpach's opinion points out, she made no reference to him sending the RFJ to the hockey coach and association and threatening to send them to the principal of his children's school. She also underplayed his narcissism, which his own counsellor described as significant and she described as mild. These examples demonstrate that the Aubé Report minimized the respondent's negative behaviours.

- [110] Dr. Aubé provided no analysis of potential harm to the children if their parenting time with their mother is reduced. This is significant given that she had the majority of the parenting time until 2014 and has had equal parenting time since then. The respondent's proposal would provide her with 20% to 25% of parenting time during the school year, a marked departure from the current arrangement.
- [111] Similarly, the requirement that the claimant physically attend and emotionally cooperate with the weekly ABA team meetings is unsupported by the information she obtained from the four ABA team members she interviewed, which described the claimant's behaviour as cooperative and communicative.
- [112] Dr. Aubé focused significantly on the false allegations. While serious, these allegations were thoroughly considered and reviewed by Justice Butler. They may well inform much of the respondent's ongoing animosity towards the claimant, but Dr. Aubé did not assess this. Instead, she seems to have reargued this issue on behalf of the respondent in her report.
- [113] For these reasons, I do not accept Dr. Aubé's diagnoses of the claimant and have given the Aubé Report no weight with respect to the areas that I have found to be problematic. I have taken into consideration the portions of her report that are not tainted by the difficulties I have identified such as her finding that L is in distress and in need of psychological help.

CREDIBILITY ASSESSMENT

Relevant Legal Principles

- [114] Credibility is an assessment of the trustworthiness of a witness' testimony. This assessment involves the examination of various factors including the demeanour of the witness, their ability to resist the temptation to modify their recollection of events to suit their interests, and whether their testimony changes during direct and cross-examination. The validity of the evidence depends on whether it is consistent with the probabilities affecting the case as a whole. The Court must determine which version of the events is most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-87, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Q.B.).

Analysis of the Parties' Credibility

- [115] There were several inconsistencies in the claimant's evidence. For example, in her direct evidence, she testified that she thought TM would work with N for an additional 30 minutes at school for which the parties were paying her directly, she later admitted under cross-examination that she knew that this was not possible.

- [116] The claimant had a tendency to slant her testimony in a manner that was more favourable to her position. For example, she rationalized going directly to the PC with the issue of L's suicidal comments because the respondent had "just" given the RFJ to the hockey association and had denied her request to volunteer at the children's school. The respondent gave the RFJ to the hockey association in August 2015 and he opposed her volunteering in that same year. Her decision to consult the PC on L's suicidal comments was more than two years later, in November 2017.
- [117] The claimant's evidence on her efforts to determine what, if anything, she could do in respect of the respondent's criminal record check casts doubt on her credibility. She admits that the children are adversely affected by not being able to have their father join them on school trips, and other volunteer activities, but she refuses to take any steps to resolve a problem that she alone created. Her vague explanations of having called the RCMP and Crown counsel office are at best, late and half-hearted attempts to rehabilitate her position on this issue. I note that the claimant was extensively questioned about this issue at her examination for discovery and her first purported attempt in this regard took place shortly after this examination. Her second alleged attempt to obtain this information took place during the period when this hearing was taking place and it became clear that this issue would be considered.
- [118] During cross-examination on this issue, the claimant was evasive and vague. She insisted that she would not write a letter to assist the respondent's efforts to clear his name because she was convinced that doing so would not make a difference. I am not convinced that she made significant efforts to remediate the damage with respect to the respondent's criminal record, or that the efforts she made were proportionate to her role in causing the damage and the continued harm that it causes the respondent and the children. Her evidence that she did was not credible.
- [119] The respondent's testimony was forthright and consistent. He made reasonable admissions and accepted fault appropriately. For example, he admits that he erred by sending the RFJ to L's coach and the hockey association and by opposing the CWF Disneyland trip. I accept that he made these mistakes at a time when he was angry after having discovered the extent to which the claimant propagated false allegations and involved both children in repeated medical examinations in furtherance of her erroneously held belief. The respondent reflected on his mistakes, takes responsibility for them, and most importantly, has learned from them with a view to making better decisions in the future for the benefit of the children.
- [120] His evidence shows that he defers to experts and relies on evidence-based approaches. This is apparent in his approach to dealing with the ABA team and making decisions about N's therapeutic needs.
- [121] On balance, I find the evidence of the respondent to be more credible than that of the claimant.

ISSUES

[122] The first issue to be determined is if there has been a material change in the circumstances since March 17, 2014, the date of Justice Butler's RFJ.

[123] If I find that there is a material change in circumstances, the following issues must be determined:

- a) parental decision making;
- b) parenting time;
- c) child support; and
- d) the value of the BSP.

Has There Been a Material Change in the Circumstances of N and L Since March 17, 2014?

Relevant Legal Principles

[124] The leading case on a material change of circumstances is the Supreme Court of Canada decision of *Gordon v. Goertz*, [1996] 2 S.C.R. 27, in which the Court articulated the following principles:

- a) Before a court considers the merits of an application for variation, it must be satisfied that there has been a material change in the circumstances of the child since the last order was made. Therefore, if the applicant is unable to show the existence of a material change, the inquiry ends (at para. 10).
- b) The requirement of a material change in the situation of a 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 and substitute its discretion for that of the original judge; it must assume correctness of the decision and consider only the change in circumstances since the order was issued (at para. 11, emphasis in original).
- c) In order for a change to be material, it must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. The question is whether the previous order might have been different had the circumstances now existing prevailed earlier. The change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order (at para. 12.)
- d) Before entering on the merits of an application to vary an order, the judge must be satisfied of: (1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; (2) which materially affects the child; and (3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order (at para. 13).

- e) Once the threshold condition of a material change in circumstance is established, the court should consider the matter afresh: "The judge on the variation application must consider the findings of fact made by the first judge as well as the evidence of changed circumstances" to determine what parenting arrangements are in the best interests of the children (at para. 17).
 - f) It is artificial for a court to restrict its analysis to the change that justifies variation: "[A]n assessment of the entirety of the present circumstances of the parties and the children is in order" (at para. 18, citing *Willick v. Willick*, [1994] 3 S.C.R. 670 at p. 734-35).
 - g) The Court should consider the following factors (at para. 49(7)):
 - i) the existing custody arrangement and relationship between the children and the custodial parent;
 - ii) the existing access arrangement and the relationship between the children and the access parent;
 - iii) the desirability of maximizing contact between the children and both parents;
 - iv) the views of the children; and
 - v) disruption to the children of a change in custody.
 - h) "The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?" (at para. 50).
- [125] A material change of circumstances is a change that if known at the time of the trial, probably would have resulted in different terms. "The focus of the analysis is on the prior order and the circumstances in which it was made. [A] court ought not to consider the correctness of that order, nor is it to be departed from lightly": *L.M.P. v. L.S.*, 2011 SCC 64 at para. 33.
- [126] The material change threshold is intended to prevent parties from re-litigating issues that were already considered and rejected; an application to vary is not to be used as an appeal from the original order.
- [127] A material change must be "substantial, unforeseen, and of a continuing nature": *Carter v. Carter* (1991), 58 B.C.L.R. (2d) 45 (C.A.).

Position of the Respondent

- [128] The respondent submits that the ongoing conflict between the parties was neither contemplated nor reasonably foreseeable when the trial order was made. The Court expected less conflict based on its expectation that the parties would defer to neutral third party experts. Justice Butler indicated that the parties:

- [80] have the ability to reasonably settle matters of contention once their emotions are removed from the equation. I expect that if neither party has the authority to make final decisions, the recommendations of the consultant will be given appropriate deference and consideration by both parties. I expect and hope there will be little need for dispute resolution.
- [129] The respondent asserts that the claimant has not deferred to consultants and medical professionals. He points to the claimant's assertions that the ABA team was biased against her as well as her unwillingness to immediately accept the advice of medical professionals on the issue of vaccinating the children.
- [130] The respondent also believes that the claimant's decision to avoid ABA team meetings from January 2017 to July 2019, along with her efforts to terminate four of the six ABA team members, are unexpected material changes of circumstance that affect N. He also points out that the RFJ did not have the expected sobering effect on the parties. Their conflict has continued and it has prevented them from making decisions regarding the children.
- [131] Furthermore, it is the respondent's view that the claimant breached the court order by failing to advise him of L's suicidal statements when they first arose. He also alleges that a troubling relationship dynamic has emerged between the claimant and L as described by Dr. Aubé.
- [132] The respondent believes that these changes of circumstance are material and the needs of the children are not met by the current order. Specifically, the parties' inability to communicate effectively prevents them from jointly making decisions involving the children. He also contends that his home is more stable than the claimant's and the children will benefit by living at his residence on weekdays during the school year with the remainder of the parenting time to be divided equally.
- [133] The respondent does not believe that the significant increase in his income constitutes a material change of circumstance that warrants an increase in child support payments.

Position of the Claimant

- [134] The claimant believes that there has been no material changes of circumstances that justify the orders sought by the respondent and that those orders are contrary to the best interests of the children.
- [135] She points out that the conflict regarding the bestiality and sexual abuse allegations predates the first trial and continues to affect the respondent's behaviour towards her. She thinks that the respondent's anger towards her continues to take precedence over his ability to make decisions that are in the best interest of the children. Furthermore, she asserts that he continues to be aggressive and rigid, while disregarding her views or blaming her for their ongoing conflict. She also notes that he persistently minimizes or fails to appreciate the children's problems. She points out that Justice Butler noted these issues in the RFJ (at

paras. 46 and 79).

[136] The claimant refers to several examples of the respondent's poor decision making since the RFJ to suggest that he has not changed his approach to her or the children. These examples are:

- a) the respondent's resistance to permitting N to go on a CWF trip to Disneyland;
- b) his decision to send the unpublished and anonymized RFJ of Justice Butler to the hockey association;
- c) his threat to send the RFJ to the principal of the children's elementary school;
- d) his refusal to change the day of the weekly ABA Team meeting to accommodate the claimant; and
- e) his refusal to agree to counselling for L and N.

[137] Accordingly, the claimant asserts that there has not been a material change in circumstance affecting the children that warrants changes to either parenting time or decision making.

[138] On the issue of child support, the claimant notes that the doubling of the respondent's income since 2014 constitutes a material change in circumstance that warrants an increase in his child support obligations. She contends that he should have reported these increases over the past five years as required by the March 17, 2014 order, failed to do so, and accordingly is liable to pay both retroactive child support and increased future child support.

Factual Findings and Analysis

[139] In my view, a material change of circumstance that is substantial, unforeseen, and ongoing, is the seriously detrimental effect of the parties' ongoing conflict on the emotional and psychological well-being of their children. Both children are acutely aware of their parents' conflict and L in particular has been significantly affected by it. His suicidal ideation and ongoing emotional turmoil are a direct result of this conflict, most of which arises over the parties' complete inability to make decisions based on their children's best interests. Instead of working together to make decisions based on their children's best interests, they each use every minute issue or dispute involving their children as an opportunity to lash out at one another.

[140] Justice Butler's expectation that with the assistance of a PC, the parties would be willing and able to jointly make decisions in the best interests of their children is entirely understandable. That is what well-adjusted, properly motivated parents do. They appreciate that while their relationship failed, they have a crucial and ongoing responsibility to set aside their differences and work together to make the necessary and appropriate decisions for the benefit of their children.

- [141] The respondent admits that he was very angry in the wake of the first trial and one would think that this would have been the optimal time to begin using a PC in order to assist the parties in the immediate aftermath of a long and emotional trial. Instead, he delayed and avoided the appointment of the PC for a year after the RFJ even though he agreed to the appointment of one during the trial. After Ms. McLeod became the parties' PC, the respondent frustrated her ability to work with the parties by failing to cooperate with her and refusing to pay her invoices.
- [142] In 2015, the respondent pulled L out of hockey for what should have been his first year of playing organized hockey because he did not receive information that he was not, in any way, entitled to regarding communications between his ex-wife and a hockey coach. He further exacerbated this conflict by sending the unpublished and anonymized RFJ of Justice Butler not only to this coach, but also to the president and other members of the hockey association. Instead of accepting his ex-wife's explanation that she wanted L to switch to another team because she was receiving unwanted advances from the coach of his current team, he put his own needs ahead of what was best for L, and used him, his then five-year-old son, as an unwilling pawn and victim of this entirely unnecessary dispute.
- [143] The claimant refused to take any steps whatsoever to correct or expunge the information held by the RCMP that indicates that the respondent is suspected of bestiality and child sexual abuse. She knows perfectly well that these allegations that she initiated and propagated are false. She admitted this in the first trial. She also must realize that this information has and will continue to limit the respondent's ability to volunteer with the children's school and other activities.
- [144] Instead of assisting the respondent in removing this false information, the claimant advanced a narrative that she had taken some vaguely described steps to determine if she could assist him. In the immediate aftermath of her examination for discovery, she purportedly telephoned the RCMP to make inquiries about removing the allegations. She failed to obtain the name or department of the person she spoke to and was unable to provide meaningful details of this exchange. Next, during the five-week hearing of this matter, presumably because she realized that this issue would arise, she made further, albeit half-hearted attempts to obtain information from the RCMP on the correction of the false information. She continued to be vague about who she spoke to or what information she obtained other than to say that she was told that she would not be able to assist with removing the false information. In my view, she undertook these minimal steps for the purposes of addressing this issue at the hearing, not to actually correct the record.
- [145] It is both telling and breathtakingly sad, that the claimant is entirely unwilling to commit to take any further steps whatsoever to assist the father of her children in correcting the egregiously false allegations that she initiated. This conduct has a direct effect on the children: their father is unable to attend overnight outings with them as a volunteer or chaperone them because of the false information contained in the RCMP's records. Furthermore, these serious allegations remain on his record. Instead of setting aside her

own feelings and resentment towards the respondent in order to do what is demonstrably in the best interest of the children, she chooses to do nothing to rectify a problem she created. This recent example of her poor decision making is disappointing and detrimentally affects the children.

- [146] In her s. 211 report, Dr. Aubé opined that the status quo level of ongoing conflict is detrimental to the children. Importantly, she notes that the theme of being sad is overwhelming for L and she describes him as a child who does not feel good about himself, is deeply unhappy, and in turmoil, pain, and distress. She believes that L needs psychological counselling and that he and N will benefit from a reduction of conflict with a change to decision making authority.
- [147] In my view, the parties' ongoing conflict has negatively affected the mental health and emotional development of the children. This outcome is serious, unexpected, and continuing. This material change in circumstance justifies changes to the manner and mechanism by which decisions are made for the children.
- [148] It is also beyond doubt that the doubling of the respondent's income constitutes a material change in circumstance regarding his obligation to pay child support.

How Should Significant Decisions Involving the Children be Decided?

Relevant Legal Principles

- [149] The parties and the court must consider only the best interests of the child in making an order under Part 4 [Care of and Time with Children] respecting parenting arrangements: s. 37(1) FLA. Likewise, under s. 16(8) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], the court must only take into consideration the best interests of the child as determined by reference to the condition, means, needs, and other circumstances of the child in making an order under that section for custody or access. The court must not take into consideration the past conduct of any person unless it is relevant to that person's parenting ability: DA s. 16(9).
- [150] Subsection 37(2) of the FLA provides that all of the child's needs and circumstances must be considered in order to determine what is in their best interests, including the following (non-exhaustive) factors:
- a) the child's health and emotional well-being;
 - b) the child's views, unless it would be inappropriate to consider them;
 - c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - d) the history of the child's case;
 - e) the child's need for stability, given the child's age and stage of development;

- 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 his or her responsibilities;
- 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;
- h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- 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; and
- j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[151] Division 2 of Part 4 of the FLA sets out the relevant principles for parenting arrangements. Although the general principle is that each child's guardian may exercise all parental responsibilities with respect to the child, parental responsibilities may be allocated under an order such that they may be exercised by one or more guardians only: s. 40(2) and (3). Similarly, s. 16(6) of the DA provides that the court may impose any terms, conditions, or restrictions in connection to a custody or access order.

[152] Subsection 40(4) of the FLA specifies that in making parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, it must not be presumed that parental responsibilities should be allocated equally among guardians or that decisions among guardians should be made separately or together. Although s. 40 of the FLA and s. 16 of the DA conflict with respect to whether or not there is a presumption that maximum contact with each parent is in the child's best interests, this is more relevant to parenting time than parenting decision making. In circumstances where the DA and the FLA conflict, and even where there is no difference in statutory approach, federal paramountcy rules dictate that the DA takes precedence: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20.

[153] Parental responsibilities are set out in s. 41 of the FLA and are as follows:

- a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- b) making decisions respecting where the child will reside;
- c) making decisions respecting with whom the child will live and associate;
- d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;

- e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- h) giving, refusing or withdrawing consent for the child, if consent is required;
- i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- j) requesting and receiving from third parties health, education or other information respecting the child;
- k) subject to any applicable provincial legislation,
- i. starting, defending, compromising or settling any proceeding relating to the child, and
- ii. identifying, advancing and protecting the child's legal and financial interests;
- l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[154] In *J.E.H. v. P.L.H.*, 2013 BCSC 752 at para. 58, Justice Abrioux (as he then was) set out the summary of principles applicable to decision making authority:

- there has been a general unwillingness to impose mandatory joint decision making on parents who cannot get along and are unable to communicate. This is out of concern for the well-being of the children;
- the ability of the parents to communicate and cooperate remains an important factor when considering the best interests of a child: *Jordan v. Jordan*, 2001 BCSC 1058 at para. 20
- joint guardianship with no ultimate decision-maker may not be appropriate on the basis that the cost and delay of applying to court each time the parents cannot agree is not warranted. Ultimately a decision has to be made. In such circumstances, the primary caregiver is best able to make the decision after making an effort to seek a consensus with the other parent: *Andrew-Reed v. Reed*, 2002 BCSC 513 at paras. 17-18
- a particular parent's understanding of the general and special needs of a child, such as autism spectrum disorders, is a factor which can be taken into account with respect to custody, guardianship, where the primary residence should be and which parent should have the ultimate decision making power: *M.H.K.J. v. K.J.J.*, 2011 BCSC 1673 at paras. 78-82
- final decision making authority can be ordered in situations to avoid continuing conflict due to the level of acrimony between the parents: *S.M.M. v. J.P.H.*, 2011 BCSC 1084 at para. 227

· the Joyce model of guardianship [in which one party is entitled to make final decisions on major issues if the parties are unable to agree, and the other party is entitled to have such decisions reviewed by the court] may well be appropriate if the court is satisfied the primary custodial parent will in fact consult and seek the input of the other parent prior to making major decisions: *Chin v. Frass*, 2011 BCSC 272 at para. 29

Position of the Respondent

- [155] The respondent believes that he uses an evidence-based approach to decision making. He gathers information, consults experts, such as the members of the ABA team, and properly defers to their judgment. By contrast, he asserts that the claimant continues to reach conclusions, look for support for them, and ignore contrary views. He cites the claimant's decision not to attend ABA team meetings for two-and-a-half years, her ongoing issues with members of the ABA team, and the almost yearlong delay in vaccinating the children, as examples of the claimant's poor decision making.
- [156] The respondent commits to continuing to consult the claimant on decisions involving the children but believes that making these decisions has been a significant source of conflict that requires a new approach. He thinks the PC process is too long and expensive and that the parties need a more timely and effective way of making decisions involving the children.

Position of the Claimant

- [157] The claimant thinks that there has not been a change of circumstances that justifies a change in decision making authority. She asserts that the respondent's anger towards her in respect of the false allegations takes precedence over his consideration of the best interests of the children. She also thinks that he does not value her input and does not adequately consider her views. She believes that he downplays the issues the children face. She relies extensively on the findings in the RFJ and the subsequent costs decision to support her contention that the respondent should not have sole decision making authority.

Factual Findings and Analysis

- [158] In my view, the respondent is more reasonable and exhibits better decision making on most issues as compared to the claimant. The documentary evidence demonstrates that he communicates extensively with the claimant, seeks her views, engages with professionals appropriately, and makes decisions by exercising good judgment based on the best interests of the children. Examples of his poor decision making are in respect of the CWF trip to Disneyland, his dealings with the hockey association, and on the issue of the claimant volunteering at the children's school. These events took place several years ago in the aftermath of the parties' first trial. The respondent's animosity towards the claimant was high because of the details of the false allegations that became known during the trial. The respondent made poor decisions when he was unduly suspicious of the respondent, but

placed in the context of having been falsely accused of having sex with the family dog and sexually assaulting his children, his animosity is not surprising. Furthermore, the claimant continues to resist any efforts to clear his record of these false allegations that she has admitted, and accepted, are false.

- [159] Although the respondent seeks the claimant's views, he continues to minimize and dismiss them or blame her for the underlying problem. Examples are that he did not listen to her when she told him that L expressed suicidal ideation and he blamed her for the children's conflict when she shared a recording of a heated argument between the children. This raises a concern about the respondent's ability to consider the claimant's views when she raises reasonable and important issues about the best interests of the children.
- [160] The claimant and respondent are unable to communicate effectively with one another. The respondent makes efforts to engage with the claimant but their history of conflict and animosity, paired with their inability to set aside these personal differences, prevents them from working together to make decisions for the children. This is apparent from the number of issues they have referred to PCs.
- [161] Countless decisions must be made for the children, including those involving N's ABA therapy, the children's education, extra-curricular activities, and medical decisions, to name only a few. The parties have tried to communicate with each other and failing that, tried working with PCs. Parenting coordinators try to assist parents in developing the necessary skills to make appropriate decisions. If this is not possible, they make significant decisions for them. However, it is impractical for virtually every decision involving the children to be made by a PC. Doing so would be needlessly expensive and time consuming.
- [162] The parties have tried communicating with each other on decisions and referred a series of issues to the PCs. Nothing has worked and the evidence is that the children are acutely aware of the conflict between their parents. This level of ongoing conflict over decision making must stop. In my view, the level of acrimony between the parents justifies ordering that final decision making be given to one of them.
- [163] In my view, the respondent has demonstrated better decision making judgment than the claimant. He relies on evidence and appropriately defers to experts. I am influenced in this regard by the claimant's:
- a) decision not to attend ABA team meetings for two-and-a-half years;
 - b) refusal to allow SD, the ABA team leader, to work with N in her home;
 - c) persistent and ongoing efforts to make significant changes to the composition of the ABA team notwithstanding her admission that this therapy was working well for N;
 - d) unnecessary delay in immunizing the children; and

- e) refusal to take any concrete steps to rectify the false information contained in the RCMP's records regarding the respondent.

[164] I am mindful that the respondent has a tendency to disregard or minimize the claimant's views, for example on L's need for counselling. In order to properly exercise his decision making authority, he must take into account the claimant's input and give it appropriate consideration. This is particularly important because the children confide in her on some sensitive and emotional issues that they do not discuss with him. The respondent will be doing a disservice to the best interests of the children if he continues to minimize or dismiss her input on decisions affecting them.

[165] In the interest of reducing the conflict between the parties that undoubtedly affects the children, the respondent will have final decision making authority. To be clear, he must consult with the claimant and seriously and thoughtfully consider her views instead of dismissing, minimizing, or leveraging them for his own benefit. However, to the extent that the parties disagree on decisions that affect the children, he will have final decision making authority.

How Much Parenting Time Should Each Parent Have?

[166] For almost six years, the parties have had equal parenting time on a 2-2-5-5 schedule pursuant to the decision of Justice Butler. The respondent seeks a significant increase in his parenting time. The claimant wants to maintain equal parenting time.

Position of the Respondent

[167] The respondent submits that he should have parenting time with the children each week from Monday to Friday and for at least one, and preferably two, weekends in each four-week rotation. He believes that the children will benefit from the structure and consistency of this schedule. He cites the Aubé Report as support for this schedule. He believes that the children's behaviour is "dysregulated" when they are at their mother's home and that they do not exhibit this behaviour when they are with him. He also asserts that the parties' breakdowns in communication and cooperation has made joint parenting unworkable. On the basis that their relationship continues to involve a high degree of conflict, he thinks that it would be best for the children to have more time in his home that he and his wife describe as stable, consistent, and respectful.

Position of the Claimant

[168] The claimant wants equal parenting time to continue. Given the children's current ages, she supports alternating weeks and wants the transition day to be Tuesday. She asks that the parties cooperate with one another to adjust the alternating of weeks to accommodate her weekend school schedule. It is her position that the children benefit from having significant time with her because she provides them with significant emotional support and they talk to her about things that they do not share with their father. For example, L told Dr. Aubé

that he likes talking to his mother when he has a bad day, she listens to him, and accordingly, he talks to her about more things than he discusses with his father.

- [169] The claimant notes that both children told Dr. Aubé that they are content with equal parenting and notes that there is no direct evidence on how a reduction in parenting time with their mother and a corresponding increase in parenting time with their father would affect them. The claimant believes that the variation proposed by the respondent will be disruptive and contrary to the children's health and emotional wellbeing.

Factual Findings and Analysis

- [170] As noted above, in determining parenting time, the Court must consider "only the best interests" of the children "as determined by reference to the condition, means, needs and other circumstances: s. 16(8) of the DA. The factors to be considered in determining the best interests of the children are set out in s. 37(2) of the FLA, outlined above. I have considered all of these factors in determining the best interests of N and L. Finally, I have considered the principle that children should have as much contact with each parent as is consistent with their best interests: s. 16(10) of the DA.
- [171] In my view, it is in the children's best interest for the parents to continue to share parenting time equally on a weekly rotation. The reasons for this conclusion are set out with reference to the factors in s. 37(2) of the FLA.
- a) Emotional Health and Well Being
- [172] As described earlier, the children's emotional health and well-being has been detrimentally affected by the ongoing conflict between their parents. This conflict is largely caused by the parties' inability to work together to make decisions based on the best interests of their children. I am hopeful that the aforementioned change to decision making will reduce the conflict between the parties and provide a more stable platform for the children's future emotional health and well-being.
- [173] Although the conflict between the parties has adversely affected their children, the parties both provide significant nurturing and emotional support to them during the time they spend together. The children share their innermost thoughts and feelings with their mother. N has spoken to her about his concerns about autism and entering high school. L confides in his mother when he is angry or scared. He spoke to his mother about his feelings of hopelessness and anxiety in both 2015 and 2017.
- [174] The children also emotionally benefit from the time they spend with their father. He plays sports with them, assists them with their homework, and participates in their activities. The respondent actively and consistently engages with the ABA team throughout N's ABA therapy. He coaches L's soccer team and structures his schedule to maximize his time with his children. The respondent and his wife have built a home environment that supports and nurtures their children.

[175] In my view, the children's emotional health and development is best served by continuing to have significant and equal time with each of their parents.

b) The Children's Views

[176] The children enjoy spending time with both of their parents and they are comfortable in both homes. Dr. Aubé reported that N had a slight preference for spending time at his father's home while L wanted more time with his mother. These seemingly minor and divergent preferences do not support a change in parenting time.

c) Nature and Strength of Relationships With Parents and Others

[177] The children have strong relationships with each of their parents. They benefit from the emotional warmth and openness of their mother and she has been a significant presence and influence throughout their lives. I reject Dr. Aubé's finding that the claimant shares too much information with the children because this finding was inadequately supported and likely influenced by her inappropriate diagnoses of the claimant.

[178] The children also have strong bonds with the respondent, his wife, and their step-siblings. They enjoy spending family time together by sharing meals, playing games, and supporting each other's activities. For example, the respondent's family strongly supports autism fundraising activities and they all join N in taking part in these events.

d) History of Care

[179] The children have had equal parenting time with the parties for approximately six years. The schedule of going back and forth between the parties' residences has been a regular and consistent part of their weekly routine. The children adapt well to these transitions and any significant change to this routine would be a significant departure that would only be justified if the current arrangement was demonstrably ineffective. In my view, that is not the case. The children have and will continue to benefit from significant and equal parenting time with each of their parents.

e) Need for Stability

[180] One form of stability is the structure and routine that the respondent described when explaining how his home functions. Stability is also the consistent and ongoing presence and engagement of both of the parties in their children's lives. The emotional support that the claimant provides to the children and the structure and supportive domestic environment created and nurtured by the respondent and his family are both important and stabilizing influences on the children.

[181] L expressed a preference for moving from a 2-2-5-5 day alternating plan to a weekly transition. The parties agree that if equal parenting time continues, a weekly transition is best for the children. Given the children's ages, L's expressed preference, and the concurrence of the parties, I agree that the parenting time schedule should change to a weekly transition. The transition day shall be Tuesday with changes to be agreed by the parties having regard to their schedules and the timing that works best for the children.

f) Ability of Each Guardian to Exercise Responsibilities

[182] The claimant is furthering her education by working on a Master of Arts degree in psychology. For the most part, she is able to arrange her schedule to ensure that she is able to take care of the children during her parenting time.

[183] The respondent organizes his work schedule so that he can leave his office by mid-afternoon in order to spend time with the children after they finish school. His wife often works from home and they have a nanny/housekeeper.

[184] Both parties are committed to and capable of exercising their parenting responsibilities based on the needs of their children and to their credit, they have done so over the past six years notwithstanding their interpersonal conflict.

g) Family Violence Concerns and the Safety of the Children (also h) and k))

[185] The claimant asserts that the respondent's communication with L's hockey coach and decision to disclose the RFJ to the hockey association was an example of family violence. She also asserts that the respondent's threat to provide the RFJ to the principal of the children's school, if she persisted in her attempts to volunteer at that school, was also an example of family violence. Family violence is defined in s. 1 of the FLA and includes "(d) psychological or emotional abuse of a family member, including (i) intimidation, harassment, coercion or threats".

[186] Both of these events took place in the immediate aftermath of the first trial. The respondent clearly erred and demonstrated poor judgment in taking these actions. He has expressed remorse and contrition for these serious lapses of judgment.

[187] I accept that these actions were motivated by an emotional reaction to discovering the details of the false allegations made by the claimant. They are undoubtedly serious but they do not rise to the level of constituting family violence because the respondent did not endanger or threaten the claimant or the children, including psychologically or emotionally. In my view, these emotional outbursts were aberrations from an otherwise consistent pattern of the respondent demonstrating that he is entirely capable of caring for the children and prioritizing their needs ahead of his own.

[188] In summary, both the claimant and the respondent provide significant value to their children's lives. The children confide in the claimant and are more comfortable sharing their thoughts and feelings with her than with the respondent. Throughout their childhood,

she has been a significant and consistent part of their lives. The respondent also plays an integral role in the children's lives. The children would experience a deep sense of loss if their time with their mother were substantially reduced. The parties have a shared devotion to their children and each brings different strengths in respect of their parenting skills. In my view, the children will continue to benefit from equal parenting time with both of their parents on a weekly transition.

What Amount of Child Support is Payable?

Relevant Legal Principles

[189] The respondent earns a significant income and I have determined that the parties will continue to share parenting time equally. Therefore, s. 4 and s. 9 of the Guidelines apply to the determination of child support:

Incomes over \$150,000

4 Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
- (iii) the amount, if any, determined under section 7.

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.

[190] The essential consideration under both sections is "the condition, means, needs and other circumstances" of the children.

- [191] There is a presumption in favour of the Guidelines amount and the party seeking to depart from this amount has the onus of rebutting this presumption: *Francis v. Baker*, [1999] 3 S.C.R. 250 at para. 42.
- [192] Clear and compelling evidence is required to support a departure from the Guidelines: *Francis* at para. 43.
- [193] There must be "some articulable reason for the court to conclude that the Table amount is improper or unreasonable in the unique circumstances of the case": *Plester v. Plester* (1998), 56 B.C.L.R. (3d) 352 (S.C.) at para. 153.
- [194] In this case, the respondent's income is significantly above the \$150,000 per year threshold in the Guidelines. The court is therefore required to undertake a careful analysis of the actual means, needs, and circumstances of the parties and their children to determine a fair award: *S.G. v. K.G.*, 2012 BCSC 1937 at para. 121.
- [195] In the RFJ, Justice Butler made several important findings:
- a) The parties did not have a lavish or extravagant lifestyle prior to separation, but it would be an error to set the child support based on a modest pattern of expenditure (at paras. 124 and 131);
 - b) It would be inappropriate for the respondent to pay the full Table amount of child support because "the condition, means and needs of the children can be met comfortably if a lesser amount is paid by the respondent" (at para. 127);
 - c) The respondent's Guidelines income was \$900,000 and the relevant Table amount of child support for this amount was \$11,554. Justice Butler ordered child support of \$9,000 per month (at paras. 108, 112, and 132);
 - d) The claimant's expenses for activities, transportation, and vacations would increase as the children grew older (at para. 129); and
 - e) A s. 9 analysis is not necessary in these circumstances because the claimant has no income and none is imputed to her. Therefore, there is no setoff of support obligations. This factor, combined with the substantial income of the respondent and their modest lifestyles, indicates that the parties will have the ability to meet the increased costs of maintaining two households of equal standards of living: (at para. 133).
- [196] The children are entitled to benefit from the respondent's increase in income because s. 1(a) of Guidelines states that they are to "continue to benefit from the financial means of both spouses after separation": *R. v. R.*, [2002] O.J. No. 1095 (C.A.) at para. 57.
- [197] If the Table amount is excessive in relation to the reasonable needs of the children, the Table amount should be reduced in order to avoid a de facto wealth transfer. The object of support payments is the maintenance of the children, not the equalization of wealth between households: *Francis* at para. 41.

- [198] The Court of Appeal in *Hathaway v. Hathaway*, 2014 BCCA 310 at paras. 28-29, provided a clear summary of the relevant principles under s. 4 of the Guidelines:
- [28] The leading authority on the principles governing a judge's discretion under s. 4 of the [Guidelines] is *Francis v. Baker*, [1999] 3 S.C.R. 250. Madam Justice Newbury provided a concise summary of these principles in *Metzner v. Metzner*, 2000 BCCA 474 at para. 30:
- 1) It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para.42);
 - 2) The Guidelines figures can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para.42);
 - 3) There must be clear and compelling evidence for departing from the Guidelines figures (para.43);
 - 4) Parliament expressly listed in s. 4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para.44);
 - 5) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in s. 4(b)(ii) (para.44);
 - 6) Section 4(b)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para.39). A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other. (para.40)
 - 7) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The Guidelines have not displaced the Divorce Act which has as its objective the maintenance of children rather than household equalization or spousal support (para.41).
 - 8) The court must have all necessary information before it in order to determine inappropriateness under s. 4. If the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.
 - 9) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible": *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 at 345.

- [29] I would add to this list the comment from *Hollenbach v. Hollenbach*, 2000 BCCA 620 at para. 45, in which this Court interpreted *Francis* as creating a "formidable onus" for wealthy payors seeking to establish that the FCSG amount is inappropriate.
- [199] A guiding principle of the child support analysis was set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 36 at para. 60: "No child support analysis should ever lose sight of the fact that support is the right of the child".
- [200] In determining if retroactive child support is payable, D.B.S. directs the court to consider the following four factors, none of which is determinative:
- a) is there a reasonable excuse for why the support was not sought earlier;
 - b) conduct of the payor parent;
 - c) circumstances of the children; and
 - d) hardship occasioned by a retroactive award.
- [201] Child support obligations fluctuate based on the payor parent's income. Therefore, a payor parent is required to increase his child support payments to correspond with his income increases in order to fulfill his obligations to his children. This obligation is independent of any prior court order: D.B.S. at paras. 54 and 68.
- [202] "A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need": D.B.S. at para. 111. "[T]he argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her": D.B.S. at para. 113
- [203] "Consideration of the child's present circumstances remains consistent with the statutory scheme": D.B.S. at para. 112.
- [204] If the court concludes that retroactive child support is warranted, the next step is to determine the date of retroactivity. The date of retroactivity will generally be the date when effective notice was given to the payor: D.B.S. at para. 122. However, if the payor engaged in blameworthy conduct, the appropriate date is when the increased support should have been paid: D.B.S. at para. 125.
- [205] The final step is determining the quantum of the retroactive award. In so doing, "a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case": D.B.S. at para. 130.

Background on Child Support

- [206] The respondent's total income has almost doubled from 2013 to 2018:

Year

Total Income

Total Income Less Expenses

Full Monthly Child Support Amount

78% of Full Monthly Child Support Amount

2013

\$967,788

\$925,991

\$11,881

\$9,267

2014

\$1,103,912

\$1,089,541

\$13,942

\$10,875

2015

\$1,272,129

\$1,249,694

\$15,960

\$12,449

2016

\$1,342,231

\$1,303,572

\$16,639

\$12,978

2017

\$1,673,057

\$1,631,387

\$19,639

\$15,318

2018

\$1,919,039

\$1,876,909

\$22,537

\$17,578

[207] The monthly child support ordered by Justice Butler was 78% of the Table amount.

[208] Justice Butler's final order required that the parties exchange their income tax returns and notices of assessment by June 1 of every year. Neither party complied with this requirement.

[209] The claimant first requested the respondent's income tax returns and notices of assessment in September 2017. She made a second request for this information in November 2017.

[210] The claimant has debt of approximately \$719,000 in the form of a mortgage and a line of credit as of April 2019. The respondent's only reported debt is a mortgage of approximately \$387,000 that is in respect of his wife's 30% share of their home. He has paid off his 70% share of the mortgage and he has no other debt.

[211] The respondent's monthly expenses include \$2,000 for wine, \$2,583 for vacations, and \$1,750 for gifts for his wife.

[212] The respondent also claims a \$23,000 monthly expense for savings he is putting aside to support N as an adult. He asked one of his colleagues to estimate the amount needed to support N when he turns 19. The colleague calculated that the respondent would need to save \$310,000 per year for nine years in order to accumulate \$3.425 million to support N throughout his lifetime. The respondent started saving \$23,000 per month in 2019, after he paid off his mortgage. These savings are not held in trust for N and the respondent puts aside these funds entirely at his own discretion. These savings are in the respondent's name and he retains sole decision making authority over these funds.

Position of the Respondent

[213] The respondent asserts that the claimant's current expenses in respect of the children are similar to those at the time of the first trial. He acknowledges that her mortgage payments have increased by \$1,000 per month because she purchased a larger home, but believes that other expenses have decreased such that her overall expenses are roughly equivalent to those in 2013. He rejects the claimant's estimates of forthcoming increased expenses for the children and asserts that most of the recent increase in expenses are attributable to her personal expenses.

- [214] The respondent calculates the claimant's expenses on the basis that 50% of her housing, household, and transportation expenses are attributable to the children.
- [215] The respondent submits that the amount he is saving to support N when he becomes an adult is relevant to a determination of the amount of child support he is required to pay. The respondent's position on the amount of this monthly savings varied. His Form 8 financial statement lists this as a \$23,000 per month expense. The respondent testified that he would need to save approximately \$310,000 per year (\$25,833 monthly) over nine years to accumulate \$3.425 million. During the respondent's closing submissions, his counsel submitted that this expense was going to be \$33,000 per month.
- [216] The respondent submits that the parties have similar standards of living in each home and the condition, means and needs of the children have not demonstrably changed over the past six years. The respondent proposes a decrease of child support to \$7,000 per month. The respondent also offers to pay all of the s. 7 expenses even though, based on his submission on parenting time, the parties would no longer be jointly parenting the children.

Position of the Claimant

- [217] The claimant submits that the respondent's significant increase in income is clearly a material change in circumstance and his child support payments should increase correspondingly. Justice Butler ordered that the respondent pay 78% of the Table amount of child support based on a Guidelines income of \$900,000. The claimant believes that the respondent should pay child support based on the same percentage of the Table amount, in respect of his increased salary.
- [218] On the issue of the funds that the respondent is saving for N's ongoing care when he is an adult, the claimant submits that this amount should not decrease the amount of child support the respondent is required to pay. She asserts that these are simply the savings that the respondent is able to accumulate because of his increased income and he alone owns and controls these funds.
- [219] The claimant further submits that he should be required to pay this increased amount retroactively to June 2015, the date on which he was required to provide the claimant with his updated income tax return and notice of assessment for the 2014 taxation year. She characterizes the respondent as a sophisticated litigant who must have known that his significant income increases would trigger an increase in his child support obligations. In the alternative, the claimant submits that retroactive child support payments should be payable from September 2017, the date when she first requested the respondent's income tax documents.

- [220] On the retroactive payment of child support, the claimant believes that the fact that the children did not suffer hardship is not determinative and that this factor does not outweigh the respondent's asserted blameworthy conduct in failing to disclose his income tax information. She also notes that there is no evidence to suggest that the respondent will suffer any hardship because of the retroactive payment of child support.

Child Support Analysis

- [221] Justice Butler found that the respondent's Guidelines income was \$900,000. The doubling of the respondent's annual income to approximately \$1.92 million in 2018 is clearly a material change of circumstance that warrants a review of his child support obligations. I have concluded that the parties will continue to have equal parenting time with their children. The provisions of ss. 4 and 9 of the Guidelines are therefore relevant to the determination of child support.
- [222] The main consideration in ss. 4 and 9 is the "conditions, means, needs, and other circumstances of the children." Under s. 4, the respondent has the onus of establishing that the Table amount of child support is inappropriate. There is a presumption in favour of the Guidelines amount and there must be clear and compelling evidence to support a departure from the Guidelines.
- [223] Justice Butler found that the parties did not have a lavish or extravagant lifestyle prior to separation and neither party has developed such a lifestyle post-separation. For the most part, this continues to be the case. However, as noted above, the respondent's Form 8 financial statement discloses that he spends approximately \$6,600 per month for vacations, gifts for his wife, and wine. This \$80,000 annual expenditure is not extravagant in relation to his annual income, but it is an indication that his lifestyle has expanded as his income increased.
- [224] The claimant's Form 8 financial statement sets out her housing, household, transportation, personal, health, and children's expenses. She lists \$700 per month for pet care that includes daycare for her pet while she attends courses for her Master of Arts degree. The respondent notes that the increase in her expenses are attributable to this specific expense along with the cost of her education and increased childcare expenses. In my view, these expenses are reasonable because all three categories are largely attributable to the claimant's pursuit of a Master of Arts degree. Her plan is to return to the workforce as a counsellor once she completes this program. These expenses facilitate this worthy endeavour.
- [225] I am mindful that the claimant has over \$700,000 in debt and less than \$250,000 in total assets, most of which are \$186,000 in retirement savings. I consider this fact to be relevant with respect to the financial ability of the parties to contribute to the support of their children, a fact that I am required to consider under s. 4(b)(ii) of the Guidelines.

- [226] I do not accept the respondent's view that only 50% of the claimant's expenses should be attributed to the children. The need for enhanced space in her home for N's ABA therapy combined with the significant period of time that the children spend with her militates in favour of a higher ratio of household expenses attributable to the children. Furthermore, as Justice Butler anticipated, expenses in respect of transportation, the children's activities, and vacations with the children have increased over the past six years and will continue to increase, as they get older.
- [227] The respondent submits that the claimant is able to meet her expenses with the current level of child support and suggests that a higher amount of child support will amount to a transfer of wealth from the respondent to the claimant. As noted above, he submits that child support be reduced to \$7,000 per month in exchange for the respondent taking responsibility for all of the s. 7 expenses. This submission seemingly ignores that his income has doubled in the past six years and his children are entitled to benefit from this increase.
- [228] The claimant asserts that child support should be increased to \$17,600 per month on the basis that this is approximately 78% of the Guidelines support amount based on his 2018 income. This submission accepts, and I agree, that there is an articulable reason for not ordering support at the full Table amount on the basis that the condition, means, and needs of the children are met if the respondent pays a lesser amount.
- [229] I do not accept that the respondent's objective of setting aside some of his income to support N as an adult is a relevant consideration in determining his child support obligations. The amount that he is purportedly setting aside is entirely voluntary and the evidence suggests that the monthly amount of these savings is variable and uncertain. These funds are not held in trust or in any way managed at arm's length from the respondent. He alone manages and controls these funds and may choose to vary or cease saving for this purpose at any time and redeploy these funds for another purpose.
- [230] The \$23,000 amount of this purported monthly saving for N, as described in the respondent's Form 8 financial statement, is the amount that is left over each month after the respondent's other expenses are met. This may explain the variance between this figure, the \$25,833 suggested by his colleague to meet N's needs, and the \$33,000 amount referenced during the closing submissions, possibly based on the respondent's current income. I support and encourage the parties to make the necessary arrangements for N's future care, but based on the evidence at trial, it would not be appropriate to consider this factor in establishing the amount the respondent is required to pay in child support.
- [231] The children are entitled to benefit from the increased income of the respondent. I have considered the importance of maintaining a comparable standard of living in each home that reflects the respondent's increased income. I have also taken into account the age of the children as they enter their teenage years. During this period, their transportation, vacation, and activities expenses will continue to increase. Having considered these and the

other relevant circumstances, I conclude that the appropriate amount for child support based on the conditions, means, needs and other circumstances of the children is \$16,000 per month.

[232] At this time, the claimant has no income, so it is not necessary to do a s. 9 analysis because there is no setoff of support obligations. I have already considered the conditions, means, needs and other circumstances of the children in setting the amount of child support under s. 4.

[233] Based on the parties' relative financial circumstances, the children's s. 7 expenses will be paid on an 85:15 ratio as between the respondent and the claimant. This figure is based on the respondent's monthly income of \$160,000, and the claimant's monthly income of approximately \$27,000 (in child and spousal support), relative to their joint total monthly income of \$187,000.

Retroactive Child Support

[234] Neither party complied with the requirement that they exchange income tax information by June 1 of each year. The claimant's failure to adhere to this term did not create any prejudice to the respondent. She has not earned income since the parties separated and the respondent knew this. The respondent's income rose steadily from 2013 to 2018 by approximately 15% per year, but he did not disclose this information to the claimant.

[235] As described earlier in these reasons, the parties have engaged in ongoing interpersonal conflict over the past six years on various issues including their use of PCs, N's ABA therapy, the composition of the ABA team, the hockey association dispute, the CWF trip, the police record check, and vaccinations. During this period, the claimant received over \$20,000 per month in spousal and child support and was able to manage and meet her expenses. Given the level of conflict between the parties on other issues, it is not surprising that the claimant did not inquire about the respondent's income until 2017. This factor does not weigh against awarding retroactive child support.

[236] In considering the conduct of the respondent, over the past six years, he paid \$9,000 per month in child support and \$11,500 per month in spousal support. I accept that he believed that he was fully complying with his child support obligations. However, given the significant and consistent increases in his income, at some point, as his income increases continued to mount, he should have realized that his child support obligations had also increased.

[237] I do not accept that the respondent engaged in blameworthy conduct by not providing his income tax information for 2014 and 2015. He was required to do so pursuant to Justice Butler's order and he should have provided these documents, but in the context of his ongoing conflict with the claimant, I accept that he did not deliberately fail to comply with this requirement.

- [238] In considering the difference between the \$9,000 per month that he has been paying and what he should have been paying, I note that that by April of 2017 when he filed his 2016 tax return, his income had increased by almost 50% as compared to the Guidelines income amount of \$900,000. This notable increase should have alerted him to the need to increase his child support obligations. The claimant requested his updated income tax information in September 2017 and followed up on this request in November 2017. By this time, the respondent received effective notice that he was required to increase his child support payments based on his significantly enhanced income.
- [239] The children's circumstances were not appreciably affected by the respondent's failure to increase his child support payments because the claimant received a significant level of child support based on the relatively high income earned by the respondent at the time of the first trial. Nevertheless, the children were entitled to benefit from the increases in their father's income. To take one example from the Form 8 financial statements, the respondent budgets four times the amount budgeted by the claimant for annual vacations. The children are entitled to similar lifestyles in each home. In my view, given the income level earned by the respondent, this includes similar opportunities to travel and spend vacation time with each of their parents.
- [240] The payor's monthly income is approximately \$160,000 and he has no personal debt. He will not suffer any hardship by paying a retroactive child support award. In my view, the application of the four factors set out in D.B.S. suggests that retroactive child support is warranted in the circumstances of this case.
- [241] The date of retroactivity is January 2018. The respondent received effective notice of the request to provide his income tax information at the end of September 2017. He should have responded to this inquiry and finalized a new child support amount with the claimant within 90 days. In 2017, the respondent knew that his income had increased by approximately 50% over the \$900,000 Guidelines amount that was used to calculate his child support obligations in 2014. Given my finding that the respondent did not engage in blameworthy conduct in failing to provide this information in earlier years, he is not required to pay retroactive child support as of June 2015. However, once he received effective notice, he should have immediately provided his income tax information and taken steps to increase his child support payments to the claimant.
- [242] In determining the quantum of the retroactive award, I have considered the relative financial positions of the parties including their expenses, assets, and debts. I have also considered the importance of ensuring that the children receive the benefit of their father's substantial increase in salary as well as their current and anticipated expenses. In my view, a reasonable and fair retroactive child support award in these circumstances is \$180,000.

What was the Value of the Respondent's BSP at the Date of Separation?

Background on the BSP

- [243] As noted in the introductory paragraphs of these reasons, the respondent's employer operates a Business Succession Program, or BSP. The purpose of the BSP is to transition the clients who work with a retiring investment advisor ("IA") to another IA. The retiring IA receives payments from the employer that are offset by payments received by the employer from the IA who takes over the clients. This transition usually takes place over three years.
- [244] The employer establishes the eligibility criteria for the BSP. The amount of assets under management, or AUM, is a significant factor in determining eligibility for participation in the BSP. An AUM of at least \$50 million is one of the eligibility criteria. Even if an IA satisfies these criteria, the employer reserves the right to deny participation in the BSP. The respondent's AUM at the time of separation was \$135 million and as of the date of the first trial, his AUM had increased to approximately \$250 million.
- [245] In 2008, prior to the parties' separation, the respondent took over responsibility for \$47 million in AUM from a retiring IA (the "Purchased AUM"). The respondent's cost of this acquisition was \$325,000, paid over a three-year period. The respondent paid two-thirds of the payment for this AUM after the parties separated.
- [246] Justice Butler made several findings in respect of the BSP:
- a) The respondent would probably remain with his employer and participate in the BSP when he retires (at para. 166);
 - b) The respondent's participation in the BSP is likely to be approved by his employer because as of 2014, he had the largest AUM of any IA in his office (at para. 166); and
 - c) The respondent's right to participate in the BSP is a family asset pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128 (at paras. 186 and 194).
- [247] He also listed several factors that may be relevant to determining the value of the BSP (at para. 193):
- The respondent has been extremely successful in building the AUM and will likely continue to do so. By the time he retires his AUM may be very substantial.
 - The respondent [in 2014] is only 39. It is probable he will continue to work for another 15 to 25 years. Accordingly, the present value of any BSP payments must be discounted substantially.
 - The payments made by the employer under the first year of the BSP are received as income and the respondent is required to work to transition clients. The first year's payments thus represent both goodwill and employment income.

- The retirement allowance payment is calculated on the basis of a number of factors which cannot be predicted with any certainty. There include the average of the IA's most recent gross commission years to a maximum of 1% of AUM and are adjusted downward depending on the client transfer success rate, and the age and circumstances of the client base.
- The employer retains discretion to deny the IA the right to participate in the BSP.
- There is a possibility the respondent will not be able to participate in the BSP as a result of death or disability.

[248] Justice Butler also described some of the circumstances that could result in the respondent not receiving payments under the BSP (at para. 197):

- the respondent might decide to seek employment with another brokerage firm. The new firm may not have a succession plan or he may not qualify for it;
- he may decide to retire without participating in the program for personal reasons (perhaps because he is financially secure, or does not feel there is another investment advisor to whom his clients should be transferred, or simply wants to leave British Columbia);
- he may decline to participate because he does not want the claimant to benefit from the program;
- the employer may exercise its discretion to deny him access to the program;
- the program may be changed substantially or discontinued.

[249] Justice Butler concluded that the valuation of the claimant's interest in the BSP should be based on the present value of her interest in the future BSP payments and that this valuation should be done as of the date of the triggering event. The respondent would then be required to compensate the claimant for her contribution to the creation of the BSP. He agreed that the BSP payments were an appropriate proxy for valuing the respondent's goodwill (at paras. 201-02).

[250] Justice Butler did not have the necessary evidence before him to value the BSP. He ordered that the following assumptions apply to the valuation of the BSP (at para. 204):

- a) The respondent will remain with his employer until retirement;
- b) He will retire in 15 to 25 years;
- c) He will choose to participate in the BSP and will be accepted for participation in the plan;
- d) He will receive payments under the BSP over three years in accordance with the present terms of the BSP;
- e) Payments made to him under the BSP will be taxed in accordance with current income tax laws.

- [251] Next, Justice Butler directed that this value be discounted to account for the circumstances relevant to the parties' interest in the BSP, including the factors set out at para. 193 of the RFJ, listed above.
- [252] Justice Butler ordered that the parties appoint an agreed upon valuator to determine the present value of the respondent's interest in the BSP as of the triggering date. The parties retained Gary Mynett to do the valuation, but were unable to agree on the value of the claimant's interest in the BSP.

The Mynett Valuation Report of the BSP

- [253] Mr. Mynett's report (the "Mynett Report") valued the BSP on a pre-tax basis between \$679,000 and \$760,000. He concluded "that the logical valuation approach was to assume that the present value of the BSP payments at the time of retirement would approximate the present value of the BSP at the valuation date, assuming [the respondent's] immediate retirement" (at para. 3.03 of the Mynett Report).
- [254] In calculating the income tax effect on the BSP payments, Mr. Mynett assumed that the respondent would have no other income aside from these payments. He acknowledged that if the respondent had other income, these payments would be taxed at a higher effective tax rate, up to 43.7%.
- [255] The Mynett Report did not consider that one-third of the payment for the \$47 million AUM that the respondent took over in 2008 was made while the parties were still together and two-thirds of this payment was made after they separated.
- [256] In order to calculate the present value of the respondent's payments, Mr. Mynett used a discount rate of 5% in consideration of a variety of factors, including:
- a) the time value of money;
 - b) the risk of client attrition;
 - c) the likelihood that the respondent will consistently grow his AUM until his date of retirement; and
 - d) the risk that the respondent will not be able to participate in the BSP due to death or disability prior to his presumed retirement date.
- [257] He also assumed that the stock market would increase at a rate of 5% per year. It is merely coincidental that this amount is the same as the discount rate.
- [258] Mr. Mynett used discount percentages of 5% to 15% to account for positive and negative factors that would affect the valuation of the BSP. These included market conditions, the variability of earned fees, the risk of losing clients, and demographic differences in the client base.

Position of the Respondent

- [259] The respondent submits that the valuation of the BSP is incorrect because Mr. Mynett did not consider that the respondent made two-thirds of the payment for the \$47 million AUM of the retiring IA after the separation. He asserts that Justice Butler required this factor be considered and the value of the BSP should accordingly be discounted by 13%. This represents the proportion of the Purchased AUM paid for after separation, in relation to the total AUM.
- [260] The respondent also asserts that the valuation did not apply the correct effective income tax rates because the rate used assumed that the BSP payments would be the respondent's only source of income. He believes that the applicable effective income tax rate should be 43.7% based on the assumption that the respondent's other sources of income would put him in this highest marginal tax rate.
- [261] The respondent further submits that the valuation did not correctly apply the discount factors for the time value of money and the potential death or disability of the respondent. Based on his assessment of these discounts along with deductions for the Purchased AUM and the higher effective income tax rates, he submits that the value of the claimant's share of the BSP is \$63,000.

Position of the Claimant

- [262] The claimant accepts the findings in the Mynett Report and submits that the claimant's share of the BSP is \$226,500. She does not believe that any further deductions are warranted. Specifically, she asserts that the Mynett Report correctly considered the relevant factors in arriving at the 5% discount rate. She also points out that Justice Butler's order gives this Court discretion to consider further evidence and submissions because he did not have the necessary evidence to value the BSP.
- [263] The respondent relies on s. 65(1) of the Family Relations Act for the proposition that the Purchased AUM should not be unequally divided unless doing so would be unfair to the respondent. She does not believe that a discount is justified for the two-thirds post-separation payment for the Purchased AUM because the claimant provided significant childcare to N and L during the period from 2009 to 2011. This was a particularly difficult period because she was caring for an autistic toddler undergoing cancer treatment and an infant. She submits that these efforts constitute an indirect contribution to the Purchased AUM and that the respondent has not displaced the presumption of equal division of this asset.

BSP Valuation Analysis

- [264] In my view, the Mynett Report is a thorough and comprehensive estimate valuation report. The methodology of valuation was consistent with the direction provided by Justice Butler. It begins with an analysis of the operating statistics of the respondent's book of business and then calculates its value in accordance with the BSP as of the date of separation, April 9, 2010.
- [265] As noted above, this valuation is discounted in two ways. First, discount percentages of 5% to 15% are applied to account for various positive and negative factors. These included market conditions, the variability of earned fees, the risk of losing clients, and demographic differences in the client base. Next, the discount rate of 5%, used to calculate the present value, is applied to account for the time value of money, risk of client attrition, the likelihood of AUM growth until the respondent's date of retirement, and the risk that he may not be able to participate in the BSP due to death or disability. By using these two methods to discount the value of the BSP, the applied methodology considers all but one of the factors described by Justice Butler. I reject the respondent's contention that the Mynett Report did not properly consider all of the relevant discount factors.
- [266] This analysis deliberately does not account for the respondent's post-separation payments for the Purchased AUM because Mr. Mynett correctly concluded that consideration of the impact of these payments was a legal issue, not a matter of valuation. Accordingly, the full value of the \$47 million in Purchased AUM was included in determining the value of the BSP.
- [267] The respondent paid approximately \$108,000 per year for three years, as a deduction from his total income, to pay for the Purchased AUM. The parties separated after the first of these payments and the respondent made the two subsequent payments post-separation.
- [268] I agree with Justice Butler that the post-separation payments for the Purchased AUM are a relevant factor in determining the value of the BSP. In my view, it would be unfair to the respondent to ignore the timing and quantum of these post-separation payments because they were used to acquire the Purchased AUM, which comprises a significant part of the total AUM managed by the respondent. I do not accept the claimant's evidence that after separation, the respondent was largely uninvolved in the care of his children, and in particular in N's cancer treatment. I am satisfied that the respondent has established that it would be unfair to ignore these post-separation payments.
- [269] I agree with the respondent's submission on the calculation of the discount to be applied in respect of the post-separation payments for the Purchased AUM. As of 2010, the respondent had total AUM of \$241 million. Two-thirds of the Purchased AUM is \$31.3 million. This amount is 13% of the total AUM. Accordingly, the value of the BSP should be discounted by 13% to account for the post-separation payments.

- [270] It is reasonable to assume that the respondent's BSP payments would not be his sole source of income. The respondent's significant income and assets combined with his lack of debt and capacity for savings/investments suggests that it is more likely than not that he will have other income such that his BSP payments would be taxable at the highest effective tax rate. For the relevant period, that tax rate was 43.7%. In my view, this tax rate should be applied in calculating the value of the BSP.
- [271] In summary, taking the mid-point of the pre-tax valuation of the BSP at \$719,500, applying the effective tax rate of 43.7% and discounting this figure by a further 13% in respect of the post-separation payments for the Purchased AUM, the value of the claimant's share of the BSP is \$176,000. She is entitled to payment of this amount.

Summary

- [272] If the parties are unable to agree on decisions affecting the children, the respondent will have final decision making authority. He is required to consult the claimant and consider her viewpoints before making any decisions.
- [273] The parties shall continue equal parenting time with the transitions to take place weekly.
- [274] The respondent is required to pay the claimant monthly child support of \$16,000 and retroactive child support of \$180,000. Section 7 expenses will be divided on an 85:15 ratio between the respondent and the claimant.
- [275] The respondent shall pay the claimant \$176,000 in respect of her share of the BSP.

Costs

- [276] Neither party provided submissions on costs. In the event that they are unable to agree on costs, the parties may file written submissions within 60 days of the date of this judgment and file replies within 15 days thereafter. If the parties wish to make oral submissions, they may arrange to do so with trial scheduling.
- [277] To assist the parties' deliberations on costs, I note that success was divided on the issues that were most important to them: the respondent was successful on parental decision making; parenting time will not change; and the claimant was successful on the financial issues. Accordingly, my preliminary view, subject to further submissions, is that neither party was substantially successful in this matter.
- [278] I sincerely hope that this is the final chapter in this long, expensive, and difficult history of litigation. I strongly encourage the parties to set aside their differences and direct their energies and attention to raising their sons instead of continuing to engage in protracted and arduous legal battles.

"Basran J."

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Prepared on 28 October 2026 · Esheria