
CANADA / JUDGMENT

T.E.A. v. R.L.H.C.

2019 BCSC 1042

COURT

Supreme Court of British Columbia

DECIDED

27 June 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 1042 T.E.A. v. R.L.H.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.E.A. v. R.L.H.C.,

2019 BCSC 1042

Date: 20190627

Docket: E170173

Registry: Victoria

Between:

T.E.A.

Claimant

And

R.L.H.C.

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for Claimant:

A. Atwood-Brewka

Counsel for Respondent:

T.L. Brown, Q.C.

R. Faber

Place and Date of Trial:

Victoria, B.C.

October 29-31, 2018

November 1-2, 5-9, 2018

January 14-16, 2019

February 28, March 1, 2019

Place and Date of Judgment:

Victoria, B.C.

June 27, 2019

Table of Contents

I. Overview.. 5

II. Issues. 6

III. Divorce. 7

IV. Parenting Arrangements. 7

A. Legal Framework. 7

B. Background. 8

The Separation. 10

The Litigation. 11

Police and MCFD Involvement 11

Current Status. 16

C. Section 211 Report 17

D. The Parties' Evidence. 18

1. The Complainant 19

2. The Respondent 20

E. The Children's Evidence. 21

F. Best Interests Analysis. 23

1. Views of the Children. 23

2. Needs of the Children. 23

a) Children's Health and Emotional Well-being. 23

Impact of the Claimant's Behaviour 24

Alienation. 26

Balancing competing concerns. 26

b) Relationships with Significant Others. 27

c) History of the Children's Care. 29

d) Need for Stability. 30

3. Ability of Each Parent 30

a) The Claimant 30

b) The Respondent 34

4. Family Violence. 35

a) Against the Children. 35

b) Against the Claimant 37

5. Ability to Cooperate. 38

6. RCMP and MCFD Involvement 39

G. Parenting Orders. 40

1. Parenting time. 40

2. Supervision. 41

3. Primary Residence. 44

4. Guardianship and Parental Responsibilities. 45

5. Parenting Coordinator 46

6. Counselling. 47

7. Holidays and Special Days. 47

8. Communication between the Parents. 49

9. Communication with the Children outside Parenting Time. 49

10. St. Michael's University School 49

11. Conditional Reviewable Order 51

12. Seizure. 52

V. Division of Family Property and Debts. 52

A. Background. 52

B. Family Home. 54

Monies Owing to L.C. 55

C. NexGen. 57

D. Corporations. 59

1. Legal Framework. 59

2. Value of RCI 60

3. Value of Dr. Corp. 61

4. Dividing the Corporate Assets. 62

E. Other Assets. 65

1. Vehicles. 65

2. RRSP's. 65

3. Bank Account 65

4. Household Items. 65

F. Family Debts. 66

G. Accounting for Monies Received or Paid. 68

VI. Support Issues. 68

A. Child Support and Section 7 Expenses. 69

1. Legal Framework. 69

2. Payor Parent 71

3. Claimant's Income. 71

4. Respondent's Income. 71

a) Determining what is Fair and Reasonable. 71

b) Imputation. 72

5. Section 7 Expenses. 74

a) Nanny Expense. 75

- b) Private School Fees. 77
- c) Other Section 7 Expenses. 78
- d) Retroactive Payment of Section 7 Expenses. 79
- 6. Prospective Child Support and Section 7 Expenses. 82

B. Spousal Support 83

- 1. Entitlement 83
- 2. Legal Framework. 84
- 3. Prospective Spousal Support 84

C. Retroactive Support 86

- 1. Retroactive Child Support 86
- 2. Retroactive Spousal Support 88

VII. Costs. 89

I. Overview

- [1] This is a complicated high conflict family matter in which the primary issue is parenting arrangements regarding the parties' two daughters who are now six and eight-and-a-half years old. The claimant, T.E.A. (also referred to as "Ms. A."), is the children's mother. The respondent, R.L.H.C. (also referred to as "Mr. C."), is the children's father.
- [2] The parties' 12.5-year relationship ended abruptly on January 13, 2017 (the "date of separation"), following an altercation that ended with the claimant being involuntarily hospitalized for concerns about her mental health. Ms. A. was released two days later, but did not return to the marriage.
- [3] Although Ms. A. was cleared of any psychiatric disorders, her behaviour since the date of separation has continued to cause concern to the respondent. Mr. C. argues that the children are at risk of emotional and physical harm if left alone in their mother's care. He seeks to have all of the mother's parenting time with the children supervised by an unrelated third party, until such time as the court determines that the children are no longer at risk.
- [4] Mr. C.'s concerns about the children's wellbeing while in their mother's care are shared by the Ministry of Children and Family Development (the "MCFD" or the "Ministry"). As a result of separate Provincial Court proceedings commenced by the Ministry, much of the mother's time since the parties' separation has been under some form of supervision.
- [5] Ms. A. denies that she is mentally unstable or that she is attempting to alienate the children from their father. She says that the father has used his position as a doctor to influence healthcare professionals, the police and the MCFD against her. She has accused Mr. C. of

wide-ranging improprieties and illegal behaviours, including abuse of the children. She argues that the allegations of abuse were based on disclosures made to her by her children. Nevertheless, she is prepared to accept that the police and MCFD investigations revealed no findings of abuse or safety concerns about the girls while in their father's care. She does not seek a supervision order against the father, but asks to return to the parenting arrangements that were in place prior to the parties' separation. Alternatively, she seeks to have the children in the same parenting regime which is currently in place.

- [6] The other issues dividing the parties are child support and spousal support. Central to those determinations is whether Mr. C. should have income imputed to him on the grounds of intentional underemployment.
- [7] The parties also disagree on division of family property and family debts. The main focus of that dispute involves the respondent's mother ("L.C."). The claimant argues that her mother-in-law's shares in a company are being held in trust for the respondent, and thus constitute family property. The respondent argues that there is a debt owing to L.C. which needs to be accounted for as a family debt.

II. Issues

- [8] Based on the pleadings and submissions at trial, the following issues are raised in this proceeding:

Parenting Arrangements

- a) Where should the children stay, how much time should they spend with each parent, and should any of that time be supervised?
- b) Who should have final decision-making authority over the children?

Division of Family Property and Family Debts

- c) What are the family assets and family debts and how should they be divided?
- d) At what date should those assets and debts be valued?

Child Support and Section 7 Expenses

- e) Who should pay child support and how much should that be?
- f) Is the respondent intentionally underemployed and should income be imputed to the respondent?
- g) How should section 7 expenses be apportioned between the parties?
- h) Where should the children go to school?
- i) Do the private school fees and nanny costs constitute special or extraordinary expenses?

Spousal Support

- j) Is the claimant entitled to spousal support?
- k) If so, how much spousal support is payable and for how long is it payable?

III. Divorce

- [9] The respondent concedes that the grounds for a divorce pursuant to ss. 8(1) to 8(3) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] have been established.
- [10] The parties were married on May 17, 2009. They separated in January 2017. They have lived separate and apart since then, and were doing so when this proceeding was commenced. I find that there is no collusion and no possibility of reconciliation. As such, the parties are granted a divorce. The divorce order is to take effect 31 days from the date of pronouncement.

IV. Parenting Arrangements

- [11] Currently, the parties share guardianship and parenting time. However, each parent wants primary care of the children, and final decision-making authority. The father seeks primary residence and sole guardianship. He wants the mother to be limited to supervised parenting time with the children. The mother seeks primary residence and joint guardianship, with reasonable parenting time to the father.
- [12] I turn first to the statutory framework that governs parenting orders.

A. Legal Framework

- [13] The parties seek relief with respect to the children under both the Divorce Act and the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Legal concepts in family law are described differently under the FLA and the DA. Despite the different terminology employed in the two statutes, the underlying purpose of the relevant provisions is identical.
- [14] While the DA does have paramountcy, in this instance, paramountcy is not triggered because the applicable provisions of the DA are not in conflict with the FLA. Both statutes require the court to consider only the best interests of the child in determining parenting responsibilities: *S.E.V. v. T.M.V.*, 2018 BCSC 30 at para. 38. In any event, the doctrine of paramountcy does not preclude applying the FLA in proceedings where a divorce was granted: *B.D.M. v. A.E.M.*, 2014 BCSC 453 at paras. 113-115.
- [15] For consistency and clarity, I will thus determine parenting arrangements with reference to the provisions contained in the FLA.

- [16] Section 37 of the FLA stipulates that in making an order relating to guardianship, parenting arrangements, and contact with the child, the court is to only consider the best interests of the child. To determine the best interests of the child, s. 37(2) of the FLA requires the court to consider all of the child's needs and circumstances, which include views of the child, the needs of the child, and the ability and willingness of each parent to satisfy the needs of the child.
- [17] Pursuant to s. 37(3), an order is not in the best interests of the child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- [18] Section 37(4) mandates that the court only consider a person's conduct when making an order respecting care and time with children when that person's conduct "substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor".

B. Background

- [19] Ms. A. is 36 years old. Mr. C. is 46 years old. The parties have two daughters, F.C., born July 4, 2010, and T.C., born March 31, 2013. During their largely traditional marriage, Mr. C. was the main financial provider, and Ms. A. assumed primary parenting responsibilities.
- [20] The parties met in 2001 in Halifax while Mr. C. was a medical resident, and Ms. A. was a business student studying marketing and public relations. During the early years of their relationship, the parties focussed on their studies. They commenced cohabitation in 2004, after moving to Toronto.
- [21] Ms. A. completed her Bachelor of Public Relations degree and certificate in marketing in 2005, and then held various jobs in her field, including working as an Assistant Promotions Manager for the Ontario Place Corporation. Mr. C. continued to pursue his specialty training, and eventually became an oncology surgeon with a specialty in ENT and neck surgery.
- [22] The parties relocated to Victoria in 2005 when Mr. C. was offered a job in Victoria in his area of specialty. Ms. A. initially worked in public relations with Planet Organic Markets, ultimately changing jobs to work with the Canadian Cancer Society as a Marketing Communications Coordinator in 2006. In addition to that, she ran her own public relations company and wrote for Senior Living Magazine.
- [23] The parties purchased a family residence in Cordova Bay. They were married in 2009, in Whistler. It was the first marriage for both.
- [24] Ms. A. left her job with the Cancer Society in 2009. She was teaching a course in business communications at Camosun College, and also working towards completing her Master of Arts degree in communications, when she became pregnant with their first child. F.C. was born in July 2010. Also in 2010, Mr. C. joined a surgical practice in Victoria.

- [25] Ms. A. became a stay-at-home mother, but was assisted by a full-time live-in nanny.
- [26] In 2011, Ms. A. obtained her Master of Arts degree in professional communication from Royal Roads University. In February 2012, she developed an online digital magazine (the "website"). The website catered to medical families throughout the world offering relationship and practical advice, home renovation tips, and recipes. Though it provided modest financial remuneration, the website was highly successful, garnering awards for top blog and best digital media.
- [27] The couple's second child, T.C., was born in March 2013. Both Mr. C. and Ms. A. were very devoted parents. Ms. A. remained at home to take care of the children. She also continued to operate the website and pursue other interests such as acting.

The Separation

- [28] In December 2016, the parties attended a Game of Thrones themed Christmas party with Mr. C.'s colleagues, medical and hospital staff, and their spouses. Following the party, Ms. A. accused Mr. C. of inappropriately interacting with a nurse, D.B.
- [29] On January 13, 2017, Ms. A. confronted Mr. C. about an affair that she thought he was having with D.B. The children, their nanny (R.Q.) and Ms. A.'s friend Jody B., were present in the home during this time. In the course of that confrontation, Mr. C. called the ambulance citing concerns that Ms. A. was having a psychotic break. Around the same time, Ms. A. called 911. In the 911 call recording, Ms. A. sounds distraught and confused. She tells the 911 operator that she believes Mr. C. has poisoned their daughter.
- [30] Both the police and ambulance attended the parties' home. Ms. A. was apprehended under s. 28 of the Mental Health Act, R.S.B.C. 1996, c. 288. She was placed in the psychiatric ward of a hospital and held for 48 hours. Dr. Sinai, the psychiatrist who assessed Ms. A. in the hospital, concluded that she was suffering from relationship distress. She was not found to be suffering from any mental illness.
- [31] January 13, 2017 was the last day that the parties were together. At the time, T.C. was three years old, and F.C. was six years old.

The Litigation

- [32] Five days after their separation, Ms. A. commenced this family law proceeding. Mr. C. filed his Response to Family Claim on February 15, 2017 and his Counterclaim on February 24, 2017.
- [33] On March 3, 2017, Mr. Justice Baird made an interim order for the parents to exercise equal parenting time on a 2-2-3 schedule (the "Baird Order"). However, rather than having the children shuffled back-and-forth between each parent's home, Mr. Justice Baird ordered that the children be permitted to reside in the family residence, with the parents going in and out in accordance with their parenting time schedule (the "nesting arrangement"). Because

Ms. A. did not want the nanny to be in the home while she was there, R.Q. was required to vacate the family home along with Mr. C. during the days that Ms. A. exercised her parenting time. When she was not exercising her parenting time, Ms. A. lived with her parents in Duncan.

- [34] Due to escalating conflict between the parties, in October 2017 Madam Justice Power varied the Baird Order such that the parties would no longer reside in the same residence and there would be no contact during transitions. The claimant obtained an apartment in Victoria and for a time exercised her parenting time either there or in Duncan, where her parents reside. The 2-2-3 schedule remained in place with some adjustments for holidays.

Police and MCFD Involvement

- [35] Between January 13, 2017 and January 2018, Ms. A. had over a dozen documented interactions with police. Most of these interactions were in relation to her ongoing dispute with Mr. C., and included allegations of sexual abuse of the children. By September 2018, Ms. A. had made over 20 combined reports to the police and the MCFD. Many of these complaints were made with the assistance of Ms. A.'s mother, V.A.
- [36] The children's first interaction with the Ministry was in February 2017, when F.C. was interviewed by a social worker. F.C. did not identify any concerns or worries for herself or T.C. at that time.
- [37] On July 27, 2017, Ms. A. made her first allegation of sexual improprieties against Mr. C., reporting to the Ministry that he was bathing with the girls and asking them to touch him. For reasons that are unclear, the MCFD declined to investigate the matter at that time.
- [38] In late August 2017, Ms. A. sent an email to Mr. C. saying that T.C. had told her that her father sleeps on top of T.C. She demanded that Mr. C. stop and that the children sleep in their own beds. The following month, V.A. made a complaint to the MCFD about the same behaviour. After a brief investigation, the MCFD determined that no child protection concerns were raised.
- [39] In October 2017, Ms. A. contacted the Saanich Police with a similar complaint. The police interviewed the parties about the allegations but decided not to interview the children, referring the matter to the MCFD to conduct the children's interviews if needed. The social worker who had conduct of the file at the time reviewed the allegations and also decided not to interview the children. The Saanich Police closed their file without charging Mr. C.
- [40] Ms. A. was upset that the children had not been interviewed. She felt that her concerns about the children were not being addressed by the police or the MCFD. To some extent, her views were corroborated by Luc van Hanuse, the social worker who was assigned the file in 2018. He testified that he would have expected the previous social worker to have interviewed the children. As well, Mr. van Hanuse thought that a referral to the Mary Manning Center may have been warranted. The Mary Manning Center is a local agency that

provides counselling to children who have experienced sexual trauma and also provides children with information about sexual health and tools for setting sexual boundaries.

- [41] In January 2018, the MCFD opened an investigation following complaints from Ms. A. that Mr. C. was showing his penis to the girls, giving them unwanted kisses, and walking around the house naked. The Ministry arranged to interview F.C. at her school on January 12, 2018.
- [42] Around the same time, with the assistance of her mother, Ms. A. enrolled the children in an elementary school in the Duncan area. The registration was done without Mr. C.'s knowledge or consent.
- [43] The circumstances around the enrollment were evidently troubling to the school administration, such that they contacted the MCFD to report their concerns. The MCFD determined that the children needed to be returned to their father. The children were not returned to Mr. C. as scheduled. On January 11, 2018, Mr. C. obtained an order for their return.
- [44] On the morning of January 12, 2018, Mr. C. put F.C. into his car to take her to school, but was unable to leave his driveway as Ms. A. was blocking the driveway of the residence with her vehicle. V.A. was present with Ms. A. and filming the incident. The claimant was standing next to her car, gesturing and holding up pictures of Mr. C. Mr. C. contacted the Saanich Police. V.A. continued to film even after the police officers arrived. The police arrested Ms. A.
- [45] Though Ms. A. denied that she faced criminal charges as a result of the January 12, 2018 incident, this was contradicted by the documentary evidence, which indicated that Ms. A. was charged with causing a disturbance pursuant to s. 175(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46.
- [46] The MCFD interview with F.C. proceeded on January 12, 2018. The social worker also interviewed the parties and the nanny. No protection concerns were identified. The children were referred to counselling.
- [47] Based on further complaints made by Ms. A., both the children were interviewed by a social worker on January 25, 2018. This was F.C.'s second interview and T.C.'s first interview. F.C.'s primary concerns were in relation to not having privacy in the washroom in her father's home. The social worker noted that T.C. spoke positively about both parents, and indicated feeling safe in both homes. She presented as very happy and well adjusted, and had no depression or anxious affect of any kind.
- [48] Near the end of January 2018, Ms. A. took both girls to a walk-in clinic in Duncan with allegations of sexual abuse by their father. The doctor contacted the Ministry, and relayed concerns about Ms. A.'s conduct during the appointment.

- [49] A social worker determined that Ms. A. was exposing the children to conflicts between the parents and having inappropriate conversations in front of the children. Ms. A. was asked to enter into a safety plan with the MCFD. Ms. A. agreed to follow certain protocols in order to address the Ministry's concerns.
- [50] Towards the latter part of February 2018, Ms. A. made a video of T.C. The video was played in court. In the video, T.C. (who was just under five years old at the time) is wearing her pajamas and lying in bed facing the camera. She says:
- Daddy touches my bum uhm daddy sleeps on top of me, daddy goes in the shower with me and takes a bath with me uhm daddy rubs my back that's all I know.
- [51] Ms. A. admitted to making the video and sending it to some of the parents at the children's school, including Shon H. ("Shon"), a friend of the parties. A colleague of Mr. C.'s also received the video. One of the recipients forwarded T.C.'s video to the police, who in turn sent it to the MCFD.
- [52] The MCFD became very concerned about Ms. A.'s behaviour, including her failure to comply with the safety plan. Consequently, the MCFD commenced child protection proceedings in Provincial Court (the "Ministry Proceeding").
- [53] On March 22, 2018, a Presentation Hearing was held in the Ministry Proceeding, pursuant to s. 33.1 of the Child, Family and Community Service Act, R.S.B.C. 1996, c. 46 [CFCSA]. An interim supervision order was made by Judge Lowe (the "March 2018 Order"), pursuant to s. 33.2(2) of the CFCSA, requiring Ms. A. to, amongst other things, engage in counselling, cooperate with the Ministry, and refrain from accusing Mr. C. of sexual abuse or disparaging him in the presence of the children.
- [54] A Protection Hearing was set for May 3, 2018, and the interim supervision order was made permanent with the consent of the claimant, pursuant to s. 41(2.1) and s. 60 of the CFCSA (the "May 2018 Order"). No finding was made by the court. The order was set to expire on November 1, 2018.
- [55] Mr. van Hanuse assumed conduct of the file around April 2018. In May 2018, he went to Ms. A.'s home to introduce himself to her and the children. Mr. van Hanuse testified that the children were within earshot of the conversation in which Ms. A. spoke about Mr. C. in a derogatory way. Ms. A. denied that the children were able to hear the conversation.
- [56] In early September 2018, Ms. A. sent text messages to Mr. van Hanuse about further disclosures from T.C. that her father and her nanny were touching her vagina at night. Consequently, another interview of the children was conducted by Mr. van Hanuse on September 4, 2018. After some investigation, Mr. van Hanuse concluded that the reference to touching T.C.'s vagina at night was in relation to cream that was applied on T.C. around the bum area due to a skin condition. Mr. van Hanuse determined that there were no child protection issues in relation to Mr. C. The descriptions provided by the children led him to conclude that the cream was not being applied in a way such as to make it sexual or

otherwise unsafe.

- [57] On September 13, 2018, the Director applied under s. 57 of the CFCSA to vary the May 2018 Order on an expedited basis because of alleged breaches of the terms of the May 2018 Order by the claimant (the "Amendment Application"). The Director cited serious child protection concerns regarding Ms. A.'s mental health, insight, ability to meet her children's needs, and ability to parent safely.
- [58] On September 15, 2018, V.A. took T.C. to a medical clinic with further reports of sexual abuse. V.A. and the claimant then took T.C. to a hospital where she was vaginally and anally examined. T.C.'s hymen and anus were examined for lesions and swabs were taken for forensic examination. All tests came back negative.
- [59] Once again, the Ministry and police became involved. While the matter was being investigated, the children were required to live with third parties for approximately one week. The third parties were only casual acquaintances and the placement was upsetting to the children. The girls were permitted to return home only after their father was cleared of the allegations.
- [60] Mr. van Hanuse interviewed the children again on September 24, 2018 in relation to the further abuse allegations. This was F.C.'s fourth interview and T.C.'s third interview in the past nine months. Again, Mr. van Hanuse determined that there were no safety concerns in relation to Mr. C.
- [61] On October 2, 2018, the Director obtained an order varying the May 2018 Order (the "October 2018 Order"), pending hearing of the Amendment Application which was scheduled in Provincial Court for the end of March 2019. The May 2018 Order was varied with the addition of the following terms:
- a) from October 2018 onwards, T.A.'s access to the children will be supervised by her father, P.A., who must be present when T.A. is with the children or within earshot of the children at all times; and
 - b) T.A. must ensure that any report of sexual abuse of the children be reported to the MCFD only and then as directed by the MCFD, through a central call number.
- [62] Since October 2018 to the conclusion of this trial, all of Ms. A.'s parenting time has been under supervision by her father, P.A. Since the supervision order was made, there have been no further investigations of Mr. C.

Current Status

- [63] Throughout the post-separation period, the children have remained in an interim shared parenting situation, spending half of their time in the care of the claimant and her parents, and the other half in the care of Mr. C. The children's nanny remains in Mr. C.'s employ, and has continued to assist with the children during Mr. C.'s parenting time.

- [64] The trial commenced on October 29, 2018, for two weeks. As it did not complete, the trial was set for continuation in January 2019.
- [65] Sometime between November 9, 2018 and January 14, 2019, Ms. A. moved from Victoria and began residing at her parents' home in Duncan. This move was made without notice to or consent of Mr. C. Since then, while in their mother's care, the children have been commuting back and forth from Duncan to Victoria to attend school. They no longer attend their regularly scheduled activities and lessons in Victoria on the evenings when they are in their mother's care.
- [66] This trial concluded in March 2019. The Provincial Court supervision order expired on March 21, 2019. Since then, the children continue on the same 2-2-3 schedule with their mother and father, with transfers of the children occurring on Mondays, Wednesdays and Fridays.

C. Section 211 Report

- [67] Pursuant to s. 211 of the FLA, the court may appoint a person to assess one or more of the needs and views of a child in relation to a family law dispute, and to assess the ability and willingness of a party to satisfy the needs of a child. The parties agreed to jointly retain Dr. Rebecca St. Clere England ("Dr. England") to prepare a s. 211 report. No s. 211 order was sought prior to trial.
- [68] Dr. England is a psychologist registered with the College of Psychologists of British Columbia. She holds a doctoral degree in clinical psychology and has obtained post-doctoral training to conduct court-ordered parenting evaluations. She also has experience in assessing and treating mental disorders.
- [69] Dr. England's expert opinion report is dated April 29, 2018. Neither party took issue with Dr. England's qualifications, the necessity of having a s. 211 report, or the relevance of the report to the issues at hand. Nor did either party argue that Dr. England's opinion evidence was rendered inadmissible by any other exclusionary rule. Accordingly, Dr. England was qualified as an expert in child custody disputes and for the purposes of preparing a s. 211 report.
- [70] Neither party asks me to wholeheartedly accept, nor wholeheartedly reject, Dr. England's opinion.
- [71] The claimant argues that Dr. England's report supports a finding that there has been no alienation of the children, and points to Dr. England's opinion that the children are presenting quite well in terms of their psychological adjustment. She relies on Dr. England's report to support her request to exercise unsupervised parenting time with the children. However, the claimant disagrees with Dr. England's opinion that the children should reside primarily with Mr. C.

- [72] The respondent submits that Dr. England's findings are accurate but they, and the recommendations in the s. 211 report, do not go far enough. He says that he should be the sole guardian of the children, and that Ms. A. should only be permitted to exercise parenting time under supervision.
- [73] Dr. England was cross-examined extensively on her report. Her evidence before the court was clear, unbiased, and consistent with the factual foundations set out in her report. She had a sound understanding and knowledge of the issues. Many of Dr. England's observations of the parties and the family dynamic were consistent with the other evidence.

D. The Parties' Evidence

- [74] Not unexpectedly, the parties presented diametrically opposed views of their marriage and relationships with the children.
- [75] Ms. A. described an unhappy and at times terrifying relationship in which the respondent asserted psychological, financial and social control over her. In addition to an isolated incident of physical violence early in their relationship, she testified that the respondent threatened to harm her if she left him, saying that he knew how to kill people without getting caught. She said that he frequently yelled at her, criticized her, and called her names. She had to account for her whereabouts, her spending, and how she dressed.
- [76] Ms. A. portrayed Mr. C. as an absentee father who kept long work hours and failed to participate in even the most basic childcare responsibilities such as giving the children a bottle of milk. She said that she performed all of the childcare, and was required to have a nanny though she did not want one. Ms. A. characterized Mr. C. as extremely selfish, putting his friends and work needs above hers and the children's.
- [77] Ms. A. accused Mr. C. of a long list of criminal acts, dangerous behaviours and improprieties. These included sexual abuse of his children, physical and mental abuse of Ms. A., theft of narcotics from the hospital where he works, drug use, alcoholism, hiding assets, and wide-ranging infidelity. She said that he continued to exercise financial control over her after their separation, preventing her from accessing family funds to retain legal counsel or to find suitable accommodation.
- [78] In marked contrast, Mr. C. described what he thought was an idyllic marriage, where he and the claimant got along, did activities together, and enjoyed raising their daughters. He recounted being an active and involved father, who participated in his children's school events and activities. Mr. C. described Ms. A. prior to the separation as a good mother and loving wife.
- [79] Mr. C. categorically denied any inappropriate touching of T.C. or F.C. He also denied the myriad of other allegations made by Ms. A. Mr. C. said that he was not abusive or controlling, and that Ms. A. had open access to money during the relationship. However, he admitted to pushing Ms. A. during an argument that occurred around 2004.

1. The Complainant

- [80] Ms. A.'s testimony lasted three days. Most of it was provided during the first two weeks of the trial. When she re-took the stand four months later, her presentation and demeanour remained the same. I did not find Ms. A. to be a credible or reliable witness, for many reasons.
- [81] Ms. A. presented as a defiant and extremely self-absorbed witness who had a great deal of difficulty controlling herself and her emotions. Her evidence was lacking in all objectivity, and was rife with inconsistencies and implausibilities. She appeared oblivious to the gravity of the allegations that she was making against the respondent and others, and the impact of her actions on her children.
- [82] When faced with video and audio recordings evidencing her inappropriate behaviour, she was unapologetic, justifying her conduct and portraying herself as the victim. Ms. A. refused to admit even the smallest mistake, and was dismissive of all concerns that her actions may be harmful to the children. Ms. A. frequently made demeaning and offensive comments about the appearance, character or professionalism of people that she disagreed with. She was particularly vicious in her criticism of the children's nanny and their paternal grandmother, with whom the children are close.
- [83] With the exception of the single incident around 2004 where Mr. C. was physically aggressive with Ms. A., none of Ms. A.'s other allegations against Mr. C. were supported by the evidence.

2. The Respondent

- [84] Mr. C. was also cross-examined at length. I found his evidence in relation to the parenting issues to be credible and reliable. His testimony was logical and consistent with that of independent witnesses. It was also consistent with the documentary, video and audio evidence. I found Mr. C. to be a diligent and careful witness, who provided his testimony in an objective and forthright manner, and readily made admissions against self-interest.
- [85] Mr. C. was generally respectful of Ms. A., and made an effort to present a fair and balanced perspective. He talked about his marriage in a candid manner and did not try to minimize the claimant's role and positive impact in the children's lives prior to separation.
- [86] Mr. C. gave credible explanations about events which I find Ms. A. had misconstrued or exaggerated. While there were some discrepancies in Mr. C.'s testimony, they were minor and did not diminish my view of his credibility.
- [87] The claimant argues that Mr. C. has been trying to manipulate the witnesses and evidence in his favour. In support, she points to audio recordings supplied by Mr. C. of his private communications with three different individuals: a police officer who was investigating the abuse allegations, Shon, and another parent at the children's school.

[88] I do not find anything inappropriate in the conversation between Mr. C. and Shon. In the phone conversation, Shon tells Mr. C. that Ms. A. sent him a video of T.C. suggesting abuse. Mr. C. suggests to Shon that he tell Ms. A. that he believes her allegations, and that he forward the video to the authorities. He also tells Shon that he wants him and his spouse to remain neutral. Similarly, I do not find anything improper in the conversations between Mr. C. and the police officer and the other parent.

E. The Children's Evidence

[89] The evidence of the children was tendered through statements alleged to have been made by the children to their parents, Dr. England, the Ministry and other witnesses. There was also a video of T.C. made by the mother in February 2018.

[90] Section 202 of the FLA allows a court the discretion, having regard to the best interests of the child, to admit hearsay evidence it considers reliable of a child who is absent. In addition, the court may admit hearsay statements of the children under the principled exception to the hearsay rule: *N.J. v. S.J.*, 2018 BCSC 2352 at para. 11, and *D.A.M. v. D.M.T.*, 2013 BCSC 359 at paras. 22-26.

[91] The necessity requirement for hearsay evidence of children is met by virtue of the fact that it would be potentially harmful for the children to testify in these proceedings: *N.J.* at para. 10.

[92] In *N.J.* at para. 14, Mr. Justice Brundrett helpfully summarized the factors established in *P.V. v. D.B.*, 2007 BCSC 237, for assessing the reliability of hearsay evidence of children. Those factors include: "timing of the statement; demeanour of the child; personality of the child; intelligence and understanding of the child; absence of motive of child to fabricate; absence of motive or bias of the person who reports the child's statement; spontaneity; statement in response to non-leading questions; absence of suggestion, manipulation, coaching, undue influence or improper influence; corroboration by real evidence; consistency over time; and statement not equally consistent with another hypothesis or alternative explanation".

[93] I have considered the *P.V. v. D.B.* factors when assessing the children's hearsay statements, including the video statement made by T.C., the statements attributed to the children which are contained in the Ministry files, and those reported to have been made by the children to the parties and other witnesses in the trial.

[94] I have rejected the statements purportedly made by the children to the parties and V.A., on the grounds they are unreliable. Specifically:

- a) Statements made to Ms. A. - Ms. A. was not a reliable or credible witness. In addition, her post-separation conduct and evidence at trial reflect a significant bias against Mr. C. and a motive to fabricate.

- b) Statements made by T.C. in the February 2018 video - the manner in which the video was made, as well as its contents, strongly suggests that the child was coached by Ms. A. into making the statements.
 - c) Statements made to V.A. - V.A. was not a credible or reliable witness. She also displayed a significant bias against Mr. C., and has a motive to fabricate.
 - d) Statements made to Mr. C. - though I found Mr. C. generally to be a credible and reliable witness, given the nature of the allegations made against him and the importance of these proceedings to him, there is a motive to fabricate.
- [95] I have relied primarily on statements made by the children to Dr. England and Mr. van Hanuse, as well statements attributed to the children as reported in the Ministry records. There is no evidence of any coaching, manipulation, or improper influence of the children's responses by either Dr. England, Mr. van Hanuse, or the other Ministry employees who interviewed the children in the course of their investigation.
- [96] Mr. van Hanuse was cross-examined at length about the MCFD's involvement in this matter. I found his evidence credible and reliable. His evidence was consistent with much of the other evidence in this trial. He gave his testimony in a balanced and forthright manner, and showed knowledge of the children's needs and circumstances. I found him to be objective and appropriately focussed on the children's well-being.
- [97] Having regard to all the evidence, I am satisfied that the statements made by the children to Dr. England and Mr. van Hanuse are reliable, relevant to the issues at hand, and necessary for a best interests analysis.

F. Best Interests Analysis

- [98] The best interests of the child analysis under s. 37 of the FLA is heavily fact-specific. As required, I have considered the factors set out in s. 37(2) and addressed any specific concerns raised by the parties.
1. Views of the Children
- [99] Section 37(2)(b) requires the court to consider the children's views, where appropriate.
- [100] F.C. and T.C. were seven and four years old when they were interviewed by Dr. England. Due to their young age, Dr. England was not able to glean a lot of information from them through the interviews. Her interviews and assessment of the children revealed that both children expressed some preference for their mother over their father, though this was not unexpected as their mother had been the primary caregiver prior to separation.

[101] Neither child reported worries or safety concerns with the other parent. While F.C. did indicate that she feels safer with her mother, Dr. England did not connect this comment to any tangible safety concerns. Mr. van Hanuse's reports of the children's views were similar to those of Dr. England.

2. Needs of the Children

a) Children's Health and Emotional Well-being

[102] Section 37(2)(a) requires the court to consider the children's health and emotional well-being in determining parenting and guardianship issues.

[103] T.C. and F.C. are now five and eight. At the time that the parties separated, they were three and six years old. Despite the extremely acrimonious relationship between their parents, by most accounts, T.C. and F.C. seem to be thriving. They do well at school. They have friends. They are bright and articulate. They participate in and enjoy regular activities such as dance, soccer, and crafts. Though Ms. A. indicated that the children were being bullied at school, this is not supported by the evidence.

Impact of the Claimant's Behaviour

[104] The Ministry investigations and Dr. England's assessment did not reveal any safety concerns for the children while in Mr. C.'s care. In contrast, both Mr. van Hanuse and Dr. England raised significant safety concerns for the children while they are in Ms. A.'s care.

[105] Dr. England opined that allegations of abuse which are made in the absence of abuse taking place can cause a child to believe that a parent has been or is being abusive to them. This can lead to destruction of a significant attachment relationship for the child, just as it would if the parent had in fact been abusive. In Dr. England's opinion, the primary need for the children is to be protected from any behaviours, both direct and indirect, related to Ms. A. making unsubstantiated allegations regarding Mr. C.

[106] Dr. England was asked about the September 2018 hospital examination of T.C. She expressed great concern about the safety of the children, and stated that if true, this represents an escalation of behavior which is more extreme than the behavior which was being exhibited when she was conducting her investigation.

[107] Dr. England also testified that the fact that the children may not be outwardly exhibiting harm from Ms. A.'s conduct does not mean that they have not been harmed. Given their young age, it is difficult to measure the harm, as it often takes time for these issues to manifest themselves.

- [108] Ms. A.'s testimony and other evidence revealed that she is oblivious to the harmful nature of her actions. She was completely dismissive of concerns about the highly invasive medical examination that T.C. was subjected to, and the emotional harm that it could have caused T.C. She refused to acknowledge any wrongdoing in creating the video of T.C. and disseminating it to third parties. She did not appear to recognize the harm posed to the children if they were to hear disparaging remarks made by their mother about their father.
- [109] In one appalling audio recording that was played in court, Ms. A. is heard talking to Mr. C. during a transition of the children. The children's voices can be heard and it is evident that they are nearby and likely within earshot of Ms. A. Ms. A. says the following:
- you're the most disgusting fucking asshole that I have ever met in my life. You know what I want you to do, I want you to commit suicide and I want to watch you're are a fucking disgusting pig. I want to break this door and slash your throat everyone wants you dead [in a louder voice] oh daddy's trying to kill me go kill yourself...
- [110] Ms. A. testified that the children could not hear her remarks. While that may be true initially when she starts speaking, I find that there is a strong likelihood that the children heard at least part of Ms. A.'s vicious comments to Mr. C. In the audio recording, Ms. A.'s voice gets louder as she continues to speak, and it is evident by the end that she is directly addressing the children.
- [111] There was also evidence that post-separation Ms. A. had made some racist comments about Mr. C. Some of those comments were repeated by her during the course of the trial. Dr. England opined that racist remarks made by Ms. A. about Mr. C. can be particularly damaging to the children in light of their biracial identity. As the children clearly physically resemble their father with Asian features, she testified that these comments can be an assault on their own self view.
- [112] While there is insufficient evidence that Ms. A. has made racist comments about Mr. C. in front of the children, there is evidence that Ms. A. has made other disparaging remarks about Mr. C. in the children's presence. There is also evidence that Ms. A. continues to expose the children to the dispute between the parties and her extremely negative views of the respondent.
- [113] The evidence establishes that the children's safety, health, emotional and physical wellbeing are at risk when they are in the care of Ms. A.

Alienation

- [114] There must be proper expert evidence before a finding of alienation can be made: *Williamson v. Williamson*, 2016 BCCA 87 at paras. 47-48. This evidence is lacking in this case.

[115] Dr. England did not find any indication that the children were exhibiting signs of alienation. The children's slight preference for their mother was more a reflection of the pre-separation history of their care. However, Dr. England did opine that the mother's repeated allegations that the children were abused by their father could, in the absence of abuse, lead to alienation.

Balancing competing concerns

[116] Counsel for the mother argues that Dr. England "does not address in her report to any great extent the possibility of harm that might occur taking the children away from their primary caregiver and placing them in full-time care of their nanny and their father".

[117] However, under cross-examination, Dr. England rejected the notion that harm might occur if the children are placed in the primary care of their father. She testified that because the children have had an alternating history of care post-separation, they have gotten used to having their mother around less often. Further, she stated that her overriding concern is the repeated messaging that their father is sexually abusing them, which is far more detrimental to the children than being separated from their mother.

[118] In *A.A. v. S.N.A.*, 2007 BCCA 363 at para. 27, the Court noted that in some cases it is in the long-term best interests of the child to disrupt a strong parental connection, despite the short-term harm that may cause, if the relationship between the child and that parent is particularly harmful to the child.

b) Relationships with Significant Others

[119] Section 37(2)(c) requires the court to consider the nature and strength of the relationships between the child and significant persons in the child's life, as part of the best interests analysis.

[120] According to Dr. England:

- a) Given the lack of substantiation regarding Ms. A.'s allegations, the children's relationship with the father needs to be supported. This is best accomplished by him engaging in the full range of parenting with the children.
- b) The nature of the children's relationship with their mother needs to be monitored.
- c) The children's relationships with significant people in their lives such as their maternal grandparents, nanny, paternal grandmother, and aunts and uncles, need to be protected from the issue of allegations regarding Mr. C. Of all of these individuals, Ms. A.'s mother appears to be most drawn into the dynamic.

[121] The children are very fortunate to have many loving adults in their lives with whom they have built strong bonds, such as their nanny, maternal and paternal grandparents, aunts and uncles.

- [122] R.Q. is the children's live-in nanny. She has been working for the family since shortly after T.C.'s birth, and continues to look after the children when they are resident with Mr. C. It was clear from the evidence that R.Q. and the children have a close, stable, and caring relationship, and that R.Q. is very concerned for and capable of taking care of, the children's well-being.
- [123] The children are also very close to Ms. A.'s parents, who moved to Victoria in 2012. Since the October 2018 Order, the children have spent all of their parenting time with their mother in the presence of P.A. who has acted as supervisor. P.A. struck as a concerned and loving grandfather who was committed to the children's best interests. He has voluntarily supervised Ms. A.'s parenting time, which has required him to travel back and forth from Duncan to Victoria on a regular basis. P.A. has generally had a positive influence on Ms. A. Though he seems reluctant to acknowledge his daughter's limitations and mental health concerns, it is notable that since P.A. started supervising Ms. A.'s parenting time, Ms. A. has made no further complaints of abuse against Mr. C.
- [124] Though it is evident that V.A. loves the children and is committed to them, I have significant concerns about V.A.'s negative impact on the best interests of the children. It was evident throughout her testimony that V.A. shares many of her daughter's derogatory views of Mr. C. She displayed a significant bias against Mr. C. and in favour of her daughter. Rather than acting as a sobering voice of reason, V.A. has frequently encouraged and assisted Ms. A. in her endeavors against Mr. C.
- [125] V.A. admitted that she actively participated with Ms. A. as follows:
- a) making multiple reports of sexual abuse upon the children by Mr. C.;
 - b) taking T.C. for the vaginal and anal examination at the hospital for alleged sexual abuse by Mr. C.;
 - c) registering the children in school in Duncan without Mr. C.'s knowledge or consent;
 - d) attending at the family residence with Ms. A. and blocking the driveway so that Mr. C. was unable to take F.C. to school, necessitating police attendance and resulting in criminal charges against Ms. A.;
 - e) holding up personal photographs of Mr. C., and showing them to the neighbours;
 - f) breaking into R.Q.'s private bedroom and taking photographs of items in the bedroom; and
 - g) yelling at Mr. C. and calling him names.
- [126] V.A.'s behaviour and views of Mr. C. are very concerning given that this is the home that Ms. A. is living in and the place Ms. A. goes back to when she completes her counselling sessions. This is also the home that the children live in when they are not with their father.
- c) History of the Children's Care

- [127] I turn now to considering the history of the children's care pursuant to s. 37(2)(d). There is no dispute that the claimant was the primary caregiver for the children prior to the parties' separation. Because Mr. C. worked long hours, the children were in their mother's and nanny's care for most of each day.
- [128] Ms. A. was an involved and loving mother. She breast-fed both children, drove them to and from school, was involved in their school community, and participated with them in their activities such as Girl Guides.
- [129] Following the birth of T.C. and the hiring of R.Q., the nanny came to provide more of the childcare, preparing meals and dressing the children. R.Q. developed a close bond with the children, which has strengthened after the parties' separation. However, Ms. A. continued to be actively involved in the children's care.
- [130] Prior to separation, Mr. C. was an involved father. He had a close relationship with both the children. Mr. C. attended school events, parent-teacher meetings, Girl Guide events, took them to recreational activities, and sometimes picked them up or dropped them off at school.
- [131] The family bond was strong, and the parties often bathed together with the children, ate meals together, and participated together in recreational activities.
- [132] Following the separation, the children have spent half their time with each parent. When in their mother's care, they are cared for by their grandparents and their mother. When in their father's care, they are cared for by their father and their nanny. Mr. C. changed his work schedule following the separation so that he could spend more time with the girls. Consequently, since the separation and during his parenting time, he usually picks up the children and drops them off at school.
- [133] Dr. England opined that based on their history of care, the children developed a stronger bond of attachment to their mother. In her view, the children will benefit from Mr. C. adjusting his work and family obligations in order to make himself more available for parenting. Over time, the children are expected to develop more evenly balanced feelings towards their father which will enhance their overall adjustment in the long term.
- d) Need for Stability
- [134] A child's need for stability is another important consideration for determining what is in the best interests of a child (s. 37(2)(e)). The children have been living in a very unstable situation since the separation. They have gone from living in the family home with both their parents and nanny, to being shuffled back and forth between their father's home, mother's home in Victoria, and grandparents' home in Duncan.

[135] Dr. England opined that children whose parents have separated experience more disruption in their lives than children from intact family units. For this reason, children of separated parents have a heightened need for stability. She noted that these children have already undergone the experience of having their parents separated, and moving back and forth between multiple residences.

[136] Ms. A. has caused much of the disruption in the children's lives. In contrast, Mr. C. has tried to provide the children with stability by decreasing his work hours so that he can be around them more. R.Q. testified that she has every intention of remaining in the position of the children's nanny for the foreseeable future.

3. Ability of Each Parent

[137] Section 37(2)(f) requires this Court to consider the ability of each person who is a guardian or seeks guardianship to exercise his or her responsibilities.

[138] Dr. England notes that both parents present as very capable individuals who are well able to satisfy the needs of the children such as providing basic care, education, healthcare, and extracurricular activities. However, Dr. England expressed significant concerns about Ms. A.'s post-separation presentation and behaviour, which compromised her ability to meet the children's needs.

a) The Claimant

[139] Dr. England opines that Ms. A. presents with a complex constellation of symptoms which include aspects of Malingering, Delusional Disorder (Jealous Type), Factitious Disorder, and Factitious Disorder Imposed on Another. Underlying these is a plausible diagnosis of a narcissistic personality trait.

[140] In relation to Malingering, Dr. England noted Ms. A.'s intention to achieve as favourable a financial settlement as possible, and her repeated raising of the topic of money. Dr. England found the amount of malingering she observed in Ms. A. quite unusual. This was consistent with my own observation that Ms. A. seemed exceedingly fixated on financial wealth.

[141] Dr. England defines a Delusional Disorder as when a person makes incorrect inferences supported by small bits of evidence. Of concern is Ms. A.'s belief that Mr. C. is having extramarital sexual relationships. Claimant's counsel takes issue with Dr. England's factual assumption that Mr. C. has not had any extramarital sexual relationships, arguing that it is evidence of bias. In my view, Dr. England's assumption that Mr. C. was not engaged in extramarital sexual relationships is a reasonable assumption based on the evidence. The respondent acknowledges that he has kissed other women and hugged them in social settings. However, there is no credible evidence that he has engaged in any extramarital sexual relationships.

- [142] I agree with claimant's counsel that "affairs are in the eyes of the beholder", and that a party can feel betrayed even if there has been no sexual intercourse. However, it is not the claimant's definition of an affair that is at issue; rather it is the claimant's insistence, in the absence of evidence, that the respondent was engaged in extramarital sexual relationships. This conviction caused the claimant to insist that the respondent get tested for sexually transmitted infections ("STI's"). It was also the basis for the claimant's assertion that the children may have been infected with STI's while bathing with their father.
- [143] However, even if I were to accept the claimant's position that Dr. England's opinion that Ms. A. may be suffering from a Delusional Disorder is unwarranted, other mental health concerns remain.
- [144] Dr. England defines a Factitious Disorder as the presentation of oneself as ill, impaired, or injured in the absence of obvious external rewards. She points to Ms. A.'s presentation (and apparent belief) of having been abused for years at the hands of her husband, "to such an extent that impresses as quite implausible".
- [145] In rejecting the notion that Ms. A was a victim of coercive control and family violence, Dr. England notes that the allegations of abuse made by Ms. A. are incongruent with Ms. A.'s successes in her life. For example, during her marriage Ms. A. finished two degrees, worked successfully in a number of occupations, and had opportunities to pursue her own hobbies and interests such as acting. I find that these would have been difficult to accomplish if Mr. C. had been the kind of person described by Ms. A.
- [146] Dr. England also opines that Ms. A. may be suffering from Factitious Disorder Imposed on Another. She points to Ms. A.'s persistence that the children have been or are being sexually abused by their father, noting that:
- [Ms. A] is reporting that the children are experiencing a number of symptoms which if correct would warrant mental health diagnoses. This was most notable with [T.C.] where the severity level of [Ms. A.'s] presentation was at a level previously unseen by the writer. In the writer's opinion [Ms. A.'s] perception of the children is distorted by the lens of her mental health issues, with the result that she lacks an accurate grasp of the needs of the children. Most notably this relates to the children's relationship with their father.
- [147] Dr. England paints a bleak clinical picture, stating that while Ms. A.'s malingering may abate once financial matters are settled, personality traits are generally stable and enduring, such that issues related to these traits are likely to persist. A diagnosis of Delusional Disorder is generally stable throughout the lifetime, whereas a Factitious Disorder often has intermittent episodes. She concludes that Ms. A. is "likely to have ongoing and significant struggles, and the nature of these struggles is likely to have ongoing negative impact on the children".

- [148] The claimant denies that she is suffering from any mental illness, and says that her behaviour can be explained by the enormous stress that she has been under since the separation, such as: being away from her children for the first time in her life; hospitalized for 48 hours in the psychiatric ward; and being forced to live in the same home as the respondent during the period of the nesting arrangement.
- [149] Her counsel submits that while those stressors stopped they have been replaced with others. For example: being forced to leave the family home and not having access to any of the family assets; being required to bring a court application in order to fund her litigation; and not having the financial ability to secure her own housing.
- [150] While acknowledging that the claimant "behaved badly at times and said or did things she shouldn't have", her counsel argues that the respondent has exacerbated the situation by prolonging those interactions and videotaping Ms. A.
- [151] Claimant's counsel urges me to view Ms. A.'s evidence from the lens of a caring and protective mother who genuinely was fearful for the safety of her children. While admitting that the claimant is very reactive at times, her counsel argues that this is simply evidence of a flight or fight response because she feels under attack. Ms. A. is defensive because she is being described as delusional and narcissistic.
- [152] The claimant also blames the lack of responsiveness by the police and the Ministry as factors contributing to her post-separation conduct. Only with her persistence were the children finally interviewed, T.C. medically examined, and some of the children's concerns finally addressed by the Ministry. She notes that since that time, there have not been any further allegations made or complaints brought forward about the respondent.
- [153] Despite Ms. A.'s counsel's valiant effort, I am not swayed by her submissions. First, the claimant's evidence was completely at odds with her counsel's submissions. Ms. A. lacked any sense of remorse during her testimony. Rather than acknowledging that she "behaved badly at times", the claimant maintained her view that she was justified in her actions. She refused to acknowledge the potential harm to T.C. by making the video of T.C. and taking T.C. for a vaginal and anal exam.
- [154] Second, in my view, it is the ongoing supervision of Ms. A. that explains the reason why she has not brought any more allegations against Mr. C., and not her satisfaction of the conclusion of the MCFD and police investigations.
- [155] Third, even if I accept that the claimant's conduct was caused by stress or her perception that she was being unfairly branded with a mental illness, her extreme response indicates a significant inability to control her behaviour. Whether the claimant reacted out of stress, fear, anger or because of a possible mental illness, it remains that her actions were extreme, harmful to the children, and not warranted on the evidence.

[156] I am also concerned at Ms. A.'s lack of insight into her own actions. She did not provide sufficient evidence to show that she is taking tangible steps to deal with her mental health issues. At the same time, none of the witnesses who testified on behalf of Ms. A., including both of her parents, seemed to have any real understanding or (in many instances) awareness of her mental health issues and the depth of the problem they posed, leaving her with no support network to assist her in overcoming her mental health concerns.

[157] Having regard to all of the evidence, I find that Ms. A. is significantly compromised in her ability to fulfill her responsibilities in relation to the children and to meet their health and emotional needs, as well as their need for stability.

b) The Respondent

[158] Dr. England opines that Mr. C. is a "high functioning and well-adjusted individual who impresses as having an accurate grasp of the children and their needs". The claimant does not seriously dispute the ability of Mr. C. to meet the children's needs. Rather, she submits that the children should be in the care of their mother rather than their nanny, who she argues will be the de facto caregiver to the children when they are with their father.

[159] Though Mr. C. does rely on R.Q. to assist him with childcare responsibilities, the evidence does not support the claimant's contention that it is the nanny who provides the primary care for the children when they are with their father.

[160] In my view, the evidence supports a finding that Mr. C. is able to and does exercise his responsibilities in relation to the children and to meet all their needs.

4. Family Violence

[161] Pursuant to s. 37(2)(g), the court is to consider the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member. Section 37(2)(h) requires the court to consider whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs.

[162] The factors to consider when assessing family violence are set out in s. 38 of the FLA:

38 For the purposes of section 37 (2) (g) and (h), a court must consider all of the following:

- (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.

[163] There are two types of family violence alleged by the claimant: violence directed towards the children in the form of sexual abuse, and violence directed at herself.

a) Against the Children

[164] Ms. A.'s counsel submits that the claimant accepts that sexual abuse has not been established on the evidence. However, it was clear from the claimant's testimony that she still holds firmly to the view that Mr. C. is a sexual predator, and that he is "grooming" the girls sexually.

[165] Mr. C. denies that he has been involved in any sexually inappropriate behaviour with the children. He submits that many of the allegations have been completely fabricated. Other allegations have flowed from normal interactions between him and the children which the claimant has taken out of context and grossly exaggerated to try to deny him parenting time.

[166] As I noted in *J.S. v. S.S.*, 2018 BCSC 355 at para. 186, in assessing the impact of the alleged sexual touching on the best interests of the children, I must first determine whether in fact sexual touching has occurred. Facts supporting this finding must be proven on a balance of probabilities. If I determine that it is not possible on the evidence to make such findings, then at the second stage of the inquiry I must consider whether there is a real risk that sexual touching of the child has occurred or might occur in the future.

[167] In *N.D.T. v. T.F.T.*, 2016 BCSC 134 at para. 103, Mr. Justice Saunders adopted the approach set out in *L. (B.J.) v. L. (E.J.)* (1983), 54 B.C.L.R. 164 (C.A.) (also known as *Leveque v. Leveque*), and related it to the best interests of the child principle found in s. 37(3) of the FLA, as follows:

[103] It has long been recognized, however, that in cases dealing with the well-being of children a court is not obliged to reach specific factual conclusions as to what has transpired while children have been in their parents' care, in making an order respecting parenting arrangements: see *Leveque v. Leveque*, (1983), 54 BCLR 164 (BCCA) at para. 13. This principle is recognized implicitly in [s. 37(3)] of the Family Law Act, which provides only that the best interests of a child be advanced through an order that protects a child's physical, psychological and emotional safety, security and well-being to the greatest possible extent. This wording contemplates that evidence in family cases is often of a type that may be only suggestive of the truth, and that resists specific conclusions being drawn.

- [168] Mr. C. had credible explanations for all of the allegations of sexual misconduct. Mr. C. admitted that he applied rash cream to T.C.'s bottom, but denied putting any cream on T.C. in any sexually inappropriate way. Mr. C.'s evidence of rubbing ointment on T.C.'s buttocks and back to treat her eczema was corroborated by R.Q. and the children in their interviews with Mr. van Hanuse. Mr. C. convincingly recounted what can only be described as completely appropriate medical care of his daughters.
- [169] With respect to the allegation that he was "sleeping on top of [T.C.]," Mr. C. explained that T.C. would ask him to put his head on her stomach while watching television. I did not find anything inappropriate about this or other interactions complained of by Ms. A. I agree with Mr. van Hanuse that they were age appropriate displays of affection between a father and child.
- [170] I note also that Ms. A's allegations of sexual abuse or inappropriate sexual behaviour were not corroborated by any of the non-party witnesses, except V.A. I have rejected V.A.'s evidence as being not credible or reliable due to her bias against Mr. C. and in favour of the claimant.
- [171] R.Q. did not report any conduct of the respondent, or statements made by the children, which might be suggestive of sexual abuse or otherwise inappropriate contact by the respondent. While R.Q. may have a motive to minimize any negative behaviour of Mr. C. as she is in his employ, the evidence leads me to conclude that her genuine affection for the children and care for their well-being weighs against her covering up any abuse or inappropriate sexual touching if it had occurred.
- [172] After carefully weighing all of the evidence, I am unable to conclude on a balance of probabilities that Mr. C. acted in any sexually inappropriate or abusive way with either T.C. or F.C. The evidence also does not establish that there is a real risk that sexually inappropriate behaviour (including abuse), or any other form of family violence, has occurred against either child, or that it might occur in the future.

b) Against the Claimant

- [173] The claimant states that while Mr. C. did not physically abuse her after the single incident around 2004, he exercised coercive control over her. Dr. England opined that in cases where one spouse exercises coercive control, one would see increased instances of physical violence. However, the violent incident that happened prior to the parties' marriage was not repeated. There is no evidence or allegation of physical violence against Ms. A. at the hands of Mr. C. in the ensuing years. This, along with other factors, led her to conclude that Mr. C. did not exercise coercive control over the claimant. Dr. England characterized the violent incident from 2004 as an isolated instance of situational couples' conflict.

[174] I found Dr. England to be knowledgeable in the area of family violence, and to have a sound understanding of issues related to coercive control. She was able to detail the indicia of coercive control, and relate those factors to the evidence (or lack thereof) in this case. I found her opinion compelling.

[175] I also note that none of the independent witnesses corroborated Ms. A.'s accounts. Anita S. ("Anita") is a close friend of the claimant and has known her since 2007. Though she is a social worker, she was never involved professionally with these parties. Anita stated that in all the years she has known the claimant, she had never heard Ms. A. say that she was afraid of her husband, that he was an alcoholic, or that he was stalking her.

[176] I conclude that the evidence fails to establish that Ms. A. was the victim of coercive control. I also find that the isolated incident of family violence which occurred early on in the parties' relationship, does not compromise the safety, security, or well-being of either child.

5. Ability to Cooperate

[177] Section 37(2)(i) of the FLA requires the court to consider 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.

[178] This has been an unusually high conflict matter, and the parties have not been able to cooperate with each other when it comes to the care of the children. However, the evidence establishes that Ms. A. is largely to blame for this situation.

[179] Ms. A. has taken many steps which have escalated conflict between the parties, such as:

- a) blocking Mr. C.'s driveway and preventing him from taking F.C. to school;
- b) unilaterally pulling the children out of their school in Victoria and registering them in a school in Duncan;
- c) posting a note maligning Mr. C. in a highly visible location at his gym;
- d) making allegations to the respondent's employers and co-workers that he has been stealing drugs from the hospital;
- e) leaving offensive notes for Mr. C. in the family home; and
- f) breaking into the nanny's suite and going through her belongings.

[180] In addition, the claimant's decision to move her home from Victoria to Duncan in the middle of the trial was taken without notice to the respondent or regard for the children's well-being. The children are now forced to commute over an hour each way in highway traffic to attend school in Victoria, and frequently miss their scheduled activities which fall during the week during the claimant's parenting time.

[181] All of these events raise significant concerns about the claimant's ability to cooperate with the respondent in making decisions affecting the children.

6. RCMP and MCFD Involvement

[182] Section 37(2)(j) requires the court to consider any civil or criminal proceeding relevant to the child's safety, security or well-being. I have already detailed the police and MCFD investigations in relation to this case.

[183] Criminal charges against Ms. A. arising out of the January 12, 2018 incident were still outstanding at the conclusion of this trial. Since the expiry of the Provincial Court supervision order on March 21, 2019, there are no new court proceedings through the MCFD. Nevertheless, the parties have advised that the Ministry continues its involvement with the family and to work with Ms. A.

G. Parenting Orders

[184] In determining a child's best interests, the court is to focus on the best interests in the long term, rather than in the short term. Where drastic changes are warranted in the long-term best interests of the children, they should be made, even if this causes short-term discomfort for them: K. (L.D.) v. K. (M.A.), 2015 BCSC 226.

[185] The long term best interests of T.C. and F.C. warrant the making of orders that will drastically change the current parenting regime. In arriving at this conclusion, I have carefully considered all of the factors set out in s. 37(2), the submissions of the parties, and the evidence in this case. The evidence establishes that the children's safety, health, and emotional and physical well-being are at risk when they are in the care of Ms. A.

1. Parenting time

[186] I agree with Dr. England's recommendation that it is in the best interests of the children that Ms. A.'s parenting time with the children be restricted, both to reduce the highly disruptive nature of the current 2-2-3 schedule, and to address concerns about Ms. A.'s inability to fulfill her parental responsibilities and meet all the children's needs.

[187] Dr. England recommends that Ms. A. have parenting time with the children for three overnight stays on alternating weekends, one alternating overnight stay during the week, and one alternating evening a week. In total, the children would have four overnight stays with their mother every two weeks, and one three-hour evening block every other week.

[188] For the past two-and-a-half years since separation, the children have been on a 2-2-3 parenting schedule. This schedule is highly disruptive, but was manageable until Ms. A. made the unilateral decision to move to Duncan. The children currently spend over two hours of commute time daily to get to and from school when they are with their mother. This means less time for homework and less time to participate in extra-curricular activities. By limiting Ms. A.'s parenting time to weekends, the children's commute to school

from Duncan will be minimized.

[189] Dr. England recommends that the four overnight parenting time visits occur during the same one-week block. However, given that Ms. A. has since moved to Duncan, the needs of the children are better met if Ms. A. does not have any overnight visits where the children are required to commute to school from Duncan during the week. In addition, given the history of the children's care, it is important to avoid long periods of time where the children do not have contact with their mother.

[190] I therefore order that Ms. A. will have parenting time with the children on a two-week rotating schedule, specified as follows:

- a) on week one of the schedule, from the end of the school day on Friday until the start of the school day on Monday;
- b) on week two of the schedule, from the end of the school day on Friday until 12:00 pm on Saturday; and
- c) every Wednesday from after school until 6:30 pm.

[191] If the parenting time falls on a day that is not a school day, then start of the school day shall be interpreted to mean 9:00 am, and end of the school day shall be interpreted to mean 3:00 pm.

[192] The parent who is exercising parenting time shall take the child to any extracurricular activity that falls during their parenting time.

[193] All pick-ups and drop-offs are to occur at the children's school when school is in session, and at another location agreed to by the parties when school is not in session. The parties are to avoid all contact with each other during exchanges.

[194] The parties are at liberty to vary this parenting schedule by consent or further order of the court.

2. Supervision

[195] The claimant relies on the fact that Dr. England does not recommend supervised parenting time for Ms. A. as evidence that concerns about the children's welfare while in Ms. A.'s care are overblown. I disagree with this characterization, but regardless, I am not bound by the s. 211 report. As noted in *A.P. v. J.C.*, 2018 BCSC 1381 at para. 118, the s. 211 report is a useful tool which can assist the court, but it is not determinative, and is not a substitute for the court's decision.

[196] Claimant's counsel argues that the conditions warranting supervision are not present in this case. Counsel relies on *M.H. v. A.M.*, 2016 BCSC 1664 at para. 132, wherein Mr. Justice Skolrood relies on the following factors taken from *F.K. v. M.K.*, 2010 BCSC 563 at para. 147:

1. Long term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress and or fear.
2. History of violence; unpredictable, uncontrollable behaviour; alcohol, drug abuse which has been witnessed by the child and/or presents a risk to the child's safety and well being.
3. Extreme parental alienation which has resulted in changes of custody and, at times, no access orders to the former custodial parent.
4. Ongoing severe denigration of the other parent.
5. Lack of relationship or attachment between noncustodial parent and child.
6. Neglect or abuse to a child on the access visits.
7. Older children's wishes and preferences to terminate access.

[197] More than one of the F.K. v. M.K. factors are present in this case, such as unpredictable and uncontrollable behaviour of Ms. A., long term harassment of Mr. C., and ongoing severe denigration of Mr. C.

[198] In J.P.G. v. V.S.G., 2012 BCSC 946 at para. 60, the Court noted that "[t]he overarching consideration for the issue of supervision is the best interests of the child". Madam Justice Maisonville quoted the following passage from Madam Justice Dardi in A.B. v. C.D., 2011 BCSC 603 at para. 30, which I find to be instructive:

[30] In V.S.J. v. L.J.G, [2004] O.T.C. 460 at para. 143 (S.C.J.), the court provided guidance as to the factors a trial judge should consider when restricting a parent's access, including:

1. The maximum contact principle;
2. The right of a child to know and have a relationship with each parent;
3. A limitation of a consideration of parental conduct to that conduct which impacts on the child;
4. The risk of harm: emotional, physical and sexual;
5. The nature of the relationship between the parents and its impact on the child;
6. The nature of the relationship and attachment between the access parent and the child; and,
7. The commitment of the access parent to the child.

[31] In summary, the determination of the child's best interests, as endorsed by the Supreme Court in Gordon, requires a full and sensitive inquiry. The inquiry must have regard to all the relevant circumstances relating to a particular child's needs and the ability of the parents to satisfy those needs. Because the inquiry is highly individualized, it must be recognized that other decided cases are of assistance only in the limited sense of illustrating the application and interplay of the governing principles: H. v. K., 2008 BCSC 660 at para. 212.

- [199] In my view, there is a real risk of harm to the children should they be left unsupervised in Ms. A.'s care, such that supervision of Ms. A.'s parenting time with the children is warranted.
- [200] In the time between the delivery of the s. 211 report and the commencement of the trial, a number of events transpired which indicate that the circumstances are more dire than they were when Dr. England assessed the parties. For example:
- a) numerous further allegations against Mr. C. by Ms. A. which have not been proven;
 - b) the involvement of the Ministry, and the temporary placement of the children in care with an unrelated third party;
 - c) the supervision of Ms. A.'s parenting time by virtue of a Provincial Court proceeding commenced by the Ministry;
 - d) the claimant and her mother taking T.C. to the emergency ward of a hospital to have her subjected to a vaginal and anal examination; and
 - e) Ms. A.'s unilateral decision to leave the Victoria area.
- [201] Further, in the approximately nine months between the delivery of Dr. England's report and the conclusion of this trial, Ms. A. remains in denial of the impact of her actions on the safety and well-being of the children, and has shown little commitment to improving. She has taken no voluntary steps to address her significant issues and does not appear to recognize the severe problems they present. As such, supervision of Ms. A.'s parenting time with the children is warranted to protect the children from emotional and physical harm.
- [202] In addition to considering the ability of each parent to exercise his or her responsibilities, s. 37(2)(f) of the FLA requires this Court to also consider this ability in relation to each person who seeks contact with the child. Given my findings regarding V.A.'s involvement in, and encouragement of, the claimant's very negative and harmful behaviours, I find that it is in the children's best interests for V.A.'s contact with the children also to be supervised.
- [203] Although counsel for the respondent urges me to consider an arm's length supervisor, in my view, P.A. is best suited to supervise the children's parenting time with their mother and grandmother. He has already shown that he is capable of fulfilling this role in an objective manner. In addition, having P.A. supervise the parenting time will offer continuity and stability for the children, without introducing a third party.
- [204] P.A. is to supervise all of the claimant's parenting time with the children and all of V.A.'s contact with the children. In the event that P.A. is unable or no longer wishes to act as a supervisor, the parties may appoint a replacement supervisor. If the parties are unable to agree to a replacement supervisor, either party may apply to court. Until the supervision order is lifted in relation to the claimant, or further order of this court, any contact that V.A. has with the children must be under supervision by P.A. or the replacement supervisor.

3. Primary Residence

- [205] I agree with Dr. England's recommendation that the father should have primary residence of the children.
- [206] Mr. C. is the party that is best suited to meet the long-term best interests of the children. Ms. A.'s actions since separation have resulted in a great deal of instability in the children's lives. In addition, I have grave concerns that Ms. A.'s home environment is not conducive to the children's well-being. Ms. A. lives with her parents. Though P.A. has had a positive influence on Ms. A., this has been negated by V.A., who has supported, encouraged, and furthered Ms. A.'s harmful behaviour.
- [207] Further, by having the children reside primarily with their father, Ms. A. can have time to focus on improving her mental health and addressing the issues that have resulted in the making of these orders.

4. Guardianship and Parental Responsibilities

- [208] Dr. England recommends that Mr. C. have final decision-making authority over the children as per the Joyce Model, which requires that he consult with Ms. A. on significant issues affecting the children. I agree with this recommendation, and find that it best meets the interests of the children.
- [209] Ms. A. submits that it is in the best interests of the children if she is able to exercise final decision-making authority. I disagree. Ms. A. has shown a marked inability to make decisions that are in the best interests of the children, and a steadfast refusal to cooperate with Mr. C.
- [210] Mr. C. argues that the Joyce Model is unworkable, and seeks sole custody which would obviate the need for him to consult with Ms. A. over significant decisions affecting the children. While I share the respondent's concerns that Ms. A. has shown an inability to cooperate with him, cutting her out from the process of making major decisions about the children is not in their best interests.
- [211] The inconvenience to the respondent of having to consult with Ms. A. is outweighed by the benefit to the children of having their mother being involved in or being given the opportunity to participate in making important decisions affecting their lives. In time, it is hoped that Ms. A. will be able to participate meaningfully in the consultation process. Requiring Mr. C. to consult with Ms. A. will ensure that the children and Mr. C. continue to see her as an important parental figure in the children's lives. It will also ensure that Mr. C. has the benefit of a differing perspective, which can only enhance the decision-making process.
- [212] I confirm that both parents are guardians of the children. Mr. C. is granted final decision-making authority, but is required to consult with Ms. A. pursuant to the Joyce Model.

5. Parenting Coordinator

- [213] I agree with Dr. England's recommendation that a parenting coordinator should be appointed. The parenting coordinator can assist the parties with communication and assist with making modifications to the parenting plan as-needed.
- [214] The parties shall forthwith retain as parenting coordinator a mutually agreed upon person meeting the criteria under s. 6(1) of the Family Law Act Regulation, B.C. Reg. 347/2012. Pursuant to s. 15(4) of the FLA, the authority of the parenting coordinator ends two years after this order is made, subject to consent of the parties or further order of this court.
- [215] The parenting coordinator's services shall be provided on the following terms, in addition to the terms set out in the most current form of the generally accepted precedent for a parenting coordination agreement endorsed by the Roster of the British Columbia Parenting Coordinators Roster Society (the "Society"), where those terms do not conflict with the following:
- a) the parenting coordinator is to assist with communication between the parties and to make modifications to the parenting time schedule as-needed;
 - b) all communications with respect to the children are to occur through the parenting coordinator;
 - c) the costs of the parenting coordinator shall be shared equally by the parties, subject to the parenting coordinator's authority to reapportion the total parenting coordination costs between the parties based on the unjustified or disproportionate use of the parenting coordinator.

6. Counselling

- [216] Dr. England has recommended counselling for the parties, as follows:
- a) Ms. A. undertake ongoing counselling to address issues that have led to her concerning behaviours;
 - b) Mr. C. undertake further counselling to assist in improving his emotional depth and engagement; and
 - c) the parties engage a parenting therapist to work with both parents to address parenting issues that may arise.
- [217] I find that counselling is warranted and in the best interests of the children. As such, the parties are ordered to attend counselling as recommended by Dr. England.

[218] Counselling or parenting therapy may be provided by a registered psychologist or a qualified counsellor. However, individual counselling for Ms. A. is to occur under the supervision or direction of a registered psychologist. The costs of the individual counselling sessions are to be borne by the party receiving the counselling. The costs of the parenting therapist are to be shared equally by the parties.

[219] The counselling may be terminated upon the counsellor being satisfied that the party seeking counselling has addressed the issues requiring their attendance and no longer requires their assistance. Parenting therapy may be terminated by the parenting therapist on the same terms.

7. Holidays and Special Days

[220] Dr. England recommends that: special single event days be assigned to the parent affected (i.e., Mother's Day to the mother); other single event days be alternated (i.e., Halloween); longer school holidays be divided (i.e., school winter break); and the basic parenting plan be continued during the summer with allowance for both parents to have uninterrupted parenting time for vacations.

[221] Neither party took issue with these recommendations. I find that they are reasonable and will best meet the children's needs.

[222] I therefore order as follows:

- a) The mother will have the following parenting time during the winter school holidays:
 - i. in odd numbered years, starting in 2019, from the end of the school day on the last day of school prior to the winter break, until 4:00 pm on December 25; and
 - ii. in even numbered years, from 4:00 pm on December 25 until the start of the school day on the first day of school following the winter break.
- b) The mother will have the following parenting time during the spring school break:
 - i. in even numbered years, starting in 2020, from the end of the school day on the last day of school prior to the spring break until 4 pm on the day halfway through the spring break; and
 - ii. in odd numbered years, from 4:00 pm on the day halfway through the spring break until the start of the school day on the first day of school following the spring break, with the child to be picked up by the claimant from the respondent's home.
- c) The regular parenting schedule will remain in force during the summer school break, except that each parent will be entitled to have two weeks of uninterrupted time with the children during which the two-week rotating parenting time schedule is suspended.

- d) Despite the regular parenting schedule, the father will have parenting time with the children on Father's Day and his birthday, commencing from after school that day until start of school the following day, and the mother will have parenting time with the children on Mother's Day and her birthday, commencing from after school that day until start of school the following day.
- e) In odd numbered years, starting in 2019, the mother will have the children on Halloween starting from after school that day until 8:00 pm the same day.
- f) In even numbered years, starting in 2020, the mother will have the children on Thanksgiving from after school that day until 8:00 pm the same day.
- g) In odd numbered years, the mother shall exercise parenting time with the children on F.C.'s birthday, and in even numbered years, the mother shall exercise parenting time with the children on T.C.'s birthday, starting from after school that day until 8:00 pm the same day.

8. Communication between the Parents

[223] Historically, minimizing direct communication between the parties has been an effective way of diffusing conflict. Except in the case of an emergency related to the children, the parties are not to communicate directly with each other.

9. Communication with the Children outside Parenting Time

[224] Dr. England also recommends that no communication take place with the children outside of the parenting plan unless agreed to by both parents and with the assistance of a parenting coordinator. I accept this recommendation, and so order. This recommendation is conducive to the children's best interests as it will ensure that each parent has uninterrupted parenting time.

[225] I further order that neither party shall:

- a) question the children about the other parent or time spent with the other parent beyond simple conversational questions;
- b) discuss with the children any inappropriate adult, court or legal matters; or
- c) blame, criticize, or disparage the other parent to third parties or in front of the children.

10. St. Michael's University School

[226] One issue that was not addressed by Dr. England, but which featured heavily in the trial, was the dispute about where the children should attend school. They currently attend St. Michael's University School ("SMU"), a private educational facility located in the Victoria area. They also attended the SMU pre-school.

- [227] The claimant does not wish the children to attend SMU. She raises several concerns, including that the children are bullied by other kids at the school, and that the administration is biased against her. Ms. A. argues that her poor relationship with the school and other parents is impacting the children. As an example, F.C. is reported to have described to her mother that one of her friends at school is not permitted to play with her when she is with Ms. A.
- [228] Rebecca Anderson, the principal of SMU, did not dispute that Ms. A.'s relationship with the school administration is fractured. Indeed, the evidence indicates that it is likely beyond repair, given Ms. A.'s numerous allegations against the school administration, staff, other students, and parents. Following a very public argument in the school parking lot involving Ms. A., her parents, and Mr. C., Ms. Anderson told the parties that they were no longer permitted to do similar child exchanges at the school. In addition, Ms. A. has directly involved some parents in the SMU community in her dispute with Mr. C. by sending them the video clip of T.C.
- [229] Ms. Anderson described a tightly knit school community at SMU where the parents are encouraged to actively participate. However, this is no longer possible for Ms. A. Though the problems are primarily of the claimant's own making, I agree with the claimant that changing the children's school is in the best interests of the children. It will enable the entire family to have a fresh start in a new educational facility where the parties and the children can establish new relationships with teachers, administration, students and parents, without the history of their toxic family dynamics overshadowing their interactions.
- [230] In arriving at this conclusion I have weighed carefully the benefit of keeping the children in the same school for the sake of stability, versus changing their school to allow the family to start on neutral terms. The children are very resilient. There is no indication that they will have a difficult time transitioning to another school. With appropriate support from their primary caregivers, they should be able to continue to thrive in any school environment.
- [231] The children are to be enrolled in a school other than SMU, for the 2019/2020 school year, and all subsequent years of their education, as follows:
- a) the decision of what school the children should attend is an important decision that requires the father to consult with the mother as per the Joyce Model;
 - b) the children shall complete their current school year at St. Michael's University school;
 - c) the children's new school shall be located in the Victoria area; and
 - d) neither party is permitted to discuss with the school administration or parents of children attending the children's new school, any details of this litigation or the reasons why the children have changed schools.

11. Conditional Reviewable Order

- [232] The court may make a parenting or supervision order reviewable in certain circumstances. These "conditional reviewable orders" allow a party to demonstrate that the circumstances of a parenting order requiring, for example, supervision have changed: *J.P.G. v. V.S.G.*, 2012 BCSC 946 at para. 74.
- [233] In my view, such an order would be appropriate in this case. The evidence indicates that prior to the parties' separation, Ms. A. was an excellent mother and appropriately focussed on the children's needs and interests. It is hoped that with appropriate counselling and a more positive home environment, she will be able to resume an equal parenting role in the children's lives.
- [234] The claimant has liberty to apply for an order to lift the supervision as follows:
- a) upon the provision of an independent psychological assessment report from a registered psychologist with the relevant qualifications;
 - b) the psychologist retained to prepare the psychological assessment report is not to be an advocate for any party;
 - c) the psychologist is to be provided with a copy of these Reasons for Judgment; a copy of Dr. England's s. 211 report; and all counselling, healthcare, or other records deemed relevant by the psychologist for the preparation of the psychological assessment report; and
 - d) the psychological assessment report must indicate that the claimant understands and has insight into her past behaviour, and that the claimant is not likely to engage in the type of behaviour that resulted in the making of the supervision order, and is not likely to engage in any other behaviour which could endanger the children or put them at risk of psychological or physical harm.
- [235] A psychological assessment report fitting the above criteria qualifies as a change of circumstance entitling the claimant to bring an application to the court respecting supervised parenting time.

12. Seizure

- [236] In *A. (A.) v. A. (S.N.)*, 2009 BCSC 387 at para. 80, the Court held that, in certain high conflict family cases where the parties are likely to reappear before the court even after judgment, it is appropriate for the trial judge to seize themselves of future applications.
- [237] For the reasons set out in *A. v. A.*, until further order of this court, I will remain seized of this matter for any applications related to parenting orders.

V. Division of Family Property and Debts

- [238] Division of property should be determined before a support claim so that the court can assess each party's means taking into account the property division: *Hsieh v. Lui*, 2017 BCCA 51 at para. 25; see also *Narayan v. Narayan*, 2006 BCCA 561 at para. 33.

[239] The determination of family property and debts was not an easy task in this case. While the parties were diligent in the evidence they presented to the Court on the parenting issues, such diligence was woefully lacking in relation to the property and debt issues. In some instances, I have had to make rough estimates based on the best available evidence. Where warranted I have referred the matter to the Registrar.

A. Background

- [240] In the early years of their marriage, the parties lived in rental accommodation. Eventually, they purchased a home located on Lochside Drive in Victoria. They were assisted in this purchase by Mr. C.'s mother who provided a loan of \$150,000. The debt was secured against the property by a mortgage.
- [241] Since 2010, the family expenses were met almost exclusively through Mr. C.'s employment earnings. The parties' spending habits and lifestyle expectations increased with Mr. C.'s increased income. They were often "over-leveraged", resulting in an ever-increasing line of credit. To reduce taxes, the parties employed a complex corporate structure involving three legal entities: a family trust and two corporations.
- [242] The [name omitted] Family Trust (the "family trust") facilitated income splitting between Mr. C. and the claimant, and Mr. C. and his mother, L.C. Income from Mr. C.'s medical practice was paid into a corporate entity called Dr. [name omitted] Inc. (the "Dr. Corp"). Income from the Dr. Corp was paid into the family trust, which in turn distributed dividends to the beneficiaries of the family trust.
- [243] Commencing in 2010, L.C. was paid dividends out of the family trust. Since 2014, these averaged around \$56,000 per year. L.C. would return a portion of those monies to the parties, retaining the remainder for her personal use (the "family trust scheme"). The parties also paid for L.C.'s taxes on the family trust income she received. As with the income split between Mr. C. and the claimant, the income splitting between Mr. C. and his mother yielded significant tax savings for the parties.
- [244] The parties lived on a Scotiabank line of credit (the "Scotia LOC") for most of the year as dividends were not paid out of the family trust until the end of the fiscal year of the Dr. Corp. The Scotia LOC sat at \$349,948 at the date of separation (all figures are rounded up to the nearest dollar). The Scotia LOC was paid down at year end through the dividend income. The Scotia LOC was in Mr. C.'s name only, and secured against some of the assets of [name omitted] Inc. ("RCI"). RCI was an investment vehicle used by Mr. C. to build an investment portfolio for the family.
- [245] The parties also participated in a business venture called NexGen Hearing, a hearing aid company. Shares for Mr. C., Ms. A., and L.C. were purchased using individual lines of credit against their own interest for \$170,000 each.

- [246] Following their separation, Mr. C. continued to pay for all the mortgage and utilities in relation to the family home, as well as the debt expenses. While there is evidence that Ms. A. paid for some of the children's expenses, her contribution post separation was minimal, despite the fact that she was in receipt of child support. Mr. C. paid for most of the children's post-separation expenses including school fees, birthday parties, childcare, clothing, and activities.
- [247] Pursuant to a consent order made in March 2019 (the "March 2019 Consent Order"), amongst other things, the parties agreed to the following:
1. Sale of the NexGen shares, with sale proceeds to be held in a solicitor's trust account.
 2. The respondent may use sale proceeds from the NexGen shares to pay down the lines of credit for the purchase of the shares.
 3. The family residence may be listed for sale and the sale proceeds are to be held in a solicitor's trust account.
- [248] Pursuant to a further consent order made in April 2019 (the "April 2019 Consent Order"), the parties agreed to a without prejudice distribution of \$100,000 each to the claimant, respondent and L.C. from the sale proceeds of NexGen.
- [249] The parties agree that family property should be divided equally between them. However, there is dispute as to whether L.C.'s shares in NexGen constitute family property.
- [250] The parties also agree on an equal division of various family debts, but disagree on whether all of the expenses claimed by Mr. C. post separation constitute family debt. There is also a dispute as to whether the \$150,000 to buy the Lochside Drive home remains owing to Mr. C.'s mother.

B. Family Home

- [251] Pursuant to the March 2019 Consent Order, the parties have agreed to list the former family home (the "family home") for sale. I therefore do not need to arrive at a valuation of the family home. However, insofar as it helps to understand what the final financial positions of the parties will be, the competing appraisals relied on by the parties place the value at either \$965,000 or \$1,320,000.
- [252] The parties have agreed to payment of the mortgage on the former family home prior to distribution of the net sale proceeds. This mortgage stood at approximately \$260,000 as at the date of trial.
- [253] The three lines of credit used to purchase the NexGen shares were also registered against the family home. These lines of credit were paid out upon the sale of NexGen.
- [254] The remaining issue in relation to distribution of the net sale proceeds from the sale of the family home is the \$150,000 claimed by Mr. C. as a joint family debt to L.C.

Monies Owing to L.C.

- [255] The claimant acknowledges that at one point a liability did exist to L.C. for \$150,000 to purchase the family home. This is evidenced by a second mortgage registered against the property in April 2007, in favour of L.C. However, the claimant argues that the mortgage liability was repaid, as demonstrated by the fact that the mortgage in favour of L.C. was discharged in June 2011.
- [256] Mr. C. says that the liability to L.C. is still owing. He testified that the mortgage was discharged to facilitate purchase of NexGen shares, which could only be bought with the use of lines of credit which the parties secured against the family home.
- [257] L.C. resides in Hong Kong. She did not testify in the trial. According to the respondent, her health was poor as a result of two recent strokes. The only evidence that the Court has about the outstanding liability to L.C. is the evidence of Mr. C. As the documentary evidence does not support Mr. C.'s testimony, his credibility is central to determining whether the \$150,000 liability to L.C. remains outstanding. While I found Mr. C.'s evidence credible in relation to issues involving the children, I did not find his evidence credible in relation to debts owing to his mother.
- [258] In his financial statement sworn on March 2, 2017, Mr. C. indicated that he had an unsecured debt owing to his mother in the amount of \$380,000. This was in addition to the \$150,000 loan which he categorized as a secured debt incurred in 2013. However, in his second financial statement, sworn May 25, 2018, all reference to the \$380,000 debt to L.C. was gone. Under cross-examination, Mr. C. was unable to explain why he had initially claimed the \$380,000 debt if it did not exist.
- [259] During the course of the litigation, Mr. C. produced a letter from L.C. dated March 1, 2017 (the "debt letter"), claiming that he was indebted to her for loans totalling \$331,745. Attached to the debt letter were cheques ranging in amounts from \$15,000 to over \$50,000. However, the evidence establishes that those cheques were in fact repayments of the dividends paid to L.C. out of the family trust, as part of the family trust scheme. Though Mr. C. disassociated himself from the debt letter, the preponderance of probability is that L.C. prepared the letter making the false debt claim, at the direction of or with the consent of Mr. C.
- [260] I am also not convinced by the respondent's assertion that L.C. only removed her mortgage to facilitate the purchase of the NexGen shares, and not because it was no longer owing. Mr. C. described his mother as a knowledgeable businesswoman. I find it implausible that after initially having secured the \$150,000 loan against the property, L.C. would not find some other way to document or secure the debt if it was still owing. For example, she could have tried to re-register her mortgage on title after the lines of credit for the NexGen loans had been secured, or she could have had the parties execute some document confirming that the loan had not been repaid. The fact that she did not do so is consistent with a finding that either the loan had already been repaid, or she had come to some resolution

with Mr. C. about the method of repayment.

- [261] It is notable that the discharge of the \$150,000 mortgage occurred around the same time the parties set up the family trust scheme. While I accept that there is no single cheque or document evidencing a lump sum repayment of the \$150,000, there is evidence that L.C. received in excess of that amount from the parties through the family trust scheme. It is reasonable to conclude on the evidence that these payments through the family trust represented, in part, re-payment of the \$150,000 debt.
- [262] In total, L.C. received \$428,725 as distributions paid to her from the family trust, during the period 2010 to 2017. Mr. C. paid an additional \$26,000 for her taxes. In contrast, L.C. made repayments totalling \$223,742 during the same period. After deducting the \$150,000 mortgage, the net remaining amount kept by L.C. for her personal benefit is \$80,983. The respondent testified that as compensation for his mother's participation in the family trust scheme, she would keep approximately \$12,000 out of the approximate \$50,000 in annual dividend payments. Over a period of seven years, this figure amounts to \$84,000, which is very close to the \$80,983 left over for L.C.'s use after accounting for the \$150,000 loan.
- [263] Having regard to all of the evidence, the plaintiff has failed to establish that there is a family debt owing of \$150,000 to L.C.
- [264] If the family home sells for \$1 million, each party should receive approximately \$370,000 each, after accounting for the mortgage liability to the bank, any taxes, legal fees or other costs associated with the sale.
- [265] The parties are to share equally in the net sale proceeds of the family home.

C. NexGen

- [266] The NexGen shares have been sold, and the lines of credit in relation to the purchase of the shares are all paid out. The net sale proceeds are currently being held in a solicitor's trust account. At issue is the distribution of the sale proceeds held in L.C.'s name (approximately \$500,000). The claimant argues that her mother-in-law's shares in the company are being held in trust for the respondent, and thus constitute family property. The respondent says that his mother is entitled to retain her interest in the shares as she held a legitimate and enforceable interest in NexGen.
- [267] A jurisdictional issue was raised by the respondent regarding the ability of the claimant to advance a claim against L.C.'s shares in NexGen as she was not a party to these proceedings. I did not find the respondent's arguments persuasive, but in light of my decision below, I do not need to address this issue.
- [268] Having regard to the documentary and other evidence, I agree with the respondent that L.C.'s interest in NexGen does not constitute a family asset.

- [269] The NexGen documentation indicates that R.C., T.A., and L.C. (collectively referred to as the "C. Family Shareholders") purchased 7% each of the shares in NexGen. Each of their share entitlements is identified individually in the NexGen shareholders listing.
- [270] There is no evidence that L.C.'s shares were purchased using family funds. Indeed, none of the C. Family Shareholders invested their own money in NexGen. Rather, each of them purchased their shares using individual lines of credit. L.C. came to Canada from Hong Kong and personally signed the loan documents for her line of credit.
- [271] I also do not accept that simply because Mr. C. paid for L.C.'s interest on the line of credit, this constitutes proof that the shares were being held in trust for him. Given that L.C. ordinarily lived in Hong Kong, it is reasonable for Mr. C. to have offered to service L.C.'s debt from his Canadian bank account. I also note that although Mr. C. paid the interest for L.C.'s line of credit, up until the day that her shares were sold, L.C. continued to remain personally liable to the bank for her debt of approximately \$170,000. Chad Linger, the respondent's accountant, testified that he was aware that L.C. had her own line of credit liability for her interest in the NexGen shares.
- [272] I accept Mr. C.'s evidence that he involved his mother in the NexGen business venture as a way of repaying her for the support that she had given him throughout his life. I also find that Ms. A. was aware that L.C. was purchasing her own interest in NexGen, distinct from the parties. In doing so, I reject Ms. A.'s evidence as it lacked credibility. For example, Ms. A. testified that she had no knowledge or information about the NexGen investment as a whole, yet her signature appears on the documents for her line of credit.
- [273] Having regard to the evidence as a whole, the claimant has failed to establish that the shares held by L.C. constitute a family asset.
- [274] Each of the C. Family Shareholders is therefore entitled to an equal distribution of the net sale proceeds from the sale of the NexGen shares, less the interest incurred on their individual lines of credit for which each of them is responsible. Each party's distribution will total approximately \$330,000.
- [275] Aside from the above distribution, I find that Ms. A. has no further interest in NexGen assets or shares. The claimant advised the court that she has waived any right to claim for any interest in office space owned by NexGen. She acknowledges that the office space has very little financial value. The respondent is therefore entitled to retain any remaining interest in NexGen solely for his own benefit.

D. Corporations

[276] Both parties agree that the appropriate way to value the two corporations (Dr. Corp and RCI) is to use the retained earnings for each corporation's year-end (September 30). However, whereas the respondent argues that the corporations should be valued as at the date of trial, the claimant seeks to use the valuation at September 2017. This is because Mr. C. made substantial withdrawals from both corporations after September 2017, thereby driving down their value.

1. Legal Framework

[277] Section 87 of the FLA stipulates that the value of family property and family debt must be determined as of the date of an agreement or the date of trial. The parties agree that there is no agreement dividing property and family debt.

[278] In *Brown v. Brown*, 2016 BCSC 1037 at para. 65, Madam Justice Bruce noted the court's discretion under s. 87 to order a valuation date other than the date of trial:

For example, the Court has held that the value of bank accounts that are used daily should be determined at the date of separation. Conversely, long-term investment accounts, including RRSPs, should be valued as of the date of trial subject to an accounting for contributions and withdrawals post-separation.... There may be other reasons for departing from the normal rules regarding valuation dates, including significant unfairness.

[279] However, the court may only use a valuation date other than the date of trial if the court finds that an equal division as of the date of trial would be significantly unfair: *E.H.H. v. C.L.M.*, 2017 BCSC 1299 at para. 89.

2. Value of RCI

[280] As noted earlier, RCI was an investment vehicle used by the parties during their marriage. The book value of the corporation as at September 30, 2017 was \$1,215,572, with assets consisting primarily of cash and securities. After applying a fair market value adjustment of the investments, the corporation value relied on by the claimant is \$1,223,524.

[281] The financial health of the corporation changed significantly by September 2018. As at the 2018 corporate year-end, the book value had dropped to \$1,104,000. After applying a fair market value adjustment of investments, the corporation was valued at \$1,079,000 as at September 30, 2018. This is the valuation relied on by the respondent.

[282] There were three significant events that occurred between September 2017 and September 2018 which account for the change in value of RCI:

- a) Mr. C. received dividends of \$133,198.
- b) Mr. C. purchased cryptocurrency for \$124,065. The cryptocurrency lost considerable value, and as at September 2018, was worth only \$46,422.

- c) The securities went up in value from approximately \$331,000 in 2017 to a market value of \$450,127 as at September 30, 2018.

[283] I do not agree with the claimant that the purchase of the cryptocurrency is a cost that should only be borne by Mr. C. The investment was done for the benefit of the corporation, and not for any improper purpose by Mr. C. Both the claimant and the respondent should bear the loss of the value of the cryptocurrency, just as both of them will derive the benefit from the gain in value of the securities.

[284] However, the withdrawal of \$133,198 from the corporation is a distinctly different matter. Mr. C. does not dispute that he paid himself a \$133,198 dividend out of the corporation. He claims that he did this to cover funds he withdrew from the company to pay for family expenses. Mr. C. also does not dispute that the payment of this dividend was done in contravention of a restraining order on assets. In a rather cavalier manner, he justified his breach of a court order by simply asserting that "bills need to be paid".

[285] Having regard to all of the evidence, I find that it would be significantly unfair not to take into consideration the dividend paid to Mr. C, when valuing RCI. The value of RCI as at September 2018, after adjustment for market value of investments, and accounting for the dividend paid to Mr. C, provides the fairest valuation in this case. I thus calculate the fair market value of the corporation as \$1,212,198.

[286] The parties are each entitled to 50% of the value of RCI, i.e. \$606,099.

3. Value of Dr. Corp

[287] Similar issues arise in terms of the valuation date for Dr. Corp. Whereas the claimant prefers to use the September 2017 book value for the company of \$579,934, the respondent relies on the book value as at September 30, 2018, which is \$283,000.

[288] As with RCI, Mr. C. withdrew substantial monies from Dr. Corp in the one-year period between September 2017 and September 2018, paying himself a management salary of \$169,149, and dividends of \$198,200.

[289] Mr. C. characterizes his large withdrawals as income to himself for the 2017 and 2018 years. He testified that although he continued to meet his spousal and child support obligations, he did not take any income for himself in 2017 because of the pending June 2018 trial date. It was his hope that the matter would resolve before the 2018 fiscal year end, at which point he would be free to restructure his finances so that he could make income payments to himself in the most tax-efficient manner. Mr. C. thus withdrew money from RCI to meet his expenses in 2017.

[290] When the June 2018 trial date was adjourned, it became evident that the matter would take longer to resolve than anticipated. As Mr. C. was in need of money to meet his financial obligations, Mr. C. drew both his deferred income for 2017 and his income for 2018, through a management salary and dividends paid to him out of Dr. Corp.

- [291] Mr. Linger corroborated Mr. C.'s testimony, pointing to the financial statements of the company which verified that the only dividend paid to Mr. C. in 2017 was for \$56,000.
- [292] Mr. C.'s testimony is also consistent with the manner in which the family operated prior to separation. Mr. Linger testified that the parties relied on lines of credit to meet their expenses, and dividends were only paid out at the end of the fiscal year, with tax considerations.
- [293] The money withdrawn by Mr. C. from Dr. Corp in 2018 equals \$367,349, gross. In addition, he received \$56,000 in 2017 as dividend income. During the same period, Ms. A. received about \$205,800 net in spousal support and child support payments. Mr. Linger and Murray Wiseman (the accountant retained by the claimant) both agreed that the tax applicable to the income earned during these years would vary depending on the tax bracket. Neither of them provided calculations for the tax that would be paid by Mr. C. on the \$367,349. Doing the best that I can with the sparse evidence that I have on this point, and bearing in mind the two applicable tax rates of 30% and 43.41%, I estimate that the net money received by Mr. C. is comparative to Ms. A.'s net income.
- [294] Having regard to all of the evidence, the claimant has failed to establish that it would be significantly unfair to depart from the presumptive rule that the date of trial valuation should be used for Dr. Corp.
- [295] I find that the fair market value of Dr. Corp is \$283,000. The parties are each entitled to 50% of this amount, which equals \$141,500.

4. Dividing the Corporate Assets

- [296] This brings us to the next issue, which is to determine the most efficient way to effect the division of the corporate assets. The respondent wishes to pay Ms. A. one-half of the post-tax value of each company. The claimant is not opposed to receiving a compensation payment after accounting for taxes, though her position is contingent on what tax rate is applied.
- [297] Where there is sufficient evidence that a division of family assets will attract tax consequences, an allowance should be made for corporate and distributive tax: *Sanai v. Mahmoud*, 2017 BCCA 155 at para. 32.
- [298] There is no dispute that payment to Ms. A. of her interest in RCI and Dr. Corp will attract taxes. However, the parties differ markedly on what those tax implications will be.
- [299] Mr. C. submits that a top marginal tax rate of 43.41% applies, and proposes to pay Ms. A. one-half of the post-tax value of RCI and Dr. Corp. Ms. A. is agreeable to receiving the post-tax value of each company, subject to the tax rate being set at 30%. Neither party was able to adequately justify the use of their preferred tax rate.

- [300] Both Mr. Wiseman and Mr. Linger agreed that the 30% tax rate reflected the rate paid by the parties prior to their separation and with the use of the family trust. However, Mr. Linger testified that recent changes to the tax rules mean that dividends paid in a family trust to a spouse are now taxed at the highest marginal tax rate regardless of income. Thus, the parties are no longer able to benefit from the 30% tax rate. Mr. Wiseman did not dispute this evidence.
- [301] I accept that because of recent changes to the tax laws, the 30% tax rate is not appropriate. To apply a tax rate for a vehicle that is no longer available to the parties would be unfair. However, I am also not persuaded that the 43.41% rate is appropriate. Mr. C. has never incurred this, and is not likely to incur it on the total amount distributed to Ms. A., given that only income received above \$205,000 would be taxed at this rate. Mr. Linger admitted that the 43.41% tax rate would only apply to income received above the top tax bracket, i.e. \$205,000. Income below that figure would attract a lower tax rate.
- [302] While I find that an allowance for taxes should be made in relation to any compensation payments made to Ms. A., I am unable to determine what that allowance should be. Based on the evidence, it would be unfair to apply either a flat 30% tax rate or a flat 43.41% tax rate. In the absence of clear evidence establishing what tax rate would be applicable, it would not be appropriate for this Court to speculate on what tax rate would apply.
- [303] This then brings us to the alternative remedy sought by the claimant - to permit her to incorporate a company of her own into which half of the shares of the original corporate entity are transferred, and then redeemed as the claimant sees fit. This was referred to by the parties as a "butterfly transaction", which is a tax-advantageous method of dividing up assets in a corporation between shareholders who are parting company.
- [304] The respondent agrees that a butterfly transaction could be employed to transfer the claimant's interest in RCI but not Dr. Corp. According to counsel for the respondent, restrictions placed by the College of Physicians and Surgeons as to who can hold the voting shares of a professional medical corporation hinder the ability of the parties to transfer shares in Dr. Corp using a butterfly transaction. However, the respondent provided no evidence to support this contention. Neither the respondent, nor Mr. Linger, provided any testimony or documentary evidence about restrictions placed by the College of Physicians and Surgeons which would prevent a share transfer of Dr. Corp from occurring.
- [305] As noted by the court in *S. (J.K.) v. S. (H.G.)*, 2008 BCCA 245 at para. 25, the goal of the court is to divide the family assets with as little disruption as possible, while still securing a party their rightful interest. In my view, this can best be achieved by permitting Ms. A. to try to employ a tax savings vehicle that might be available through a butterfly transaction.
- [306] Thus, Ms. A. is entitled to receive shares in RCI and Dr. Corp equivalent to one-half of the fair market value of RCI and Dr. Corp, to be redeemed as she deems fit. If it is not possible for the claimant to transfer shares out of Dr. Corp through the use of a butterfly transaction, then the parties may agree to a formula which addresses the tax consequences

of the compensation award. If the parties are unable to agree on a formula which addresses the burden of distributive tax payable by each, either party may apply to this Court for directions.

E. Other Assets

1. Vehicles

[307] Mr. C. has three vehicles: a Porsche, a Mustang, and an Infiniti, which the claimant says are worth \$71,000, and the respondent argues are worth \$63,000. The parties agree that Ms. A.'s 2013 Infinity is worth \$22,000. If each party retains their own vehicles, this would mean a compensation payment to Ms. A. of either \$20,500 (as submitted by Mr. C) or \$24,500 (as submitted by Ms. A.). Both parties rely on hearsay information obtained from various websites to determine the values of the cars. As I have no way of determining which value is more reliable, I have split the difference between the competing valuations.

[308] Thus, each party is entitled to retain their own vehicles, and Mr. C. is required to pay Ms. A. \$22,500 as her one-half interest in the vehicles in Mr. C.'s possession.

2. RRSP's

[309] The parties agree that Ms. A. is entitled to a one-half interest in the RRSP in Mr. C.'s name. The RRSP was valued at \$211,562 as at September 30, 2018. Ms. A.'s one-half interest equals \$105,781, which shall be transferred to Ms. A by way of a tax-free rollover pursuant to the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).

3. Bank Account

[310] The parties agree that they each are entitled to one-half of the \$49,793 remaining in a joint bank account held at Scotiabank. Each party's respective interest is \$24,897.

4. Household Items

[311] The claimant seeks to attend at the former family home to pick up her possessions and one half of the household furnishings, household effects and sports equipment (collectively referred to as the "household items"). The respondent does not oppose the granting of this order. However, neither party provided evidence as to the nature or value of the household items sought to be divided.

[312] I conclude that the parties are each entitled to a one half interest in all household items. Ms. A. is also entitled to attend at the family home to pick up her possessions and one half of the household items, upon giving 72 hours notice to Mr. C. In the event that the parties are not able to agree on a method for division of the household items, either party may apply to court for further directions.

F. Family Debts

- [313] Family debts are defined under s. 86(a) of the FLA as all financial obligations incurred by a spouse from when the relationship between the spouses began. Thus, any debt acquired during the relationship, regardless of whether it was for a family purpose, is a family debt: *Cole v. Cole*, 2016 BCSC 716 at para. 25.
- [314] Pursuant to s. 86(b) of the FLA, family debt also includes all financial obligations incurred by a spouse after the date of separation, provided that they are incurred for the purpose of maintaining family property.
- [315] The parties agree that the mortgage on the family home and the NexGen lines of credit, constitute family debts which should be shared equally. In addition, the parties agree that the Scotia LOC, as it stood at the date of separation (i.e. \$349,948), is a family debt also to be shared equally.
- [316] The Scotia LOC balance ballooned to over \$800,000 by the date of trial, due to expenditures incurred on it by Mr. C. These expenditures included meals, support payments to Ms. A., mortgage payments, school fees, vehicle payments, home expenses, nanny expenses, and utilities. Mr. C. acknowledges that not all the expenses on the Scotia LOC are family debts. Of the approximate \$450,000 in additional debt since the date of separation, he seeks to have Ms. A. share in one-half of \$279,356.
- [317] Mr. C. acknowledges that the onus is on him to show that post-separation expenses incurred on the Scotia LOC (which was solely in his name) were for the purpose of maintaining family property: *Unger v. Conrad*, 2018 BCSC 507 at paras. 68-69.
- [318] I conclude that expenses incurred by Mr. C. for "family meals out" and "groceries" do not constitute a family debt. Items included in the "other family expenditures" category such as entertainment, vacations, haircuts, and clothing for the children, are also not family debts. None of these expenses were incurred to maintain family property, and there is no basis to otherwise require Ms. A. to contribute towards them.
- [319] I also conclude that the cost of Dr. England's s. 211 report of \$34,000 is not a family debt. It was not incurred to preserve family property.
- [320] There were also a number of items which Mr. C. included in the "other family expenditures" category which are more properly categorized as s. 7 expenses. These include: children's medical and healthcare expenses, including counselling, optometrist, and dentist; extracurricular activities such as music and gymnastics; Chinese school; St. Michael's University School fees and related costs, and nanny expenses. They are dealt with under the section 7 expenses discussion.
- [321] The evidence supports the finding that the following post-separation expenditures made by Mr. C. using the Scotia LOC, constitute family debt under s. 86(b) of the FLA:

- a) Mortgage payments of \$60,440;
- b) Vehicle expenses of \$6,559;
- c) Home expenses of \$25,000 (this figure includes \$17,500 in rent payments for NexGen). The total claim advanced under this category was \$39,582.70. Rejected expenses include personal items such as Netflix charges, and charges for London Drugs, Canadian Tire, and Home Sense, for which there was insufficient evidence establishing that they were incurred for maintenance of family property;
- d) Utilities of \$20,795;
- e) Heat pump costs of \$12,868; and
- f) Interest on the Scotia LOC of \$10,500. This figure is roughly halfway between the amounts sought by each party.

[322] These post-separation family debts total \$136,162. Added to them is the Scotia LOC debt at the date of separation of \$349,948. This brings the total family debts to \$486,110. Ms. A. is responsible for one-half of this amount, i.e. \$243,055.

G. Accounting for Monies Received or Paid

[323] There is no dispute that monies received by Ms. A. following the separation need to be accounted for in the final distribution to Ms. A., as follows:

- a) \$11,273 withdrawn from the parties' joint bank account;
- b) \$120,000 in lump sum payments from Mr. C; and
- c) \$100,000 received from net sale proceeds of NexGen, from funds held in trust pursuant to the Consent Order of April 2019.

[324] These figures total \$231,273, which amount is to be deducted from Ms. A.'s share of the family assets, prior to final distribution.

[325] In addition, Mr. C. has paid for the cost of Dr. England's s. 211 report of \$34,000. Ms. A. agreed to pay for half the cost of this report, but has not done so. As such, \$17,000 is to be deducted from Ms. A.'s share of the family assets, prior to final distribution.

VI. Support Issues

[326] I turn now to determining the support issues dividing the parties.

[327] The parties commenced cohabitation in 2004, and their relationship ended in January 2017. Following the birth of F.C. in 2010, Ms. A. remained at home with the children, earning only a negligible income over the ensuing years.

- [328] Pursuant to the Baird Order, Mr. C. was required to pay \$5,000 per month, plus related taxes, to Ms. A as a dividend through the family trust. It is common ground amongst the parties that this payment represents an interim spousal support payment. The Baird Order also required Mr. C. to pay Ms. A. \$4,800 per month for interim child support, on a without prejudice basis.
- [329] Both the interim spousal support and the interim child support payments commenced on March 15, 2017, and have continued to date. However, pursuant to the March 2019 Consent Order, the interim spousal support payment was varied to account for the payment of taxes by the respondent on the claimant's behalf. Thus, commencing January 1, 2018, the respondent agreed to pay interim spousal support of \$6,250 per month, with \$1,250 representing taxes to be paid on behalf of the claimant, such that the claimant's net receipt remained \$5,000 per month. This payment was made without prejudice to the claimant's right to seek retroactive spousal support.

A. Child Support and Section 7 Expenses

- [330] There is no dispute that F.C. and T.C. are children of the marriage as defined by s. 2(1) of the DA, and thereby entitled to child support. At issue is who the payor spouse should be, and the amount of child support that is payable.

1. Legal Framework

- [331] Child support is the right of the child. It survives the breakdown of the marriage and is intended to provide the child with the same standard of living which the child enjoyed when the spouses were together. The specific amount of child support that is owed may vary based on the income of the payor spouse, but the duty to provide support does not. Indeed, this is reinforced by s. 147(1) of the FLA, which stipulates that each parent and guardian of a child has the duty to provide support for that child.
- [332] Both the FLA (s. 150) and the DA (s. 15.1(3)) adopt the use of the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines or CSG], to determine the appropriate amount of child support, which is based on the parties' incomes. Deviation from the Guidelines is allowed in limited circumstances: FLA, s. 150 and DA, s. 15.1(8).
- [333] Sections 16 to 19 of the CSG distinguish between taxable income (often referred to as Line 150 income), and income for support purposes. The overriding principle is to make the fairest determination of income, having regard to the evidence. Pursuant to s. 17(1) of the CSG, the court may consider income patterns or fluctuations to arrive at an amount that is fair and reasonable.

- [334] Section 18(1) of the CSG deals with situations where a spouse is a shareholder, director or officer of a corporation. It permits the court to determine a spouse's annual income to include all or part of the pre-tax income of the corporation (or related corporation) where the court believes that the spouse's annual income as determined under s. 16 does not fairly reflect all of the money available to that spouse for payment of support.
- [335] Section 19(1) of the CSG provides a non-exhaustive list of circumstances where the court may impute income to a spouse, such as when the spouse is intentionally under-employed or unemployed. The court has a broad discretion to impute income to either or both spouses for the purposes of determining child and spousal support, and is not limited by the restrictions set out in ss. 16-18 of the CSG: *Yeung v. Silva*, 2016 BCSC 1682 at paras. 43-45.
- [336] The court must have a rational and evidentiary basis for imputing income: *Windle v. Windle*, 2010 BCSC 18 at para. 88; *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 35.
- [337] The onus rests on the party seeking to impute income. Bad faith is not required for a finding that a parent is intentionally underemployed, rather it requires a finding that the party is not earning to their capacity: *Beissner v. Matheusik*, 2014 BCSC 1785 at para. 37, *aff'd* 2015 BCCA 308.
- [338] When imputing income, the court must consider what is reasonable given the age, education, skills, health of the parents, and availability of work. A parent who chooses to work less than full-time must justify the choice by the needs of the children: *Yeung* at para. 48.
2. Payor Parent
- [339] Until now, the parties have been in a shared parenting arrangement. That arrangement will now change, such that Mr. C. will have primary residency of the children, with specified parenting time to Ms. A. I conclude that Ms. A. is to be the payor parent for ongoing child support payments, subject to further order of the court or agreement of the parties.
3. Claimant's Income
- [340] Mr. C. concedes that Ms. A.'s income for support purposes is less than \$2,000 per year. Application of the Guidelines results in a nil payment from Ms. A. for child support, both on a retroactive basis and for the 2019 year.
4. Respondent's Income
- [341] The parties agree that Mr. C.'s income tax returns are not a fair representation of his income during the marriage. Those income tax returns do not account for the complex corporate structure used by the parties to help reduce income tax.
- a) Determining what is Fair and Reasonable

[342] Below are the gross revenue and income figures from the respondent's medical practice for the years prior to and subsequent to the separation. I have also included the income figures for each year as argued by the parties:

Table 1: Gross Revenue and Income of Dr. Corp

1

2

3

4

5

Year

Gross Revenue

Net Income Before Income Taxes

Per Respondent Normalized Income Before Tax with Addback of Management Salaries

Per Claimant Normalized Income Before Tax with Addback of Dividends to RC, TA, and LC

2014

\$679,608

459,723

482,528

[not provided]

2015

\$682,774

468,116

494,133

349,949

2016

\$754,766

502,779

528,576

500,334

Post Separation

2017

\$522,819

305,821

306,684

347,325

2018

\$246,843

(114,012)

54,578

[not provided]

[343] The parties approach the issue of determining the income of the respondent using two entirely different methods.

[344] The claimant bases her calculations using Mr. C.'s personal tax returns. She takes the line 150 income for the respondent, and adds back in the dividend payments made to T.A. and L.C. out of the family trust, to yield the claimant's income for the requisite years. The income figures derived using this approach are set out in column 5 of Table 1.

[345] The respondent relies on the financial statements of Dr. Corp as the foundation for determining the respondent's income. Using the income figures for the corporation (arrived at by subtracting expenses from revenue), the respondent adds back in the management salaries paid out of the corporation. The resulting income figures are set out in column 4 of Table 1.

[346] The respondent's approach is most consistent with sections 16-18 of the CSG. I have used this approach to determine the respondent's normalized income for the years 2014 to 2018. I turn now to the issue of imputation of income.

b) Imputation

[347] As is evident in Table 1, the respondent's income has decreased substantially since the parties separated. Whereas the gross revenue and income for Dr. Corp showed a steady increase in the three years prior to separation, it plummeted in the years following the separation.

[348] The claimant alleges that the respondent has been intentionally underemployed since their separation. She seeks to impute income to Mr. C. of \$399,202 per year, based on a three-year average of the figures in column 5 for the 2015-2017 tax years.

- [349] The respondent says his drop in income was caused by the increased needs of the children following separation, and the enormous amount of time spent dealing with the numerous allegations made by the claimant. Mr. C. argues that he is maximizing his earning potential, and that his CSG income should be set at \$306,684 per year. The \$306,684 figure is equivalent to Mr. C.'s normalized income for 2017, and is what he hopes to earn in 2019. It is substantially lower than what Mr. C. earned in the three years prior to the parties' separation, and is substantially higher than what he earned in 2018.
- [350] I accept that some of the respondent's drop in income is due to reasons relating to the needs of the children. Mr. C. changed his work hours to pick up the children and drop them off at school during his parenting time. This was both necessary and beneficial to the children. It provided them with stability during a time of great upheaval, and addressed the fact that it was unfeasible to have the nanny (who could not drive) do pick ups and drop offs using public transit or a taxicab.
- [351] I also accept that the post-separation actions of the claimant had a detrimental impact on the respondent's ability to earn an income. In addition to having to cancel work days in order to address the allegations of abuse, Mr. C. gave credible evidence of the difficulties he had focussing on his work. For example:
- a) Mr. C. got a troubling call from Mr. van Hanuse just as he was about to operate on a patient. The call was regarding new allegations of sexual abuse made by Ms. A.
 - b) Ms. A. repeatedly called Mr. C.'s cell phone while he was in the operating room performing complicated surgeries. In one conversation played in court, the operating room nurse who answered the phone tells the claimant that the respondent is in the middle of a complex surgery and her phone calls are disruptive. Ms. A. refuses to hang up the phone.
 - c) Ms. A. spread false and extremely damaging rumours about Mr. C. to his employers and co-workers, such as her belief that he was stealing drugs from the hospital and having extra-marital affairs with nursing staff.
 - d) Ms. A. and her mother would call Mr. C. at all hours of the night, leaving disturbing messages on his phone.
- [352] Mr. C. testified that he reduced his work hours out of fear that he may endanger patient safety due to distractions at the workplace arising from the claimant's repeated allegations against him.
- [353] However, not all of the reasons for reducing his work hours are justifiable. Mr. C. testified about his own personal desire to be more available to the children before and after school. This was a choice not a necessity, and is not sufficient reason to justify underemployment: Yeung at para. 48.

[354] Even allowing for the reduction in earnings caused by the claimant's actions and Mr. C.'s need to change his work schedule to meet the children's needs, I find that Mr. C. is not earning to his full capacity. Having regard to all of the evidence, I conclude that Mr. C.'s income for 2019 should be imputed at \$350,000.

5. Section 7 Expenses

[355] The respondent seeks an order that the parties share the costs of special and extraordinary expenses proportionate to their incomes. This is consistent with the guiding principle set out in s. 7(2) of the CSG, and there is no dispute that such an order should be made.

[356] The parties disagree on whether the respondent's claim for nanny expenses (\$35,000/year) and his claim for private school fees (\$36,000/year), properly fall within s. 7 of the CSG as a special expense or extraordinary educational expense.

[357] The relevant portions of s. 7 of the CSG are set out below:

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

[.]

[358] In *Hsieh v. Lui*, 2017 BCCA 51 at para. 65, the Court stated that an order for contribution under s. 7 is discretionary on the trial judge, holding further that:

The court may order payment of an enumerated expense taking into account its necessity relative to the child's best interests and the reasonableness of the expense relative to the means of the spouses and the family's pre-separation spending pattern: *Bodine-Shah* at para. 66. In cases involving high-income earners, expenses that may not be considered reasonable for many people may, in context, be reasonable, so long as the award does not enter the realm of wealth transfer rather than support: *Francis v. Baker*, [1999] 3 S.C.R. 250; *Sirdevan v. Sirdevan*, 2010 ONSC 2375.

a) Nanny Expense

[359] In considering the necessity and reasonableness of the nanny expense, I have distinguished between the period January 2017 until August 31, 2018, and the period September 1, 2018 onwards.

- [360] The evidence supports a finding that following the separation and up to September 2018, the nanny expense was both necessary and reasonable, having regard to the means of the parties, their pre-separation spending pattern, the children's emotional needs and Mr. C.'s work demands (see also paragraphs 371-372 below).
- [361] The nanny provided important emotional support for the children during a very tumultuous time. She was a predictable and comforting constant in their lives. Although Mr. C. changed his work hours to meet the children's needs, it took time for that transition to occur. During the transition period, the children's nanny provided invaluable assistance which enabled Mr. C. to be able to continue to work, albeit at a reduced capacity. R.Q. assisted with getting the children ready for school, preparing their lunches, and doing their laundry. Though she could not drive, when required she would take a taxi or a bus to take F.C. to school and T.C. to preschool.
- [362] However, the situation is significantly different after September 1, 2018:
- a) Since September 2018, both the children are attending full-time school and do not require a nanny during the day.
 - b) The respondent has permanently changed his hours of work so that he can take the children to and from school, and remain with them after school is out.
 - c) The primary use of the nanny when the children are in school is for domestic chores, such as laundry, housekeeping, and cooking, as the respondent does not cook, clean, or do laundry.
- [363] In finding that the mother was not entitled to contribution for the nanny expense under s. 7, the Court noted in Hsieh at para. 67 the lack of evidence that the claimant incurred "the nanny expense for child care purposes as a result of her 'employment, illness, disability or education or training for employment'".
- [364] Similarly, there is insufficient evidence that Mr. C.'s employment, health or education required him to employ a nanny after August 31, 2018. I would characterize his decision to continue to do so as one of choice rather than need.
- [365] The evidence establishes that the principal time the nanny is required for childcare is when the children are not in school and Mr. C. is on call duties. However, the respondent has not provided any evidence of how frequently that occurs. He has also not provided any evidence that he has sought less costly alternative arrangements for childcare, such as a babysitting arrangement, which could accommodate his on call duties. This is significant since he argues that his financial means are significantly lower since the parties' separation.
- [366] Having regard to all of the evidence, I find that Mr. C. has failed to establish the necessity and reasonableness of the nanny expense beyond August 2018. It is not a s. 7 expense to which Ms. A. must contribute.

[367] I find that the pre-September 2018 nanny expense is a s. 7 expense which must be shared between the parties. If there is any dispute between the parties as to the total cost of the nanny expense to which the claimant must contribute, the matter is referred to the Registrar pursuant to Rule 18-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009.

b) Private School Fees

[368] St. Michaels University School is a private educational facility located in Oak Bay. Both F.C. and T.C. attended pre-school at SMU. They are also both currently enrolled at SMU for their primary school education. The annual tuition cost for both children combined is \$36,000. At trial, the claimant did not strenuously object to sending the children to private school. Rather, her counsel simply noted that the claimant is happy to have the children attend public school if the reduced cost will assist the respondent in meeting his support obligations.

[369] Prior to the parties' separation, both parents were in agreement that the children should attend private school. The ongoing enrollment of the children at SMU following the parties' separation was in keeping with the parties' intentions.

[370] I agree with the claimant that the drop in Mr. C.'s income post separation does raise questions about the reasonableness of keeping the children in private school. However, there are other factors for consideration which I must also balance.

[371] The pre-trial period was marked with significant upheaval, disruption and instability. The children's living arrangements were constantly changing. Ms. A. went from being a constant presence in their lives, to seeing them every two to three days, and then eventually to only being with them under supervision. At one point, the children were placed in care with unrelated third parties. Added to that was the ongoing stress of the acrimonious breakup between the parties, the involvement of the Ministry, and the involvement of the police. The SMU school provided the children with much needed stability and a warm and supportive environment. The children had strong friendships, a close-knit peer group, and they were familiar with the teachers and administration.

[372] Further, while Mr. C.'s income did decrease in 2017, he still remained in an extremely high income earning bracket for that tax year. The marked drop for the 2018 year was an anomaly, and Mr. C. concedes that his income for the 2019 year will be back up to at least 2017 levels.

[373] Thus, having regard to all of the evidence in this case, I find that keeping the children in SMU during the pre-trial period was a necessary and reasonable expense and in keeping with the children's best interests.

[374] However, as noted by the Court in McDonald v. McDonald, 2001 BCCA 702 at para. 29, what is reasonable for a short period of transition can become unreasonable in the long term and with a change of circumstance.

- [375] By virtue of the order made in these reasons, the children will be required to transfer out of SMU. It is unknown at this time whether there are other private schools in the Victoria area that one or both parties may wish to enrol the children in, what the cost of the chosen educational institution will be, and whether there will be any dispute about a proportionate sharing of any private school expense under s. 7.
- [376] I find that the SMU private school fees from the date of separation to the conclusion of the 2018/2019 academic school year are a shared s. 7 expense to which the parties must both contribute. If there is any dispute between the parties as to the total cost of the SMU private school fees to which the claimant must contribute, the matter is referred to the Registrar.
- [377] The respondent's claim for sharing of ongoing private school fees under s. 7 is adjourned. Either parent is at liberty to bring this issue back before the court in the event that one parent wishes to enrol the children in a private school, and the other parent does not consent to sharing the cost on a proportionate basis.
- c) Other Section 7 Expenses
- [378] There were a number of items which Mr. C. included under the family debts claim, which are more properly categorized as s. 7 expenses. The largest items - SMU fees and nanny costs - have been dealt with separately. Remaining are the following items: children's medical and healthcare expenses, including counselling, optometrist, and dentist; extracurricular activities such as music and gymnastics; and Chinese school (collectively referred to as "the additional s. 7 expenses").
- [379] The claimant does not dispute that the additional s. 7 expenses were incurred on behalf of the children. Nor did the claimant argue that the additional expenses were unnecessary or unreasonable.
- [380] I find that the additional s. 7 expenses incurred by the respondent were necessary and reasonable. They constitute a s. 7 expense which ordinarily should be shared between the parties proportionate to income. However, I am not able to determine the exact cost of the additional s. 7 expenses, given the nature of the evidence provided.
- [381] The additional s. 7 expenses are included by the respondent in a category called "Other family expenditure". This category totals over \$90,000, and includes items such as parking costs, SMU fees, Netflix charges, restaurant meals, and counselling fees. Spreadsheets evidencing these costs total 40 pages, with no breakdown for the combined total of the additional s. 7 expenses.
- [382] If there is any dispute between the parties as to the total cost of the additional s. 7 expenses to which the claimant must contribute, the matter is referred to the Registrar.
- d) Retroactive Payment of Section 7 Expenses

- [383] I have found that the pre-September 2018 nanny expenses, January 2017 to June 2018 private school expenses, and additional s. 7 expenses (collectively referred to as the pre-trial s. 7 expenses"), all qualify as expenses which should be shared by the parties. Ms. A. did not contribute towards these expenses, and the respondent seeks her contribution proportionate to the parties' incomes.
- [384] The principles set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 apply to retroactive orders for s. 7 expenses: *Semancik v. Saunders*, 2011 BCCA 264 at para. 38.
- [385] Delay in making a claim for contribution for past s. 7 expenses was not raised as an issue in this proceeding. After applying the DBS factors such as needs of the recipient parent, conduct of the payor parent, hardship occasioned by a retroactive award, and circumstances of the child, I find that Ms. A. is obliged to pay her proportionate share of retroactive s. 7 expenses.
- [386] I accept the evidence that Mr. C. went into a considerable amount of debt in order to continue to meet his financial obligations to the children and to Ms. A. Despite receiving almost \$10,000/month in net support payments, of which \$4,800 represented child support, Ms. A. refused to contribute towards the children's expenses. Rather, she left almost all of the responsibility for providing for the children's needs to Mr. C. For example, Ms. A. refused to purchase a tablet, iPad or computer so that the children could do their online homework, requiring them instead to do their homework on her cellular phone. In that same time period, she purchased a new vehicle for which she pays \$678 per month; she agreed that one monthly installment could have paid for a tablet or iPad. It was the claimant's evidence that as she had been "pushed out of the house with garbage bags" she could not afford to purchase these items for the children.
- [387] In my view, the making of a retroactive s. 7 award will not impose any hardship on Ms. A. From the date of separation to the commencement of trial, she received over \$100,000 in child support payments. Aside from paying for the children's living expenses when they reside with her, she has contributed very little for their educational, healthcare or extracurricular expenses. In addition, I note that Ms. A. will be receiving a substantial sum of money when the assets are divided, thus alleviating any financial hardship that might otherwise be occasioned by the making of a retroactive award.
- [388] Weighing these factors, I find that a retroactive award for s. 7 expenses is appropriate in this case. Ms. A. is to pay her share of the pre-September 2018 nanny expenses, January 2017 to June 2018 private school expenses, and pre-trial additional s. 7 expenses, in proportion to her income during those years.
- [389] I turn now to determining what the apportionment percentage for special expenses should be for the retroactive period. This was not an easy task, given that the support payments made to Ms. A. by Mr. C did not correlate with Mr. C.'s actual income during the years the payments were made. In other words, while Ms. A.'s support remained stable at \$9,800, Mr. C.'s income dropped from \$528,000 to just over \$306,000. None of the calculations provided

to the Court by counsel correlated to these actual numbers. As the support payments to Ms. A. represented a net after taxes award, whereas Mr. C.'s normalized income figures for each year are before tax, it was also not possible for the Court to run its own CSG calculations, since neither the parties nor their experts provided this Court with the grossed up value of the net \$9,800/month payment to Ms. A.

[390] In arriving at the percentage that each party should contribute towards retroactive s. 7 expenses, I have considered the calculations yielded by the CSG when inputting the party's incomes for Guidelines purposes. In addition to providing calculations for the amount of child support and spousal support payable, the CSG calculations set out apportioning percentages for special expenses. These are done by factoring in the recommended award for spousal and child support as income for the recipient spouse.

[391] Table 2 contains the CSG-generated apportioning percentages for the years in question.

Table 2: CSG Special Expenses Apportioning Percentage - Father/Mother

1

2

3

4

5

6

2

SSAG

Amount per Month

"With Child Support" formula

2017

(2016 income for Father \$528,576)

CSG

Special

Expenses

%

F/M

2018

(2017 income for Father \$306,684)

CSG

Special

Expenses

%

3

Low

\$9,109

79/21

\$5,156

79.3/20.7

4

Mid

\$12,482

71.4/28.6

\$6,905

72.5/27.5

5

High

\$13,689

68.7/31.3

\$7,617

69.7/30.3

[392] As can be seen, none of the SSAG figures match the actual support received by Ms. A. Since Ms. A. received \$9,800 in support in 2017 (which most closely matches the low end of the Spousal Support Advisory Guidelines ("SSAG") range set out in column 3, row 3), it is fair to conclude that Ms. A.'s proportionate percentage for s. 7 expenses for that year should be above 21%. In the 2018 year, Ms. A. received support which substantially exceeded the highest end of the range for that year (column 5, row 5). As such, it is reasonable to conclude that her proportionate percentage for that year should exceed 30%.

[393] As I was provided with insufficient evidence for how much of each s. 7 expense was incurred in which year, I have taken the midpoint between 21% and 31% to arrive at a percentage of 26%. Ms. A.'s proportionate share of pre-trial s. 7 expenses up to the date of judgement is therefore 26%.

6. Prospective Child Support and Section 7 Expenses

[394] Commencing in 2020, child support is to be reviewed annually to determine the appropriate amount of support payable based on the parties' incomes and application of the CSG. The review is to occur prior to July 1 of each year. Each party is to make all necessary disclosure to facilitate the review, including providing copies of their most recent personal and corporate tax returns. Any adjustments in support payments as a result of the review are to be made effective January 1 of the same year in which the review occurs.

[395] In the event that there is a material change in the parenting regime such that Ms. A.'s parenting time is increased so as to invoke considerations under s. 9 of the CSG, she may apply at any time to seek a reconsideration of her support obligations.

[396] From the date of judgment onwards, the parties are to share their s. 7 expenses proportionate to income. Mr. C.'s CSG income for 2019 is imputed at \$350,000. As Ms. A. will be in receipt of spousal support payments of \$5,000/month, her net income for calculating her proportionate share of post-trial s. 7 expenses is \$60,000 for the 2019 year. The parties are to gross up this amount to obtain the claimant's CSG income for calculating the parties' proportionate share of s. 7 expenses.

[397] The parties' proportionate share of s. 7 expenses is to be reviewed annually, with the review to occur at the same time and in the same manner as the annual child support review.

B. Spousal Support

[398] Mr. C. accepts that Ms. A. is entitled to spousal support, as he was the primary financial provider for the family while Ms. A. looked after the children.

1. Entitlement

[399] The claimant seeks retroactive and prospective spousal support pursuant to the FLA. Section 161 of the FLA sets out the objectives of spousal support, which are virtually identical to those set out in s. 15.2(6) of the DA, as follows:

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

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

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

[400] Consistent with these objectives, our courts have recognized three grounds for entitlement to spousal support: compensatory, non-compensatory and contractual (there is no contractual claim in this case): *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 15. These grounds are well-known and discussed in *Bracklow* and in *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal ref'd [2009] S.C.C.A. No. 41. Given Mr. C.'s concession that Ms. A. is entitled to spousal support, I will not review the principles set out in these cases in any detail.

[401] Suffice it to say that the evidence supports a finding that the claimant is entitled to spousal support on both compensatory and non-compensatory grounds. She suffered an economic disadvantage from the marriage as a result of assuming primary caregiver responsibilities. Further, on a needs analysis, she is unable at this time to become economically self-sufficient such as to enjoy the standard of living achieved by the parties prior to their separation.

[402] I turn now to considerations of amount and duration.

2. Legal Framework

[403] Section 162 of the FLA provides:

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.

[404] While not binding, the Spousal Support Advisory Guidelines (the "SSAG") provide a "useful tool" for determining amount and duration of spousal support: *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 64.

[405] Section 6.1 of the SSAG makes clear that ss. 16-19 of the CSG are used for determining spousal support whether there are children involved or not: *Chutter* at para. 111.

3. Prospective Spousal Support

- [406] The quantum of ongoing spousal support payable by Mr. C. to Ms. A. is based on the parties' incomes. I have concluded above that Mr. C.'s income for Guidelines purposes should be imputed at \$350,000 for the 2019 year.
- [407] Based on primary residence of the children being with the father, the prospective spousal support calculations per the SSAG yield a range of spousal support of \$3,750 on the low end, to \$5,000 per month on the high end, for a 6.25 to 12.5 year duration from the date of separation. At the mid range figure of \$4,375, the parties would have a net disposable income of 80% for Mr. C., and 20% for Ms. A.
- [408] Chapter 9 of the SSAG sets out the following non-exhaustive list of factors to consider in determining amount of spousal support within the range: strength of any compensatory claim; recipient's needs; age, number, needs and standard of living of children; needs and ability to pay of payor; work incentives for payor; property division and debts; and self-sufficiency incentives.
- [409] Having regard to these factors, in my view, spousal support at the high end of the range is appropriate. Ms. A. has a strong compensatory claim given that she undertook the bulk of the childcare duties during the parties' 12.5-year relationship while the respondent advanced his career. Her pre-separation income was nominal. She has had a difficult time adjusting to the separation. Though she is relatively young and intelligent, she will need significant financial assistance to get back on her feet, particularly in light of her mental health challenges which may require extensive treatment.
- [410] In contrast, Mr. C. has significant financial means, and will not suffer hardship through the payment of such an award. As the family adjusts to the new post-separation regime, there is every indication that Mr. C.'s income should return to his pre-separation levels. A spousal support award payment of \$5,000/month will preserve his work incentives while meeting Ms. A.'s financial needs.
- [411] Mr. C. is required to pay Ms. A. spousal support in the amount of \$5,000/month for the 2019 year, from January 1, 2019, to December 31, 2019. Support is payable for a duration of seven years post separation, and will end on December 31, 2024. Commencing in 2020, the amount of spousal support is to be adjusted annually, prior to July 1 of each year, based on Guidelines income of the parties. Any adjustments in support payments are effective from January 1 of the same year. Each party is to make all necessary disclosure, including providing copies of their most recent personal and corporate tax returns.
- [412] Either party may apply to court to vary spousal support based on a material change of circumstances.

C. Retroactive Support

[413] Ms. A. claims for retroactive child and spousal support for the period following separation to the date of trial. Considerations that affect the making of retroactive child support or spousal support awards were explained in *D.B.S. v. S.R.G.*, 2006 SCC 37, and *L.S. v. E.P.*, 1999 BCCA 393, leave to appeal ref'd [1999] S.C.C.A. No. 444. Retroactive support is from the date of "effective notice" (*D.B.S.* at para. 118). Factors to consider include the needs of the recipient, the conduct of the payor parent, the reason for any delay in seeking support, the circumstances of the child, and any hardship that would be occasioned by a retroactive award.

1. Retroactive Child Support

[414] Section 9 of the CSG applies in determining Mr. C.'s post-separation child support obligations as the parties have been sharing parenting time more or less equally since their separation. Section 9 of the CSG provides:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
 - (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[415] In a shared parenting regime, the court is required to undertake an analysis of the factors set out in s. 9 of the CSG: *Dyck v. Bell*, 2015 BCCA 520 at para. 30. The "set-off" approach in s. 8 of the CSG is a "useful starting point": *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 41. Under that approach, "the amount of the child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses": CSG, s. 8.

[416] Since separation, Ms. A. has earned nominal income so her monthly child support payment would have been nil. Thus, the difference between the amounts will be the child support amount that Mr. C. should have paid.

[417] Ms. A. argues that the income used to calculate Mr. C.'s retroactive support payments should be imputed at \$399,202. She does not provide authority for this proposition.

[418] In *Hsieh* at para. 49, Madam Justice Dickson noted that "[i]nsofar as possible, retroactive support is to be determined based on actual income earned in each year for which it is due: *Tedham v. Tedham*, 2003 BCCA 600 at paras. 58, 71; *Cornelissen v. Cornelissen*, 2003 BCCA 666 at paras. 35-42". This principle applies to both child support and spousal support orders.

[419] Although Mr. C.'s income was over \$150,000 in 2016 and 2017, I do not find it "inappropriate" to use the table amounts: CSG, s. 4. Mr. C. has not adduced "clear and compelling evidence" to rebut the presumption that the table amounts are payable: *Metzner v. Metzner*, 2000 BCCA 474 at para. 43, leave to appeal ref'd [2000] S.C.C.A. No. 527; see also *Francis v. Baker*, [1993] 3 S.C.R. 250.

[420] Thus, Mr. C.'s income for retroactive support purposes is taken from the normalized income figures for each year set out at Table 1. However, support for the 2019 year is determined based on his imputed income of \$350,000.

Table 3: Retroactive Child Support Calculations

Year

RC's Income (preceding year)

Table Amount per month

Number of Months in Period

Total Due for the Period

2017 (Jan 13 onward)

\$528,576

\$6,626

11.5

\$76,199

2018

\$306,684

\$4,008

12

\$48,096

2019 (Jan 1 - June 14)

\$350,000

\$4,519

5.5

\$24,855

Total Amount Owning

\$149,150

Less amount Paid

March 15, 2017 to June 14, 2019 = 27 payments

27 x \$4,800 = \$129,600

-\$129,600*

Net Retroactive Child Support Due

\$19,550

[421] Based on these calculations, Mr. C. underpaid child support in the amount of \$19,550.

2. Retroactive Spousal Support

[422] Ms. A also claims retroactive spousal support for the post-separation period. The SSAG yield the following support figures for the post-separation period. These are based on Mr. C.'s normalized income for each preceding year set out at Table 1, though the figure for 2019 is the imputed income figure.

Table 4: Spousal Support "With Child Support" Formula

Year

Mr. C.'s Income

Ms. A.'s Income

Amount per Month

"With Child Support" formula

Less Child Support

Low SSAG

Mid SSAG

High SSAG

2017

\$528,576

\$2,000

\$9,109

\$12,482

\$13,689

\$6,626

2018

\$306,684

\$2,000

\$5,156

\$6,905

\$7,617

\$4,008

2019

\$350,000

\$2,000

\$5,844

\$7,864

\$8,706

\$4,519

[423] At table 5, I have used the mid-range figures for spousal support which I consider the most appropriate for a retroactive support analysis. From these I have deducted the child support payable during that period, to arrive at the spousal support that should have been paid to Ms. A. from the date of separation to the date of judgment.

Table 5: Retroactive Spousal Support Calculations - Without Child Support

Year

RC's Income (preceding year)

Spousal Support Owing per month

Number of Months in Period

Total Due for the Period

Less Amount Paid

9.5 months from Baird Order

2017 (Jan 13 onward)

\$528,576

\$5,856

11.5

\$67,344

\$47,500

2018

\$306,684

\$2,897

12

\$34,764

\$60,000

2019 (Jan 1 - June 14)

\$350,000

\$3,345

5.5

\$18,398

\$27,500

Total Amount Owing

\$120,506

Less amount Paid

27 x \$5,000 = \$135,000

-\$135,000*

Net Spousal Support Over Payment

\$14,494

*The figures for the amount of child and spousal support paid in Tables 3 and 5 are calculated based on the assumption that Mr. C. continued to meet his support obligations following the conclusion of the trial. If that is not the case, the figures for the retroactive child support due, and the spousal support overpayment, will need to be adjusted, which in turn will affect the amount of retroactive support due.

[424] Having regard to the child support underpayment, and the spousal support overpayment, Ms. A. has received \$5,056 less than what is warranted based on the CSG and SSAG. I award her that amount in retroactive support.

VII. Costs

[425] Costs usually follow the event. Where there is a split result, they are ordinarily awarded to the party that has achieved substantial success. If a party wishes to address the issue of costs, that party may do so by providing written submissions up to a maximum of seven pages in length, for the Court's consideration. These are to be submitted through Supreme Court Scheduling within 30 days of this Order.

"Shergill J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/10/2019BCSC1042.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/t-e-a-v-r-l-h-c-2019>

Prepared on 25 October 2026 · Esheria