
CANADA / JUDGMENT

T.S.V. v. B.V.

2019 BCSC 1970

COURT

Supreme Court of British Columbia

DECIDED

18 November 2019

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2019 BCSC 1970 T.S.V. v. B.V.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.S.V. v. B.V.,

2019 BCSC 1970

Date: 20191118

Docket: E180617

Registry: Vancouver

Between:

T.S.V.

Claimant

And:

B.V.

Respondent

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Claimant:

J.F. Brown

Counsel for the Respondent:

D.P. Kuhn

Place and Dates of Trial:

Vancouver, B.C.

June 17-21, 24-28, 2019

August 19-20, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2019

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1.0 INTRODUCTION

- [1] The claimant, Ms. V, now 38, was born and raised in Calgary, Alberta. She and her family, who remain in Calgary, are members of the Ismaeli branch of the Muslim faith.
- [2] In 2006, Ms. V obtained an undergraduate business degree from Calgary's Mount Royal University. From 2007 through 2014, she worked to establish a career in the field of human resources, specializing in workforce planning. By 2014, she was earning \$85,000 per year working with Accenture, plus bonus and benefits.
- [3] Then in October 2014, after a whirlwind courtship, Ms. V moved to Langley, BC, to live with Mr. V, now 36, who had a daughter from a previous relationship. Mr. V's daughter, whom I will call AG, was 3 when the parties started living together, and is now 8. Ms. V's life changed dramatically.
- [4] By the end of 2014, Ms. V was pregnant. She and Mr. V married on April 22, 2015, and their first daughter, AMV, was born on September 12, 2015. She is now 4. A second daughter, IMV, was born March 18, 2017, and is just past 2½.

- [5] Things had moved very quickly, and Ms. V soon became uncomfortable in the relationship. Her life with Mr. V in Langley was very different from what she had left in Calgary. She felt controlled and stifled. She began planning to leave the relationship soon after IMV's birth, but Mr. V was unaware of this until formal separation occurred on March 12, 2018. On that day, to his surprise and dismay, he was served with a protection order barring him from contact with Ms. V and the children. In the meantime, Ms. V had made a number of surreptitious recordings of some of their less pleasant interactions.
- [6] Ms. V now proposes to return to Calgary with their two daughters, AMV and IMV. There, she plans to resume her career. She seeks sole custody and proposes to limit Mr. V's contact to supervised access in Calgary one weekend a month.
- [7] Her claim for sole custody is based primarily upon the proposition that her relationship with Mr. V included intimate partner violence ("IPV") in the form of coercive control on his part, and upon their consequent inability to communicate in any meaningful fashion concerning the children. In this she is supported by a section 211 evaluation report prepared by Dr. Ashley Heiner, dated March 25, 2019. Dr. Heiner declined to make a recommendation concerning relocation.
- [8] Ms. V's position that Mr. V's access going forward should be limited to supervised access in Calgary (notwithstanding that his access in Langley has not been supervised) is based upon concerns she raised about certain behaviours of Mr. V in relation to both AG and AMV (the "protection concerns").
- [9] Mr. V does not want his children to move to Alberta. If necessary, he is prepared to exercise sole custody in British Columbia. But his preferred parenting plan is for joint custody and co-parenting in Langley. If Ms. V is to be permitted to move the children to Calgary, Mr. V seeks considerably greater and freer access than she proposes.
- [10] Mr. V maintains that Dr. Heiner's conclusions about IPV in the form of coercive controlling behaviour are not supported by the evidence, and that with appropriate guidance from the court, difficulties in co-parenting can be overcome. He points out that the protection concerns have already been the subject of investigation by the Ministry of Children and Family Development ("MCFD") and the RCMP, and have been found not to be substantiated.
- [11] This question of custody and relocation is the primary issue in this litigation. The question is a very difficult one that the court is obliged to resolve through the lens of the best interests of the children: a lens that is not always crystal-clear.
- [12] In addition, Ms. V seeks child support and transitional spousal support, and the parties require the court's assistance in dividing their assets, property and debt. The property issues raise unusual questions concerning excluded property.

- [13] I will review the background before providing an overview of the section 211 report. Before doing so, I note that each party has challenged the other's credibility. Both have some cause for doing so. Some of these causes I will discuss in more detail below. But in the end, I conclude that neither is dishonest; at the same time, neither is always reliable. The evidence of both suffers from the refraction of their truth through the prism of their perceptions. Consequently, the evidence of each must be approached with some caution.

2.0 BACKGROUND

- [14] In the review that follows, I do not propose to cover every incident the parties described. That would take a very long time. What ensues will, I hope, allow for a sufficient understanding of their situation.
- [15] Ms. V's parents divorced when she was very young, and she was raised by her father, with whom she continues to have a close relationship. Her grandparents lived with her and her father, and she has an extensive family network in Calgary. She and her family were active in the Ismaeli community.
- [16] Mr. V's parents also divorced when he was very young. When he was born, his family lived on a farm in southern Alberta, but after his parents separated, he moved with his mother to Lethbridge. He was able to visit his father on the farm frequently, and preferred the farm lifestyle to that of the town.
- [17] After graduating from high school, Mr. V moved to British Columbia where he obtained a helicopter pilot's license, and ultimately ended up working as a personal trainer. He is very fit, and committed to a healthy lifestyle.
- [18] It was in the personal training context that Mr. V met his first spouse, TG, a personal trainer and yoga instructor. By early 2008, their relationship became romantic in the wake of the deterioration of TG's existing relationship.
- [19] Mr. V, however, had a problem in the form of a collision with the criminal justice system. The details are not clear as he said little about it, but it appears that Mr. V was convicted of an offence related to the trafficking of firearms. As a result, he spent a number of months in custody in 2008 before being released on probation. TG visited him while he was incarcerated.
- [20] In that same year, Mr. V completed a personal training certification program. He moved in with TG, who was then operating a juice bar business that went downhill. They started a gym together, and Mr. V developed a personal training business operating as "Total Body Development". He operated this business in part in the home he bought together with TG, in which he later lived with Ms. V.
- [21] TG became pregnant in late 2010, and AG was born on July 18, 2011. Mr. V and TG separated in February 2014.

- [22] Mr. V and Ms. V first met in August 2008 at the wedding of Mr. V's sister, EV, who had worked with Ms. V in Calgary. There was no further meaningful interaction until May 6, 2014, when Mr. V reached out to Ms. V on Facebook. He flew to Calgary to see her on May 23. He wooed her intensely, and the relationship quickly progressed. By August, Ms. V decided to move to British Columbia to be with him, notwithstanding that it meant leaving her family and her "dream job" at Accenture. She was, she said, in love.
- [23] After a trip to Vancouver to look for work, Ms. V returned to Calgary, and then moved with her belongings to Mr. V's house in Langley -- the same house he had bought with TG, and which remained the subject of a property division dispute between Mr. V and TG. It remained registered in TG's name until she and Mr. V resolved their issues on April 27, 2017.
- [24] In the Lower Mainland, Ms. V found employment with Swim Recruiting, a Vancouver human resources firm specializing in the fields of finance, accounting and IT. This was a sales position, with a starting salary of \$4,000 per month that would convert to commission. It was not the kind of work that interested Ms. V from a career perspective, but she did not have the contacts she had in Calgary. She remained with Swim Recruiting a little less than a year, working until she commenced her maternity leave in 2015.
- [25] AMV was born on September 12, 2015. On that same day, Mr. V's mother passed away. It was a stressful day.
- [26] In December 2016, Mr. V and Ms. V started a business in the form of a fitness/spin cycling studio in Langley (the "spin club"). It was financed largely by money Mr. V inherited from his mother. According to Ms. V, this was all Mr. V's idea. She went along with it, but it was not what she really wanted to do.
- [27] The shares of the company, on its incorporation, were put in Ms. V's name, as was the lease for the spin club's premises. Ms. V was responsible for the administrative side, while Mr. V undertook the personal training, boot camps and other fitness activities. They continued to operate the business after separation.
- [28] Throughout this time, Ms. V became increasingly unhappy in the relationship for reasons that centred on what she described as Mr. V's excessively controlling and demeaning behaviour. She found this particularly to be so in relation to the raising of the children: first AG (e.g. what AG could and could not be fed), then her pregnancy with AMV (e.g. what Ms. V should and should not eat), and raising AMV (e.g. how long she should be breast-fed, what solid foods were acceptable). Her evidence in this regard is supported by other witnesses, and I accept it.
- [29] It is clear to me from Ms. V's evidence that she found herself in difficulty right from the start of her move to Langley to live with Mr. V. In Calgary, she was an independent career woman earning a good salary, with well-developed family, social and professional networks. In Langley, she was in a new environment with no networks. She was now a spouse, an instant part-time mother, and an employee in a job that did not really interest her. Very quickly, she

became a full-time mother, and then worked in a business that was not her field of interest. She lived in a house with a number of incomplete renovation projects that was registered in the name of her husband's former spouse.

- [30] To compound all of this, from Ms. V's perspective, Mr. V was very regimented and controlling. When she was pregnant, Mr. V tried to control things by, for instance, telling her she must not eat fast food, questioning her fitness level, and prescribing how much exercise she should undertake.
- [31] When they consulted a midwife and doctor of naturopathy, Dr. Carlson-Rink, Ms. V felt virtually excluded from the discussion. Mr. V insisted that the childbirth should be natural, with no epidural, that he would be there to catch the baby, and that the baby should not be breast-fed for more than one year because it would not be fair for Ms. V to have so much more bonding time than Mr. V.
- [32] Tellingly, Dr. Carlson-Rink was taken aback. It was the first time in 21 years as a midwife she had experienced such a discussion. From her perspective, this was a time for cooperation, not competition. Yet Mr. V considered it unfair if Ms. V had more time bonding than he did. She found his approach to be anything but collaborative.
- [33] Things became worse, from Ms. V's perspective, after AMV's birth. Mr. V became even more controlling. He did not want her to breast-feed for comfort. He did not want her to make decisions about, for instance, giving gripe water without discussing them with him first. Did she want to give AMV a bath? No, she should wait till AG came over. He did not want her to join "mommy groups" because he wanted her to be home with the baby when he came back between sessions at the spin club. When it was time to move to solid food, everything had to be approved by him. He wanted the baby to have no sugars. If he was unhappy about how things were going, he would take the baby and leave the house. He became upset when Ms. V breast-fed AMV beyond 12 months, causing her to continue her breast-feeding surreptitiously thereafter.
- [34] From Mr. V's perspective, fitness and health were of the greatest importance, and he was simply trying to ensure that his children were as healthy as possible. His approach, however, as sensed by Dr. Carlson-Rink, was not collaborative, but rather left Ms. V feeling that she had no voice. Mr. V claimed a superior knowledge base as a fitness expert and a father, and therefore knew best.
- [35] I accept that in taking the positions he did, Mr. V was motivated by a sincere concern to maximize what he perceived to be the health and well-being of his children. I also accept that in many instances, the parties simply disagreed. But Mr. V seemed unwilling to accept the validity of views contrary to his own. I find that this was due in part to an inability always to appreciate the difference between what was best for the family and what was best for him.

- [36] One example is his approach to breast-feeding, subordinating the benefit to the baby of continued breast-feeding to his own desire for bonding (which he viewed as a benefit to the baby). Another is his disapproval of the number of doctor's appointments scheduled for AMV. Ms. V had arranged appointments in accordance with the schedule given to her by the physician: checkups at intervals of 2, 4, 6, 9, 12, 18 and 24 months. Mr. V considered this schedule to be excessive, suggesting that Ms. V should take AMV less often, increasing his chance of accompanying them.
- [37] Ms. V described an incident in February 2017 when she was very pregnant with IMV. Mr. V was home that morning, and they had a serious argument. He went to grab AMV from Ms. V to take her out, which, she said, he knew Ms. V hated. She said she would go too. Mr. V said no, and told her to leave the house.
- [38] According to Ms. V, she walked up the stairs to get her wallet and keys. Mr. V followed her up the stairs and was yelling at her, pressing her back. She went to push him away, but her hand "accidentally hit his face as he lunged". Ever since, Ms. V reported, he has accused her of hitting him, and that is indeed his perception.
- [39] Which perception of that incident is correct cannot now be determined. But as will be seen, Dr. Heiner referred to a subtype of IPV called "conflict-instigated episodes of situation-specific violence" which she described as a phenomenon where both partners sometimes become aggressive during heated conflict. That, I am satisfied, describes what occurred here.
- [40] In the circumstances, Ms. V was no longer able to engage in sexual intimacy with Mr. V. Mr. V had difficulty understanding this. He viewed himself as an attractive person, and Ms. V was his wife. But as Ms. V bluntly told him, the problem was not one of lack of physical attraction. He was a sexy guy. But for her, sexual intimacy required emotional connection, and that was no longer possible for her. When he continued to press her, she said that she could not help him. If he had to, he would have to look elsewhere. Mr. V later viewed this as an attempt to goad him into committing adultery in order to support her claim for custody. At the time, it was another significant source of conflict.
- [41] Matters were not improved by the birth of IMV in March 2017. Ms. V began preparing to depart; indeed, in her initial notice of family claim, Ms. V pleaded a separation date of April 1, 2017. That was news to Mr. V.
- [42] Mr. V was, of course, well aware that things were not going well between them. To his credit, he took steps to try to make things work. These included counselling, and arranging date nights. It was, however, too little too late from Ms. V's point of view.
- [43] In the meantime, Mr. V and TG finally resolved their outstanding legal differences in a separation agreement dated April 27, 2017. Mr. V paid out TG for her interest in the family home he now occupied with Ms. V, and arranged for title to be transferred to himself and Ms. V jointly. He was, of course, unaware of how Ms. V was really feeling.

- [44] Earlier that spring, Ms. V had travelled to Calgary to attend a religious event celebrating the Diamond Jubilee of the Aga Khan. There, she ran into her ex-boyfriend, S. This was not just any ex-boyfriend; according to Ms. V, their relationship had ended very badly. S had assaulted Ms. V, causing her to leave him. He then undertook a course of harassment to try to get her to return, harassment that included breaking into her house. She was obliged to get an emergency protection order (a precedent she was later to follow in relation to Mr. V).
- [45] When she ran into S in the spring of 2017 (just how that happened was not described in any detail), she explained that she sought closure, and he apologized. She did not tell Mr. V about any of this, testifying that she was afraid to, lest he try to prevent her from going back to Calgary. Then, over the summer of 2017, she and S talked to each other by phone about five times. S's then-fiancée learned of these calls and, Ms. V said, was furious. She got in touch with Mr. V over Facebook to say that his wife was interfering with her relationship with S, and was trying to get back together with him.
- [46] Mr. V was irate, and confronted Ms. V, backing her against the wall and accusing her of having an affair. She denied this, saying, untruthfully, that she had spoken to S only twice. A major fight ensued, and this continued to be a significant issue between them.
- [47] Over their time together, Ms. V had also become concerned about certain behaviours of Mr. V in relation to both AG and AMV, that she labelled as sexually abusive. I will discuss this aspect of the case in more detail below. But these protection concerns figured largely when, on March 9, 2018, Ms. V, through counsel, applied without notice for a protection order, and an order granting her sole occupancy of the matrimonial home and sole interim custody. Mr. V, in short, was to go nowhere near her or the children. These orders were served on Mr. V at the spin club on March 12, 2018. He had no idea they were coming. Contrary to the terms of the orders, he went directly to the home to ask what the heck was going on, and insisted on seeing the children. He testified that he was too upset and confused to understand that he was not even to have a chance to say goodbye.
- [48] For about a month, Mr. V had no contact with his children, and was then permitted supervised access. The protection order was vacated on June 7, 2018, and on June 19, 2018, the parties consented to an interim order that provided for:
- (a) shared parental responsibilities, with final say to Ms. V;
 - (b) unsupervised parenting time for Mr. V on a rotating two-week schedule:

Week 1: Monday, Wednesday, Friday 2:00 p.m. - 6:00 p.m. and Saturday and Sunday, 9:00 a.m. - 2:00 p.m.;
 - Week 2: Tuesday and Thursday, 2:00 p.m. - 6:00 p.m.
 - (c) mortgage payments on the family residence to be paid out of the joint spin club business account.

[49] Since then, the parties have experienced considerable difficulty in managing the exchange of the children, and in dealing with each other as co-parents. Regrettably, the nature of the parenting schedule necessitates numerous interchanges.

[50] Ms. V continues to occupy the family home with AMV and IMV; it is soon to be sold. The expenses have until very recently been paid through the spin club business.

3.0 THE PROTECTION CONCERNS

[51] These concerns were put forward by Ms. V as constituting sexually abusive and inappropriate contact between Mr. V and his two older daughters. Primarily, they comprised three categories.

[52] The first was what Ms. V described as a "game" in which Mr. V allowed AG to touch his penis. She repeatedly referred to a particular catchphrase as one used by AG and Mr. V to describe the "game".

[53] The second was activity that Ms. V described as "French kissing" between Mr. V and his older daughters.

[54] The third was Mr. V using a Q-tip in cleaning his daughters' vaginas, and doing so after moistening it in his mouth.

[55] Mr. V denied any kind of sexual abuse. With respect to the first category of concern, he acknowledged that he had been in the habit of not worrying about being naked around his daughters in the bathroom, before dressing. He felt that nakedness was nothing to be ashamed of. He further acknowledged that, in this context, AG had reached out and grabbed his penis. He was somewhat taken aback and confused about how to stop this behaviour. He did try to discourage it, but did not immediately change his habit of nakedness.

[56] With respect to the second category, Mr. V denied any French kissing. He did acknowledge that he played a game with AG and AMV whereby he would stick out his tongue, and his daughters would try to nip it. He pointed out photographs of Ms. V also sticking out her tongue with her daughter. Ms. V's explanation that these were entirely different was not convincing.

[57] With respect to the third category, Mr. V acknowledged using a Q-tip in the manner described. He explained that he thought it would be wrong for him to use his hands to clean his daughters' private parts, and therefore used a Q-tip. When Ms. V pointed out to him that this was problematic, he stopped it. At one point, he did hold the centre of the stick between his lips to free up his hands, but he did not moisten the cotton before using the swab.

- [58] As noted, these concerns of Ms. V were investigated by the MCFD and the RCMP. AG was interviewed at length. She was utterly unaware of the catchphrase that Ms. V had testified AG and Mr. V used to describe the penis-touching "game". She knew nothing of any such "game", and spoke very positively about her father. After interviewing all those concerned, both the MCFD and the RCMP concluded that the evidence did not substantiate the existence of sexual abuse.
- [59] I agree. As we shall see, Dr. Heiner came to the same conclusion. On this issue, I prefer Mr. V's evidence to that of Ms. V. Certainly, Ms. V did not behave as one would expect a concerned mother to behave in the face of sexual abuse of her daughter. In the context of her medical care and hospital admissions surrounding IMV's birth, Ms. V complained to professionals about Mr. V's controlling behaviour, saying that she was "desperate" to get out of the marriage, and expressed fear about having to share custody if she left the marriage. But she also reported that there were no concerns about the safety of her children, and that while Mr. V was abusive towards her, he never abused the children. Then, as we have seen, she consented to an order providing Mr. V with unsupervised access.
- [60] A small example of exaggeration on Ms. V's part is her position that, contrary to what was ordered (given the protection concerns), Mr. V bathed the children when he had them. It is true that he did so. It is also true that, through her lawyer, Ms. V requested that he not do so. But no term of any order or agreement forbade it. It is evident that having requested that he not bathe the girls, Ms. V, in her own mind, elevated that request to a legal requirement. That was not the case.
- [61] I do not suggest that there was nothing wrong with Mr. V's behaviour. He displayed a lamentable lack of judgment. Nevertheless, I find that Ms. V elevated what she observed in this regard into much more serious concerns because of her firm belief that her children should be in her sole custody, thereby skewing both her judgment and her recollection.

4.0 THE SECTION 211 REPORT

- [62] Dr. Heiner prepared a very extensive and thorough report, and generally followed what I consider to be an appropriately cautious approach in evaluating the evidence upon which she based her findings.
- [63] Dr. Heiner concluded that it was "more likely than not" that the relationship between the parties included IPV in the form of a pattern of "coercive controlling, psychological-emotional violence", with Mr. V acting as the primary instigator. She also considered it "possible" that a subtype of IPV existed in the form of "conflict-instigated episodes of situation-specific violence", which she described as a phenomenon in which both partners sometimes become aggressive during heated conflict. On the basis of the evidence of both parties, I consider this to be probable, not merely possible.

- [64] Mr. V argues that a careful review of the evidence, including the content of the last of the surreptitious tapes, and his own testimony, should lead to a conclusion that Dr. Heiner's opinion concerning the existence of IPV cannot be supported.
- [65] The issue of the surreptitious tapes was a very sore one for Mr. V. They were not disclosed until relatively late in the litigation, and they left him feeling manipulated and betrayed. One can understand why. Throughout the time they were made, Ms. V was planning to leave, while Mr. V was unaware that things had come to that state. He feels that the interactions were selectively chosen for recording, and that Ms. V behaved differently while she was taping than she would have otherwise.
- [66] In one, for instance, Mr. V can be heard yelling and swearing at Ms. V, and demeaning her. He concedes that he was behaving "like an asshole". But, he maintains, Ms. V only kept her cool because she knew she was recording the exchange. At other times, he says, she, too, was swearing and yelling and demeaning, but of course she did not record those exchanges, and, having recorded nothing himself, he is not in a position to prove it.
- [67] It is indeed difficult to be satisfied that the tapes disclose a true and complete picture when one party was aware of the recording, and in a position to guide the tone and content of the exchanges, while the other was not. They are accordingly of limited value. What they certainly confirm is that there was a great deal of animosity between the parties, and that Mr. V was quite capable of treating Ms. V in an emotionally abusive fashion.
- [68] Dr. Heiner was alive to Mr. V's concerns about the tapes. She also had the benefit of interviews with collateral parties, and extensive interviews and testing of Mr. V and Ms. V. While she concluded that IPV existed in the form she described, and that Mr. V was the "primary instigator", she did not suggest he was the sole instigator. Nor did she exclude Ms. V as a participant in what Dr. Heiner described as "conflict-instigated episodes of situation-specific violence". But she was clearly concerned about what she considered to be Mr. V's significant contribution to IPV.
- [69] What Ms. V described as Mr. V's penchant for arguing rigidly and overriding anything she had to say is supported, interestingly, by his exchange with his insurance agent over coverage for the spin club premises. The agent, whom Mr. V described as a good friend, was concerned about hot spin classes he was conducting, where the heat in the studio was turned up during the classes to, as she understood it, "higher than normal temperatures".
- [70] The agent pointed out that such classes should not be offered before first ensuring that the policy would continue to cover him. She said that the insurer would need to know the maximum temperature he proposed to use, how many classes per month would be offered at the higher temperature, and what precautions were made in relation to health concerns of participants.

- [71] Mr. V did not see the problem. He asked her to define "higher than normal temperatures". When the agent replied that normal would be around 68-72°F, he responded that he felt normal temperature would be 72-76°F and asked for the insurer's written room temperature range standards. The exchanges continued in a similar vein. Mr. V seemed upset that he had to seek the insurer's approval. He kept arguing that what he was doing was not out of the ordinary. What he did not do was provide the information requested. This kind of approach is consistent with what Ms. V described as typical of their interactions.
- [72] Dr. Heiner is an expert in this field; I am not. In my view, she gave her evidence carefully, and approached the issue conservatively. Her opinion is entitled to considerable weight. While a very few of her evidentiary findings are open to question, for the most part they are consistent with my own. When I take into account all of the evidence I heard, including that of Ms. V, that of Mr. V's first spouse, TG, the observations of independent third parties such as teachers and medical professionals, and Ms. V's surreptitious tapes, I conclude that Dr. Heiner's opinion is amply supported and ought to be accepted: I find that there was indeed a pattern of IPV in the form of coercive control of which Mr. V. was the primary instigator.
- [73] From my observation of Ms. V in the witness box, and from listening to her tapes of confrontations, I also conclude that Ms. V was not as helpless and weak as she would have had me believe, but was capable of standing up for herself (as one would expect of a woman of her accomplishments). This is consistent with Dr. Heiner's observations. I accept, however, that Ms. V suffered emotionally as a victim of Mr. V's controlling behaviour, and I find that that the situation remains problematic going forward.
- [74] As noted above, with respect to the protection concerns raised by Ms. V, Dr. Heiner found that the evidence did not support Ms. V's allegations that Mr. V was sexually abusive towards the children. Nevertheless, Dr. Heiner considered that it was "more likely than not" that Mr. V lacked judgment, and failed to instill what would be considered appropriate boundaries with his daughters around touching private parts. I agree with Dr. Heiner in this regard.
- [75] Dr. Heiner expressed the view that these inappropriate boundaries "may reflect an enmeshed over-involved and intrusive parenting style". This was consistent with her general evaluation that Mr. V "appeared to be a parent who was warm and responsive paired with over-involved and intrusive". I accept this description as an accurate one. It could be applied to a great many parents today.
- [76] What I do not accept is the hypothesis Dr. Heiner offered following this discussion, arising from observations of differences in the way Mr. V treated AG as compared to the younger AMV, that these differences may be a result of infantilization. She described this as a family systems process whereby adult members abdicate their roles and responsibilities to a child or children, so that children take on caregiving roles and responsibilities usually reserved for adults:

In other words, [Mr. V] needs to be needed by his children. Because infants, toddlers and preschoolers are normatively very needy and demanding, [AMV and IMV] likely fulfil [Mr. V's] needs; thus, he largely appears competent, attentive and responsive in his interactions with them, particularly to the untrained observer. If the evaluator's hypothesis about infantilization is correct, then [Mr. V] likely finds [AG's] otherwise healthy development towards autonomy threatening and unacceptable, which may be why he was observed being emotionally unresponsive to her.

[77] Dr. Heiner went on to concede that there was no way to prove or disprove this hypothesis, aside from observing real-life experience as the children grew. In other words, this may be a valid observation, or it may not. That is not helpful, and I question the propriety of raising it at all, given that it is nothing more than speculation arising from a questionable observation. While Mr. V. and the children were together with Dr. Heiner, it appeared to her that he was being more attentive and more responsive to AMV than he was to the older daughter, AG. Mr. V acknowledged that that had been the case, and explained (I thought quite reasonably) that this was because he understood the evaluation to relate to his parenting skills and relationship with AMV and IMV, and had nothing to do with AG. Strictly speaking, he was right.

[78] Moreover, Dr. Heiner's speculation, based on her one-time observation, was not consistent with the evidence from the witnesses Mr. V called who were familiar with his parenting, and whose evidence I preferred in this regard.

[79] As for Ms. V, Dr. Heiner described her as:

an appropriately sensitive and responsive caregiver, who was skilled at balancing the needs of two small children at the same time, and she appeared reasonably competent and willing to seek and respond to opinion of authority with regard to meeting the Minor Children's needs.

[80] I accept this description. It is consistent with my own impression of Ms. V, together with the evidence of her witnesses.

[81] I also find, on the basis of the evidence of the witnesses produced by Mr. V, that he, too, is a sensitive and responsive caregiver who is skilled at balancing the needs of, in his case, three small children at the same time. Where Mr. V may fall short, however, as Dr. Heiner observed, is in not always properly distinguishing his own interests from those of his children, otherwise described as a form of enmeshment. But one example from the evidence is his position on breast-feeding, discussed above -- an example also of his controlling behaviour.

- [82] Dr. Heiner went on to observe that the co-parenting relationship between the parties since separation "was of a very low quality, with an absence of constructive, proactive, routine child-centred adult communication, cooperation, and consistency of parenting practices". That is certainly consistent with the evidence I heard, and I accept Dr. Heiner's description. As Dr. Heiner noted, the marital relationship was characterized by substantial conflict, to which the children were exposed, and this continues to be the case.
- [83] Dr. Heiner then addressed the issue of parenting and custody. It was her opinion, based on her findings regarding the presence of IPV and the existing low quality of the co-parenting relationship, that a joint custody arrangement with shared parenting time and responsibilities was unlikely to be viable or in the best interests of the two children. In her view, even a joint custody arrangement with parallel parenting (divided decision-making with minimal contact between parents) would not be viable, given the pattern of IPV and the children's stage of development.
- [84] Dr. Heiner concluded that a sole custody arrangement was in the best interests of the children, with decision-making authority and parenting time assigned to the parent best able to provide (a) a non-violent home, (b) sensitive and warm caregiving based on the children's developmental needs now and into the future, and (c) predictability, consistency and routine. While acknowledging that this was a decision for the court to make, Dr. Heiner expressed the view that at this time, Ms. V was the better candidate for exclusive decision-making authority and primary parenting.
- [85] Access by Mr. V, Dr. Heiner opined, should be crafted in a way to promote quality, rather than quantity. Based on her concerns about enmeshment and inappropriate boundaries, she suggested that Mr. V's access visits be limited to several hours or day-visits, and if the court were to conclude that there is a high risk of mistreatment (that was not Dr. Heiner's conclusion), then supervision should be considered. Otherwise, there should be an explicit order for access setting out times, dates, holidays, etc. including directions for contact with each parent when the children are not in that parent's care.
- [86] Dr. Heiner respectfully declined to provide a recommendation on whether Ms. V's proposed relocation to Calgary should be allowed or denied, noting advantages and disadvantages to both locations. She did offer the view that the reasons for relocating to Calgary offered by Ms. V appear to have been made in good faith, as opposed to an attempt to restrict Mr. V's involvement.

5.0 DISCUSSION

5.1 Custody, Relocation and Access

- [87] For the reasons that follow, I have come to the conclusion that, in all of the circumstances of this unhappy case, the interests of the children are best served by awarding sole custody to Ms. V, permitting her to relocate with the children to Calgary, and granting reasonable unsupervised access to Mr. V. The children shall reside primarily with Ms. V.

[88] The issue of custody is governed by section 16 of the Divorce Act, RSC 1985, c 3 (2d Supp):

16 (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

- (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.
- (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
- (7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.
- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[Emphasis added.]

[89] In *Gordon v Goertz*, [1996] 2 SCR 27, the Supreme Court of Canada considered the questions of custody and relocation in the context of an application to vary an order made under section 16. In that case, the mother, who had custody of the parties' child, wished to move the child with her to Australia from Saskatoon, where both parents then lived. The father applied to vary the custody order to grant custody to him in order to keep the child in Saskatoon.

- [90] With respect to the mobility issue, in the context of the variation application, Madam Justice McLachlin (as she then was), for the majority, stated that "the reasons or motives for moving will not be relevant to the custodial parent's parenting ability", except where the motive is for an improper purpose (para 23).
- [91] With respect to the "maximum contact" principle set out in section 16(10), McLachlin J observed that while the principle was mandatory, it was not absolute:
- [25] The reduction of beneficial contact between the child and the access parent does not always dictate a change of custody or an order which restricts moving the child. If the child's needs are likely to be best served by remaining with the custodial parent, and this consideration offsets the loss or reduction in contact with the access parent, then the judge should not vary custody and permit the move. This said, the reviewing judge must bear in mind that Parliament has indicated that maximum contact with both parents is generally in the best interests of the child.
- [92] At para 49, McLachlin J summarized the approach to be taken as follows:
1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.
 2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
 3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
 4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
 5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
 6. The focus is on the best interests of the child, not the interests and rights of the parents.
 7. More particularly the judge should consider, inter alia:
 - (a) the existing custody arrangement and relationship between the child and the custodial parent;
 - (b) the existing access arrangement and the relationship between the child and the access parent;
 - (c) the desirability of maximizing contact between the child and both parents;
 - (d) the views of the child;

- (e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child [emphasis original];
- (f) disruption to the child of a change in custody;
- (g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[93] In *Nunweiler v Nunweiler*, 2000 BCCA 300, the Court of Appeal expressed the view that only factors (c) through (g) as set out above were relevant to an initial application, such as I am considering, as opposed to a variation application. Madam Justice Saunders, for the court, noted at para 28:

The significance of the reasoning in *Gordon v. Goertz* in an initial determination of custody is, I consider, threefold. First, the decision directs the court to consider the motive for a parent's relocation only in the context of assessing the parent's ability to meet the needs of the child. This, in my view, is as relevant a direction on an initial custody hearing as on a variation hearing. Second, the decision confirms the significance of the instruction, found in s. 16(10), to consider the willingness of a parent to facilitate contact, but notes that this consideration is subordinate to over-all consideration of the best interests of the child. Third, and more broadly, it approaches the issue of a relocation of residence from a perspective of respect for a parent's decision to live and work where he or she chooses, barring an improper motive.

[94] In *Falvai v Falvai*, 2008 BCCA 503, the Court of Appeal observed at para 25 that the analysis of Saunders JA maintained the conventional approach to determining custody on an initial application, which requires a balancing of all relevant factors, including a parent's proposed move to a new community. The factors had to be considered, in short, in a "blended analysis" of both custody and mobility.

[95] In *Falvai*, the court considered the mother's appeal from a trial judgment where the mother's parenting plan proposed that she should have sole custody, and that the child relocate with her from their home community on Vancouver Island to the Lower Mainland, where she had lived and worked prior to the marriage. The father's parenting plan proposed joint custody, or alternatively sole custody for himself, with the child remaining in the home community on Vancouver Island. The trial judge awarded sole custody to the mother, but made it conditional upon her continuing to live in the Vancouver Island community. As I find this case very helpful, I propose to review it at some length.

[96] Madam Justice D. Smith, for the court, stated at para 29 that, while the reasons offered by a parent for wanting to move are to be respected:

respect for the parent's views on relocation does not create a presumption in law favouring, or refusing, custody to that parent. The parent's wish to relocate is simply one of the factors, to be balanced with the other relevant factors, in determining the best interests of the child. When considering mobility in the context of the broader custody analysis, which requires the court to evaluate competing parenting plans, the focus of the inquiry becomes the impact of the proposed move on the child's best interests, rather than the reasons for the proposed move.

[97] Madam Justice Smith went on to say this:

[30] Addressing mobility in the broader custody analysis creates a more uncertain outcome. It may be that, where such a move would significantly curtail the child's access to the other parent and extended family, the court would find that the child's interests are best met by remaining with the parent who continues to reside in the community to which the child is accustomed, and where the child has ties to extended family members, existing friends and a familiar school. On the other hand, it may be that the negative effect of removing the child from the care of his or her primary caregiver who has raised him or her since birth, and to whom he or she is closely bonded, would dictate that custody remain with the primary caregiver, in which case reasonable arrangements would be made to facilitate access to the other parent. Regardless of the outcome, however, the analysis requires an evaluation of both proposed parenting plans with the best interests of the child as the focus of the inquiry.

[31] To the extent that the factors in *Gordon* are relevant to an initial application, Nunweiler confirms that a parent's reasons for wanting to move with the child are relevant to the analysis only if they disclose an improper purpose, such as an intent to thwart the other parent's access to or relationship with the child. Improper motives are relevant in that they have a negative impact on the assessment of that individual's parenting abilities. Absent an improper motive, however, a parent's reasons for wanting to move are not relevant to the analysis of what is in the child's best interests; it is the consequences of the move, not the reasons for it, that are relevant to the analysis.

(iii) The maximum contact principle

[32] As previously noted, the maximum contact principle is not an absolute one. It is a relevant factor that s. 16(10) of the *Divorce Act* mandates a court to consider in determining what is in the best interests of a child, and in particular the degree to which the proposed custodial parent who wishes to relocate with the child is prepared to facilitate the other parent's reasonable access to the child. However, it is to be balanced with all of the other relevant factors in determining what is in the best interests of a child.

(iv) Restrictions on a custody award

[33] The imposition of restrictions which narrow the geographic region in which a custodial parent shall live is contrary to the historical concept of custody. In *Gordon*, L'Heureux-Dubé J., for the concurring minority, canvassed this issue extensively at paras. 72-100. She explained that, at common law, a custodial parent had the sole responsibility of overseeing

all aspects of the day-to-day and long-term care of a child, as well as determining all major decisions, including the place of residence of that child, as an incident of his or her custody. She summarized this notion of custody as follows:

- [77] Thus, custody at common law has been historically recognized as a wide and inclusive concept which grants the person entrusted with it, *inter alia*, the power to choose where the child shall live, subject to the right of the non-custodial parent to oppose such choice by seeking a variation order of the custody or access terms and such other limitations as may be warranted on the facts of the case.
- [34] After reviewing the provisions of the Divorce Act, as well as judicial and academic commentary on its meaning, L'Heureux-Dubé J. concluded, at para. 81, that custody of a child within the context of divorce retained the same meaning ascribed to it at common law.
- [35] Madam Justice L'Heureux-Dubé then turned to the imposition of restrictions on the rights of a custodial parent pursuant to s. 16(6) of the Divorce Act. That provision permits a court to impose terms, conditions or restrictions in connection to a custody or access order. She considered the directions contained in ss. 16(8) and 17(5) of the Divorce Act, that the court shall only take into consideration the best interests of the child in making a custody or access order, and then stated:
- [98] Having regard to these statutory parameters, limitation on the rights of the custodial parent should not be imposed as a matter of routine. Only if they are found to be required in the best interests of the child, from the child's point of view, can such limitations be justified.
- [Emphasis added.]
- [98] Madam Justice Smith then turned to consider the trial judge's decision, which awarded sole custody to the mother, conditional upon her continuing to live in their home community rather than moving with the child to the Lower Mainland:
- [38] While appellate courts must be cautious in weighing into a trial judge's exercise of discretion in determining the best interests of a child, in the circumstances of this case, I find that the restriction imposed on the appellant's custody of the child is not supportable by the legal principles reviewed above. The appellant has been the primary caregiver of the child since his birth. She wishes to return to the community from which she came before her marriage and where she will have emotional, psychological, social and economic support. Her reasons for moving are not improper but relate to her personal needs.
- [39] The trial judge in this case was faced with a difficult decision. In my view, it was incumbent on him to determine whether the interests of the child would be best fulfilled by remaining with his mother as his primary caregiver in her new location with more limited access to his father, or by residing with his father in his childhood home with more limited access to his mother. It was not open to him, in my view, to determine that it was in the child's best interest to be in the sole custody of his mother, while restraining the mother from relocating with the child.

[40] In today's world, individuals rarely live their entire lives in the same community in which they are born. We exist in a far more mobile society. Work demands often require families to move; some require one parent to work in a community apart from where the family lives. In my view, a court cannot indenture an individual to a community. While I recognize that a residency condition of limited duration may be necessary on an award of sole custody in order to provide the access parent with notice of a proposed relocation, in my view, except in the rarest of cases, permanent conditions restricting the movement of a custodial parent should not be imposed.

[Emphasis added.]

[99] In the present case, the impact of the mobility issue on the best interests of the children must be considered in the context of the overall custody question. The analysis must be a "blended" one.

[100] There is one particular aspect of Ms. V moving to Calgary with the children that Mr. V raises, and which I agree is of concern: the impact this will have on the relationship between the children and Mr. V, and between the children and their half-sister, AG.

[101] This is particularly concerning given IMV's age: she is not yet 3. Ideally (as Dr. Heiner acknowledged), a child should have until 4 or 5 years of age to develop a proper bonding with the parent. And, of course, the positive "social capital" from which the children have benefited through their relationship with their half-sister would be better preserved with continuing contact.

[102] But in weighing this in the balance, I note also Dr. Heiner's observation that Mr. V has bonded very well already with his two daughters. Indeed, this is consistent with my own observation, and my finding that Mr. V is and has been a warm, responsive, and heavily-involved parent.

[103] With these considerations, I must balance Dr. Heiner's conclusion, with which I agree, concerning the presence of IPV in the relationship both before and after separation, and the low quality of the existing co-parenting relationship.

[104] In these circumstances, I am driven to the conclusion that Ms. V's parenting plan, apart from her proposed restrictions on access, is preferable, from the perspective of the best interests of the children, to the parenting plan of Mr. V.

[105] For Mr. V to have sole custody in Langley would not, as I see it, promote the best interests of the children. They would be deprived of appropriate access to their mother, who has been the primary caregiver of the children since their birth.

[106] For the parents to have joint custody in Langley, which would require Ms. V to remain there, is also not in the children's best interests. Joint custody of itself would not, for the reasons discussed by Dr. Heiner, be either viable or healthy. It would also "indenture" Ms. V to Langley when it is her clear intention to move to Calgary.

- [107] Mr. V protests that Ms. V never really gave it a proper shot in Langley. She has not, he asserts, made any real effort to find employment in the Lower Mainland that would offer a position and remuneration similar to that she expects to find in Calgary. But, as the case law makes clear, I need only be satisfied that her reasons for moving to Calgary are reasonable and genuine, and that her proposal is not made for an improper motive. I am so satisfied. Ms. V has family and social support in Calgary that she lacks in Langley; she has a work history in Calgary in a field in which there are more opportunities there than here; and she has professional contacts there that she lacks in the Lower Mainland.
- [108] That, of course, is not the end of the analysis. What are the consequences of such a move for the children? As I mentioned above, it would obviously interfere in their relationship with their father and their half-sister. The Divorce Act requires me to give effect to the principle that a child should have as much contact with each spouse as is consistent with the child's best interests. But as the case law provides, that is but one factor in the balancing I must undertake. I find that restricting Ms. V from relocating would not be in the children's best interests, given the impact that would have on Ms. V's support networks, her finances and her emotional well-being, all of which would negatively impact the children.
- [109] As I have indicated above, I consider that the maximum contact principle is satisfied here with an award of full custody to Ms. V, with leave to move the children to Calgary, so long as Mr. V is granted appropriate access.
- [110] The award of full custody to Ms. V is immediate. The leave I am granting for her to move with the children to Calgary will have effect as of December 27, 2019, after the 2019 Christmas holiday period. I consider this appropriate in order to allow both parents time to prepare for the move, and to allow appropriate access over the Christmas period without involving travel. I do not consider this to be an unwarranted restriction on Ms. V's custody rights given the brief period involved and the time required to prepare for a move in any event. In the meantime, Mr. V's access will continue in accordance with the current schedule.
- [111] As I noted earlier (para 6), Ms. V proposed that once she has relocated to Calgary, Mr. V's contact with the children should be limited to supervised access one weekend a month. In my view, access so limited would be contrary to the best interests of the children, and a violation of the maximum contact principle.
- [112] In support of her position, Ms. V relies upon the protection concerns, and the following paragraph in Dr. Heiner's report:

A third intervention that might serve the best interests of the Minor Children is for practical boundaries to be placed on [Mr. V's] access in such a way that the quality of his interactions with the children is maximized and opportunity for an mashed, infantilization behaviour would be minimized. For example, it is recommended that [Mr. V's] access visitations be limited to several hours or day-visits, and that permissible activities and locations be stipulated. If the Court becomes concerned that the risk of maltreatment to the minor children is high or that

aforementioned recommendations will not suffice to protect children, then [Mr. V's] access should be monitored/supervised by a trusted third-party.

[Emphasis added.]

- [113] I observe, first, that Dr. Heiner was not recommending (and did not recommend) supervised access. Dr. Heiner was generally careful not to intrude upon the function of the court, and therefore made alternative recommendations that would be available to the court depending upon its findings. This was an example.
- [114] In fact, as we have seen, Dr. Heiner did not find the protection concerns to be supported by the evidence; nor did I. Both of us had concerns about Mr. V's judgment in relation to boundaries. He has clearly learned from his experience in this regard.
- [115] I have also rejected, for the reasons discussed, Dr. Heiner's "hypothesis" of infantilization. For some reason, she referred to it again in this quoted passage without acknowledging, as she had before, that it was mere speculation.
- [116] Taking into account Dr. Heiner's evaluation, and considering the evidence of witnesses who have observed closely Mr. V's interactions with his children during the unsupervised access he has exercised since June 2018, the supervision reports from the time when Mr. V's access was supervised, the relatively long history of the unsupervised access he has enjoyed with AG, and the evidence as a whole, I am satisfied that it is in the children's best interests that Mr. V should continue to have unsupervised access, and, once the children have relocated to Calgary, should have it two weekends a month. Anything short of this would, I find, unacceptably violate the maximum contact principle without any balancing enhancement of the best interests of the children. There should also be generous access by telephone, FaceTime and/or Skype.
- [117] Mr. V requested, in the event that the children are permitted to relocate to Calgary, access for two weekends per month, with which I agree. He proposed, however, that one weekend be in Calgary, and the other in Vancouver. Taking into account the age of the children, and Dr. Heiner's emphasis on the benefits of routine, predictability and consistency, I order that the weekend visits take place only in Calgary for at least the first year (2020). The exception will be that the children will be permitted to travel to Vancouver to stay with Mr. V during holiday time as set out below.
- [118] With respect to all aspects of the access, the parties will, as always, be at liberty to apply in the event of a material change in circumstances. Otherwise, I direct that either party may apply for a review of the access regime at any time after January 1, 2021. I would encourage the parties to do their best to agree to reasonable changes without the need of application, including varying the access schedule to provide for one weekend a month in Vancouver after 2020 -- or before, if it appears to them to be appropriate. I do not, however, order that change at this time.

- [119] Mr. V notes that he has never been permitted overnight access, and that this should now be changed. I agree that overnight access is a goal to be worked towards, but given the significant change that is about to occur in location, and considering Dr. Heiner's recommendations, I am not prepared to order that it commence immediately. Assuming that no concerns develop in the meantime, I order that Mr. V's weekend access in Calgary include overnight access on Saturday nights commencing the first access weekend of June 2020, and continuing thereafter.
- [120] Until overnight access commences, Mr. V's weekend access time will be from 4:30 p.m. to 7:00 p.m. on Friday, from 9:30 a.m. to 7:00 p.m. on Saturday, and from 9:30 a.m. to 6:00 p.m. on Sunday. After overnight access commences, the times will be the same on Friday, and from 9:30 a.m. on Saturday to 6:00 p.m. on Sunday. The parties are, of course, at liberty to vary these times by consent recorded in writing.
- [121] I turn now to the question of holiday time.
- [122] Mr. V has one week in July and one week in August every year with his daughter AG, and seeks to have the children stay with him for each week. I agree that this is desirable, but for the first year, 2020, limit this to one full week in July plus an additional weekend in August. Thereafter, unless the parties agree otherwise, Mr. V shall have the children with him for one week every July, and one week every August, which he may schedule to coincide with his time with AG. These weeks are to include one of Mr. V's access weekends, which would otherwise take place in Calgary, and would therefore run from Friday through the Sunday of the following weekend.
- [123] Mr. V will also have the children with him for one week every Christmas, to include Christmas Day and Boxing Day in alternate years, beginning with 2020. Similarly, Mr. V will have the children for the Easter long weekend in alternate years, beginning in 2021.
- [124] Ms. V will advise Mr. V each year by January 1 of the principal religious events she would like the children to attend, and the respondent's weekend access shall be adjusted accordingly. These events comprise:
- (a) the 23rd and 24th day of Ramadan, and if Ramadan is in January or February, the respondent's weekend access may be adjusted;
 - (b) Eid, which happens three times per year; Ms. V shall advise the respondent of the dates well in advance;
 - (c) March 21, July 11 and December 13 in relation to the ceremonies that occur in those months; Ms. V shall advise the respondent of any change to those dates;
 - (d) visits to Canada of the Aga Khan, of which Ms. V shall advise Mr. V as soon after she has notice.

- [125] Mr. V will have the first choice to have one of his access weekends on the weekend in June on which father's day falls, and unless Ms. V chooses otherwise, will not have one of his access weekends include the weekend in May on which mother's day falls.
- [126] The parties shall schedule access weekends during 2020 to ensure that Ms. V has parenting time with the children on her birthday on October 5, and that Mr. V has parenting time with the children on the weekend closest to his birthday on July 17. From 2021 on, he may schedule his week with the children in July to include his birthday.
- [127] Mr. V shall have weekend access over Thanksgiving weekend, to include the holiday Monday, every second year, beginning 2020. Otherwise, if a statutory holiday Monday falls on a weekend during which Mr. V is to have access, his access is extended to Monday at 6:00 p.m. After May 2020, this will include overnight access on the Sunday night, as well as the Saturday night. Other than those specifically scheduled, the parties are to alternate long weekends (February, May, July, August and September) to the extent it is practicable to do so.
- [128] The costs incurred by Mr. V to travel to Calgary, and for accommodation there if he is not able to stay with relatives, and costs incurred by Ms. V in connection with delivering the children to Vancouver, are to be shared equally by the parties. Each party shall deliver any applicable receipts to the other at the end of each month, with the other party to reimburse 50% by the end of the following month.
- [129] Mr. V is entitled to communicate with the children by telephone, FaceTime or Skype, or such other mode of communication to which the parties agree, three days a week while they are resident with Ms. V, subject to the number of communications being varied by consent. If the parties require me to specify the dates and times of such communications, they should each submit their proposals in writing within 14 days. During holiday weeks when the children are resident with Mr. V, Ms. V is likewise entitled to communicate with them on three days of the week.
- [130] Before June 1, 2020, both parents will attend courses as recommended by Dr. Heiner: Ms. V is to take a parenting workshop or parenting training program teaching skills for managing unwanted behaviours in children; Mr. V is to undertake a general parent education program. Each is to provide the other, through counsel, with confirmation of the program taken, the identity of the organization providing it, and the dates of attendance.
- [131] For communication concerning the children, the parents are directed to enlist the use of www.OurFamilyWizard.com, or such other electronic format as the parties may agree to, as their default communication tool.
- [132] All exchanges of the children are to take place at an agreed neutral site unless otherwise agreed in writing. The parties are to avoid communicating with each other except as necessary concerning the immediate circumstances of the children.

- [133] As custodial parent, Ms. V may travel with the children when they are in her care without requiring Mr. V's consent, and will provide Mr. V with advance details in writing of any proposed itinerary, including destination and contact number, the duration of the travel, and flight numbers.
- [134] During his access visits to Calgary, Mr. V shall not remove the children from Calgary, and during holiday visits by the children to Mr. V in Langley, Mr. V shall not remove them from British Columbia without Ms. V's consent in writing. During such holiday visits, Mr. V is free to travel with the children within British Columbia without Ms. V's consent, upon providing Ms. V with advance details in writing of any proposed itinerary, including destination, contact number, and duration and means of travel.

5.2 Guardianship and Parental Responsibilities

- [135] Both parties are guardians of the children, in accordance with section 39(1) of the Family Law Act, SBC 2011, c 25.
- [136] The parties shall exercise parental responsibilities on the following terms:
1. While the children are in the care of a guardian, that guardian will have day-to-day care, control and supervision of the children, and make day-to-day decisions affecting them in accordance with the limitations set out in this order. Neither party shall feed the children pork.
 2. Each party is obliged to communicate with the other regarding matters of a significant nature affecting either of the children, and significant decisions concerning them. All such communications are to be in electronic format in accordance with the terms of this order.
 3. The parties are to make every effort to reach an agreement concerning such significant decisions in the best interests of the children, but if they cannot, Ms. V will have the default decision-making power in accordance with the parental responsibilities hereinafter allocated to her. Mr. V will have the right to apply to the court for directions in the event he considers any such decision to be contrary to the best interests of the children, as contemplated by section 49 of the Family Law Act.
 4. In the event of the death of either guardian, the other guardian shall be the sole guardian of the children.
 5. Each guardian shall have the right to obtain information concerning either of the children directly from third parties, including teachers, counsellors, medical professionals and third-party caregivers.
 6. Ms. V shall have the following exclusive parental responsibilities:
 - (a) making decisions about where the children will reside, other than during Mr. V's access times;

- (b) making decisions respecting with whom the children will live and associate;
- (c) making decisions respecting the children's education and participation in extracurricular activities;
- (d) making decisions respecting the children's cultural, linguistic, religious and spiritual upbringing and heritage;
- (e) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the children, including selecting the children's health care professionals and providers, provided she supplies their names and contact information to Mr. V;
- (f) applying for a passport, Nexus card, license, permit, benefit, privilege or other thing for the child, or the renewal thereof, without requiring the consent or signature of Mr. V;
- (g) giving, refusing or withdrawing consent for the children, if consent is required;
- (h) subject to any applicable provincial legislation, (i) starting, defending, compromising or settling any proceeding relating to the children, and (ii) identifying, advancing and protecting the children's legal and financial interests; and
- (i) exercising such other responsibilities as may be reasonably necessary to nurture the children's development.

5.3 Child Support and Spousal Support

[137] By agreement, Ms. V does not seek retroactive child or spousal support, and Mr. V makes no claim for occupational rent. Mr. V is, of course, obliged to pay ongoing child support for the two children in accordance with the Federal Child Support Guidelines. Two questions arise. First, what income should be attributed to Mr. V for this purpose? Second, should the child support be reduced from the Guideline amount in accordance with section 10 of the Guidelines, in recognition of the expenses that Mr. V will incur in travelling to and from Calgary to exercise access?

[138] At present, neither party has any ready money. The expenses of the matrimonial home have been covered by the income generated by the spin club business, with very little left over given the costs of the litigation. Both have relied on family and friends for financial assistance. Mr. V has been unable to devote his attention to the business to the extent he would like, and while Ms. V has been carrying on with the administrative side, she, too, has had much to distract her.

5.3.1 Income

[139] Neither party is currently earning it anything like the level at which they are capable. The main source of their income, the spin club, is not producing as it has in the past, carries a good deal of debt, and has been covering expenses.

- [140] Ms. V declared an income of \$18,252 in 2016, comprising the universal childcare benefit (\$960) and employment insurance benefits (\$17,292). Her declared income in 2017 was \$15,000, being income earned from her administrative duties at the spin club. Her financial statement filed July 30, 2018, sets out the same amount of income as expected for that year. She acknowledges, however, that she can earn up to \$100,000 in Calgary, once she has had an opportunity to move there and sufficient time to secure appropriate employment.
- [141] Mr. V's income-earning history has not been consistent. In 2016, his line 150 income, from self-employment and a business, amounted to \$127,153.66. But in 2017, his income dropped to \$15,000, from business. Obviously, this does not reflect the large amount of his expenses that are paid, and deducted from gross business income. In his financial statement sworn August 30, 2018, he sets out an expected annual income of \$60,000. In submissions before me, however, he maintains that a more realistic expectation for at least the immediate future, given the impact on his business of his separation, is \$50,000. Ms. V submits that I should impute an income of at least \$80,000 to Mr. V.
- [142] It is clear, and I find, that both parties are capable of earning substantial incomes, well in excess of those disclosed in their most recent financial statements. But it is equally clear that, in the short term, neither is likely to be earning to their full capacity, and imputing additional income based on best past performance would be counterproductive.
- [143] Taking into account all of the evidence, and the transition she must now undertake, I impute no income to Ms. V at this time and for the first six months of 2020. Thereafter, I am confident that she will be earning at least as much as, if not more than, Mr. V, in the range of \$75,000-\$100,000 and beyond.
- [144] With respect to Mr. V, there is much to be rebuilt, and I accept that for 2020, he is not in a position to earn income at the same level that he did prior to 2018. His submission that I should impute an income of \$50,000 is more pessimistic than I think the evidence would support. Although the spin club is no longer a viable source of income (see below at para 170), his personal training business continues, and there is additional income from podcasts. He is a resourceful man. In the circumstances, I impute an income of \$65,000 through 2020. Thereafter, I think it probable that he will be in a position to increase it significantly.
- [145] Both parties will exchange financial information annually, beginning June 1, 2021, with child support to be adjusted accordingly.

5.3.2 Child support

- [146] For the present, Mr. V will pay child support to Ms. V in the amount of \$1,009 per month commencing December 1, 2019. Special expenses are to be shared equally. Given that I have ordered the access travel expenses to be shared evenly, I do not consider that this is an appropriate case to reduce the child support on the basis outlined in section 10 of the Guidelines.

5.3.3 Spousal support

- [147] Mr. V submits that given that his income is \$50,000, that Ms. V is capable of earning at least \$30,000, and the relatively brief duration of their relationship, no entitlement to spousal support arises.
- [148] I have, of course, imputed a higher income to Mr. V. But in any event, I disagree with Mr. V's analysis. I find that Ms. V is entitled to transitional support on both compensable and needs bases for a period of seven months commencing December 1, 2019.
- [149] As to her entitlement, I find that but for Ms. V's role as wife and mother, she would be in a position to obtain appropriate employment much more quickly, and indeed would have been in a position to be earning at a considerably higher level than \$15,000.
- [150] As to duration as well as entitlement, I have considered the condition, means, needs and other circumstances of each spouse, together with the other factors set out in section 15.2(4) of the Divorce Act. I am satisfied that Ms. V will be in a position to obtain employment at a relatively high level of remuneration within the seven-month period I have set. Given the equality of earning power, and the relatively brief duration of the relationship, I am satisfied that no further support is justified in the absence of unanticipated developments.
- [151] According to my DivorceMate calculation, taking into account the duration of the relationship, the age of the children, the child support payable, an income for Mr. V of \$65,000 and an income for Ms. V of \$0, the mid range for spousal support is \$688/month. I order Mr. V to pay monthly spousal support in the amount of \$688 commencing December 1, 2019, and continuing through June 1, 2020. Either party is at liberty to apply if there are errors (arithmetic or algorithmic) in the calculation.

5.4 The matrimonial home

- [152] Mr. V maintains that before the equity in this property can be divided, he is entitled to deduct the amount of \$225,000 as excluded property. He asserts that this is the value of his share of the property when he settled matters with his first spouse in April 2017, and only then did his interest in the property, and his exclusion, crystallize.
- [153] The background facts are as follows.
- [154] Mr. V and Ms. V began cohabiting in October 2014. The home they occupied together was the Langley property that had been the home of Mr. V and his first spouse, TG. It remained registered in the name of TG.
- [155] As of October 1, 2014, the Langley property had a value of \$485,000, with the mortgage registered against it in the amount of \$430,000. The equity, accordingly, was \$55,000.

- [156] Matters between Mr. V and TG were resolved by a separation agreement entered into on April 27, 2017. By that time, the mortgage had been paid down to \$403,000. All payments on the mortgage had been made by Mr. V.
- [157] The appraised value of the Langley property in April 2017 was \$750,000.
- [158] What then occurred was this: Mr. V and Ms. V, with the help of Mr. V's father, took out a mortgage on the property for \$565,000. Of this, \$115,000 was paid to TG pursuant to their separation agreement. The balance paid off the existing mortgage of \$403,000, and all of the outstanding taxes, fees and transaction expenses. An amount was left over of \$36,593.68, which was paid jointly to Mr. V and Ms. V. Title to the house was then registered jointly in the name of Mr. V and Ms. V.
- [159] I conclude that Mr. V indeed has an excluded property claim, in the amount of \$27,500.
- [160] I begin by looking at the value of the property at the time Mr. V and Ms. V began cohabiting (\$485,000). There is no doubt that Mr. V's interest in the property constituted excluded property. But did that state of affairs continue? The Family Law Act provides in section 84(2) (g):
- (2) Without limiting subsection (1), family property includes the following:
 - (g) the amount by which the value of excluded property has increased since the later of the date
 - (i) the relationship between the spouses began, or
 - (ii) the excluded property was acquired.
- [161] Mr. V argues that he did not acquire the excluded property until April 2017 when he resolved matters with TG. That period, from October 2014 until April 2017, happens to cover the time during which the value of the property increased most significantly.
- [162] I do not agree. When Mr. V and TG separated, by operation of section 81(b) of the Family Law Act, Mr. V was entitled to, and acquired, an undivided one-half interest in the property. As I see it, it is at that time that he acquired the excluded property. Any increase in its value, then, from the time his relationship with Ms. V began, becomes family property.
- [163] Ms. V argues, accordingly, that his excluded property claim is limited to one-half of the equity as of October 2014. That equity was (\$485,000-\$430,000) \$55,000. One-half is \$27,500. I agree.
- [164] The property was, of course, subject to a mortgage that was a family debt as between Mr. V and TG, which mortgage Mr. V continued to pay. But Mr. V's liability for half of that family debt became, in essence, a family debt between him and Ms. V, which was ultimately paid out by the new mortgage in both their names. Accordingly, I conclude that Mr. V's claim for excluded property amounts to \$27,500, being one half of the equity taking into account the value as of October 2014 (\$485,000), less the mortgage balance at that time (\$430,000).

- [165] I do not accept that Mr. V's direction that title be transferred to him and Ms. V jointly eliminated his claim for excluded property. I find that his intention was that the house would be their joint property from that point on, not that he would lose his claim to excluded property on the undivided half interest he had at the time he separated from TG: see, for instance, *Venables v Venables*, 2019 BCCA 281 at para 95. Although Mr. V believed that the value of his undivided half interest was higher than I have found, the fact remains that he viewed it as his own, not something that he was giving to Ms. V; he had no donative intent in that regard. No presumption of advancement arises in such circumstances.
- [166] I am advised that, since final argument in this matter, the property has been sold with the closing date in January 2020, subject to the purchaser's request for an earlier completion date of December 13, 2019.
- [167] When the sale completes, the parties will pay from the proceeds the real estate commission, the usual adjustments between vendor and purchaser, ordinary legal fees and disbursements relating to the sale, and the amount necessary to discharge the mortgage, including any outstanding mortgage payments, penalties and outstanding taxes.
- [168] I am told that a lien in the amount of MSP premiums of approximately \$5,000 has been registered against the property. The parties disagree as to whether this is a family debt. Ms. V knows nothing about it. Mr. V testified that the debt was in relation to outstanding premiums not just for him, but for the whole family. Although he has failed to adduce documents to support that contention, I accept his evidence. That debt will therefore be paid out of the proceeds from the sale of the house before any division.
- [169] With respect to the balance, Mr. V will be entitled to his excluded portion of \$27,500 from the proceeds before any division. But there will be no payment to either party until the matter of costs has been resolved. Ultimately, Ms. V's share will be reduced in accordance with paras 176, 177 and 183 below. Mr. V is, of course, solely responsible for his lawyer's accounts.

5.5 The businesses and foundation

- [170] The parties' dispute relating to the spin club business was resolved by a consent order I pronounced on November 8, 2019. The parties agreed that the business should be sold. Mr. V waived his claim for excluded property (based upon the use in the business of funds he obtained by inheritance from his mother). Ms. V was granted sole conduct of the sale, to include any and all equipment and furnishings (including equipment and furnishings transferred from Total Body Development). The sale proceeds, it was agreed, are to be used first to pay any outstanding debt of the business, and second, to pay outstanding debt of Total Body Development to a maximum of \$13,000. The balance is to be held in trust and divided equally between the parties once this matter has been finalized.
- [171] As the sale process unfolds, the parties are at liberty to apply in the event of unforeseen circumstances.

[172] Mr. V is to retain Total Body Development, and will be solely responsible for that business's debt in excess of \$13,000.

[173] Mr. V will also retain the foundation he established, Active Sprouts Foundation, but will immediately take all necessary steps to remove Ms. V as a director.

5.6 Ms. V's RRSPs and vehicle

[174] Ms. V has two RRSPs. The first is a locked-in plan. When the relationship began, it had a value \$19,825.79. This was derived entirely from a payout of her pension with Sun Life from her Calgary employer. There have been no further contributions to it, and it has remained locked-in ever since. Its current value is in the neighbourhood of \$26,577. While the amount by which an RRSP has increased in value during the course of the relationship would ordinarily be considered family property, Ms. V submits that this is not the case with this locked-in account because it is in fact a pension subject to Part 6 of the Family Law Act. As none of it accrued during the relationship, none of it is divisible.

[175] I disagree. In *Lade v Perreault*, 2016 BCSC 535, Madam Justice Hyslop, then of this court, held that a "locked-in registered account" comprising the commuted value of the holder's pension is an RRSP and therefore should be divided under Part 5 of the Family Law Act, not Part 6 (see paras 20-24). To be subject to Part 6, there must be a pension plan to which the person is a member, and to whom a pension will be paid or is being paid. That was not the case there, and is not the case here.

[176] It follows that the increase in value since October 2014 of approximately \$8,000 must be divided equally between the parties.

[177] The second RRSP was worth \$28,988.69 when the relationship began, and has a present value of approximately \$38,860. Ms. V maintains that she should retain the full value of this account, as it would be significantly unfair to divide the increase equally. I am unable to see any significant unfairness in an equal division. The amount of this RRSP in excess of \$28,988.69 is also to be divided equally.

[178] When the parties began cohabiting, Ms. V owned a Lexus vehicle which she then traded in on a 2016 GMC Acadia that the family used. There is an outstanding loan balance on the Acadia of approximately \$24,800. Ms. V is to keep the Acadia for her own use and will be solely responsible for the debt. Mr. V will keep his 1991 BMW 218i.

5.7 Bank accounts, RESPs, and reimbursements

[179] Each party will retain their individual bank accounts, and will be equally responsible for any overdraft in their joint accounts.

[180] The parties will jointly administer the children's RESPs and each will have signing authority. Any amounts in bank accounts in the children's name will be held in trust by the parties for the benefit of the children.

- [181] Mr. V will retain his TFSA accounts (their value is under \$5,000), but will pay \$210 to Ms. V in relation to his share of Dr. Heiner's fee. Mr. V did transfer the appropriate amount to Ms. V from his TFSA, but it was quickly reduced because of an overdraft in the joint bank account, in which the parties should share.
- [182] Mr. V will also reimburse Ms. V the following amounts: \$300 for Calgary airfare, and \$615.80 for repairs to the hot water system.
- [183] The total of these reimbursements, \$1,125.80, will reduce Ms. V's liability to Mr. V arising from her RRSPs as discussed above in paras 176-177.

5.8 Household contents and personal belongings

- [184] Mr. V will return to Ms. V her iPad Mini. Each party shall keep their own personal items.
- [185] With respect to household contents, Ms. V shall keep the following items: the Sony TV; one patio couch and two patio chairs; one outdoor fireplace; one computer monitor; the bedroom furniture, blankets, pots and pans, silverware and party platters she brought with her from Calgary; two Christmas mugs; and the children's toys and clothes. Mr. V may keep the balance of the household contents.

5.9 Costs

- [186] The parties are at liberty to speak to costs.

6.0 SUMMARY

- [187] Custody and Relocation. Sole custody of the two children of the relationship is awarded to Ms. V immediately, and she has leave to relocate the children to Calgary at any time on or after December 27, 2019.
- [188] Access. Mr. V's access will continue as before until the children are relocated. Thereafter, he will have unsupervised access in Calgary two weekends per month as set out in para 120. The weekend access in Calgary will include overnight access on Saturday nights commencing the first access weekend of June 2020. He is also entitled to access by telephone, FaceTime and/or Skype at least three days a week. Holiday access is set out in paras 122-127. While the children are with Mr. V for holiday time, Ms. V is also entitled to access by telephone, FaceTime and/or Skype at least three days a week.
- [189] The parties may seek a review of the access regime at any time after January 1, 2021, and are encouraged to include varying the schedule to provide for the children to travel to Vancouver for one weekend a month after 2020. All travel costs are to be shared equally between the parties.

- [190] Courses and communication. Before June 1, 2020, both parents will attend courses as recommended by Dr. Heiner as discussed in para 130 above. Communications concerning the children are to be undertaken by the use of www.OurFamilyWizard.com or such other electronic format as the parties may agree to, as their default communication tool.
- [191] Exchanges. All exchanges are to take place at an agreed neutral site unless otherwise agreed in writing. The parties are to avoid communicating with each other at exchanges except as necessary concerning the immediate circumstances of the children.
- [192] Travel. Ms. V may travel with the children when they are in her care without requiring consent. Mr. V may travel with the children in British Columbia when they are in his care during holiday periods without consent. He is not to remove the children from British Columbia during holiday stays, or from Calgary when he is exercising access there, without consent in writing. With respect to any approved travel, each parent will provide the other with advance details of the proposed itinerary, including destination and contact number, the duration of the travel, and means of travel.
- [193] Guardianship and parental responsibilities. Both parties are guardians, with parental responsibilities to be exercised on the terms set out in para 136.
- [194] Child support. Commencing December 1, 2019, Mr. V is to pay child support to Ms. V in the amount of \$1,009 per month. Special expenses are to be shared equally. The parties will exchange financial information annually, beginning June 1, 2021, with child support to be adjusted accordingly.
- [195] Spousal support. Commencing December 1, 2019, through and including June 1, 2020, Mr. V is to pay Ms. V transitional spousal support in the amount of \$688 per month. His obligation to pay spousal support will thereafter be extinguished.
- [196] The matrimonial home. This has now been sold. From the proceeds of the sale after the payment of real estate commission, the usual adjustments between vendor and purchaser, ordinary legal fees and disbursements, and the amount necessary to discharge the mortgage including any penalties and outstanding taxes, the outstanding MSP account is to be paid, and Mr. V is entitled to an amount on account of excluded property of \$27,500. The proceeds are not, however, to be divided until the matter of costs has been resolved.
- [197] Businesses and foundation. The spin club is to be sold and the proceeds divided in accordance with my order pronounced November 8, 2019. Mr. V is to retain Total Body Development and is solely responsible for that business's debt in excess of \$13,000. Mr. V will also retain the Active Sprouts Foundation, and will immediately take all necessary steps to remove Ms. V as a director.

[198] RRSPs, vehicles and accounts. Mr. V is entitled to half the value of the increase from October 1, 2014, to the date of trial, of both Ms. V's RRSPs, less amounts he is to reimburse Ms. V as set out in paras 181-182. Ms. V is to keep the GMC Acadia for her own use and will be solely responsible for the outstanding debt. Mr. V is to keep his 1991 BMW 218i. The bank accounts, RESPs and TFSAs are to be dealt with the set out in paras 179-181 above.

[199] Household contents and personal belongings are to be distributed as set out in paras 184-185.

[200] Costs. The parties are at liberty to speak to costs.

"GRAUER, J."

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