

CANADA / JUDGMENT

Sahi v. Sahi

2023 BCSC 736

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 736 Sahi v. Sahi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sahi v. Sahi,

2023 BCSC 736

Date: 20230504

Docket: E52141

Registry: New Westminster

Between:

Daljit Singh Sahi

Claimant

And

Daljit Kaur Sahi

Respondent

Before: The Honourable Justice M. Fleming

Reasons for Judgment

Counsel for the Claimant:

U. Dhaliwal

A. Dhaliwal, Articled Student

(June 21-25, 2021)

P. Rigi, Articled Student

(October 17, 20-21, 24-25,
27 and 28, 2022)

Counsel for the Respondent:

S. Gadey

Counsel for the Child, V:

M. Zimmerman

Place and Dates of Trial:

New Westminster, B.C.

June 21 - 25, 2021,

October 17 - 21, 2022

October 24, 25, 27 and 28, 2022;

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May 4, 2023

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Introduction

- [1] Married in 2001, the parties to this family law proceeding separated in 2003, reconciled in 2007 and then separated finally in 2016.
- [2] At issue are parenting arrangements for their youngest child ("V") who is now 13 years old, child support and property division. The respondent seeks an unequal division in lieu of spousal support and asserts a small excluded property claim.
- [3] The key issues at dispute are the claimant's parenting time and his income for child and spousal support purposes.
- [4] The parties' dispute about the claimant's income relates to the business expenses he has deducted from the gross income he receives for his work as a long-haul trucker.
- [5] The dispute about parenting time involves most significantly, serious allegations of family violence by the claimant and V's opposition to spending any time with him. The claimant denies all family violence allegations and blames the respondent for V's views.
- [6] Subject to no contact conditions in a bail order followed by a "peace bond" after the separation, the claimant had no involvement with V until they participated in joint counselling in 2021 and 2022.
- [7] Credibility is also a significant contested issue in this case, which I assess and make findings about after my discussion of the evidence related to parenting arrangements.

Overview

- [8] Born and raised in India, the parties married on April 8, 2001 in Punjab, India. The claimant was still living in India at that time of the marriage. The respondent had moved to Canada the year before. After the wedding, the respondent returned to Canada and was living in Winnipeg with her parents and her brother and his family. The claimant joined her there in April 2002.
- [9] Initially, the parties lived with the respondent's brother and his family. Both parties worked full-time in a factory doing the same nightshift. The claimant also had a part-time job at a gas station. After their first child A was born in January 2002, they moved to their own apartment.
- [10] The parties separated in 2003, after, the respondent alleges, the claimant physically assaulted her. Although he pleaded guilty to a criminal charge, the claimant denies he was violent with the respondent, also stating he entered the plea because he had no money to pay for a lawyer and did not know anybody in Winnipeg. His sentence included a lengthy probation order with term(s) that prohibited him from having contact with the respondent.
- [11] During the separation the respondent and A lived with her brother and his family. The claimant had no contact with A. Nor did he pay any child support.

- [12] The respondent continued working at the factory. She opened her own bank account at the TD Bank where she deposited all of her pay cheques.
- [13] In or about 2004 or 2005, the claimant moved to BC and started working as a long-haul truck driver.
- [14] The parties reconciled in 2007. The respondent and A moved from Winnipeg to live with the claimant in Abbotsford. The respondent remained at home until around the time A started Kindergarten.
- [15] At some point the claimant's trucking route changed to California. Because of his work, he was away from home most of the time. The claimant testified to being on the road 25 or 26 days per month. Trips to and from California took five or six days, and he was only home for 36 hours each week.
- [16] In or about February 2009, the respondent started working part-time at a mushroom farm. She stopped working in the summer of 2009 during her pregnancy with V due to illness. V was born in December of that year. By that time, the claimant's parents had moved to Canada from India and were living with the parties.
- [17] In November 2010, the respondent returned to her job at the mushroom farm, working full-time as well as some overtime. According to the respondent, her mother-in-law cared for V while she was at work, but she drove A to school and when she was not working she was responsible for caring for the children, preparing dinner and doing the housework.
- [18] In November 2011, the respondent quit her job at the mushroom farm to look after V because her mother-in-law had knee surgery. In 2012, the respondent started a different job with a cannery where she is still employed. Initially, she worked seasonally from the end of June until mid-September. Now, she continues until Christmas. She also worked after Christmas for a month or so and sometime between March and June.
- [19] The claimant's parents also began to work seasonally, picking blueberries. As a result, the respondent's work schedule changed to nightshifts.
- [20] Earlier, in December 2010 the parties purchased the former family home. The respondent contributed approximately \$35,000 to the down payment with funds she saved during the separation. Banking records confirm her savings and her contribution.
- [21] The parties received rental income from a suite in the basement.
- [22] The claimant described his relationships with both children, but V in particular, as very close. According to the claimant he spent all of his (limited) time off with them, V went everywhere with him and the two of them even slept together.
- [23] The claimant also described his relationship with the respondent as positive. They had no conflict, he said, until seven or eight months before the final separation when they started arguing about money issues.

- [24] In sharp contrast, the respondent alleged the claimant was abusive toward her and the children, fueled by heavy use of alcohol, and the final separation occurred after the claimant violently assaulted her on October 2, 2016 (the "October 2, 2016 Incident").
- [25] Significantly, although the claimant denied ever being physically violent or misusing alcohol, the respondent's allegations regarding the incidents of family violence before the first and the final separation were not challenged in cross-examination.
- [26] The claimant was arrested and charged with assault and uttering threats on October 2, 2016. He was released on a bail order with multiple conditions that included not only conditions of no contact with the respondent and the children, but also a "no go" to the family home, the respondent's workplace and the children's school(s).
- [27] The Ministry for Children and Family Development ("MCFD") also became involved.
- [28] Both the bail order and a "Family Plan", or safety plan, signed by the claimant and MCFD representatives required him to abstain from drinking alcohol. He was also required to engage in various counselling and support services.
- [29] After the separation the respondent and the children remained in the former family home. Initially, the claimant and his parents lived in rental accommodations.
- [30] The trial for the claimant's criminal charges began in September 2017. A, who was 15 by then, was scheduled to testify as a witness for the Crown. During an interview with Detective Farai of the Abbotsford Police Department, he alleged the claimant, his paternal aunt and his paternal grandmother tried to persuade him not to testify or to lie during his testimony. His aunt promised to buy him an expensive car in return.
- [31] In January 2018, the claimant was arrested and charged with obstruction of justice and breach of a recognizance.
- [32] Subsequently, the Crown entered a stay of proceedings on the charges of assault and uttering threats and the claimant entered into recognizance or peace bond for 12 months with no contact conditions related to the children and the respondent.
- [33] In an earlier letter dated December 14, 2017, MCFD social worker Traci Braley, recommended professional supervision of any parenting time the claimant may have, based on a lack of information about his progress and a report about his contact with A in breach of the no-contact bail condition.
- [34] In a letter from their counsel dated May 3, 2018, MCFD maintained its position that the claimant's parenting time should be supervised, by "someone who understands the protection concerns, is willing to comply with any orders, is able to be protective of the children, and can prioritize the needs of the children".
- [35] The peace bond expired in or about March 2019.

- [36] Professionally supervised visits were arranged for the claimant and the children on June 1 and June 8, 2019. A refused to participate. V reluctantly attended the first visit and then refused to attend the second one.
- [37] Family justice counsellor Sonia Carnduff prepared a Views of the Child Report dated April 15, 2020, based on an order made pursuant to s. 211 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] (the "Section 211 Report"). In Grades 12 and 5 at that time, A and V disclosed to her the claimant had been violent and abused alcohol before the separation. V expressed not wanting to see his father because it would be uncomfortable and his father used to hit him.
- [38] An order granted January 19, 2021 required the respondent to make her best efforts to encourage V to speak to the claimant during daily weekday phone calls, and V to "continue" with counselling with the goal of restoring his relationship with the claimant.
- [39] The respondent was also granted "primary parenting responsibilities" along with the obligation to consult the claimant about significant decisions affecting V, which did not occur. The claimant was permitted to obtain documents and information about V from third parties.
- [40] The claimant testified that after the January 2021 Order he attempted to call V repeatedly, but no one answered the phone. The respondent described her efforts to encourage the children to answer his calls, but she was unwilling to speak with the claimant herself.
- [41] The claimant did not arrange for any further supervised parenting time with V.
- [42] However, before the trial started in June 2021, he and V attended joint counselling with Pardeep Atwal. Ms. Atwal's evidence includes a brief letter, her session notes and her testimony. Further on in these reasons I discuss significant concerns about her evidence. At this stage I note that she observed some positive interactions between the claimant and V.
- [43] Unfortunately the trial, which started in June 2021 did not complete until late October 2022.
- [44] After the first part of the trial, the claimant and V attended more joint counselling with a different counsellor, Kashmir Besla. In her report dated February 13, 2022, Ms. Besla described V appearing uncomfortable and not really talking during the sessions.
- [45] Ms. Besla wrote that she had hoped V would become more engaged over time, but he did not. After 16 sessions the joint counselling was discontinued.
- [46] In January 2022, I granted an unopposed order appointing the Child and Youth Legal Centre ("CYLC") as counsel for V. Lawyer, Michael Zimmerman fulfilled that role and participated in the continuation of the trial.
- [47] Mr. Zimmerman explained that lawyers from the CYLC advocate for children based on the solicitor-client model. Consequently, before agreeing to act for a child, the CYLC must be satisfied the child wants to be represented, the ability to express their views, and have the capacity to instruct counsel. In addition to providing legal services, social workers with the

CYLC are available to provide clinical support as needed. The CYLC has a protocol that requires several interviews before a child's views "are expressed". All discussions during interviews are confidential. Information provided by the child is only shared based on their instructions.

- [48] By the end of the trial, Mr. Zimmerman reported he had met with V over 12 times. During some of their meetings they reviewed some of the parties' evidence, along with the Section 211 Report. V's counselling with Ms. Atwal and Ms. Besla were also discussed. All of their meetings occurred remotely, at V's request.
- [49] V takes the position he does not want any parenting time with the claimant or the claimant having a role in making decisions about him. Describing V as highly intelligent, mature and responsible, Mr. Zimmerman argued that V's views should be given significant weight.
- [50] Since the separation, the claimant has continued to work as a long-haul trucker and the respondent has continued to work at the cannery subject to Covid-19 related restrictions.
- [51] Although, he filed his original notice of family claim in December 2016, the claimant paid no child support until 2018. After two payments in 2018, he again paid no child support until April 2021.
- [52] Shortly before the trial, the claimant produced volumes of documents related to his income and the business expenses he deducts for income tax purposes.
- [53] Since the final separation, the respondent and the children have remained in the family home where the maternal grandparents are also living. For the most part the basement suite has remained rented and the respondent has received and declared all of the rental income since 2017.
- [54] Pursuant to an order made March 27, 2018, the claimant's interest in the family home was transferred to the respondent. Based on a purchase price of \$855,000, she paid \$265,518.43 to be held in trust. A further term of the order provided for the release of \$150,000 to the claimant.
- [55] The claimant alleged that the respondent purchased his interest with family funds, an allegation he did not pursue in final submissions.
- [56] The claimant has lived with his parents in a home they purchased. According to the claimant he owns only a 1% interest in the property.
- [57] During his testimony at the trial, the claimant alleged for the first time that some years prior to separation the respondent had told him they had savings of \$90,000 that she wanted to invest in a taxi with a relative. He agreed. According to the claimant in 2014 she told him that she had sold their interest in the taxi for \$280,000. The claimant said he had no idea where she deposited the funds, but he had proposed they use them to upgrade the family home and to buy RESPs for the children.

- [58] The claimant also alleged that he and the respondent argued about her working for cash, which she kept for herself. He alleged the mushroom farm paid her partly in cash and she told him she had another job at a pub that paid her cash in or about 2014.
- [59] The respondent adamantly denied all of these circumstances.
- [60] In closing submissions, the claimant did not refer to the taxi allegation. Nor did he suggest income should be imputed to the respondent based on cash earnings.

Parenting Time and Parental Responsibilities

The Parties' Positions

- [61] In his pleadings and at the outset of the trial, the claimant took the position that V reside primarily with him and the respondent's parenting time be limited to every other weekend. He also proposed that he and the respondent make parenting decisions jointly, but in the event they were unable to agree, he should have final decision-making authority.
- [62] At the continuation of the trial and in his closing submissions, the claimant instead sought immediate, but gradually increasing unsupervised parenting time with V leading to parenting time every week when he is not working. Regarding parenting decisions, he simply asserted he should be able to participate.
- [63] As I have indicated, through his counsel, V opposed spending any time with the claimant. If "forced" by the court to have parenting time, V asked that it be supervised and only resume after the claimant has attended at least 10 individual counselling sessions, an anger management course and treatment related to alcohol consumption.
- [64] The respondent proposes that she have all of the parenting time with V, other than telephone or video contact with the claimant every Saturday initiated by V, and at other times as agreed to by V and the claimant. She opposes in person supervised parenting time, noting the two previous orders were made without V's consent and since the January 2021 Order, the claimant has not attempted to exercise any supervised parenting time, apart from joint counselling sessions.
- [65] With respect to parental responsibilities, the respondent takes the position she should be allocated all parental responsibilities and the sole decision-maker, given the history of alleged family violence, which the claimant denies, an ongoing power imbalance and his ongoing efforts to repudiate and control her with false allegations about her misappropriation of family funds and other financial wrongdoing.

Legal Framework

- [66] Both parties' pleadings regarding parenting issues rely on the FLA.

- [67] Under the FLA, parenting time is the time a child spends with a guardian. Parental responsibilities encompass all aspects of parental decision-making and other powers and obligations of a guardian with respect to a child, enumerated in s. 41 of the FLA. Parental responsibilities may be allocated to one or both guardians.
- [68] Together parenting time and parental responsibilities constitute parenting arrangements.
- [69] Section 37(1) of the FLA requires the court to consider only the best interests of a child in making orders regarding parenting time and parental responsibilities.
- [70] To determine what is in a child's best interests, the court must consider all of their needs and circumstances, including the non-exhaustive list of factors set out in s. 37(2) of the FLA:
- (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 care;
 - (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 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 the 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;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- [71] Family violence, identified in s. 37(2)(g) and (h), is defined in s. 1 of the FLA. The definition includes physical, psychological and emotional abuse of a family member. For a child, exposure to family violence also constitutes family violence.
- [72] Section 38 of the FLA further requires the court to assess family violence based on a number of mandatory considerations:
- (a) the nature and seriousness of the family violence;
 - (b) how recently the family violence occurred;

- (c) the frequency of the family violence;
 - (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
 - (e) whether the family violence was directed toward the child;
 - (f) whether the child was exposed to family violence that was not directed toward the child;
 - (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
 - (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
 - (i) any other relevant matter.
- [73] The obligation to consider a child's views under s. 37(2)(b) of the FLA is a key consideration here. While never determinative, considerable weight may be given to the views of an older child depending on their age and maturity.
- [74] Significantly, s. 37(3) of the FLA provides that an order is not in the best interests of a child unless it protects, to the greatest extent possible, their physical, psychological and emotional safety, security and wellbeing.
- [75] With these principles in mind, I turn to consider the material aspects of the evidence related to V's best interests.

Discussion of the Evidence

Family Violence

- [76] I begin with the respondent's allegations of family violence. As I have indicated, the claimant denied being violent or abusing alcohol during the marriage, anticipating her evidence at the trial.
- [77] The respondent depicted the claimant as quite cruel and cold or unfeeling as well as volatile and physically abusive.
- [78] She alleged that early on, after her maternity leave with A, the claimant wanted him sent to India to be cared for by his parents. Instead A stayed with her brother and his family during the week while the parties worked the night shift at the factory. The respondent visited A every day before work, but the claimant never did.

First Separation

- [79] The first separation occurred, she testified, after she called the claimant from her brother's home to tell him she wanted to look after A because he was ill instead of going to work. The claimant hung up on her and came to pick her up. As he drove them to work, he refused her repeated request to let her look after A and slapped her, saying something to the effect of this is why he had wanted A sent to India. They continued to argue in the car. He slapped her again on her head and face.
- [80] The claimant stopped the car at the respondent's parents house. According to the respondent, he told her mother, "take care of this bitchy woman. I don't want to keep her anymore. I'm going to file for divorce". She described the claimant slapping her about four times in the car and then many times in front of her mother, as well as strangling her throat, before he left.
- [81] The respondent testified that she did not contact the police for a few days because she was torn by how much she cared for the claimant even though she could not understand why he had beat her in front of her mother.
- [82] Ultimately, the claimant was charged with assaulting her. The respondent alleges that after he was charged he also threatened to kill her entire family if they did not send her back to him.
- [83] In cross-examination, the claimant denied A being ill or the respondent wanting to take the day off to care for A before the separation, referring to these suggestions as false and total lies. The claimant acknowledged the two of them argued in the car on their way to work and he dropped her off at her parents. According to the claimant he told her, "you go home" and asked her why she argues and fights with him "too much".
- [84] Again in cross-examination, he denied slapping or hitting the respondent, also asking her counsel, "[w]ere you there" and laughing at what he referred to as "this cooked up" story. He laughed again when he denied choking the respondent and asked how he could have done that in front of her family or other people.
- [85] Regarding the sentence imposed following his guilty plea, the respondent said a three year no contact order was made on March 13, 2004. The claimant indicated a two year probation order was made on March 13, 2005.

Reconciliation

- [86] Although they dispute the circumstances, each party indicated that family members brokered a reconciliation in 2007. Both of them had travelled to India around the same time to attend family weddings. According to the respondent, the claimant's parents "pressurized" hers to get the parties back together. By then the claimant was living in BC. The respondent described being resistant and not wanting to move to BC, but ultimately agreed to reconcile on a number of conditions and reassurances from the claimant's parents related to the

claimant behaving appropriately and financial matters.

- [87] The day after the claimant's "no contact" order expired on March 17, 2007, the respondent and A flew to BC. The respondent testified that her brother paid for their tickets, even though the claimant was supposed to, indicating he had no money at that time.
- [88] As mentioned the claimant's work as a long-haul truck driver meant that he was most often away from home.
- [89] The respondent described him arriving home each week with bottles of alcohol from the duty free and drinking heavily during his time off, although not the night before he returned to work. When he drank, the respondent said the claimant did not want anyone around him and spoke to all of them "very rudely".
- [90] The claimant denied having a problem with alcohol during the marriage, stating he did not have time to drink. He also testified that he stopped drinking about five years ago, because he is diabetic. Acknowledging he has continued to buy not insignificant amounts of alcohol at the duty free shop, which various receipts confirm, he identified all of these purchases as gifts that he is required to provide to various work contacts.
- [91] Asked to describe the claimant's relationship with A, the respondent testified that A really loved and respected his father, but was scared and afraid when the claimant was home. She described A as always sad and upset and said the claimant would hit him if he did something small or for no reason at all. When she had to leave for work, if the claimant was there, the children would ask her to stay. Sometimes when she returned, she found broken items, the internet turned off or an iPod taken away.
- [92] The respondent gave a specific example of arriving home from a night shift in the summer time and finding the modem broken. A was lying down in the rec room. His shirt had grass on it. He would not tell her what had happened and the claimant refused to talk to her. She said her father-in-law told her the claimant hit A the night before, after getting angry, turning the television off and breaking the modem. A left the home and they did not know where he was. Although the father-in-law's out of court statements are not admissible for its truth, the respondent testified that A later said the same things to her. A also told her the claimant kicked him out of the house and he spent the night in the park.
- [93] The only real challenge to the respondent's hearsay evidence about the children's statements relates to her credibility.
- [94] The respondent also described the claimant physically abusing A one night in 2014. The claimant had been drinking a lot and had the television playing very loudly. A was in bed. When he told his father he could not sleep because of the noise, the claimant dragged him out of bed and started hitting his face "forcefully". On this occasion, the claimant's mother intervened and confronted the claimant. The respondent indicated she overheard rather than saw this incident, stating she was lying down with V at the time "facing the other way". However, the next morning, she saw fingers marks or a hand print on A's face, which he was

icing.

- [95] A went to school that day. The respondent gave some confusing evidence about the school counsellor becoming involved after that, the claimant being away in India and school personnel meeting with him after he returned.
- [96] When asked about the claimant's relationship with V, as with A, the respondent readily acknowledged V loved his father, but described V getting really scared and upset by the fights that occurred in the home. At those times V would hide or run to her.
- [97] The respondent testified to telling the claimant not to hit the children and explaining "they need to be kept with love" but he continued, even when his parents were present. She also emphasized that the claimant always refused A when he asked for anything. According to the respondent, the claimant never bought either A or V anything, even a birthday present. The claimant would tell her buying things for the children was her responsibility because she was the one who kept the children's money, meaning the Child Tax Benefit.

Final Separation

- [98] The respondent gave very detailed and precise evidence about the October 2, 2016 incident of alleged family violence. Her mother and father-in-law were at the park with V initially. She described the claimant becoming angry when he saw a \$1,000 expenditure in a bank statement. The respondent told him it was for a laptop, a backpack and supplies that A needed for school. The claimant wanted to see the bill and said she was supposed to buy something cheap. As the argument escalated the claimant grabbed her by the throat and said he would finish her off today. He pushed her backwards onto a dresser in the master bedroom holding onto her throat for two or three minutes. He then tried to hit her neck on the dresser. A glass vase filled with flowers rolled off and broke on the ground. A had gone into his room, two or three minutes earlier. Once she caught her breath she called out for him. He emerged from his room right away and told the claimant: "Dad stop. You can't hit like that". By then the claimant was grabbing the respondent's hair. She fell to the ground. Some of her hair was in his hand. Her right leg hit the vase or the vase hit her right leg and one of her eyes was bleeding. At that point the claimant started slapping her. She recalled her mother-in-law and V being present by then.
- [99] After the violence stopped, her mother-in-law quickly began cleaning up the broken vase. A asked the respondent if she was okay and why she had not called the police. The respondent was torn, knowing the police would separate the family. A implored her, stating when the claimant hits her, he and V come to rescue her and then he hits them too. V was crying. A also told her he felt as though they lived in prison and if they lived separately, maybe they would be happy. The respondent said she told A that children need both their parents. When he got older he would ask where his father was.

- [100] At a certain point, the respondent also spoke with the tenant in the basement who warned her against phoning the police, but pointed out her neck was bleeding and she was missing an earring.
- [101] The respondent described her back hurting a lot all night. The next morning she woke V for school. When he looked at his hand and saw it was bleeding, he started crying. The respondent drove him to school and ended up speaking with two teachers about what had happened. They strongly encouraged her to call the police. Instead, she and A went to her doctor's office. He too advised her to call the police and to separate from the claimant. After meeting with the doctor, the respondent and A went to the Abbotsford police station with the teachers. The police took statements from her and A.
- [102] The police also went to the home and took photographs of the respondent that are in evidence. Some of them show fairly extensive bruising on the right side of the respondent's lower back. Others show a bruise on the back of one of her arms and what appears to be bruising at the top of her right leg or below her right buttock. Asked about a photograph of the top of her head and upper torso, the respondent said it showed where the claimant ripped her hair out. Certainly, there is an area to the top left of her forehead that appears quite bald. Other photographs taken from different angles show the respondent's hair was generally thick.
- [103] The claimant gave almost no direct evidence about what occurred in the family home on October 2, 2016. In cross-examination, he denied drinking that day. Although, he agreed he had questioned the respondent about a laptop she bought for A, he denied speaking disrespectfully or "getting physical" with her. After they argued, he said, he went to the bedroom and she followed him. He specifically denied grabbing the respondent by the throat and dragging her into the bedroom, stating nothing like that happened and "my mom" was there. The claimant also suggested V was still at the park with his father.

Other Family Violence Allegations

- [104] During persistent cross-examination that suggested non-violent family dynamics, the respondent refused to acknowledge normal or normative conflicts over the children's behaviour or happy times. Instead she gave further evidence about ongoing family violence that involved the claimant being profoundly rejecting and controlling.
- [105] She testified, for example, he insisted that only his mother was allowed to answer the house phone and he would hang up if the respondent or the children answered instead. Whenever the respondent called him due to an emergency, she would receive "very wrong answers", such as "why did you call" and "I don't want to listen to these things from you". In addition to never calling her on her cell phone, the claimant hung up on her the first time she called him while he was driving his truck. When he arrived home, he took her phone, set the password so only he could retrieve messages and hid it in the microwave.

- [106] The respondent also said the claimant would not allow her to call her own family, none of whom lived in BC. Her phone did not have a long distance plan so she could only receive their calls. The claimant monitored her call history. If she had a call with a family member that lasted more than five minutes, "there was a fight".
- [107] The claimant also monitored the mileage on her car. He would ask her where she went if the car drove an extra two kilometres.
- [108] According to the respondent there were times when the claimant would not speak to her at all for as long as two months straight. He would ignore her when she asked him to come to the table for a meal, although she spent a lot of time preparing his favourite dishes.
- [109] Describing herself as extremely isolated, the respondent said she had no connections with anyone here including at the temple.
- [110] The respondent also testified they never went anywhere as a family or attended family events, although the claimant took the boys on a trip to Nelson, BC once. She was not invited. The respondent struggled to remember any positive family moments, other than the claimant and the children laughing together sometimes.

After Separation

- [111] As I have indicated, after the claimant was arrested and charged in relation to the October 2, 2016 Incident, the respondent and the children remained in the former family home. MCFD became involved. In addition to abstaining from alcohol, the safety plan signed by MCFD and the claimant also required him to attend a Punjabi men's group at Abbotsford Addictions, counselling for anger management and family violence and "pursuing" attendance at a Punjabi men's group at the Abbotsford Community Services focused on the same issues.
- [112] A letter dated December 19, 2016 from family therapist Surjeet Kalsey indicates the claimant attended 10 sessions of a Respectful Relationship Violence Treatment Counselling Program that she co-facilitated. In the sessions, anger and stress management skills, respectful family relations and alcohol use or abuse and its effects on the family, especially children, were addressed. The letter states that the claimant was committed to learning new skills and "taking responsibility for his own behaviour". It also states that the claimant indicated that he was not (currently) using alcohol.

Obstruction of Justice Allegations

- [113] As indicated, the claimant was later charged with obstructing justice and breach of a recognizance based on A's allegations about contact with the claimant in September 2017, and attempts to influence him regarding his testimony at the criminal trial.

- [114] Detective Farai testified about A's discussions with her, which ultimately led to the charges. The transcript of their interview on September 27, 2017 was also in evidence.
- [115] She described A as distressed about what had happened with the claimant and family members and conflicted about what to do when they first met that day. A was very concerned that they could go to jail. He would not provide a statement until she offered not to share any details with the Crown without his permission. After consenting in the first interview to being audio and video recorded, he agreed to be 100% honest.
- [116] A began by telling Detective Farai that his aunt and his father had tried to talk him out of testifying, at the courthouse. He suggested she look at the video footage for the two days he was there and then described his aunt speaking to him both days about it and that it was up to him to save his dad. She told him as a minor he could not be subpoenaed, his future would be jeopardized if his dad had a criminal record, he would have a difficult time getting a government job, and if he saves his dad she will get him a car when he turns 16.
- [117] On the second day of court, according to A, she also said it had been a while so he should just say he forgot (what happened). That same day at court, A went into the washroom not knowing his dad was in there. Once other people left, his dad walked out of the washroom too and then returned to speak to A about how it was in his hands and "please save me". His dad also said he had not done anything wrong. Later on in the interview, A added that his dad actually asked him not testify, saying something like "you are the only strong witness" and "save me".
- [118] A also told Constable Farai about discussions with his dad, his aunt and his grandmother that occurred about two weeks earlier.
- [119] While he was at the gym with his cousin, his aunt called wanting to meet with him and for him to meet with his grandparents. Initially A said no but then he agreed. They met at a Starbucks. His grandparents were crying. His grandmother told him his dad will change; they will fix him. She also told A to tell his mother to "drop the case" because it will harm his future. A described his aunt as fake crying and saying the same things she later told him at the courthouse, including the offer to buy him a car. Asked to clarify what she said about the car, A stated she was "more or less saying" that "we" will give "you" a \$100,000 car.
- [120] Through his cousin, A met with his aunt again at a Milestone's restaurant. She told A his dad missed him, was really sick and really sad that he could not see A and V. She also told A again it was up to him to save his dad. During the meeting she called his dad and persuaded A to visit his dad's home, the basement suite where he was living with A's grandparents. A agreed but said he would only speak to his dad alone, which they did in his bedroom. A said his dad started crying, asked about his health and V, and then spoke to A about the criminal case. He told A he was not going to take a deal if it makes him guilty; he wanted to provide a future for A and V; "even if there are a hundred witnesses" he would still go to trial; those who lie in court can sometimes win so he will not admit to being guilty, and it was up to A if he testifies or not. A said he tried not to talk much.

- [121] Asked how he felt about his father's conduct, A told Detective Farai he did not feel a lot of emotions most of the time. He also stated he thought his dad was just trying to save himself, what he asked of A was wrong, and if his dad truly cared about him, he would not be asking A to jeopardize himself like this.
- [122] Detective Farai explained to A that he could not talk about his statement to her with anyone, including his mother, unless he was unsafe.
- [123] Detective Farai spoke with the Crown about the prospect of a jail sentence for a conviction in these circumstances, which they assessed as unlikely, and whether A could testify remotely. She updated him when they met again briefly on October 4, 2017. He remained apprehensive. A confirmed he had not spoken to his mother about his statement. Sometime later he agreed to the investigation proceeding.
- [124] The claimant acknowledged meeting with A at his home while his sister and her daughter were visiting from Nelson. The claimant denied knowing anything about the visit beforehand, stating he came home from work to find A there. He testified to telling A they were not supposed have contact and A responding that he knew that but he wanted to meet him. Like A, the claimant said they spoke together alone in his room. However, the claimant denied talking with A about the trial, because, he said, he knew that was not permitted. A had some food and the claimant gave him \$200 as he was leaving.
- [125] I note A told Detective Farai about receiving money too, but he explained the gift was customary and not something he interpreted as ill intended, which I accept.
- [126] Detective Farai testified to reviewing the video footage of the courthouse lobby on September 21 and 22, 2017, when A was there. What she observed corroborated A's account of his aunt interacting with him in the courthouse lobby. It also corroborated what A had said about the claimant. The footage showed A entering the washroom, the claimant then leaving the washroom, looking around the hallway, pausing to look at the sheriff and then re-entering the washroom.
- [127] In cross-examination, the claimant denied knowing A was already in the washroom or going in after him.
- [128] Detective Farai was cross-examined about why the criminal proceeding was stayed. She testified the Crown advised her there were some concerns about the respondent's credibility, related to inconsistencies between her initial statement to a Punjabi-speaking police officer and her testimony. The respondent was adamant the translated statement was inaccurate. Detective Farai asked for a review. She described a Punjabi-speaking employee identifying a number of errors in the translation. A formal review never happened although the translator no longer works for the agency. None of this evidence can be admitted for its truth. Nor is the Crown's apparent assessment of the respondent's credibility one that I could properly consider.

- [129] Detective Farai also gave evidence about attending the continuation of the criminal trial on October 16, 2017 to provide extra security and to ensure no witness intimidation occurred. She escorted A and the respondent to her car in the parking lot. After observing the claimant in the lobby speaking with his counsel, she noticed him walking fast behind them and then beside them in the parking lot while glaring and smirking at A. Dressed in plain clothes, Detective Farai stopped and introduced herself to the claimant as a police officer, shaking his hand. During their interaction, he continued to focus on and glare at A. A looked afraid and ran to the car while she remained with the claimant. A long-time police officer with a great deal of experience in dealing with domestic violence, she described the claimant's behaviour towards A as very intimidating.
- [130] Detective Farai was a straightforward, reasonable and articulate witness who testified objectively and readily conceded specific circumstances put to her in cross-examination. I view her evidence as highly credible.
- [131] Again in cross-examination, the claimant denied staring or glaring at A or following A and the respondent, stating words to the effect of, "why would I follow them when they were with a police officer". He also indicated he remained behind them and was walking through the parking lot to pick up his car.

Supervised Visits

- [132] Again, after the prohibition on contact between the claimant and the children ended in or about March 2019 two supervised visits were arranged for early June 2019.
- [133] Consistent with the respondent's evidence, the supervisor's first report states that A refused to attend the first visit despite attempts by her and the respondent to persuade him. V attended although he said he did not feel comfortable around his father before the visit.
- [134] The report also describes the claimant as affectionate and talkative with V. V appeared very uncomfortable and responded with one-word answers to the claimant's many questions. The visit took place at a shopping mall. V refused several offers from the claimant to buy him clothes, food and a laptop. V also refused the claimant's request to take his picture which he then attempted to do surreptitiously.
- [135] The claimant gave similar evidence about the first visit. He recalled V not talking or answering his questions. He would not accept any food or even juice.
- [136] The second visit report states that A was locked in his room when the supervisor arrived. He did not answer when the supervisor knocked on his door. The supervisor then spent 45 minutes trying to convince V to attend the visit. The respondent also tried but was unsuccessful. The report also states that the claimant had tears in his eyes when he was told the children did not want to attend.

The Section 211 Report

- [137] Completed in 2020, the Section 211 Report indicates that each of the parties provided very different accounts of the October 2, 2016 Incident to Ms. Carnduff. The claimant told her the respondent fabricated her allegations that he was violent, A was not present and he did not recall V being present either.
- [138] The respondent described the children as emotionally stronger as a result of not living with the claimant. She stated she would not prevent them from visiting with him, expressing the view that it was their decision to make.
- [139] A was completing Grade 12 at the time. He reported grades "in the 90s range", no involvement in extracurricular activities and spending his free time playing video games and on the internet.
- [140] Ms. Carnduff described A as aloof and disinterested in discussing his family relationships. However, he made disclosures about family violence before the separation, indicating it often occurred when his father had been drinking. A described his father as violent with all three of them, although he was more of a target of his father's physical violence than V. A specified his mother was only physical in self-defence. He also acknowledged the occasional positive experience with his father.
- [141] Regarding the October 2, 2016 Incident, A said he remembered his father choking his mother.
- [142] Consistent with what the respondent told Ms. Carnduff, A said his mother believes he and V should decide whether or not to spend time with the claimant. A expressed suspicion about his father's motivation in pursuing parenting time with him as opposed to V. At the same time, A conveyed if his father was genuinely interested, he would be "okay with it".
- [143] In Grade 5 by then, V presented as shy and polite. He described school as fun, playing on the school basketball team and getting good grades. V reported no happy memories of his father and his father being physically abusive to him and A on multiple occasions. V stated his father would hit them with his hand in front of his mother and his father drank a lot. Addressing the October 2, 2016 Incident, V said his father was hitting and hurting his mother. He also said he was present "for the end of it". V recalled a vase falling and breaking, causing his hand to bleed.
- [144] V told Ms. Carnduff that he and his mother do not discuss his father although he suspected she would not want V to spend time with him. V referred to the one supervised visit he had with his father as awkward. He expressed the view that his father was trying to bribe him and being opposed to spending time with his father, "because I wouldn't feel comfortable and because he used to hit me. And he hasn't said sorry".

- [145] In contrast, V described his mother as a good listener. He said he enjoys spending time talking to her as well as going shopping together. Instead of hitting them when he or A do something wrong, V said she "talks about things and tells us not to do it". V told Ms. Carnduff he would feel comfortable going to his mother or A if he needed support. He also reported that he and A get along well together.
- [146] The claimant testified the Section 211 Report was "all lies" and V was lying because the people he lives with lie to him.

Claimant's Involvement with V

- [147] The January 2021 Order provided the claimant with weekly supervised visits and required the respondent to make her best efforts to encourage V to speak with the claimant during weekday phone calls he was permitted to make daily.
- [148] The claimant testified to making a lot of phone calls. A answered twice and they talked. After that the claimant said he continued to call, for a long time, but no one answered.
- [149] The respondent recalled the claimant calling for a couple of weeks. She described various efforts she made to get the children to speak with the claimant. In addition to telling them to answer the phone, she would pick up the phone and hand it to them. A then stopped her from doing this. He said he knew his father's phone number and would call if was "in the mood". The respondent also told A to let her give the phone to V so he could talk but V would run away.
- [150] She acknowledged being unwilling to speak to the claimant herself.
- [151] After the January 2021 Order, the claimant did not try to arrange any further supervised parenting time with V or to speak with him by phone. The claimant testified that he could not afford the cost of supervision, as well as counselling and child support and he was demoralized by his earlier efforts at phone calls.

Joint Counselling with Ms. Atwal

- [152] As indicated, the claimant and V attended counselling with Ms. Atwal for the purpose of rebuilding their relationship. She conducted individual and six joint counselling sessions from January to April 2021. Unlike the Section 211 Report writer and Ms. Besla, Ms. Atwal was required to testify.
- [153] Unfortunately, her report, her session notes and her testimony left me with the impression that the counselling proceeded on her implicit acceptance of what the claimant told her about the marriage and the respondent. In addition to a lack of objectivity, I was concerned that her approach with V and the respondent did not consider, or was not sensitive to, the history of alleged family violence. I attribute Ms. Atwal's approach in part to the very limited information she received and elicited about the allegations of family violence.

- [154] Ms. Atwal started the counselling by obtaining background information from the claimant during an individual session. She testified he was concerned about the children being kept from him and being told negative things about him. The claimant also reported that during the marriage the respondent would provoke him and then threaten to call the police. Asked why she did not ask the respondent for background information from the outset, Ms. Atwal said she wanted to gain an understanding of what bothered her client.
- [155] Ms. Atwal never received the Section 211 Report. Nor was she aware the children had reported abuse to the report writer. Ms. Atwal testified to being under the impression V had not suffered abuse, because when she asked him about it, he said no. Questioned about whether she was aware the children also reported witnessing parts of the October 2, 2016 Incident, Ms. Atwal testified she was not under the impression that V had seen anything.
- [156] Her notes indicate that V asked her at one point why the claimant chose drinking even though it hurts people. She wrote: "[t]herapist provided some understanding of addiction and substance use not sure if this is valid issue or not". Asked to explain why she queried if drinking was an issue, Ms. Atwal said the claimant had told her he had stopped drinking. She acknowledged not asking V what he meant by the claimant "hurts people". Instead she assumed V was referring to emotional hurting because he viewed the claimant as causing the separation.
- [157] After her initial meeting with the claimant, Ms. Atwal had two individual sessions with V. Her notes for the first session with V indicate she spoke to him about normative separation dynamics and children feeling caught in the middle:

Therapist and client discussed how parents separating is difficult situation for all especially for children and how most children want their family to be together and happy. Therapist explained sometimes situations between adults are complicated and they may no longer be happy together.

Therapist and client discussed the "fight" is between parents and how adults are obligated to protect their children from their conflict and work to never have children put in the middle. Therapist and client discussed the hurt that goes with being put in the middle and getting caught up on loyalty bind and feeling they must take sides. Therapist and child discussed how children do not have to take sides they can like each parent and not feel they need to protect the other or feel guilty.

- [158] Ms. Atwal's notes for the second session with V state she focused on gaining an understanding of his perspective "and hardships", although it is not clear what he told her. The two of them discussed questions he wanted to ask the claimant. In addition to identifying a question about why he chose drinking, V asked: "[h]e had so many chances, why didn't he take them". V agreed to a 30-minute meeting with the claimant, along with using a signal (pulling on his ear) if he was uncomfortable and wanted to end the session.

- [159] During the first joint session, V and the claimant played checkers. Afterwards, V told Ms. Atwal he had felt uncomfortable but had forgotten the signal. He reluctantly agreed to try again.
- [160] The respondent then cancelled two sessions because V was ill. Ms. Atwal and the claimant made much of V saying he had not been sick at the next joint session. The respondent testified he was in fact sick for two weeks starting the day before Spring Break. Because of his illness she took him to the doctor and he was prescribed medication.
- [161] Ms. Atwal's notes suggest that V enjoyed much of the next session with the claimant. They laughed and played games together. After the claimant talked about his love for A and V remaining constant despite being isolated from them, V became overwhelmed and upset and asked to speak alone with Ms. Atwal. V told Ms. Atwal his father just does not know how to be nice and does not like his mother. Ms. Atwal asked him how he knew these things and he said his mother had told him.
- [162] At his request, V met alone with Ms. Atwal the following week. V expressed concern about the claimant manipulating both of them. Her notes indicate that they, or she, discussed manipulative behaviours such as telling children negative things about the other parent, an obvious reference to the respondent. They also discussed how the claimant's current behaviours showed he was putting a lot of effort into trying to connect with A and V. Her notes state that V told Ms. Atwal the claimant abused his mother, although he denied witnessing the abuse. V said his mother told him his father had pulled her hair. It was at this point that Ms. Atwal asked V if the claimant had abused him and he denied it. Her notes also state that V agreed it was not fair that a parent and child be kept from each other just because the parents do not get along.
- [163] During her testimony Ms. Atwal added that V said his mother showed him a picture related to her hair being pulled. I would note the respondent was never asked about V's apparent statements about her to Ms. Atwal, although in cross-examination she was repeatedly asked about and denied speaking negatively about the claimant to the children. She also indicated she did not talk to the children about the past.
- [164] Before the start of the next joint session, Ms. Atwal asked the respondent if she was willing to meet with her and the claimant. The respondent refused, stating she knew what kind of person he is. Ms. Atwal's notes indicate she believed the respondent was looking at V through a crack in the door to the room beyond, when she said this, which the respondent denied. In cross-examination, Ms. Atwal agreed this was an assumption on her part and she was not actually concerned that V could hear her discussion with the respondent. She also agreed it was not uncommon for a victim of domestic violence to feel uncomfortable about being in the same room with the perpetrator.
- [165] On April 25, 2021, Ms. Atwal met with the respondent alone. According to Ms. Atwal the meeting was intended as an opportunity for the respondent to share information she viewed as important and to answer questions V had. In terms of information provided by

the respondent, Ms. Atwal's notes state only: "Ms. Sahi reported of her issues with Mr. Sahi and past abuse. Mr. Sahi denies abuse". During her testimony Ms. Atwal gave no indication what issues or past abuse the respondent reported or any effort on her part to elicit any information. Instead Ms. Atwal suggested the respondent said very little about her experiences.

- [166] Ms. Atwal also reviewed with the respondent V's questions for both parents, which included who asked for a divorce, how did the respondent find out that A visited the claimant during the "time of no contact" and who keeps delaying court. The respondent's answers were factual and consistent with other evidence at the trial.
- [167] The claimant and V attended joint sessions February 21 and 26, March 26, April 9, 23, 24 and 30, 2021. During the first session, after the claimant told V it was okay for him to ask questions, V said he was not sure if his father was telling the truth. V asked him how A's visit to his home came about. The claimant told V he was unsure, but a couple of days after the visit he was arrested for breaking the no contact condition. During one of the sessions, V called the claimant Dad. During parts of both joint sessions, V and the claimant played checkers and interacted positively.
- [168] What became the last joint session occurred on April 30, 2021 Again, Ms. Atwal noted V and the claimant enjoyed playing checkers together. V was unwilling to take off his mask and eat the food the claimant brought but V took it home with him. During the session Ms. Atwal talked to V about the parties' responses to his questions.
- [169] In May 2021, V missed two more sessions which the respondent said was due to Covid-19. Again, Ms. Atwal expressed skepticism, but school records confirm the respondent's explanation.
- [170] During her testimony, Ms. Atwal described V as desperately wanting clarity about who he could trust. He needed the claimant to be truthful in order to have a meaningful connection. V became more and more adamant about this, although he also enjoyed his time with the claimant. At a certain point, Ms. Atwal told V the absolute truth may not be attainable because everybody has their own perspective.
- [171] Contrary to Ms. Atwal's testimony and some of her notes, the respondent denied speaking negatively about the claimant or about the litigation with V. She indicated she did not know why he was asking the questions Ms. Atwal discussed with her.
- [172] The respondent drove V to and from the sessions, after school. She maintained that V was unhappy and upset after each of the joint sessions. On one occasion he was crying "really loudly" and told her to take him home quickly. He was still crying when they arrived at home. She asked him what had happened but he would not tell her. The respondent encouraged V to talk to Ms. Atwal. According to the respondent, V responded: "She doesn't listen to me. She listens more to Dad".

- [173] The respondent also testified that after counselling sessions V would say he was not going to the next one and the morning of each session he would ask repeatedly if he had to go. She maintained that she encouraged him to go, telling him he needed to keep going and build up a relationship with his father, and he should be happy he has an opportunity to talk to his dad.
- [174] Through correspondence, the respondent's counsel expressed concerns about Ms. Atwal's apparent focus on the litigation.

Joint Counselling with Ms. Besla

- [175] Ultimately, the respondent proposed joint counselling with Ms. Besla, a counsellor the respondent and V had met with four or five times after the separation. According to the respondent, V refused to participate in joint counselling with anyone else. From September 2021 until February 2022, the claimant and V attended 16 joint sessions.
- [176] In her report, Ms. Besla noted the claimant disputed the respondent's accusations of domestic violence. He described their relationship as rocky. She identified the safety and wellbeing of V as her central focus.
- [177] Again, Ms. Besla described V appearing uncomfortable and largely unresponsive during the sessions. Once or twice V recalled negative incidents such as the claimant slapping him and throwing a router in anger. The claimant said he believed that V had heard "these stories" from the respondent and expressed feeling hurt that V had no positive memories of the many happy times the family had together.
- [178] Ms. Besla noted the claimant was consistently early or on time for the sessions. At the start of every session V greeted Ms. Besla but not the claimant. During every session the claimant told V he loves him and he wants them to have a relationship. The claimant also told V he wants him and his brother to have a good life and thinks of them often. V did not respond other than to say he does not enjoy coming to the sessions. Although encouraged to talk and share his feelings, V remained quiet.

V's Circumstances and Views

- [179] Aware that V would be speaking with "a child advocate" in the coming weeks, at the last session the claimant said he was hopeful V would express his true emotions and allow him to be in V's life once again.
- [180] During his testimony, the claimant blamed V's unwillingness to engage on the respondent, speculating that the relatively long drive to Ms. Besla's office in Surrey from Abbotsford allowed her to coach him on the way to the sessions, which she denied. In addition to denying that she ever attempted to influence V against the claimant, the respondent said her mother and brother, who are very close to V and A, would never do such a thing because they love the children. The respondent said she does not speak to the children

about the claimant. Instead she talks to them about positive things.

- [181] Repeatedly accused of failing to properly encourage or support the re-establishment of the children's relationship with the claimant, the respondent acknowledged not telling them the claimant had completed some previous counselling for anger management. She said she did tell them he was trying (to meet with them) and they should spend whatever time they can with him.
- [182] Another focus of cross-examination was the respondent failing to inform or consult with the claimant about parenting decisions. She expressed confusion about being required to do so, although the January 2021 Order obligated her to consult with him about significant decisions. The respondent acknowledged that prior to the order, in the summer of 2019, she arranged for V to visit her brother and his family in Winnipeg without informing the claimant. She indicated she was not comfortable having direct contact with the claimant and has never spoken to him since the separation.
- [183] In written and oral submissions, V's counsel Mr. Zimmerman addressed his impressions of V, V's current circumstances and his views, but also his response to aspects of the evidence. In Grade 8 and attending middle school, V's favourite subject is English. V is a basketball fan but does not have a favourite team. V enjoys reading dystopian novels and writing. He has read a ton of books. V also likes to play Minecraft on his X-Box. He hopes to become a dentist.
- [184] Mr. Zimmerman reviewed the Section 211 Report with him. V stated that what he said to the report writer was true. V recalled incorrectly that the claimant's supervised visits stopped around the winter of 2021. Consistent with the supervised visit reports, however, V said he attended one visit but did not want to attend the second visit. His mother tried to persuade him but he refused.
- [185] He said he likes that his mother has all of the parenting time and makes all decisions about him, because it has resulted in a period of stability and calm.
- [186] V described his mother as caring. She is not overly strict but she does have rules. V is comfortable talking and sharing his feelings with his mother. V identified his mother as the parent who has always attended teacher interviews, taken him to the dentist, doctor and other appointments. V denied that his mother has told him or coached him about what to say to Ms. Atwal, Ms. Besla or Mr. Zimmerman. He stated that his mother has not told him much about court. She does not talk to him about his father or say negative things about him.

- [187] V described his relationship with the claimant as not close. V attributed the distance between them to what his father had done in the past. V stated his father is an angry person with a drinking problem. He specified that his father's drinking made him more violent. When his father drank, he would be verbally and physically aggressive with his mother, his brother and him. V was unclear about whether his father had taken any steps to stabilize his life, including quitting drinking and attending counselling.
- [188] V does not recall his father calling him over the last few years although V also indicated his brother may have answered some calls from his father in the past. His father has never sent him cards for special occasions although he did bring one to a counselling session, which V interpreted as making a show for the counsellor.
- [189] V said he did not like the counselling with Ms. Atwal. Whenever he tried to say something, he felt she would take his father's side. During the sessions his father said V was not present when his parents were fighting. V disagreed, which I observe is not reflected in Ms. Atwal's records. V said he was present for the middle and end of the October 2, 2016 Incident.
- [190] V stated he did not mind the counselling with Ms. Besla. Describing her as unbiased, he understood she was trying to re-establish his relationship with the claimant. V did not want to go but he did attend.
- [191] V identified one of the most significant factors affecting their relationship was the claimant had never admitted or apologized for the things that happened in the past.
- [192] Consistent with the respondent's evidence, Mr. Zimmerman described V as highly intelligent, thoughtful, calm, responsible and mature for his age. Mr. Zimmerman also noted that during their many interviews V's views did not change. Mr. Zimmerman provided various examples of V's capacity and understanding during their interactions, such as, during their initial meeting, V ably answered questions about the roles of the judge and lawyers in this proceeding and the risks of taking a particular position. V was also able to weigh the pros and cons of various options and is well aware the court can order him to have parenting time with the claimant, despite his opposition.
- [193] The claimant disputed the reliability of Mr. Zimmerman's account of V's disclosures and views, again suggesting they reflect the lies he has been repeatedly told. He was critical of Mr. Zimmerman for meeting with V remotely, meaning from home, where he was subject to the presence of the respondent and other family members, rather than in person.
- [194] The claimant testified to being opposed to supervised parenting time with V because supervision is unnecessary and he has "money problems". The claimant also expressed the view that when a third person is involved, V cannot fully share his feelings because he is afraid that counsellors or supervisors will report what he says and those "at home" will become aware.

[195] The claimant said he would exercise supervised parenting time if supervision is ordered, but the respondent should be required to pay half.

Assessing Credibility and Reliability

[196] Finding the facts necessary to decide the parenting issues requires me to assess the credibility and reliability of the parties' evidence in the context of the evidence as a whole, and the reliability of the hearsay statements made by A and V as recorded in the Section 211 Report, supervised access reports, counselling documents and for A, what he said to Detective Farai and the respondent.

Legal Principles

[197] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they saw or what they recall.

[198] Also, credibility and reliability are not all or nothing concepts. I may believe some, all, or none of a witness's evidence and attach different weights to different parts of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

[199] The basic approach to assessing the truthfulness of any interested witness was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357, with these words:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[200] *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, identified several factors to consider when assessing both credibility and reliability, which I summarize as follows: the capacity and opportunity of the witness to observe the events at issue; the witness's ability to remember those events; the ability of the witness to resist being influenced by their interest in recalling those events; internal and external inconsistency in the witness's evidence, meaning did their testimony change between direct and cross-examination, between prior statements, their discovery evidence and their evidence at trial; whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence; whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and the witness' demeanour, meaning the way they presented and behaved while testifying.

- [201] Regarding the last factor, Faryna and other authorities caution against relying too heavily on the demeanour of a witness to determine their credibility, given the risk of misinterpreting the testimony of the better actor as truthful, and conversely, the poor presentation of an honest witness as deceptive (see: *R. v. Jeng*, 2004 BCCA 464 at para. 54; *R. v. Tyers*, 2015 BCCA 507 at para. 18).
- [202] The potential for misinterpretation also arises where witnesses testify through an interpreter. Fortunately in this case we had the benefit of a consistent and particularly skilled interpreter. Further, both counsel are Punjabi-speaking and were quick to address any interpretation issues.
- [203] Bearing in mind the allegations of family violence, I also highlight that the law prohibits unsupported stereotypical reasoning or speculation about human behaviour from affecting the assessment of credibility. It is understood that there is no typical victim, typical perpetrator or typical ways in which a victim or perpetrator will behave.
- [204] Further, the evidence regarding children is recognized as needing to be analyzed somewhat differently based on their age at the time of the alleged events. In *R. v. B. (G.)*, [1990] 2 S.C.R. 30, [1990] S.C.J. No. 58 at para. 56, Justice Wilson observed:
- [56] While children may not be able to recount precise details and communicate the when and the where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it.
- [205] Finally, I remind myself of the relationship between the civil burden of proof, on a balance of probabilities, and the assessment of credibility, as described in *F.H. v. McDougall*, 2008 SCC 53:
- [86] However, in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case
- [206] Turning now to the principles that govern the assessment of the children's hearsay evidence. Hearsay evidence is an out of court statement relied on to prove the truth of its contents: *R. v. B. (K. G.)*, [1993] 1 S.C.R. 740 (S.C.C.) at 762-64. Primarily concerned with an inability to test the out of court statement through cross-examination, under the hearsay rule, hearsay evidence is presumptively inadmissible unless a traditional and/or the principled exceptions apply: *R. v. Khelawon*, 2006 SCC 57.
- [207] Under the principled exception, hearsay evidence may be admitted for its truth if it is both necessary and reliable.

- [208] Recognizing the harm or potential trauma involved, children rarely, if ever, are required to testify in family law proceedings. Section 202 of the FLA provides the court with a broader discretion to admit a child's hearsay evidence, having regard to their best interests. Necessity is not required.
- [209] At common law, threshold reliability must be established before an out of court statement can be admitted for its truth. Applying a functional approach, the admissibility inquiry focuses on the particular dangers presented by the hearsay evidence at issue and the circumstances relied on to overcome those dangers: Bradshaw at para. 39. If admitted, the statement is then assessed for its ultimate reliability. In assessing both threshold and ultimate reliability, all relevant factors are considered, including the presence of supporting or contradicting evidence: Khelawon at paras. 2 and 4; R. v. Bradshaw, 2017 SCC 35. Evidence will not corroborate the threshold reliability of a statement unless it is independent evidence that supports the truth of an assertion.
- [210] In cases dealing with children's hearsay statements, the indicators of (substantive) reliability have been found to include: the child's age, intelligence, understanding and demeanour; the timing of the statement, whether it was made spontaneously or in response to non-leading questions; the absence of motive for either the child or the person testifying to their statement to fabricate; and the absence of suggestion, manipulation, coaching, or undue influence: R. v. Khan, [1990] 2 S.C.R. 531, [1990] S.C.J. No. 81 at para. 30; D.D.R. v. K.T.R., 2019 BCSC 1805 at para. 102.
- [211] Although also hearsay evidence, the "facts" stated in a s. 211 report are "prima facie evidence" of their truth: K.M.W. v. L.J.W., 2010 BCCA 572 at para. 50. This includes a child's disclosures and statements about their views and preferences.

Discussion

- [212] With these principles in mind, I turn to assess the parties' evidence and the hearsay evidence of A and V.
- [213] Although the claimant did not object to the admission of V and A's hearsay evidence, implicitly at least, he asserts that any disclosures of abuse that V and A have made, and V's stated opposition to any involvement with him, are unreliable.
- [214] I start with the credibility of the parties, given the suggestion that the respondent has negatively influenced the children and is entirely responsible for V's views about the claimant. Although, I have yet to discuss some of the parties' evidence related to the other substantive issues, my assessment is based on all of their evidence and in the context of the evidence as a whole.
- [215] In summary, I find the respondent was a credible and reliable witness. In sharp contrast, I have serious concerns about the claimant's credibility.

- [216] Beginning with the respondent, she displayed a truly remarkable memory, which is a critical factor in my assessment of her evidence as reliable. Able to recall bank account numbers, amounts of money and dates from the time of the parties' first separation in 2003, she also provided extremely detailed evidence about family violence and other circumstances. Sometimes overly inclusive, particularly when describing the incidents of family violence that led to the first and final separations, my impression is the respondent was trying her best to convey every aspect of those incidents and her experience.
- [217] The claimant impugns the respondent's credibility in part because she gave some evidence about family violence for the first time in cross-examination. It is clear, however, the additional evidence was elicited by the claimant's persistent questioning. The respondent testified, for example, about his controlling and emotionally abusive behavior in response to repeated suggestions the parties actually had normal conflicts over the children's behaviour, the claimant's relationships with her and the children were positive or at least normative, her inability to recall any happy family times was not believable and she was to blame for the children's estrangement from the claimant.
- [218] Importantly, throughout direct and cross-examination the respondent's testimony remained factual. Although she was at times less responsive or more tangential in cross-examination, her credibility was not undermined by any material inconsistencies in her evidence.
- [219] The respondent's demeanour reinforces my assessment of her credibility based on the content of her evidence. Always respectful and attentive, the respondent appeared very serious and subdued. Very stoic most of the time, she also conveyed a certain vulnerability and bewilderment. Her presentation was the same as she sat in the gallery throughout the trial before and after her testimony.
- [220] I do have limited concerns about specific aspects of the respondent's evidence. They include some minimization of the claimant's parents' level of involvement with the children before the final separation. Although, I can accept the respondent was entirely responsible for the children vis-à-vis the claimant who was rarely home, there is no dispute the grandparents were responsible for the children when the respondent was working. Indeed the respondent stopped working at one point when her mother-in-law was unable to care for V because of surgery. I also accept they were likely at least somewhat involved with the children when she was not at work. I would note the respondent's allegations about the final incident of family violence places the grandparents at the park with V when the incident began.

- [221] I have the same concern about her evidence she did not talk to the children about the claimant or his family violence. V's comments to Ms. Atwal about his mother telling him his father did not know how to be nice and did not like her, and showing him a picture related to her hair being pulled, contradict this evidence. As I have indicated, there is such a picture and I can think of no other reasonable explanation for V becoming aware of it, although the respondent was not asked about whether she did so.
- [222] Both she and the claimant appear to assume that any discussion with V or A about the claimant's family violence would be wrong or inappropriate. In my view, however, it is not realistic or reasonable to expect parents and children who have been victims of family violence to never talk about what happened. While, of course parents should always refrain from disparaging one another or attempting to influence a child against the other, talking about past experiences of family violence is entirely different and some discussion is likely necessary to deal with or overcome those experiences.
- [223] On the whole I found the respondent's version of events convincing. Her descriptions of the claimant's abusive and controlling behaviour (as well as his misuse of alcohol), which included many idiosyncratic details, impressed me as authentic recollections of actual events and painful, traumatic circumstances. Importantly, aspects of the respondent's allegations of family violence are supported by, or at least consistent with, other evidence, including the children's disclosures to the Section 211 Report writer, the claimant's guilty plea to committing a violent offence against the respondent in 2005 or 2006, the police photographs of the respondent after the October 2, 2016 Incident and the peace bond the claimant entered into in 2018.
- [224] Again, the respondent's allegations regarding the family violence that precipitated the first and final separations were not challenged in cross-examination, despite the claimant's own denials he had ever been physically violent with the respondent or the children or had ever abused alcohol.
- [225] My assessment of the claimant's evidence is entirely different. As I have indicated, I am left with significant concerns about his credibility.
- [226] Dealing first with the way he presented, in contrast to the respondent, he often became quite agitated, both as he watched the proceedings and during his testimony. Rather than responding to questions factually, his answers were often accusatory, inflammatory, categorical, sarcastic and speculative.
- [227] The claimant regularly referred to the respondent telling lies as his explanation for a range of circumstances, including allegations of physical violence and the breakdown of his relationship with the children. He also refuted some of her most serious allegations of violence by suggesting they were simply not possible. For example, he testified that choking her before each of the separations could not have occurred because family members were present, which I found entirely unpersuasive.

- [228] Juxtaposed with all of this was the claimant's attempt to portray himself as quite virtuous. Not only did his presentation contradict this portrayal, the nature of his testimony left me without a plausible alternative account of the violent events the respondent described.
- [229] The claimant's complete denial of all allegations of violence is inconsistent with not only the respondent's evidence, but the other evidence that supports or is consistent with her evidence (again, the children's disclosures to the Section 211 Report writer, the claimant's guilty plea in 2005 or 2006, the police photographs of the respondent after the October 2, 2016 Incident and the 2018 peace bond).
- [230] There is also some inconsistency between the claimant's denials of any violence or alcohol abuse, and the letter he introduced into evidence from Ms. Kalsey who provided him with counselling that addressed anger and stress management, the effects of alcohol abuse on family and children and respectful family relationships. Again, the letter states the claimant was committed to learning new skills and "taking responsibility for his own behaviour". The same is true of the MCFD documents I referred to which he signed, that required him to abstain from drinking alcohol and attending a range of services related to both family violence and addictions.
- [231] In contrast to my limited concern about the respondent minimizing specific aspects of her evidence, the claimant gave direct evidence that was patently false. A simple example of this involved his direct evidence about V showing him a report card during an appointment with Ms. Besla that was not very good. In cross-examination, he agreed the opposite was true and the respondent was not challenged on her evidence of V's report card which was in fact very good. Another example involves his allegations the respondent discussed investing their funds in a taxi, selling their interest at great profit and then hiding the funds from him, all of which she categorically denied. Again, after making the allegation for the first time during his direct evidence, it was not raised in closing submissions.
- [232] Sometimes, the claimant also expressed completely contradictory views. For example, after giving evidence that the respondent was a good mother, he testified to being concerned she may turn V into a terrorist.
- [233] In any event, the claimant's credibility was entirely undermined by his evidence denying any attempt to influence A about testifying in the criminal trial. Considered in the context of the evidence as a whole, and in particular the hearsay evidence of A, which I accept for reasons I will come to, as well as Detective Farai's testimony, I am firmly convinced the claimant and his sister attempted to persuade A not to testify or to give false evidence. This means the claimant not only lied under oath in this proceeding, he engaged in frankly deplorable conduct that involved betraying A and undermining the integrity of the criminal justice system.
- [234] Ultimately I have determined I cannot safely rely on any of the evidence of the claimant unless it is undisputed or confirmed by other evidence I do accept.

- [235] Turning to the children's hearsay evidence, again, neither the Section 211 Report writer nor Ms. Besla were required to testify which means the accuracy of their written accounts of statements made by the children are not disputed, although the role of the respondent's alleged influence very much is. I have already outlined my concerns about Ms. Atwal's evidence and my view of Detective Farai as a credible witness.
- [236] There is a kind of reciprocal relationship between my assessment of the children's various statements about family violence, A's statements about the claimant's attempts to influence his testimony and the parties' credibility.
- [237] In assessing the ultimate reliability of V and A's statements, again all relevant factors are considered, including the presence of supporting or contradicting evidence.
- [238] As it relates to their statements about the claimant's acts of family violence and excessive drinking, the only contradictory evidence, other than the claimant's, which I reject, is V's apparent comment to Ms. Atwal that he did not suffer abuse. Given my concerns about Ms. Atwal's evidence and her approach to the joint counselling, the respondent's evidence that V told her Ms. Atwal sided with the claimant and Mr. Zimmerman's submissions about V's statements to him about past abuse, I have some doubt about the accuracy of Ms. Atwal's evidence on this point. If V did in fact deny any abuse, I have little confidence that his denial was appropriately elicited or explored. In other words, I do not view the evidence of V's apparent denial on one occasion as reliable.
- [239] Addressing the balance of the children's disclosures of family violence, there is no dispute both A and V are intelligent, if not very intelligent. All of the evidence regarding V, including the observations of the Section 211 Report writer and the submissions of his counsel, indicate he is also sensitive, thoughtful and concerned about the truth.
- [240] Along with accepting the respondent's allegations of family violence, I have also accepted there was some (understandable) discussion of the claimant's family violence and the claimant. Discussing visits, phone calls and for V, counselling with the claimant, was also necessary. Although, I reject the suggestion the respondent attempted to negatively influence either A or V against the claimant, given his young age at the time of the separation, V was naturally susceptible to her perspective as well as A's. Also, I struggle to think of a reasonable explanation for showing V the police photographs.
- [241] Based on my assessment of the respondent's evidence as a whole, I accept her testimony about A's statements to her about abuse that occurred when she was not home, her depiction of A as sad and unhappy prior to separation, and A urging her to leave the claimant following the October 2, 2016 Incident.
- [242] Turning next to the children's statements to the Section 211 Report writer, again the report was unchallenged.

- [243] V was in Grades 2 and 6 turning seven when the final separation occurred. He was describing events more than three years later when he met with Ms. Carnduff. While the claimant argues V's young age and the passage of time raises significant concerns about the reliability of his memory, as the respondent's counsel noted, each of us is able to recall events and circumstances from that stage of our childhood. I accept that V was not so young that his memories must be viewed as unreliable. There is no suggestion that his statements to the Section 211 Report writer were elicited in response to leading questions. Considered as a whole, her report points to an objective approach to eliciting information from the children along with their views.
- [244] Again, V identified the claimant as hitting him or being physically abusive to him and A on multiple occasions. This is somewhat different from the respondent's allegations which focused on the claimant's abuse of A. V reported being present for the end of the October 2, 2016 Incident that involved the claimant hitting and hurting his mother. V recalled particular details about a vase falling and hurting his hand, consistent but not exactly the same as the respondent's account. Denying he and the respondent discussed the claimant, V stated he was aware or suspected she would not support him spending time with the claimant, which indicates to me he was comfortable speaking candidly. In any event, V went on to provide his own reasons for being opposed that included the claimant's failure to apologize, consistent in my view with the absence of manipulation, coaching or undue influence.
- [245] A was in Grade 12 and doing extremely well academically, according to him, when he spoke with the Section 211 Report writer. Despite presenting as disengaged, he disclosed the claimant was physically violent with all three of them, associated with his alcohol use. A also identified himself as a particular target, consistent with the respondent's evidence. He described his father choking his mother during the October 2, 2016 Incident, an especially dangerous form of violence, which is also part of her own account. In contrast to V, and although suspicious of the claimant's motivation, A expressed some willingness to see the claimant if he was genuinely interested.
- [246] In my view, the variability in the children's views and disclosures of family violence, coupled with their overall consistency, bearing in mind their different ages and opportunities to observe as it relates to the October 2, 2016 Incident, enhances rather than undermines the reliability of their hearsay statements. I accept that V was attempting to convey what he remembered and his own views.
- [247] Eighteen years old by then and ambivalent and suspicious rather than categorically opposed to any involvement with the claimant, I am not concerned about the reliability of A's statements.
- [248] I assess A's statements to Detective Farai as particularly reliable. A not only consented to the interview being recorded, he agreed to be completely honest, important procedural indicia of reliability. Further, A's distress about his father and father's family's attempt to

influence him along with his concern they could go to jail and strong reluctance to making a formal complaint, are consistent with the circumstances he described to Detective Farai and the absence of a motive to fabricate or anger as a motivation. The transcript also demonstrates A's ability to think and act independently. Again, A's statements about his father and aunt approaching him at the courthouse were corroborated by what Detective Farai observed in the video footage.

[249] Ultimately, I am satisfied that all of the hearsay statements of A can be safely relied upon and are entitled to significant weight. Given V's young age at the time of separation and the gap between the separation and his disclosures to the Section 211 Report writer, I would have put less weight on his disclosures of family violence but for their consistency with the statements of A and the respondent.

[250] In addition to the hearsay statements, Mr. Zimmerman provided detailed submissions about V's views. In light of my assessment of the evidence, the fact that V is now 13, the number of interviews or meetings he had with Mr. Zimmerman, and the consistency between the submissions and the evidence of V's views, I also accept that V has accurately or reliably conveyed his views to Mr. Zimmerman.

Analysis

[251] As indicated, in making orders about parenting time and parental decision-making, I must only consider V's best interests, which in turn requires me to consider all of his needs and interests based on the factors set out in ss. 37 and 38 of the FLA. Almost all of those factors identified are engaged here, although V's views, his significant relationships, the impact of family violence, and the requirement for cooperation or at least direct communication between the parties vis-à-vis parental decision-making, are most prominent.

[252] Addressing family violence as a consideration in determining V's best interests, based on my assessment of the evidence, I make the following findings:

¾ The claimant's family violence included the ongoing acts of physical violence fueled by alcohol misuse, emotional abuse and highly controlling behaviour described by the respondent, A and V;

¾ V was directly exposed to the claimant's significant family violence toward the respondent and A before the separation; and

¾ In addition to causing injuries and physical pain, the claimant's family violence was emotionally and psychologically harmful to A and V, as well as the respondent.

[253] In the language of s. 37(3) of the FLA, the claimant compromised the physical, psychological and emotional safety, security and wellbeing of A and V.

- [254] As *Barendregt v. Grebliunas*, 2022 SCC 22 emphasized at para. 43, the courts have increasingly recognized that any family violence or abuse may affect a child's welfare; research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives; and harm can result from direct or indirect exposure, for example, by observing the incident.
- [255] Rather than acknowledge his abusive and controlling behaviour and its harmful impact, the claimant accused the respondent of lying and influencing the children against him. He took this approach despite completing 10 sessions of a Respectful Relationships Violence Treatment counselling program ("RRVT Counselling") soon after the separation, entering into a Peace Bond and completing two "rounds" of joint counselling with V.
- [256] Throughout the trial, in addition to maintaining his denial of any wrongdoing and accusing the respondent of lying and undue influence, he also focused on blaming her for failing to facilitate the re-establishment of his relationship with V. His efforts to blame her took various forms, but they included faulting her for failing to tell the children about his RRVT Counselling and that he had stopped drinking.
- [257] All of this conduct, along with the claimant's attempts to prevent or influence A's testimony, demonstrate a marked inability to act in the best interests of his children.
- [258] Turning to the respondent, of course she had an obligation to protect A and V from being harmed by the claimant. Highly isolated, subject to ongoing abuse herself and unprotected by the claimant's parents however, she too needed protection.
- [259] Despite the abusive environment, the respondent was a loving and devoted parent. Always the primary caregiver to A and V, I accept she was and has remained very attentive to V's needs, and she and V share a very close relationship. It is clear V feels supported and understood by his mother. He trusts and respects her. V also enjoys close and supportive relationships with his maternal grandparents and his uncle.
- [260] Although there is no evidence about A's current circumstances, the evidence related to V and the submissions of his counsel indicate he also views his relationship with A as positive.
- [261] V has in fact flourished since the separation.
- [262] Addressing his relationship with the claimant, the respondent does not dispute that V loved and respected his dad before the separation. Although V was very distressed by the claimant's violence, I accept there were positive aspects to V's relationship with him before the separation.
- [263] I also accept the claimant wants to have a relationship with V. The report of Ms. Besla, as well as Ms. Atwal's evidence, demonstrates his commitment to the joint counselling and the capacity to engage appropriately with V under supervision. Although V sometimes appeared to enjoy interacting with the claimant during joint counselling sessions with Ms.

Atwal, I accept the respondent's evidence that V was always resistant to attending and often upset before and after sessions. It is clear V not only felt uncomfortable during joint sessions with Ms. Besla, he was also unwilling to interact with the claimant. I reject the notion that the respondent is responsible for V's response to joint counselling or the idea that there is anything wrong with that response.

- [264] With the benefit of hindsight and in light of my findings, I can see that attempting to re-establish the relationship before addressing the family violence issues was contrary to V's particular emotional and psychological needs.
- [265] The claimant argues, and I agree, that absent an order requiring V to maintain some involvement with him, V is unlikely to take any steps on his own.
- [266] Underlying V's opposition to any involvement with the claimant is his failure to apologize for or acknowledge his abusive behaviour, and to demonstrate change. This is not only understandable, it is appropriate. The reality is that a lack of concern regarding the claimant's significant past violence would be concerning. In my view, along with his emotional and psychological needs, V's opposition reflects his integrity.
- [267] Given V's obvious maturity, thoughtfulness and sensitivity and all of the circumstances, including most importantly my findings of family violence, I agree with his counsel that his views are entitled to significant weight.
- [268] I also agree it is not in V's best interests to require him to speak with or visit the claimant in person, against his wishes. Accordingly, I grant an order that the claimant will have no parenting time with V, except at his request and with his consent.
- [269] At the same time, I am also not persuaded that preventing any future opportunity for a relationship with the claimant is in V's long-term best interests. It is difficult to quantify and to anticipate how much may be lost by giving up on the possibility of a meaningful relationship or at least some connection with a parent in these circumstances. Should the claimant take significant steps to fully acknowledge and properly address his family violence and its impact, it may well be that an attempt at re-establishing some involvement would be in his best interests.
- [270] Ultimately, I have determined that granting the claimant leave to apply for a review of the order granting him no parenting time to V, after he has taken those significant steps, is in V's long-term best interests.
- [271] In the meantime, the parties and V have leave to propose what terms establishing what is required before the claimant can seek a review.
- [272] My view of V's best interests in relation to the allocation of parental responsibilities is much the same. The evidence satisfies me that the claimant's involvement in exercising parental responsibilities and decision-making before separation was minimal. Much like the joint counselling, the January 2021 Order requiring the respondent to consult with the claimant

about significant decisions affecting V, rest on setting aside the disputed family violence allegations. Without suggesting the respondent was not obligated to comply, some arrangements ought to have been made that would have allowed for consultation without the need for direct communication. The reality is the respondent has not spoken with the claimant since the separation. Her limited English and perhaps his too, prevents meaningful written communication. In any event, I am firmly of the view that requiring the respondent to communicate with the claimant directly about V is not in his best interests. This is partly because he does not wish the claimant to play a role in making decisions that affect his life, but it is also because, at this stage, I have no confidence in the claimant's ability to participate respectfully and reasonably.

[273] I declare that both parties are guardians pursuant to s. 39(1) of the FLA, however, I order that all of the parental responsibilities enumerated in s. 41, except (j), are allocated to the respondent alone. As it relates to s. 41(j), both parties may request and receive information about V's health, education or other information respecting him from third parties, subject to third parties' requirement for his consent. Although the respondent is not required to consult with the claimant regarding V, I do require her to notify him promptly of any medical emergency for V, through an agreed upon third party.

[274] For clarity, I grant an order permitting the respondent to apply for V's passport and other travel documents for him, without the consent of the claimant. I also grant an order permitting V to travel without the claimant's consent.

[275] Again, I grant the claimant leave to apply for a review of this order on the same grounds as the parenting time order.

[276] Any leave application brought by the claimant must be served not only on the respondent, but also on V through his counsel.

Child Support

[277] In detailed submissions the respondent argues income should be imputed to the claimant, taking the position that some of the business expenses he deducts from his gross income should not be considered in determining his income for child support purposes. The claimant asserts the respondent has failed to prove that any of his claimed expenses are unreasonable, relying on a partial misunderstanding of the burden of proof as it relates to business expenses, which I will discuss in a moment.

[278] Although the claimant proposes incomes for 2016 onward that are somewhat higher than the total or line 150 incomes in his tax returns, he has not explained which of the claimed expenses he has added back.

- [279] Given the children have resided entirely with the respondent, her income is only relevant to determining the proportion of the claimant's contribution to the children's expenses under s. 7. Her income is a key consideration in applying the Spousal Support Advisory Guidelines [SSAG] with respect to her claim for an unequal division of family property in lieu of spousal support.
- [280] Despite the claimant's allegations the respondent earned undeclared cash income during the marriage, his DivorceMate calculations indicate he accepts her income is appropriately based on her total incomes as set out in her annual tax returns.
- [281] Following the trial, I invited the parties to make further submissions about whether income should also be imputed to the respondent based on the rental income she has received since the separation, which I will address in determining her incomes.

Legal Framework

- [282] Under section 147 of the FLA each parent has a duty to provide support for their child. Section 150(1) requires the amount of a child support order to be determined in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines].
- [283] The key objective of the Guidelines is to establish a fair standard of support for children that ensures they continue to benefit from the financial means of both parents after separation. The Guidelines require payment of the "table" amount of child support based on the payor's annual income, and an additional amount, if any, for extra or specified expenses under s. 7, based on both parents' annual incomes.
- [284] Section 16 of the Guidelines provides that a parent's annual income is determined using the sources of income set out under the heading "Total Income" in the Canada Revenue Agency T1 General form, namely the income set out at line 150, adjusted in accordance with Schedule III of the Guidelines.
- [285] Under s. 19 of the Guidelines income may be imputed in a broad range of circumstances, including where the parent has unreasonably deducted expenses from income: s. 19(1)(g). Section 19(2) of the Guidelines specifies that the reasonableness of an expense deduction is not solely governed by whether it is permissible under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
- [286] Although the party seeking to impute income bears the onus of proof, under s. 19(1)(g) of the Guidelines, the initial evidentiary burden is met by showing the other party had deducted business expenses: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 140; and *C.M. v. V.M.*, 2016 BCSC 2144 at paras. 39-40. The onus then shifts to the other party to demonstrate the business expenses are reasonably deducted from income for child support purposes: *C.M.* This requires the claimed expense to not only be reasonable, but also to have legitimate business purpose. Personal expenses, that is expenses that provide a personal benefit and/or constitute an ordinary living expense, should be added back into the other

party's income: D.M.B.; Kowalewich v. Kowalewich, 2001 BCCA 450.

[287] Sections 19(1)(g) and (2) of the Guidelines require the reasonableness of expenses claimed against gross rental income to be assessed in much the same way as the claimant's business expenses: Barry v. Davis, 2021 BCSC 546.

Claimant's Income

[288] During his evidence, the claimant conveyed a limited understanding of the deductions made from his gross income, indicating he provides all of his receipts, including some personal ones, to his accountant Mr. Wahdawan. The claimant repeatedly testified to relying on his accountant to make the appropriate deductions. In addition to his T1 General Tax returns up to 2021 all of the receipts are in evidence.

[289] Mr. Wahdawan gave brief fact evidence. In determining the claimant's deductible business expenses, he relies on an assistant to calculate the total expenses based on the receipts. Mr. Wahdawan acknowledged a number of errors in the expense calculations, which I observe were generally in an upward direction.

[290] The following table identifies the claimant's gross and total incomes and the expenses claimed based on T1 General tax returns and the expenses the respondent recognizes as reasonable, along with the proposed Guideline incomes of both parties, my assessment of reasonable expenses and my Guidelines income findings, which are explained below.

T1 General Claimed Expenses

Claimant's Position

Respondent's Position

Court

2016

Meals

\$12,729.60

\$12,729.60

\$6,350.00

Insurance

\$17,229.10

\$14,848.71

\$14,878.71

Interest

\$3,582.26

\$3,582.26

\$3,585.26

WCB

\$948.58

\$948.58

\$948.58

Fuel

\$77,468.90

\$68,503.56

\$68,503.56

Repairs

\$15,842.11

\$15,842.11

\$15,842.11

Business tax/licenses

\$355.18

Office Expenses

\$4,075.59

Office Supplies

\$0.00

Professional Fees

\$1,050.00

\$1,050.00

Utilities

\$2,280.00

\$800.00

Travel

\$0.00

Motor Vehicle

\$3,847.58

Capital Cost Allowance

\$40,301.02

\$20,150.00

Other

\$7,946.41

\$6,200.00

Gross Income

\$216,030.58

Total Income

\$28,374.65

Guidelines Income

\$37,577.00

\$99,575.76

\$77,872.36

2017

Meals

\$12,648.00

\$12,648.00

\$6,000.00

Insurance

\$18,514.33

\$15,548.91

\$15,548.91

Interest

\$2,745.34

\$2,745.34

\$2,745.34

WCB

\$4,128.30

\$1,217.69

\$1,217.69

Fuel

\$91,886.54

\$91,886.54

\$91,886.54

Repairs

\$24,742.52

\$18,647.79

\$18,647.79

Business tax/license

\$413.28

Office Expenses

\$4,075.59

Office Supplies

\$2,615.28

Professional Fees

\$1,300.00

\$1,300.00

Utilities

\$0.00

Travel

\$387.60

Motor Vehicle

\$2,639.96

Capital Cost Allowance

\$24,180.62

\$12,000.00

Other

\$2,640.00

\$1,200.00

Gross Income

\$219,959.35

Total Income

\$28,373.18

Guidelines Income

\$36,372.00

\$77,265.08

\$69,263.08

2018

Meals

\$10,608.00

\$10,608.00

\$5,000.00

Insurance

\$5,488.52

\$5,488.52

\$5,488.52

Interest

\$1,876.92

\$1,876.92

\$1,876.92

WCB

\$937.11

\$937.11

\$937.00

Fuel

\$46,297.56

\$33,214.14

\$33,214.14

Repairs

\$29,659.95

\$23,937.67

\$23,937.67

Business tax/license

\$0.00

Office Expenses

\$2,877.32

Office Supplies

\$0.00

Professional Fees

\$1,300.00

Utilities

\$2,832.27

\$800.00

Travel

\$129.22

Motor Vehicle

\$2,578.77

Capital Cost Allowance

\$14,508.37

\$7,250.00

Other

\$3,050.00

\$1,200.00

Gross Income

\$150,887.22

Total Income

\$28,743.21

Guidelines Income

\$37,031.00

\$74,824.86

\$71,182.97

2019

Meals

\$14,203.20

\$14,203.20

\$7,000.00

Insurance

\$6,013.50

\$6,013.50

\$6,013.50

Interest

\$1,144.44

\$1,144.44

\$1,035.66[1]

WCB

\$855.04

\$855.04

\$855.04

Fuel

\$84,252.42

\$84,224.60

\$84,224.60

Repairs

\$36,472.86

\$29,710.49

\$29,710.49

Business/tax license

\$0.00

Office Expenses

\$963.85

Office Supplies

\$2,624.55

Utilities

\$1,971.62

\$800.00

Travel

\$0.00

Professional Fees

\$1,102.50

\$1,102.50

Travel

\$253.05

Motor Vehicle

\$1,739.98

Capital Cost Allowance

\$8,705.02

\$8,705.02

Other

\$5,500.00

\$200.00

Gross Income

\$199,435.58

Total Income

\$33,583.55

Guidelines Income

\$39,919.00

\$63,284.31

\$59,788.77

2020

Meals

\$16,560.00

\$16,560.00

\$8,000.00

Insurance

\$14,198.00

\$14,198.00

\$14,198.00

Interest

\$944.13

\$944.13

\$187.64[2]

WCB

\$1,013.88

\$1,013.88

\$1013.88

Fuel

\$77,652.82

\$76,932.23

\$76,932.23

Repairs

\$32,311.25

\$33,869.69

\$33,869.69

Business/tax license

\$0.00

Office Expenses

\$0.00

Office Supplies

\$2,400.00

Professional Fees

\$1,155.00

\$1,115.00

Utilities

\$1,532.16

\$800.00

Travel

\$0.00

Motor Vehicle

\$3,474.88

Capital Cost Allowance

\$5,223.01

\$5,223.01

Other

\$5,580.00

\$27.00

(\$20.00 USD)

Gross Income

\$189,688.40

Total Income

\$27,643.27

Guideline Income

\$30,050.00

\$46,170.47

\$48,321.95

2021

Meals

\$13,524.00

\$13,524.00

\$6,500.00

Insurance

\$12,038.50

\$12,038.50

\$12,038.50

Interest

\$0.00

\$0.00

WCB

\$1,025.94

\$1,025.94

\$1,025.94

Fuel

\$78,763.88

\$70,666.43

\$70,666.43

Repairs

\$54,893.20

\$54,893.20

\$54,893.20

Business taxes/licenses

\$5,375.72

Office Expenses

\$2,400.00

Office Supplies

\$0.00

Professional Fees

\$1,155.00

\$1,115.00

Travel

\$103.89

Utilities

\$1,987.54

\$800.00

Motor Vehicle

\$2,328.61

Capital Cost Allowance

\$3,133.81

Other

\$2,425.95

\$625.95

Gross Income

\$199,629.70

Total Income

\$20,473.66

Guidelines Income

\$27,189.00

\$47,481.63

\$51,964.68

[291] As it relates to the claimant's expenses for meals and entertainment, he testified the amounts claimed are based on the per diems permitted by the government. Mr. Wahdawan also indicated the per diems yield higher amounts than actual meal costs. I accept this is true for the claimant. Many of his food receipts indicate he purchased meals with fuel points. His food receipts also include purchases made in Abbotsford, where he lives, and Surrey, which is nearby.

[292] The respondent accepts the expenses claimed each year for meals (and entertainment), interest, WCB, fuel and repairs. The amounts she includes for each of these categories is based on her calculations from the claimant's receipts. Where they differ from the amounts claimed, it is because the receipt amounts do not support the amount claimed. Without providing calculations of his own, the claimant argues Mr. Wadhawan should have been cross-examined about each discrepancy and the respondent's figures have no reliable value.

[293] I entirely disagree. The respondent's calculations are the result of simple addition. Absent a dispute about their accuracy, and given the various "clerical" errors noted during Mr. Wadhawan's testimony, I prefer the respondent's calculations of the amount of the deductions for those categories.

[294] The respondent explains she has excluded various other business expenses because she has included the full amount claimed for meals, despite the evidence that the claimant's actual cost is less than the daily government rate he claims. As it relates to the deductions for the Capital Cost Allowance ("CCA"), she takes the position they are not reasonable.

- [295] Categories of expenses the respondent says should be imputed or added back, include office and office supplies expenses. Mr. Wahdawan testified he allows clients to claim around \$2,400 per year for a home office, based on square footage. I do not accept, however, that the claimant requires a home office for work purposes.
- [296] The respondent also imputes the cost of the utilities claimed, which include the household utilities for the home he shares with his parents.
- [297] After the claimant received \$150,000 from the funds held in trust related to the transfer of the former family home, he and his parents purchased that property. His registered interest is only 1% interest. The claimant testified essentially that he has no equitable interest. He is on title only because his parents could not get approval for the mortgage without him. He also testified to paying rent to his parents of \$1,000 each month sometimes: "If I have it, I give it; if I don't, I don't". Some of the utilities are in his name. The claimant suggested this is because his parents do not speak English. Asked about who pays them, he said he sometimes pays a percentage.
- [298] Although I reject the claimant's evidence about his ownership interest in his current home, regardless, there is no work-related purpose for the household utility cost he deducts.
- [299] The utilities category also appears to include the claimant's cell phone expenses. He testified to having two cell phones for work, one for use in the US and the other for use here, which I do accept, and estimate those costs at \$800 annually.
- [300] Another disputed category are the motor vehicle expenses the claimant deducts related to his personal vehicle. The accountant testified that the Canada Revenue Agency allows a percentage of the costs related to the use of the vehicle for work purposes to be claimed. He understood the claimant mainly used his personal vehicle for work. This would explain the 25% deduction applied to the total for motor vehicle expenses for "P Use". However, the claimant's evidence indicates his use of the vehicle for work purposes is limited to driving himself to and from where his truck is parked, which is not far from his home.
- [301] In my view, no deduction for this category of business expense is reasonable for child support purposes, also bearing in mind the respondent, like all other T4 employees who drive themselves to and from work in a personal vehicle, are not permitted to deduct these expenses from their gross income.

Capital Cost Allowance

- [302] The claimant's CCA deductions relate to his 2016 Volvo truck, which he drives to haul loads. He takes the position all of his CCA deductions since 2016 are reasonable. The respondent argues none should be allowed.

[303] Like other business expenses the reasonableness of deductions for CCA relating to personal property is assessed pursuant to ss. 19(1)(g) and (2) of the Guidelines: Egan v. Egan, 2002 BCCA 275.

[304] Accordingly, the deduction is not automatically permitted when determining income for Guidelines purposes simply because it is allowed under the Income Tax Act. Reasonableness is assessed by examining the nature and extent of the CCA deduction: Egan at para. 25.

[305] In Egan, the Court of Appeal endorsed a pragmatic, contextual approach to contested CCA claims, also stating if there is some evidence supporting the reasonableness of the expense, the deduction is unlikely to be denied. Nor are the rates permitted under the Income Tax Act likely to be second guessed. Egan identified factors listed in Andres v. Andres, [1999] M.J. No. 103, as providing helpful guidance in determining whether a particular CCA deduction should be imputed back into income. Those factors include:

1. Was the CCA deduction an actual expense in the year?
2. Was the CCA deduction greater than or less than the cost of acquisitions during the same time period?
3. Was the CCA deduction greater than or less than the repayments of principal with respect to the chattels in question?
4. Was the CCA deduction the maximum allowable CCA deduction?
5. Was it necessary to take the CCA deduction in that year?
6. How much of a loss in a business year resulted in that year?
7. Are the chattels for which the CCA was claimed truly needed for business purposes?
8. Do the chattels for which the CCA was claimed truly depreciated [sic]?
9. Is it foreseeable that future chattel purchases will not be required?
10. Is there a pattern of spending which establishes a greater real income than income tax returns indicate?
11. If the children were living with the spouse, would they benefit from the actual income earned by the spouse?
12. Is there a dire need for child support?

[306] In Egan, the CCA deduction for a work vehicle, approximately \$5,000, was allowed. The bulk of the claim was for depreciation and the evidence established depreciation was a real cost. The remainder of the CCA claimed was disallowed because it was not supported by the evidence.

- [307] Subsequent cases have also allowed CCA deductions for vehicles used for work, when the evidence establishes depreciation or allows for it to be inferred.
- [308] The claimant testified to purchasing the truck with a loan, without identifying the total amount of the loan. Two letters from the Royal Bank related to a business loan set out principal payments in 2019 (\$22,357.27) and 2020 up to August 20 (\$14,793.98). According to the respondent, the truck was originally purchased with a down payment of \$50,000 and the balance was financed over five years. There is no evidence about the purchase price.
- [309] The claimant's first Form F8 financial statement filed in June 2017, indicates he bought the truck in 2015 and its value at that time was \$3,000. Subsequently in his second Form F8 he valued the truck at \$15,000. The claimant also relies on letters from sales representatives at Pacific Coast Heavy Truck Group where he bought the truck, which estimate its value. The first estimate, dated in October 2016, is for \$71,000. The second dated in July 2019 values the truck at \$40,000. Ultimately, the parties agreed to the claimant paying the respondent \$8,750 for her half interest in the truck, indicating a current value of \$17,500. All of this suggests a maximum drop in value of \$53,500 since 2016.
- [310] The CCA deductions for 2016 through 2021, however, total approximately \$96,052. The CCA portion of the claimant's 2016 tax return, identifies an undepreciated capital cost ("UCC") of \$100,752.46. In 2016, the CCA deduction of \$40,301.02 is based on a 40% depreciation rate, which I accept must be allowable but strikes me as high, bearing in mind the estimates of the truck's actual value in 2016 and 2019. The claimant's tax return for 2017 does not include the portion of the return that sets out the CCA deduction (or the amounts claimed under other). His subsequent tax returns use the same 40% depreciation rate, so I infer that rate was also used in 2017, when \$24,180.62 was claimed. In 2018, his CCA deduction remained significant: \$21,762.55. After that, given the significant decline in the UCC the deductions become quite modest and in 2019 and 2020, they were less than the capital payments on the business loan.
- [311] There is no question the claimant not only uses the truck for work, he earns all of his income from driving it. He paid an unknown amount of principal on a truck loan. For most of 2016 those payments were made with family funds, as was a significant down payment when he purchased it in 2015, accepting the respondent's evidence. She does not dispute the reasonableness of claiming the interest on the loan as a separate deduction. Since August 2020, there has been no debt associated with the truck.
- [312] Regardless of my findings regarding the claimant's Guidelines incomes, he has and will continue to enjoy the significant tax benefit that results from all of his business expenses deductions, because they result in very modest net incomes. If he were to finance the purchase of new or newer truck, his deductions would again include his interest payments along with significant CCA deductions based on higher amounts for depreciation.

- [313] Leaving aside deductions from gross rental income, as I have indicated, the respondent does not have the ability to deduct work-related expenses from her gross employment related income. Her employment incomes have been and will, I predict given her limited earning capacity, remain modest, leaving aside temporary increases based on Covid-19 income benefits.
- [314] After the separation in October 2016, the claimant paid no child support until April 2018. In April and May 2018, he paid \$284 each month. The claimant made no further child support payments until April 2021 - not long before the trial started - when he began paying \$300 per month. By the end of the trial he had paid a total of \$7,843.
- [315] Her incomes since the separation, along with the claimant's failure to pay almost any child support until April 2021, created a significant, if not dire, need for child support.
- [316] Taking a pragmatic, contextual approach and considering the relevant Andres factors, including the significant need for child support and the apparent actual drop in value of the truck since October 2016, I have determined that for 2016, 2017 and 2018, allowing a deduction for 50% of the CCA claimed, for 2019 and 2020 the whole amount, and for 2021 no amount is reasonable.

Other Deductions

- [317] Although I appreciate the efficiency and practicality of the respondent's approach of allowing the full amount for the meal deductions as a kind of set off against not allowing other business deductions; in my view, reasonableness demands a closer, although not an exacting, consideration of each category.
- [318] As it relates to the claimant's deductions for food and entertainment, recognizing he claims more, if not significantly more, than he actually spends and he would also be incurring the food (and entertainment) costs if he did not have to travel for work, I assess a reasonable deduction at 50% of the costs claimed for each year.
- [319] The category of other expenses seems to be comprised of parking, truck washes and loaded trailer (overweight) expenses. The claimant gave confusing evidence about how, and the extent to which, he actually pays the truck wash expenses. His parking receipts include truck and personal vehicle parking. In 2016, receipts supported loaded trailer and truck parking costs of \$5,000 and \$1,200. In 2017, only truck parking of \$1,200 is supported by receipts and 2018 is the same. In 2019, receipts supported \$200 in truck parking. For 2020, the only receipt is for truck parking in the amount of \$20 USD. For 2021, receipts supported truck washes totalling \$625.95.

Respondent's Income

- [320] As I have indicated, since the separation in October 2016, the respondent has been receiving rental income from the basement suite in the former family home, with some gaps in tenancy or failure to pay rent, which she has reported in her tax returns starting in 2017. She testified to not claiming the rent she received after the separation for the remainder of 2016 because she was uncertain if the claimant claimed it. Her tax returns for 2017-2019 also show a net loss each year, based on the expenses she has deducted from the rental income. Her income tax documents for 2020 and 2021 do not include the schedule of expenses.
- [321] The categories of expenses she has claimed include insurance, interest (mortgage), maintenance and repairs, property taxes, utilities, and "other expense" categories, which in 2017, for example, totalled \$1,064 and \$1,347.
- [322] The respondent testified that "Hydro" and Terasen, or electricity and gas (the "Utilities"), and internet and cable are included in the rent and deducted as expenses. The tenant(s) is also given access to the washing machine. The amounts deducted for Utilities are quite modest. I also accept the cost of Utilities is increased by the tenant's use of the washing machine. Accordingly, I view the Utilities deduction as reasonable. I infer the amounts deducted for cable and internet are included under an "other expense" category. There is no evidence her total costs are increased by their availability in the basement suite. Consequently, I am not able to find they are reasonable.
- [323] Addressing the deduction for insurance, the respondent submits she pays a premium that covers the rental suite, relying on her home insurance application and declaration, which indicates the insurance extends to the rental area. Home insurance is a cost the respondent would incur in any event. I am not able to infer the cost of her home insurance is increased by the rental of the basement suite. Accordingly, I do not view this deduction as reasonable.
- [324] My view is the same regarding the interest deduction. This is an expense the respondent would incur in any event, given the mortgage on the home.
- [325] She also submits that deducting her property taxes is reasonable because they include an amount for solid waste and recycling charges, both of which the tenants would contribute to. However, her 2017 Property Tax Notice demonstrates those particular charges are only a very small fraction of the property taxes she paid and deducts. Consequently, I disallow this deduction.
- [326] Lastly, the respondent provided no specific evidence about expenses for maintenance and repairs. Accepting some cost for both would arise from a tenant's occupation of the basement suite, noting the fairly modest amounts claimed under this category, but uncertain about the extent to which they may include expenses not strictly related to the suite, I conclude an amount equal to 50% of the expenses claimed is reasonable.

[327] Based on her total incomes, less Schedule III deductions, her rental income and the deductions I have allowed for 2016 through 2019, and then estimating reasonable deductions from the gross rental income for 2020 and 2021, I find the respondent's Guidelines incomes for 2016 through 2021 to be as follows:

Year

Total Income

Rental Income

Expenses

Guideline Income

2016

\$18,653*

\$1,950

\$300

\$20,303

2017

\$22,495

\$7,800

\$1,299.15

\$28,995.85

2018

\$28,421

\$4,200

\$670.73

\$31,950.27

2019

\$21,342

\$6,000

\$885.98

\$26,456.02

2020

\$31,230

\$10,200

\$1,600

\$39,830

2021

\$31,620

\$9,350

\$1,500

\$39,470

*The total income included is less Schedule III deduction(s).

[328] A turned 19 in January 2021. Section 146 of the FLA defines a child as including a person who is 19 or older and unable to obtain the necessities of life or withdraw from the charge of his parents.

[329] The respondent has not asked me to determine whether A is still a child for child support purposes because of his wish for no involvement with the claimant.

[330] Accordingly, based on the claimant's Guidelines incomes for 2016 onward, I find his child support obligation since the separation is as follows:

Year

Guideline Income

Monthly Child Support Payable

Annual Child Support Payable

2016

\$77,872.36

\$1,178.09

\$14,137.08

2017

\$69,263.08

\$1051.05/\$1,074.95*

\$12,636.50

2018

\$71,182.97

\$1,104.74

\$13,256.88

2019

\$59,788.77

\$927.99

\$11,135.88

2020

\$48,321.95

\$756.51

\$9,078.12

2021

\$51,964.68

\$487.68

\$5,852.16

*The Guidelines changed November 21, 2017.

[331] This results in a total child support obligation of \$66,096.62 as of the end of 2021. As indicated by the end of the trial, the claimant had paid \$7,843 in child support. My expectation is that the parties will be able to agree on the claimant's 2022 Guidelines income based on my approach to determining his income in the previous years and the total arrears. In the meantime, the claimant must continue to pay monthly child support of \$487.68. He must also produce to the respondent all income documents and all paid receipts in support of claimed business expenses for 2022 by June 1, 2023 and by June 1 of each year thereafter, until V is no longer a child for the purposes of child support. In the event, the parties cannot agree on his current Guidelines income, they have leave to bring an application.

Property and Debt Division

Parties' Positions

- [332] Essentially, the claimant seeks an equal division of the parties' family property and debt. As I have indicated, he did not continue with, or pursue, his allegations she invested family funds in a taxi and then took the proceeds for herself or that she purchased his interest in the former family home using family funds.
- [333] The respondent makes an excluded property claim of \$35,380.52 based on her contribution to the purchase of the former family home from funds she saved during the parties' first separation. She also seeks an unequal division of the net equity in the former family home in lieu of spousal support, relying on s. 95(3) of the FLA.

Legal Principles

- [334] Part 5 of the FLA governs the division of property and debt after separation, based on an excluded property regime that defines property as family property or excluded property. The relevant principles are:
1. Spouses are entitled to family property and are responsible for family debt regardless of their respective use or contribution (s. 81(a));
 2. On separation, each spouse has a presumptive right to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt;
 3. Any real or personal property owned by at least one spouse at separation is family property, subject to s. 85 which identifies property excluded from family property (s. 84);
 4. Excluded property includes property acquired by a spouse before the relationship began (s. 85(1)(a)), and property derived from property or the disposition of property referred to in ss. 85(1)(a) and s. 85(1)(g);
 5. The party claiming property is excluded bears the onus of proof on a balance of probabilities with clear and cogent evidence (s. 85(2); *Pisarski v. Piesik*, 2018 BCCA 326);
 6. Family debt includes all financial obligations incurred by a spouse by separation and after separation if incurred for the purpose of maintaining family property (s. 86);
 7. An unequal division of family property, family debt or both may be ordered if it would be significantly unfair to divide them equally based on the considerations in s. 95(2) and (3) (s. 95(1)); and
 8. The significant unfairness threshold is a high bar. It requires unfairness that is "compelling or meaningful having regard to the factors set out in s. 95(2)", or something objectively unjust, unreasonable or unfair in an important or substantial sense: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44; *V.J.F. v S.K.W.*, 2016 BCCA 186 at para. 10; *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41 and 42.

Excluded Property Claim

- [335] The respondent provided very detailed testimony and documentary evidence in support of her excluded property claim, which is based on savings she accumulated in a sole account she opened in Winnipeg during the first separation and then contributed to the down payment of \$89,000 on the former family home by transferring them to an account the claimant held jointly with his parents.
- [336] The claimant does not dispute that the savings she accumulated during the first separation were excluded property. Nor does he dispute they can be traced to purchase of the former family home. Instead, he argues the exclusion was lost when she contributed them to the purchase.
- [337] *Venables v. Venables*, 2019 BCCA 281, affirmed that the intention of the spouse transferring "ownership" of the excluded property is critical in determining whether the property remains excluded or becomes family property. The same is true when a spouse contributes excluded funds to a joint purchase.
- [338] In *Pisarski v. Piesik*, 2019 BCCA 129 [Pisarski BCCA 2019], the parties purchased a house in their joint names shortly after they married with funds each of them contributed. The wife's funds were excluded, being proceeds from the sale of a condominium she owned prior to the marriage. The trial judge concluded they became family property when she contributed them to purchase the jointly held house. He found that each party intended to gift their respective contributions, noting they had pooled funds to acquire the house without steps being taken to document that the wife's contribution would be treated as separate. The decision was upheld by the Court of Appeal. Justice MacKenzie observed that "the 'gift' was to the marriage as an entity to which both parties belonged": *Pisarski BCCA 2019* at para. 45.
- [339] Similarly, in *Namdarpour v. Vahman*, 2019 BCCA 153, the trial judge's conclusion that the husband's personal injury settlement lost its exclusion and became family property was upheld on appeal. After he deposited the settlement funds into a joint account, they were used for a down payment on a property registered to both parties. The same joint account was also used for family purposes and both parties declared rental income from the property purchased with the settlement funds. At para. 46, Justice Savage remarked that depositing the funds into a joint account, by itself, was not persuasive evidence of donative intent. However, the pattern of activity in the joint account, along with the splitting of rental income, supported the finding that the husband intended to gift the funds.
- [340] In discussing the principles that apply to determining a party's intention based on the, Savage J.A. explained:

[40] (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those considerations include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.

[Emphasis added.]

[341] He also commented the role of the presumption of advancement should not be over-emphasized.

[342] Subsequently, in *Small v. Small*, 2020 BCSC 707, Justice Horsman, as she then was, interpreted the authorities as standing for the proposition that if a party "makes no attempt to keep excluded property separate, this supports an intention to gift the property to the other spouse": at para. 108 citing *Pisarski BCCA 2019* at para. 48; *Wickstrom v. Ng*, 2019 BCSC 1685 at paras. 160-161.

[343] I would note that in *Pisarski BCCA 2019*, MacKenzie J.A. also clarified the burden on the spouse seeking to prove the exclusion. If documentary evidence is not available, the spouse's testimony about the disputed transaction will be scrutinized for credibility. The court is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties: at para. 24.

[344] In summary, I am required to determine the respondent's intention at the time she contributed the excluded funds, after considering all the circumstances, including both direct and circumstantial evidence. The presumption of advancement applies only if I am unable to determine her actual intention.

[345] Along with the transfer and contribution to the down payment, the respondent also gave evidence about providing \$15,000 for the initial deposit.

[346] She maintained she did not intend to gift the excluded funds when she contributed them to the purchase of the former family home. She testified that earlier, during the brokering of their reconciliation, it was agreed the parties would keep separate any funds they had earned during the separation. She also testified that after they reconciled and were planning to buy a home, her mother-in-law and the claimant pressured her to contribute her savings.

[347] In cross-examination, she gave more detailed evidence that she objected to contributing. The claimant told her she was going to give her "Winnipeg money" as an offer on the former family home. When she responded they should use the money in their joint account instead, he slapped her and told her to "get out" if she was not going to contribute her funds. The respondent also gave evidence that she deposited all of her income once she started working in 2009 to a joint account with the claimant. There are no statements for a joint account from around that time.

- [348] Although the claimant does not assert an excluded property claim based on any contributions he or his parents made, the respondent was cross-examined on these issues. She denied that the claimant had contributed savings accumulated before the reconciliation stating he did not have any. She also testified he spent his money on his sister's wedding and had to borrow money from the company he worked for, which he was paying back when they reconciled. She also denied the suggestion that her money (and the claimant's from the joint account with his parents) was pooled with money they provided, stating they had no money and either were not working yet, or had worked seasonally for a very short time by then.
- [349] Denying any agreement to keep separate the funds each of them accumulated prior to reconciling, the claimant testified the top priority was being together as a family. Without specifying a timeframe and suggesting the joint account he had with his parents was really their account, he also gave evidence he had deposited his pay cheques and all of the money that was in that joint account.
- [350] There is no dispute that after the parties purchased the former family home, the mortgage was paid from a joint account.
- [351] Appreciating the need to carefully scrutinize evidence from a spouse asserting they did not intend to gift excluded property, my assessment of the respondent as a credible and reliable witness was based on the evidence as a whole, including the parties' conflicting evidence related to the excluded property issue which I have just now discussed.
- [352] As indicated, the respondent's remarkable memory played a role in that assessment. I accept therefore that the parties had another joint account that contained funds accumulated from the time of reconciliation. I also accept her evidence about proposing they use those joint funds instead of her Winnipeg money, and the pressure and abusive conduct of the claimant at that time.
- [353] In my view, the evidence of his conduct is key to determining the respondent's actual intention at the time, as are my findings about the claimant's physical violence, emotional abuse and highly controlling behaviour and their harmful impact.
- [354] In the context of an abusive spousal relationship, it would be unreasonable to expect documentation of an intention or an agreement to keep the victimized spouse's contribution separate.
- [355] The respondent's proposal to the claimant that they use joint funds was an attempt to continue to keep her Winnipeg money separate. In other words, it was an expression of intention to maintain it as excluded property. In light of all the circumstances, I am satisfied the claimant's conduct caused her to contribute them to the down payment.
- [356] I find the respondent did not intend to gift her Winnipeg money to the claimant or the marriage when she contributed those funds to the down payment.

[357] I conclude therefore she has made out her excluded property claim.

Dividing Family Property and Debt

[358] As I have indicted, the respondent seeks an unequal division of the net proceeds from the former family home, in lieu of spousal support, relying on s. 95(3) of the FLA.

[359] Under s. 95(3) of the FLA, the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the spousal relationship, may be considered in deciding whether an equal division would be significantly unfair, if, on making a determination respecting spousal support, the objectives of spousal support under s. 161 have not been met.

[360] As Justice Riley explained in *N.D.S. v. J.A.S.*, 2020 BCSC 1034 at para. 77, "[i]f a spousal support order is contemplated, but the objectives in s. 161 of the FLA have not been met by that spousal support order, this may result in or contribute to a finding of significant unfairness so as to justify an unequal division of family property."

[361] Consequently, it is necessary to first determine whether the respondent is entitled to spousal support and if so, whether an order for spousal support can meet the statutory objectives.

[362] The objectives in s. 161 of the FLA include:

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

[363] All of them are considered in determining entitlement to spousal support. Once entitlement is established, the amount and duration of spousal support is determined under s. 162 of the FLA:

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

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

- [364] The SSAG also provides an important tool in deciding on an appropriate award.
- [365] The respondent claims an entitlement to spousal support based on compensatory and non-compensatory grounds.
- [366] Animated by the first and second objectives, compensatory support is intended to provide redress for an economic disadvantage arising from the marriage or its breakdown (such as diminished earning capacity and lost career opportunities from taking on childcare responsibilities) or an economic advantage conferred upon the other spouse (such as enhanced earning capacity through career development): *Chutter v. Chutter*, 2008 BCCA 507 at para. 39. Both are not required.
- [367] If compensatory support is not justified, need alone may be sufficient to establish an entitlement to non-compensatory support, which is grounded in the third and fourth objectives. The purpose of non-compensatory support is to narrow the gap between the means and needs of the spouses upon marriage breakdown. The concept of need goes beyond the basic necessities of life and varies with the circumstances of the parties: *Chutter* at para. 55; *H.C.F. v. D.T.F.*, 2017 BCSC 1226 at para. 212; *Loesch v. Walji*, 2008 BCCA 214 at para. 39. The same is true of self-sufficiency.
- [368] The cases recognize that compensatory and non-compensatory support share the goals of equitable sharing of the economic consequences of a spousal relationship or its breakdown and narrowing the gap between the needs and means of the spouses. Viewed as a joint endeavour, the longer the spousal relationship, the "greater will be the presumptive claim to an equal standard of living on dissolution": *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 84.
- [369] Since the separation, the claimant has continued to earn higher incomes from his work than the respondent does. In 2020 and 2021, the respondent's employment-related income increased due to Covid-19 related income benefits, which will not continue. The gap in their incomes is lessened somewhat by the rental income the respondent receives, although I appreciate the claimant has provided very limited evidence about his housing circumstances and I have rejected his evidence about his 1% ownership interest.
- [370] With these problems in mind, the parties' respective financial statements show the respondent's annual expenses are somewhat higher because of higher housing costs. In April 2018, as I indicated much earlier, the respondent purchased the claimant's interest in the former family home, with new mortgage funds from RBC. To qualify for the mortgage, however, she required four co-applicants or guarantors. After the transfer, the secured debt on the former family home was approximately \$625,000. A bank statement from April 2018 shows monthly payments on the mortgage loans and line of credit of approximately \$2,700.

- [371] I note again, throughout the trial, until closing submissions the claimant maintained an allegation that the respondent used family funds to purchase his interest, although the related documents disclosed to him prior to trial and the evidence of conveyancing lawyer, A. Rai, made it clear the transaction was completed without funds from the respondent except for \$1,147 and cash of \$315.
- [372] Given their roles during the marriage, I am satisfied the respondent is entitled to spousal support on compensatory grounds. She was solely responsible for the children and the household duties vis-à-vis the claimant for almost ten years. Assisted to some degree by her in-laws once they arrived in Canada, the respondent also worked outside the home. Her work schedule however, was dictated by her in-laws' once they started working, and I accept, her responsibilities at home.
- [373] For a certain period, the respondent had to stop working because her mother-in-law was not able to provide care to V. Prior to that she was also unable to work during her pregnancy with V due to illness.
- [374] Largely because of her role, the claimant was able to focus on his work as a long-haul trucker which took him away from the home most of the time. Although he began long-haul trucking before they reconciled, after the reconciliation, the claimant was able to continue his work completely unburdened by the competing demands of childcare and household responsibilities, which is an economic advantage to him.
- [375] Addressing the economic disadvantage to the respondent, although she completed an undergraduate degree in India, I infer the respondent's opportunities for work in Canada have been limited by her inability to communicate in English. She has been confined to jobs, all of which have been low paying, where the ability to speak English is not required. The respondent gave no evidence about any aspirations she may have to improve her English being impeded by the marriage. I accept, however, that absent her responsibilities for the children and the household, she would not have been limited to seasonal work or night shifts, and therefore she could have worked more. I find therefore the respondent did experience suffer an economic disadvantage due to the marriage, although the extent of that disadvantage is lessened by the limits on her earning capacity attributable to her lack of English.
- [376] In these circumstances, I conclude the respondent has a moderate entitlement to compensatory spousal support.
- [377] Despite her entitlement, applying the SSAG, based on the parties' Guidelines incomes, no spousal support is payable.
- [378] As Justice Schultes put it in *B.S.D. v. S.K.D.*, 2021 BCSC 2327, the entitlement to spousal support in this context, is meaningful only as a gateway to considering whether family property should be reapportioned to address unmet spousal support objectives.

- [379] In *Parton v. Parton*, 2016 BCSC 1528, the wife sought spousal support and an unequal division of family property relying upon some of the factors under s. 95(2) and subsection (3). Justice Butler concluded she was entitled to spousal support on compensatory and non-compensatory grounds, but the objectives of spousal support could not be met by an order for periodic support because the husband was expected to retire in the near future. Examining the objectives, the claimant's entitlement, and a notional equal division of family property, Butler J. determined it would be significantly unfair to divide the family property equally. He went on to identify lump sum spousal support or an unequal division of family property as possible alternative remedies. He ultimately awarded lump sum spousal support of \$250,000, an amount below the range provided by the SSAG.
- [380] The Court of Appeal dismissed the husband's appeal but allowed the wife's cross-appeal increasing the size of the lump sum award (*Parton v. Parton*, 2018 BCCA 273).
- [381] In *Delaunier v. Massicotte*, 2018 BCSC 1857, I concluded it would be significantly unfair to equally divide the former family home and ordered a reapportionment of 60/40 in favour of Ms. Delaurier, applying s. 95(3).
- [382] In that case, the parties had two young children with very high needs. Ms. Delaurier had remained at home to care for them before the separation although the plan was to move towards shared parenting. By the time of the trial she was training to become a legal assistant. Like here, despite her entitlement to compensatory support, the amount of spousal support payable was likely to be nil once she completed the program and found full-time employment, given the parties' relative incomes and the child support obligation.
- [383] Both parties needed to provide the children with a suitable home. The respondent had a much higher income and greater earning capacity related to the parties' roles in the relationship. Mr. Massicotte also had greater assets, and a working partner with some means. He was therefore in a significantly stronger financial position to purchase a property and pay expenses.
- [384] After also considering a notional equal division, I determined Ms. Delaurier would be unable to afford to remain in the former family home or to purchase anything remotely comparable and without some reapportionment her entitlement to spousal support would not be fulfilled.
- [385] Here, absent an unexpected change in the parties' income trajectories, the respondent's entitlement to spousal support will remain unfulfilled by an order for spousal support, before the claimant's obligation to pay child support ends.
- [386] Applying s. 95(3), the question becomes given the spousal support objectives and the circumstances that underlie her compensatory entitlement - the economic advantage to the claimant and the attenuated economic disadvantage to her - would an equal division of the net equity in the former family home be significantly unfair.

- [387] There is also the effect of the parties' roles in the marriage on their financial means and needs to consider. Although the claimant's income has remained higher, and I accept the respondent experienced significant financial need after the separation due to the claimant's failure to pay child support, she was able to purchase the respondent's interest in the former family home with the assistance of others. Ultimately, the parties' means and needs are not all that incomparable.
- [388] Based on a value of \$855,000 and debt of \$324,265.14 at the time of the transfer, the net value of the former family home is \$530,734.86, less a deduction of \$35,380.52 for her exclusion. The net value to be apportioned then is \$495,354.
- [389] An equal division would provide each party with \$247,677. A 60/40 division would provide the respondent with \$297,212.40 and the claimant with \$198,142.
- [390] In my view the facts here are distinguishable from many of those that grounded my finding of significant unfairness in Delaurier. Although not ordering an unequal division leaves the respondent's entitlement to spousal support unfulfilled, given the high threshold for significant unfairness, based on the considerations in s. 95(3), I am not persuaded an equal division of the net equity would be significantly unfair.
- [391] I have considered the respondent's unmet entitlement in considering other smaller aspects or adjustments raised by the parties in relation to property and debt division, such as a dividend payment received by the respondent. There is no requirement for her to equalize it.
- [392] I would note that along with seeking an equal division, the claimant argues the rents received by the respondent after separation until she purchased the former family home and mortgage payments he made after separation, must be equalized, with the effect of reducing her equal share. I have accounted for the rental income, however, in the respondent's Guidelines incomes. I am also not prepared to require the mortgage payments made by each party to be equalized.
- [393] Related to this I would not require the claimant to contribute to the cost of the property taxes after separation.
- [394] The parties have agreed to keep their respective vehicles without the need to equalize their values.
- [395] They have also agreed the claimant will buy out the respondent's half-interest in the claimant's truck, for \$8,750. I grant that order.
- [396] As it relates to the parties' bank accounts, referring to those listed in the respondent's Scott Schedule (Alternative 1), the parties have agreed to equalize the balances in all of the accounts except for the account the claimant holds with his parents (TD 6002). I grant that order and trust counsel can agree on the amount.

- [397] The claimant's submissions identify an additional bank account (RBC 5440) and an agreement to equalize the balance. I grant that order also.
- [398] The claimant opposes the balance in the joint account he shares with his parents being equalized on the basis he has no interest in the account, an assertion that I reject. There is no evidence, however, that would allow me to account for the funds contributed by his parents. In the alternative, he proposes equalizing the amount of his paycheck deposited into that account on October 6, 2016. The respondent suggests taking into account the deposit of his September paycheck the following month, but family property crystallizes at separation. Accepting his alternative position, I order the equalization that he proposes.
- [399] Absent any appraisal or valuation evidence, I make no order regarding family jewelry.
- [400] As it relates to family debt, the claimant argues the respondent owes him \$6,651 based on funds she withdrew from the RBC homeline line of credit before she purchased his interest in the former family home. The respondent asserts she owes him nothing because she paid out this line of credit when she purchased his interest in the family home. I agree with her.
- [401] I also order the "additional funds" held in trust, \$20,000, further to the respondent's purchase of the claimant's interest in the former family home, be released to her.
- [402] Based on her submissions, I am left uncertain about whether she continues to argue that the claimant owes her \$9,849, an amount he withdrew from the line of credit before it was paid out. The parties have leave to appear before me to address this issue, if necessary.
- [403] Subject to this point, I expect counsel can agree on a total payment due from one party to the other to effect of the division of all family property and debt. If not, again the parties have leave to appear before me.

Divorce Order

- [404] I am satisfied the requirements for a divorce under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) have been met. Subject to s. 12 of the Divorce Act, I grant a divorce order which will take effect 31 days from the date of judgment.

Costs

- [405] In my view, the respondent is the substantially successful party. She is therefore entitled to regular costs. She has indicated however that she intends to seek a different form of costs order and recognizing there may be other circumstances I am unaware of, the parties have leave to schedule a costs hearing.

"Fleming J."

[1] See Exhibit 23 Tab 26

[2] See Exhibit 23 Tab 27

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